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1200 Pennsylvania Ave. NW
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Submitted via Regulations.gov

**RE: EPA Proposed Section 401 Water Quality Certification Regulations
Docket ID EPA-HQ-OW-2019-0405**

**Comments of Delaware Riverkeeper Network and Maya van Rossum-The
Delaware Riverkeeper**

Dear Ms. Kasperek and Ms. Downing,

Thank you for the opportunity to comment on the EPA's proposed Section 401 Water Quality Certification regulations.

The proposed regulations are a clear and obvious power grab designed to take from states their legal right to deny Section 401 certifications and to empower the EPA and other federal agencies to unilaterally decide whether a project should be allowed to advance, regardless of the state's determination regarding compliance with water quality requirements and applicable state and federal law.

The proposed regulations would illegally re-write Section 401 contrary to the plain language of the Clean Water Act. They would severely and improperly constrict state authority, contrary to what Congress provided for in Section 401 and the rest of the Clean Water Act. They would expand EPA's role far beyond the scope of its statutory authority, and do the same for *other* federal agencies. This federal power grab upsets the Clean Water Act's cooperative federalism framework solely for the benefit of the shale gas industry, including companies seeking to construct and operate fracked gas pipelines, LNG export facilities, and associated compressor stations and other related infrastructure. The regulations also would interpose more burdens on state agencies that are already understaffed, underfunded, and under attack from the

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shale gas, pipeline, and fossil fuel industries. Most harmfully, the proposed regulations could result in significant gaps in water quality protection in states like New York, New Jersey, Pennsylvania, West Virginia, Virginia, Massachusetts, North Carolina, Oregon, and Ohio where there is significant pressure from the shale gas industry and pipeline companies to secure extensive shale gas infrastructure buildout. The interplay of the proposed regulations and the judicial interpretations of the Natural Gas Act's limitations on state authority would be particularly disastrous. As always, the burden of this pollution will fall on residents who already feel shut out and left behind when it comes to the protection of where they live, work, and recreate, and many of whom have already suffered extensively from the massive industrial expansion occurring in Pennsylvania and resulting in mass pipeline, LNG and related infrastructure proposals in New York, New Jersey, Virginia, West Virginia, North Carolina, Ohio, Massachusetts, Oregon and beyond.

EPA's proposed regulations are a substantive overreach and, if enacted, would be unconstitutional. EPA claims ambiguity and gaps to fill in the Clean Water Act where none exist, solely so it can drive a truck through Chevron v. Natural Resources Defense Council¹ and similar cases in order to give itself lawmaking authority, which is constitutionally reserved to Congress and to give itself the ability to override any judicial opinion it disagrees with, all contrary to Constitutional separation of powers.

The regulations would also be contrary to the plain language and clear intent of the Clean Water Act and so, if enacted, would be clearly illegal. The Clean Water Act and Section 401 are very clear about many things, including the balance of power between state and federal entities, the discharges to be regulated, the limited role for federal agencies (including EPA) in the 401 certification process, and more. The legislative history further supports that clarity. Simply because industrial entities, the present Administration, and/or EPA *think* Section 401 should entail different substance and process does not mean that the Clean Water Act is ambiguous or "missing" something that EPA can add. And yet, that is precisely what the proposed regulations do – they seek to add, modify and fundamentally alter the substance and the process of the Clean Water Act. As examples, the proposed regulations would re-write statutory definitions (e.g. "discharge"), improperly constrict state authority under Section 401, and limit states to reviewing *only* point source pollution, and *only* for compliance with standards set under the listed statutory sections, or *EPA-approved* Clean Water Act programs and/or provisions. The fact that the preamble itself is written like a legal brief, misrepresents legislative history, and is as long as it is, in contrast to Section 401 itself (and the proposed regulations), is a key indication that EPA has gone to great lengths to conjure bases for the proposed regulations where there simply are none.

EPA goes so far as to cite Chevron as a basis for its rulemaking authority. No court decision constitutes statutory rulemaking authority. Much less *any* rulemaking authority to wholly rewrite Section 401, to constrain states beyond what the statute provides for (e.g. interstate natural gas pipelines), and to even grant *other* federal agencies authority that the Clean Water Act does not provide. The EPA's proposed regulations would result in a substantial difference in regulation for similar types of facilities (e.g. in the context of interstate natural gas

¹ Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

pipelines versus interstate hazardous liquids pipelines) without any rational basis for doing so, violating equal protection principles and harming those in the path of any federally-licensed/permitted facility.

Below, we discuss: 1) the statutory language is clear; 2) EPA's proposed regulations conflict with the Clean Water Act at every turn; 3) EPA proposes to illegally re-write the Clean Water Act without any authority for doing so, contrary to the Clean Water Act and the U.S. Constitution; 4) EPA's proposed regulations would violate the Tenth and Fourteenth Amendments; 5) EPA's proposed regulations would violate the Fifth Amendment; and 6) EPA's proposed regulations would have other significant and damaging consequences, particularly in states experiencing significant shale gas development and infrastructure expansions, and would violate the Unfunded Mandates Reform Act, along with other Executive Orders that EPA claims it has complied with.

I. Statutory Language Is Clear

It is well settled that “[t]he first step in interpreting a statute is to determine ‘whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’ ” . . . “Where the language of the statute is clear . . . the text of the statute is the end of the matter.” . . . However, if the language of the statute is unclear, we attempt to discern Congress’ intent using the canons of statutory construction. . . . If the tools of statutory construction reveal Congress’ intent, that ends the inquiry.

U.S. v. Cooper, 396 F.3d 308, 310 (3d Cir. 2005)(internal citations omitted). “In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” Crandon v. United States, 494 U.S. 152, 158 (1990)

Applying these principles, Section 401 and the Clean Water Act (“Act”) are clear and the meaning of words that EPA writes off as “ambiguous” are easily elucidated. We engage in a statutory construction analysis that EPA, despite its claims of a “holistic” analysis, failed to do in favor of simply declaring whatever it wanted as “ambiguous” to re-write the Act.

A. General Overview of Section 401 and the Purposes of the Act

The Act establishes a system of cooperative federalism, and, to accomplish such a system, carefully set forth the balance of power between states and the federal government.

The starting points for understanding the system in which Section 401 functions are Section 101, and Section 510.

Section 101 of the Act opens with an ambitious “Congressional declaration of goals and policy” to be achieved by the Act in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). These include a prominent role

for states, and the control of all pollution. Specifically, the Act states that “it is the national policy that programs for the control of *nonpoint* sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met ***through the control of both point and nonpoint sources of pollution.***” 33 U.S.C. § 1251(a)(7)(emph. added).

It further clearly states: “It is the policy of the Congress to recognize, *preserve*, and *protect* the *primary* responsibilities and rights of States to prevent, reduce, and eliminate pollution, . . . and to consult with the Administrator in the exercise of his authority under this chapter.” 33 U.S.C. § 1251(b)(emph. added).

Section 510 states:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) ***any requirement respecting control or abatement of pollution***; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency ***may not adopt or enforce*** any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance ***which is less stringent*** than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370 (emph. added). Thus, only where Congress *expressly* states that states may not act or enact stricter regulations are states excluded from regulation under their own laws or the Act. *Id.*, see 33 U.S.C. § 1322(f)(1)(A)(expressly limiting state and local authority to regulate marine sanitation devices on vessels regulated under Section 312 of the Act).

It is within this intentionally-crafted statute that Section 401 lies. Section 401 ensures that states have a role in ensuring that federally-permitted/licensed projects, such as interstate natural gas pipelines, comply with state environmental standards. This ensures that state residents are protected from harm to the same or similar extent regardless of whether a federally-licensed interstate natural gas pipeline crosses their land, or a state-permitted interstate hazardous liquids line does.

To accomplish this, Section 401 establishes a certification process, with the requirements and processes by which certifying authorities (e.g. states, which we focus on in this comment) can review and protect their residents from harm. It also provides a role for neighboring states, and for other specific situations. It also clearly identifies the limited role of both the EPA (i.e.

the Administrator) and the federal permitting agencies.

Each subsection of Section 401 addresses itself to a different aspect of the process or substance of Section 401 certification. Both the language of each subsection and the headings of each confirm this. Almendarez-Torres v. U.S., 523 U.S. 224, 234 (1998). This recognition is key when construing the language of Section 401 because otherwise, the danger arises of viewing particularly Section 401(a)(1) and Section 401(d) as somehow the same when they address themselves to different issues.

A brief overview of these subsections is as follows:

- Section 401(a) – This subsection addresses, via separate paragraphs: the compliance determinations by a certifying authority and/or neighboring states; the processes for doing so; and other related matters (e.g. revocation).
 - Section 401(a)(1) – Pertains to compliance determinations (i.e. a certification) by the certifying authority (e.g. the state) in whose jurisdiction a potential discharge originates. The state determines whether the potential discharge will comply with enumerated sections of the Act. This paragraph also addresses process, including public notice, and the timeframe in which a certifying state must act before it waives its certification ability.
 - Section 401(a)(2) – For neighboring states outside of where the discharge originates, they may have the ability to determine compliance and address whether potential discharge will violate “any water quality requirements” in that neighboring state. This paragraph also provides the hearing process for the neighboring state to present its case, and delineates the roles of the EPA Administrator and the federal permitting/licensing agency in the process.
 - Section 401(a)(3) – Sets forth that a compliance determination by a certifying state regarding a facility’s federal license/permit to construct will cover that facility’s federal operation permit/license *unless* the state in which a potential discharge originates, after receiving notice of the application for the operation permit, notifies the reviewing federal agency that the state’s prior compliance determination is not valid due to, *inter alia*, changes to the proposed construction or operation of the facility.
 - Section 401(a)(4) – Provides state in which potential discharge originates the ability to inspect operations, prior to commencement, of a federally-licensed facility for which a federal operational permit/license is *not* required, and to inspect for

compliance with “applicable effluent limitations or other limitations or other applicable water quality requirements.”

- Section 401(a)(5) – Specifies grounds for revocation of federal license or permit.
- Section 401(a)(6) – Grandfathering provision.
- Section 401(b) – Savings clause stating, *inter alia*, that Section 401 does *not* limit the authority of states (among other entities) to require, under other laws, compliance with water quality requirements.²
- Section 401(c) – Subsection relative to spoil disposal areas
- Section 401(d) – This subsection identifies the conditions that a certifying state must include in a certification, and that such conditions “shall become” conditions on the federal license or permit.

Section 401 clearly uses the unqualified term “discharge” throughout. This is important because it means that state authority under Section 401 is *not* limited to point source discharges, but rather includes other types of pollution, including non-point source pollution. This contrasts with, for instance, Section 402, which uses the qualified term “discharge of any pollutant.” 33 U.S.C. § 1342(a)(1).

This difference is important. Section 502 of the Act has two definitions pertaining to discharges. The qualified terms “discharge of a pollutant” or “discharge of pollutants” (e.g. the terms used in Section 402) are limited to point source discharges. 33 U.S.C. § 1362(12). In contrast, the unqualified term “discharge,” as used in Section 401, is not. 33 U.S.C. § 1362(16). “[D]ischarge’ when used *without* qualification *includes* a discharge of a pollutant, and a discharge of pollutants,” *id.* (emph. added); in other words, “discharge” includes point source discharges, but is not limited to such point-source pollution. S.D. Warren Co. v. Maine Bd. of Env’tl. Prot., 547 U.S. 370, 383–84 (2006). This is consistent with the Act’s purpose of addressing both point sources and non-point sources in order to remedy pollution and improve water quality. 33 U.S.C. § 1251(a)(7); *see also*, e.g., 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(b), 1288, 1329, 1330, 1314(f). Further, it is generally presumed when Congress uses specific terms with specific meanings, and uses them in different ways, there is a reason for that. *See S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 383–84 (2006).

B. Relationship of Section 401(a)(1) and Section 401(d)

Two of the most significant components of Section 401 are Section 401(a)(1), regarding compliance determinations by a certifying authority, and Section 401(d), regarding the types of

² This section also provides the EPA Administrator with authority to provide, *upon request* by a state, information or guidance on water quality requirements.

conditions a certifying authority can include in the actual certification.

Section 401(a)(1) requires, in part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, *shall provide* the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. 1341(a)(1)(emph. added). This sentence clearly specifies (with emphasis added):

1) which applicants need to get a certification:

“Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,”

2) which activities of the applicants are subject to a compliance determination:

“any *activity* including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*”

3) to whom the certification must be provided:

“the licensing or permitting agency”

4) who provides the compliance determination:

“the State in which the discharge originates or will originate [or interstate agency, where applicable]”

5) and that the certifying entity must determine whether:

“any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.”

Thus, when the state makes its compliance determination under Section 401(a)(1), the state focuses on *any* potential discharge from the applicant’s activity, and the specific enumerated sections listed above. The use of “any” before “discharge” further confirms that “discharge” is to be read broadly and to include more than simply point-source discharges.

The scope of the Section 401(a)(1) compliance determination is broad, due in part to its reference to Section 1311(b) (Section 301(b)). Section 301(b)(1)(C) states, in part:

In order to carry out the objective of this chapter there shall be achieved . . . ***any more stringent limitation***, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, ***established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)*** or any other Federal law or regulation, ***or*** required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C)(emph. added). Section 301(b)(1)(C)'s reference to Section 1370 further clarifies the breadth of a compliance determination under Section 401(a)(1). This is because Section 1370 is likewise broad and preserves states' ability, unless the Act expressly states otherwise, "to adopt or enforce . . . any requirement respecting control or abatement of ***pollution***" (*inter alia*) so long as such requirements are not less stringent than any requirement in the Act. 33 U.S.C. § 1370(1)(B)(emph. added); see also S. Conf. Rep. 92-1236 at *3825 (Sept. 28, 1972). "Pollution" means "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). Thus, Section 1370, like Section 1311(b)(1)(C), encompasses a broad range of state pollution control and prevention requirements, regardless of whether the pollution is point-source or non-point source, or even directly about water quality.³ In sum, when a state must determine whether "any such discharge will comply with the applicable provisions of sections 1311," it must determine whether the discharge complies with "any more stringent limitation . . ." provided for in Section 1311(b)(1)(C), which necessarily includes determining compliance with "any more stringent limitation . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of [the Act])." 33 U.S.C. §§ 1311(b)(1)(C), 1370(1)(B). Neither Section 301(b)(1)(C) nor Section 1370 are limited to point source discharges or technical effluent limitations.

If a state determines, under Section 401(a)(1), that the potential discharge will *not* comply with the enumerated sections of the Act, regardless of what conditions it could potentially impose under Section 401(d), it denies the certification.

³ For instance, water quantity regulations (such as the minimum flow requirements in P.U.D. No. 1, ensure that there is enough water for aquatic life, and to sustain other uses of a waterbody. Alternatively, a state may have coastal land use requirements that "control . . . pollution" by limiting where certain types of activities (e.g. industrial activities, residential development) may go in order to "control" "man-induced alteration of the chemical, physical, [and] biological . . . integrity of water" that such activities may cause, whether via sedimentation, dune destruction, or other actions that induce changes to the "integrity of water." 33 U.S.C. § 1370(1)(B); see also 33 U.S.C. § 1251(b). Alternatively, these types of regulations are covered under "any other appropriate condition of State law set forth in such certification." 33 U.S.C. § 1341(d).

If, however, the state seeks to impose conditions, Section 401(d) sets forth what conditions are fair game. The precursor to Section 401 (Section 21(b)-(d) of Public Law 91-224 (Apr. 3, 1970)) did not contain any provision like Section 401(d); Congress newly added this provision in the 1972 amendments to the Act.⁴

C. Scope of Potential Certification Conditions under Section 401(d)

The scope of potential conditions under Section 401(d) is very broad due largely to two phrases: “other limitations” (including those under Section 1311(b)(1)(C), and thus in turn, Section 1370), and “any other appropriate requirement of State law set forth in such certification.”

Section 401(d) states:

Any certification provided under this section *shall* set forth *any* effluent limitations and other limitations, *and* monitoring requirements necessary to assure that *any applicant* for a Federal license or permit *will comply with* any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, *and with* any other appropriate requirement of State law set forth in such certification”

33 U.S.C. 1341(d)(emph. added).

Based solely on this language, Section 401(d) allows states to include four categories or types of conditions in a certification. They are:

- “any effluent limitations and other limitations”
- “any . . . monitoring requirements necessary to assure that any applicant for a

⁴ This undermines EPA’s attempt to import “discharge” from Section 401(a)(1) into Section 401(d) and, in turn, restrict state authority as to the conditions states can include in certifications. See, e.g., 84 Fed. Reg. at 44095-97, proposed Sections 121.1(h), 121.3. EPA argues *inter alia* that Congress’ replacement of “activity” in pre-1972 Section 401(a)(1) to “discharge” means that Congress meant that Section 401(d) is only about discharges also. Id. This ignores that Section 401(d) was a new provision, and there is no prior reference that demonstrates that Congress meant the change from “activity” to “discharge” to also apply to Section 401(d). What we *do* have – the clear language of the Act, among other things – shows that Congress deliberately did *not* include the word discharge in Section 401(d). EPA cannot simply import that word because it thinks it would help its goals to shrink state authority under Section 401. EPA also fails to recognize the different purposes of Section 401(a)(1) and 401(d), as discussed herein, claiming *inter alia* that these two different sections must have the same scope or purposes contrary to the plain language of the Act. 84 Fed. Reg. at 44095-97.

Federal license or permit will comply”:

- “with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and”
- “with any other appropriate requirement of State law set forth in such certification”
- “any other appropriate requirement of State law set forth in such certification”

Section 401(d) does not use the term “discharge” anywhere. Thus, there is no basis to limit Section 401(d) conditions to a discharge because the term is used nowhere in the section. This makes sense given that Section 401(d) is about *conditions* (unlike Section 401(a)(1)), and that Section 401(d) provides for broad categories of conditions for states to impose. At the end of the day, only an applicant can be held responsible for complying with conditions – the discharge or the activity itself cannot. Permits, like certifications, are issued *to* applicants, not *to* discharges or activities.⁵ In addition, “any other appropriate requirement of State law set forth in such certification” may or may not include conditions that are discharge-related; this is the same for “other limitations,” which will be discussed further below. If Congress wanted states only to be allowed to impose conditions under Section 401(d) that are discharge-related, it would have said so, and it did not.

The first category of conditions that Section 401(d) sets forth is unqualified by (not limited by) any sections of the Act, and specifically uses “any” before “effluent limitations and other limitations.” Thus, a state can include as conditions “*any* effluent limitations and other limitations” beyond the enumerated provisions listed in Section 401(a)(1). (emph. added).

Regarding the fourth category of conditions listed above, in order for a state to need to put a monitoring requirement necessary to assure compliance with “any other appropriate requirement of State law set forth in such certification,” there must be “any other appropriate requirement of State law set forth in such certification” to begin with. Thus, that language does not simply describe a category of monitoring requirements that a state can include as conditions. That language also describes a fourth category of conditions. This is confirmed by the legislative history, in which a Joint Conference Committee of the House and Senate specifically added that language less than a month prior to the Act’s passage. S. Conf. Rep. 92-1236 at *3815 (Sept. 28, 1972).

Section 401(d) thus provides broad flexibility to states so that they can ensure that federally-licensed or -permitted facilities/projects are treated the same as state-licensed facilities/projects. Otherwise, Section 401 would be sanctioning disparate treatment of those who live along or near federally-licensed/permitted facilities than those who live along or near state-approved facilities/projects, with no rational basis for the different treatment, contrary to equal protection standards. See Sections IV. and V., infra.

⁵ In other words, Section 401(d) discusses two categories of monitoring requirements that States can impose. A discharge cannot monitor itself, but an applicant can monitor a discharge.

The remaining questions regarding scope of conditions involve determining the meaning of and the difference between “other limitations” and “any other appropriate requirement of State law set forth in such certification” under Section 401(d). These terms, and thus types of conditions, cannot mean the same thing because otherwise there would be surplusage in the Act. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988).

1. “Other Limitations”

To figure this out, we first need to determine the meaning of “other limitations.” The use of “other limitations” throughout Section 401; other defined terms; and the history of amendments to Section 401 all aid in determining the meaning of “other limitations.” In summary, “other limitations” means any requirement that has some connection to water quality. When qualified by Section 1311 or 1311(b), “other limitations” means all requirements under Section 301(b)(1)(C).

First, Section 401 sometimes uses “effluent limitations” and “other limitations” together, and qualified by particular sections of the Act, as follows:

- “In the case of any such activity for which there is not an applicable effluent limitation *or other limitation* under sections **1311(b)** and 1312 of this title,” 33 U.S.C. § 1341(a)(1)(emph. added)
- Any certification provided under this section shall set forth any . . . monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations *and other limitations*, under **section 1311** or 1312 of this title, . . . and shall become a condition on any Federal license or permit subject to the provisions of this section. 33 U.S.C. § 1341(d)(emph. added).

These examples, which are expressly tied to, *inter alia*, Section 1311(b), show a direct connection between “other limitations” and Section 1311(b)(1)(C) (301(b)(1)(C)), set forth earlier. Because Section 301(b)(1)(C) addresses *more* than point source discharges, it follows that “effluent limitations” could not be connected to, or be referencing, Section 301(b)(1)(C) because the Act expressly confines “effluent limitations” to point source discharges. 33 U.S.C. § 1361(11).

“Other limitations,” and thus Section 301(b)(1)(C), also necessarily must address *more* than water quality standards under Section 303 (Section 1313) of the Act. This is because of Congress’ history of amendments to the Act.

When Congress passed the Federal Water Pollution Control Act Amendments in 1972, it did not draft Section 401 to expressly mention Section 303 of the Act (33 U.S.C. § 1313) regarding state water quality standards, plans, and requirements. S. Rep. 95-370, at 4397-98 (July 28, 1977). At that time, the drafters of the Act understood Section 303 to be included wherever Section 301 was mentioned. *Id.* This is most likely due to Section 301(b)(1)(C) (33 U.S.C. § 1311(b)(1)(C)), set forth earlier.

Congress's understanding is important because water quality standards are not end-of-pipe standards (and thus not limited to point source discharges). Also, in 1972, Congress included in Section 401 a reference to Section 302 (33 U.S.C. § 1312), which pertains to water quality-based effluent limitations ("WQBELS"). Thus, Section 301(b)(1)(C)'s reference to any stricter limitation, including "those necessary to meet water quality standards" cannot simply be referring to WQBELS because Section 401 separately includes Section 302. Section 301(b)(1)(C) would essentially be duplicative and thus surplusage, contrary to the statutory language and basic canons of statutory construction. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988). Thus, whatever Section 301(b)(1)(C) included when Congress passed it in 1972, it at a minimum, according to Congress, was meant to include water quality standards under Section 303.

In 1977, Congress amended the Act to expressly include Section 303 to clarify that "Section 303 is always included by reference where section 301 is listed." House Conf. Rep. 95-830, at 4471 (Dec. 6, 1977); see also S. Rep. 95-370, at 4397-98 (July 28, 1977). Thus, "other limitations" expressly includes, at a minimum, water quality standards. However, "other limitations" cannot be limited to water quality standards because Congress did not eliminate "other limitations" from Section 401 when it added Section 303.⁶ If "other limitations," and thus Section 301(b)(1)(C), were limited to water quality standards under Section 303, Congress would have needed to make further changes to the Act to address this, which it did not do. In other words, if "other limitations" and Section 301(b)(1)(C) were simply meant to address what is covered by Section 303, there would be surplusage in the Act, which means that such construction is incorrect. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988).

The last piece of the puzzle involves looking at how "other limitations" appears throughout Section 401 with "effluent limitations, a defined term. "Effluent limitations," even though limited to point source discharges, is broad in scope, as the term means:

any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical,

⁶ The only other amendment Congress made to Section 401 in 1977 was to expand Section 401's scope to include federal facilities. Congress has not made any other subsequent amendments to Section 401.

All amendments – both during the legislative process leading up to the 1972 passage of the amended Act and in 1977 – show an intent to *expand* Section 401's scope, not to restrict it. In the legislative drafting process leading up to the 1972 amended Act, Section 401 (like the Act itself) grew from addressing only technical standards (effluent limitations) to addressing both technical standards and water quality standards. Then, further expansive language was added to Section 401(d), specifically "any other appropriate requirement of State law set forth in such certification." S. Conf. Rep. 92-1236 at *3815 (Sept. 28, 1972). In 1977, Congress clarified Section 303's role in the certification process, and removed the federal facilities exemption. At the same time, it did not alter any other language. Thus, again, the 1977 amendments expanded Section 401's scope.

biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (emph. added). Thus, “other limitations” should be similarly broad.

At times in Section 401, “other limitations” is tied to Section 1311 (or 1311(b)). In such situations, that term is most likely limited to Section 301(b)(1)(C). However, when used in an unqualified manner, “other limitations” must necessarily be broader than Section 301(b)(1)(C) – again, different usages must mean different meanings.

Thus, “other limitations,” unqualified, includes Section 301(b)(1)(C), and its outer scope is that “other limitations” must at least have some connection to water quality. This is because of how “other limitations” is used, *unqualified* (or not limited to Section 1311/1311(b)) in Section 401. Two examples of “other limitations” used in an unqualified manner are as follows:

- “Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained . . . , which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State . . . to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations *or other limitations* or *other* applicable water quality requirements will not be violated.” 33 U.S.C. § 1341(a)(4)(emph. added).
- “Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations *or other limitations* or *other* water quality requirements such Federal agency may, after public hearing, suspend such license or permit.” *Id.* (emph. added).

These examples show that Congress broadly classified “effluent limitations” and “other limitations” under “water quality requirements,”⁷ since the statute expressly states “other” before “water quality requirements.”

Thus, “other limitations” means any requirement that has some connection to water quality. When qualified by Section 1311 or 1311(b), “other limitations” means all requirements under Section 301(b)(1)(C). Thus, “other limitations” is defined, contrary to EPA’s claims. 84 Fed. Reg. 44080, 44103 (Aug. 22, 2019), see, e.g., Proposed Sections 121.1(f), (p), 121.3)).

2. “Any Other Appropriate Requirement of State Law Set Forth in

⁷ “Other applicable water quality requirements”, taking guidance from the other subsections of Section 401, must at least include standards under Section 1316 and 1317, which are discussed in Section 401(a)(1), (a)(3), and Section 401(d).

Such Certification

Thus, that leaves us with “any other appropriate requirement of State law set forth in such certification.” Because Section 401(d) uses “other limitations,” unqualified, water quality-connected requirements are already covered as a category of conditions that states can impose on a certification. Thus “any other appropriate requirement of State law set forth in such certification” must mean something else, otherwise there would be superfluous language.⁸

Congress added this language into the proposed Act in its September 28, 1972 draft, which was a compromise between the House and the Senate, each of which had two differing bills. Prior to the change, the Senate version of Section 401 contemplated compliance with only water quality requirements. S. Rep. 92-414 at *3735 (Oct. 28, 1971)(Cmte. of Public Works). Thus, with the addition of this language, plus the fact that “other limitations” addresses water quality-connected requirements, this phrase must mean non-water quality-connected requirements that the State finds appropriate to impose. This is in line with P.U.D. No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology (“P.U.D. No.1”), 511 U.S. 700 (1994). There, the Court “did not speculate on what additional state laws, if any, might be incorporated by this language.” Id. at 713. The Act provides that guidance.

One way to understand this language is as a “catchall” to ensure equal regulation and thus equal protection between federally-permitted/licensed facilities and state-permitted facilities. Thus, if a state-permitted facility of a similar nature and type would be subject to a given non-water quality condition, then this language of Section 401(d) ensures that the state could impose the same condition on the federally-licensed/permitted facility. To the extent such a condition conflicts with *another* federal statute or any constitutional concerns,⁹ the courts are the arbiter of

⁸ As noted earlier, this language is not simply describing a category of monitoring requirements. Rather, in order for a state to be able to require an applicant conduct monitoring to ensure compliance with “any other appropriate requirement of State law set forth in such certification,” there has to *be* such a requirement *in* the certification to begin with. This is consistent with what Congress understood. S. Conf. Rep. 92-1236, at *3816.

⁹ EPA expresses concerns about the Commerce Clause that are unclear and confusing. 84 Fed. Reg. at 44086-87. EPA needs to clarify what it is saying and seeking comment on in order for comments to be properly responsive. EPA begins by discussing that Congress did not intend for state authority to be tread upon, but then abruptly switches direction and begins talking about a need to limit state authority based on Commerce Clause concerns.

To the extent EPA is attempt to conflate the Act with other statutes or the material that is travelling in interstate commerce (e.g. in pipelines), in order to claim it must limit state authority under the Act, this is wrong.

First, the Act flows from Congress’ Commerce Clause powers. In the Act and specifically Section 401, Congress *expressly* gave states the ability to deny approval to projects requiring federal licenses and/or permits based on state concerns for the local environment. See, e.g., New York v. U.S., 505 U.S. 144, 171 (1992). Thus, there cannot be a basis for a Commerce

that decision.

More guidance as to the meaning of “any other appropriate requirement of State law set forth in such certification” can be found from revisions Congress made to the draft Act in September 1972 at the same time as when Congress inserted this language into the draft Act. Read together, Congress’ revisions demonstrate that, contrary to EPA’s claims that this language must be limited to water quality (and be even more narrowly limited than that),¹⁰ this language allows states to impose *appropriate* non-water quality conditions (with courts determining what “appropriate” means), including land use requirements that the Act leaves to states to manage. 33

Clause/”dormant” Commerce Clause claim *when Congress expressly said states could deny approval to projects*. Likewise, there is no need for EPA to “balance” states’ Section 401 certification authority with “Congress’ goal of facilitating commerce on interstate navigable waters” because *Congress already did that*. 84 Fed. Reg. at 44087. Congress *already* handled the balancing and made the decision that states denying Section 401 approval to projects raising substantial environmental concerns was *not* an undue burden on interstate commerce, so again, there is no place for EPA to say that it must craft regulations to do so. *Id.* These same concepts apply to state Section 401 certification approvals that include conditions the state finds necessary to protect the local environment if the project proceeds.

Second, the Commerce Clause connection with the Act is navigation. Dams and interstate natural gas pipelines do not move in interstate commerce down streams. Unless a state certification somehow places an undue burden on navigation, there are no Commerce Clause/”dormant” Commerce Clause concerns. Indeed, it would be odd to find that there was such a concern when the Act *expressly* provides for state certifications pertaining to federally-licensed/permitted projects such as dams and interstate natural gas pipelines. Ironically, the only reported case that EPA refers to involves EPA’s vessel general permit. Lake Carriers Association v. EPA, 652 F.3d 1 (D.C. Cir. 2011). Even then, however, courts recognize that Congress can expressly authorize states to “unduly” burden interstate commerce. *Id.* at 8-10; New York, 505 U.S. at 171. Congress has done just that in Section 401.

EPA appears to be conflating the Act and certifications with *other* statutes that pertain to, for instance, the movement of natural gas across state lines, which is incorrect and again, directly contrary to Section 401. Indeed, even 15 U.S.C. § 717b (of the Natural Gas Act) on LNG facilities still provides for states to deny approval (or issue approvals with important conditions) to LNG facilities under Section 401 certification authority.

Lastly, EPA lacks the authority to be the arbiter of Commerce Clause concerns, particularly abstract and speculative ones, and particularly when Congress already spoke on the matter to the contrary. If a project and certification action (denial, issuance with conditions, etc.) raise an actual case or controversy, the judiciary, not EPA, is responsible for and fully capable of addressing the matter. Lake Carriers Ass’n, 652 F.3d 1.

¹⁰ See, e.g., proposed Sections 121.1(g), (p), 121.3; 84 Fed. Reg. at 44103-44104; see also 84 Fed. Reg. at 44094 & n.22.

U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, . . .”).

Prior to the September 1972 round of changes in which Congress added “any other appropriate requirement of State law set forth in such certification,” the proposed Act included the following provision:

(g) In the implementation of this Act, agencies responsible therefor shall consider all potential impacts relating to the water, land, and air to insure that other significant environmental degradation and damage to the health and welfare of man does not result.

H. Rep. 92-911, p.2 (Mar. 11, 1972)(Rep. from Cmte. on Public Works). This language resembles a requirement similar to the National Environmental Policy Act (“NEPA”) but would have applied to any agency with responsibilities under the Act, including states. The pre-September 1972 draft also lacked the NEPA-exemption language presently in Section 1371(c)(1). *Id.* at 59.

The Joint Conference Committee eliminated Section 101(g) in the September 1972 draft. It also altered Section 1371(c) to include language that, except for specified actions,¹¹ “no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act . . .” 33 U.S.C. 1371(c)(1); S. Conf. Rep. 92-1236 at *3826-27 (Sept. 28, 1972). Thus, the Joint Conference Committee Report shows a clear desire *not* to subject every action of the *EPA* Administrator to NEPA. It also demonstrates an intent not to subject the *states* to NEPA.

However, the removal of a *requirement* to consider non-water quality impacts in a NEPA-like fashion¹² is merely that. It is not also a limitation on state authority to *impose*

¹¹ The language that is now in Section 401(a)(1) (regarding certain state certifications not satisfying NEPA requirements under Section 1371) was not significantly altered throughout the process.

¹² Simply because this language was removed does not mean that *state* law does not impose process or substantive obligations on state agencies relative to environmental decision-making. For instance, the California Environmental Quality Act (“CEQA”) was enacted in 1970, approximately two years before Congress passed the 1972 amendments to the Act. The CEQA has both a process component (requirement to consider impacts) and a substantive prohibition on approving projects when better alternatives exist. In 1971, Pennsylvania ratified the Environmental Rights Amendment. Pa. Const., art. I, § 27. The Amendment requires, *inter alia*, governmental entities at all levels of government consider and address, in advance of acting the likely environmental impacts of proposed actions in order to respect residents’ constitutional environmental rights and to comply with government’s trustee obligations under the Amendment, including respect for the rights of future generations. Robinson Twp., Delaware

conditions from state law that address more than water quality via Section 401. This is particularly so when the Joint Conference Committee, at the same time it altered the NEPA-like language, added “any other appropriate requirement of State law . . . “ into Section 401(d). See P.U.D. No.1, 511 U.S. at 720. Thus, the Act did not *require* states to comply with NEPA-like provisions, but they certainly could impose conditions not directly connected to water quality. In other words, Congress’ removal of a requirement to consider non-water quality impacts does not somehow negate¹³ Congress’ addition of language allowing states to include “any other appropriate requirement of State law” (which may include non-water quality provisions) in a Section 401 certification.

Thus, “any other appropriate requirement of State law set forth in such certification” is also defined, again contrary to EPA’s claims. 84 Fed. Reg. at 44103; see, e.g., Proposed Sections 121.1(f), (p), 121.3.

D. States are the Final Word on Their Certifications, Absent Review by the Judiciary, and Have an Enforcement Role

Importantly, Section 401(d) provides that “Any *certification* provided under this section . . . *shall* become a condition on any Federal license or permit subject to the provisions of this section.” 33 U.S.C. § 1341(d)(emph. added). This language is important because it says several things.

First, the *certification as a whole* becomes a condition on the Federal license or permit; in other words, compliance with the state’s certification must be a condition of the Federal license or permit. This ensures clarity because if each individual provision of the certification (which includes state law provisions) were to become separate conditions on the relevant Federal license or permit, it would create confusion and intertangling of federal and state, particularly who is to enforce those provisions. Notably, Section 309 does not mention Section 401 as a provision via which the Administrator has an enforcement role. Federal enforcement to the exclusion of the very state whose laws the laws being enforced would be a massive intrusion into state sovereignty. See also, e.g., Section IV, infra.

Riverkeeper Network, et al. v. Com., 83 A.3d 901 (Pa. 2013); Pa. Env’tl. Def. Found. v. Com., 161 A.3d 911 (Pa. 2017).

¹³ In discussing the removal of draft Section 101(g), EPA claims that the removal means that there is no *federal* policy or directive to address non-water quality impacts via the Act. 84 Fed. Reg. at 44094 & n.22. Likewise, EPA says it finds nothing in the Act showing that “Congress intended to impose federal regulations on anything more than water quality-related impacts.” 84 Fed. Reg. at 44094.

Even if this were so, which we do not concede, all of that says nothing about *state* authority and obligations, which the Act expressly preserves. See, e.g., note 12, supra. It likewise says nothing about the language in Section 401(d) discussed above. The Act, as already noted, expressly contemplates states having a key role in water pollution control and enforcement, and establishes a cooperative federalism framework – not a situation where the federal government is the one driving the boat.

Accordingly, Section 401(d) provides that certification as a whole (thus, compliance with the certification) is a condition on the relevant Federal license or permit. This is no different than a Federal license or permit saying that the applicant must comply with State law. For instance, the federal permitting/licensing agency might enforce against the permittee for violating that condition of the permit. Meanwhile, the state would be better-suited to enforce its own laws against the permittee. This is consistent with Section 309 of the Act also.

Second, this language provides *no* ability for any federal agency to question the substance of the state's certification or any provision in the certification. There are two reasons for this. First, the statutory language is clear that certification *as a whole* must become the condition, meaning no agency can pick and choose which parts of the certification it thinks are appropriate to include in the certification. Second, Section 401(d) expressly says that whatever the certification is, it "shall" become a condition on the permit. Thus, an agency cannot question the substance of the certification, including any provisions (conditions) in the certification. Amer. Rivers Inc. v. FERC, 129 F.3d 99, 109-111 (2d Cir. 1997).

II. EPA's Proposed Regulations Conflict with the Act at Every Turn

As illustrated extensively throughout Section I, the Act is clear, and leaves no room for EPA's proposed regulations. However, EPA has proceeded anyway, and, at every turn, done so in a way that directly conflicts with the Act. The proposed regulations repeatedly and substantially conflict with the very words on the page of the Act, and the express intent of Congress set forth in the Act. In fact, in a dramatic display of impudence, EPA effectively claims that anything in Section 101 that is a "policy" is not something it needs to bother itself with because it is not enforceable. 84 Fed. Reg. at 44086. This ignores the fact that, when Congress delegates authority to agencies, it must do so with sufficient policies and parameters to guide and restrain such agencies. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)(requiring that there be an "intelligible principle" in the statute to which the agency conforms its actions); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935)¹⁴; Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935)¹⁵ EPA does not have the choice of simply declaring that the policies set forth in the Act are optional. It does not have that constitutional authority. Yet, this is key illustration of how EPA attempts to assume the power to legislate, which the Constitution forbids to it absent a proper Congressional delegation, which it lacks as just described.

In attempting to justify its proposed regulations, EPA says one thing to support its action,

¹⁴ "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable"

¹⁵ "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."

but then completely disregards the same principle in order to justify something else. It claims it took a “holistic” view of the Act, yet frequently cuts off words, sentences, and phrases from the rest of Section 401 and the Act in order to declare them “ambiguous.” See, e.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992)(if a provision alone were to leave doubt, the statutory structure removed ambiguity). It recognizes that the usage of different terms are important under statutory construction principles, 84 Fed. Reg. at 44085 n.8, yet then declares “discharge” ambiguous in order to make it mean the same thing as “discharge of pollutants.” EPA claims that if something were meant to be addressed in the Act, Congress would have said so clearly. 84 Fed. Reg. 44080, 44094 (Aug. 22, 2019). However, EPA then argues that silence in the Act means it has incredible authority to write procedures and define “ambiguities” because Congress allegedly has not addressed a matter. See, e.g., 84 Fed. Reg. at 44105 (claiming “condition” is ambiguous). EPA flips statutory construction on its head, choosing and discarding principles, case law, and the plain language of the Act wherever it needs to in order to justify its overreaching proposed regulations.

While we attempt below to discuss many of the problems with the proposed regulations and how they clash with the Act, the conflicts between the proposed regulations and the Act are so extensive that a full enumeration may not be possible in the time frame that EPA has provided for comment. EPA must reject its proposed rulemaking in full.

A. Contrary to the Balance of Power in the Act, including Section 401

EPA upsets the careful balance of cooperative federalism in the Act, and the express drive in Section 401 to ensure that states could address their concerns in federal permitting/licensing processes *without interference from federal entities, including EPA*.

The Act is an exercise in cooperative federalism. That said, it bears comparing Section 401 to Section 402 because the comparison demonstrates that Section 401 intentionally tilts the balance far more toward states than other sections of the Act like Section 402. Section 402 allows states to take on certain permitting duties so long as the states develop programs that meet certain minimum standards in the Act and are approved by the Administrator. Section 401 *does not involve any federal approval* of what the state does. So long as the state has *state law* authority to issue certifications, which every state does, 84 Fed. Reg. at 44112, the state can act under Section 401.

Further, as discussed earlier, Section 1370 (as one example) specifically preserves state authority *unless the Act* “expressly” states otherwise. 33 U.S.C. § 1370. Section 401 lacks any such “express” limitations, and not surprisingly, EPA’s proposed regulations cite no such limitations even while significantly constricting state authority. Section 401’s language contrasts directly with Section 312, which expressly limited state and local authority to regulate marine sanitation devices on vessels regulated under Section 312. 33 U.S.C. § 1322(f)(1)(A). Section 312 was specifically altered in 1972 from existing law to include this language. Congress clearly did not do the same with Section 401. In fact, Congress *expanded* Section 401’s scope throughout the legislative process leading up to the 1972 amendments and again in 1977. This all demonstrates that, if Congress wanted to restrict state authority in the Section 401 certification context, and to provide EPA and *other* federal agencies with more authority, it could

have and did not. EPA’s proposed regulations directly contradict Congress’s intent, the balance of power in the Act between states and the federal government, and the very words of the Act itself.

B. EPA Misrepresents the Act’s Focus and Purposes to Re-Write Defined Terms and Other Components of Section 401 and the Act

EPA openly misrepresents the Act as only, or primarily, focusing on point-source discharges and on technical limitations more so than other types of pollution and water quality standards. See, e.g., 84 Fed. Reg. at 44096, 44098-44099. It does so in order to justify its narrowing of 401 certifications to solely point source discharges, and to justify its extremely constrictive reading of what conditions states may impose. This is completely wrong.

A prime example of EPA’s wholesale rewriting of the statutory text is its proposed definition of “discharge” in proposed Section 121.1(g), which is already a defined term in the Act. 33 U.S.C. § 1362(16). EPA’s proposed definition eliminates any difference between the *expressly* unqualified, defined term “discharge,” 33 U.S.C. § 1362(16), and the defined terms “discharge of pollutants” and “discharge of a pollutant.” 33 U.S.C. § 1362(12); see proposed Section 121.1(g). This directly conflicts with the Act. EPA goes so far as to claim that “the statute does not define with specificity the meaning of the unqualified term *discharge*.” 84 Fed. Reg. at 44098.

EPA claims that it is interpreting “discharge,” *a defined term*, to only count for point source discharges because, essentially, Sections 402 and 404 regulate point source discharges. See, e.g., 84 Fed. Reg. at 44098. This is directly contrary to the statutory text of Sections 401, 402, and 404. Sections 402 and 404 specifically do *not* use the unqualified term “discharge.” Congress did not just make typos throughout Section 401 – it clearly use the unqualified and defined term “discharge” for a reason.¹⁶ When Congress deliberately uses different terms, and here, specifically provides different definitions for those terms, statutory construction principles indicate that there was a reason for that. S.D. Warren Co. v. Maine Bd. of Env’tl. Prot., 547 U.S. 370, 383–84 (2006). Otherwise, the differences would be mere surplusage, contrary to basic canons of statutory construction and the very language Congress used in the Act. Mackey, 486 U.S. at 837; United States v. Goldenberg, 168 U.S. 95, 102–03 (1897); see also Estate of Cowart,

¹⁶ EPA further cites a Ninth Circuit case, Oregon Nat’l Desert Ass’n v. Dombek, 172 F.3d 1092 (9th Cir. 1998), that makes the same statutory construction and logical flaws (including writing off the definition of “discharge”) that EPA has made as discussed herein, including use of the 1971 Senate Committee report discussed *infra*, which dealt with a draft of amendments to the Act that was subsequently changed to include water quality standards, not simply effluent (technical) limitations). 84 Fed. Reg. at 44098; 172 F.3d at 1097. Both Dombek and EPA also ignore Section 1311(b)(1)(C), which does not pertain solely to point source discharges.

Although EPA fully rejects substantial judicial decisions, including P.U.D. No. 1, it cherry-picks other cases in order to justify its contrarian reading of the Act and its proposed regulations. This is EPA’s same approach to its supposed “holistic” reading of the Act and Section 401, and reliance on legislative history.

505 U.S. at 480 (plain meaning of one part of a statute “cannot be altered by the use of a somewhat different term in another part of the statute”).

Relatedly, EPA’s claim that certifications, and in turn discharges, are only about point sources directly conflicts with the Act’s purpose of addressing both point sources and non-point sources in order to remedy pollution and improve water quality. 33 U.S.C. § 1251(a)(7); see also, e.g., 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(b), 1288, 1329, 1330, 1314(f); see, e.g., 84 Fed. Reg. at 44098; proposed Sections 121.1(f) & (h), 121.3, 121.5(a), 121.6-121.8.

EPA likewise misrepresents legislative history to further minimize the importance of water quality standards and ambient water quality protections under the Act in favor of technical limitations that apply to point source discharges. Specifically, on page 44096, EPA discusses, in its warped view, the development of Section 401 leading up to the 1972 amendments to the Act. In the process, it states: “Indeed, the 1971 Senate Report provides that section 401 was ‘amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.’ S. Rep. No. 92–414, at 69 (1971).”

EPA conveniently ignores that this was an earlier version of the draft Act. This draft was subsequently modified, which can be easily seen in the Joint Conference Committee Report from 1972, *which EPA also cites in its preamble*. Page 44094 n.22.

The Joint Conference Committee Report from September 1972, and the final version of the Act, show that Congress included both technical limitations and water quality standards. See, e.g., S. Conf. Rep. 92-1236, at *3798-99, *3800-01; 33 U.S.C. §§ 1311(b)(1)(C), 1313. Yet, EPA relies on language from the Senate’s 1971 draft to support its proposed regulations. This is absurd. Notably, EPA also ignores other language in that same 1971 Senate report that conflicts with its proposed regulations. For instance, the 1971 Senate Committee Report specifically states that Congress provided a definition of certification. S. Rep. 92-414 at *3735 (Oct. 28, 1971)(Senate Cmte. on Public Works). However, EPA implicitly claims there is no such definition in Section 401, therefore it can provide one under Chevron. 84 Fed. Reg. at 44103; see also proposed Section 121.1(b).

C. EPA’s Narrowing of the Conditions States may Impose is Contrary to the Act

EPA has employed various means in the proposed regulations to narrow state authority in every way it can find. As already discussed, the proposed regulations illegally narrow the meaning of “discharge,” and improperly import “discharge” into Section 401(d). Sections I., II.B., supra.

As it did with “discharge” and Section 401(d)’s use of the term “applicant,” EPA claims that what constitutes a “condition” under Section 401(d) is ambiguous. 84 Fed. Reg. at 44105. This is wrong for the reasons already set forth in this comment. See, e.g., Section I, III. However, another fact undermines EPA’s position. The precursor to Section 401 (Section 21(b)-(d) of Public Law 91-224 (Apr. 3, 1970)) contains *no* provision like Section 401(d). Many of the

other provisions of Section 401 have counterparts in the 1970 law, but Section 401(d) does not. Section 401(d) is that portion of Section 401 that expressly describes the conditions that states may impose. Clearly, based on past experience with the 1970 law, Congress thought that expressly outlining state authority was important, especially given that it already knew of cases of the EPA encroaching on state authority. H.R. 92-911 (March 11, 1972). Contrary to EPA's allegations of "Congressional silence", 84 Fed. Reg. at 44105, Congress expressly spoke to the issue of conditions, which it had not done in the 1970 law. Relatedly, EPA also claims that Congress failed to provide a definition of "certification." It ignores that Section 401 in its entirety, especially when read in the context of the Act, defines what a certification is. The legislative history confirms that Congress defined what constitutes a certification, with Section 401(d) being a key piece of that. S. Rep. 92-414 at *3735 (Oct. 28, 1971) (Report from Senate Cmte. on Public Works).

EPA also improperly attempts to constrain "any other appropriate requirement of State law set forth in such certification" (under Section 401(d)) to simply mean EPA-approved state regulatory programs and/or provisions (the proposed regulations are not clear) under the Act. See, e.g., proposed Sections 121.1(p), 121.3; 84 Fed. Reg. at 44094-95, 44103-105. This falls flat when Section 401 is construed as a whole, and construed within the Act as a whole, including in light of Sections 1311(b)(1)(C) and 1370. See, e.g., Section I, supra. The Act directly cuts down EPA's disingenuous claim that "nowhere in section 401 did Congress provide a single, clear, and unambiguous definition of the section's scope." 84 Fed. Reg. at 44103.

EPA's constrictive construction immediately looks wrong when set beside Section 301(b)(1)(C), which requires compliance with "***any*** more stringent limitation . . . established pursuant to ***any*** State law or regulations (***under authority preserved by section 1370 of this title***)." 33 U.S.C. § 1311(b)(1)(C)(emph. added).¹⁷ If Section 401 expressly entails compliance

¹⁷ Section 1370 states:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

with more stringent provisions of *State* law under Section 301(b)(1)(C), *regardless of EPA's approval of such state laws*, it is absurd for “any other appropriate requirement of State law set forth in such certification” to be limited to EPA-approved state regulatory provisions and/or programs under the Act. Section 301(b)(1)(C) even refers to “any more stringent limitation . . . established pursuant to any other **Federal** law or regulation,” not simply the Act. 33 U.S.C. § 1311(b)(1)(C)(emph. added). *See, e.g.,* Section I, *supra*. If Congress had wanted to limit Section 401(d) to what EPA advocates for, the Act and even Section 401 itself shows Congress was completely capable of doing so. It did not. In fact, as explained earlier, Congress expressly *expanded* the scope of Section 401(d) throughout the drafting process leading to the 1972 amendments to the Act – including by adding the very phrase that EPA seeks to severely narrow.

EPA's adoption of the dissent's framing from P.U.D. No. 1 and concomitant use of *ejusdem generis* to support its narrow construction of “condition” also fails. 84 Fed. Reg. at 44095, 4409-99, 44103-04. First, the text of Section 401(d), as explained earlier, is clear. “The language of the statute may not be distorted under the guise of construction, or so limited by construction as to defeat the manifest intent of Congress.” U.S. v. Alpers, 338 U.S. 680, 681–82 (1950).

To recap, Section 401(d) states:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply *with* any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and *with any* other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. 1341(d) (emph. added). Contrary to assertions of the EPA's and the dissent in P.U.D. No. 1, *ejusdem generis* does not apply here. Congress specifically inserted “with” *before* “any other appropriate requirement of State law set forth in such certification,” which cuts off reading

33 U.S.C. § 1370 (emph. added).

Notably, Section 401 lacks any such “express” limitations that support EPA's proposed regulations, in contrast to Section 312, which expressly constricts state and local authority to regulate marine sanitation devices on vessels regulated under Section 312. 33 U.S.C. § 1322(f)(1)(A). Section 312 was specifically altered from existing law in 1972 to include this language. Congress did not do the same with Section 401 – in fact, it expanded Section 401's scope throughout the legislative process, and again in 1977. This all demonstrates that if Congress wanted to restrict state authority in the Section 401 certification context, it could have and did not.

“any other appropriate requirement of State law set forth in such certification” as a continuation of the list of items before it. The “with” refers directly back to “monitoring requirements”, skipping over the specific list of items before it.

The word “any” only strengthens this, and contradicts EPA’s indiscriminate application of *ejusdem generis*. The U.S. Supreme Court has stated: “We have previously noted that ‘[r]ead naturally, the word “any” **has an expansive meaning**, that is, “one or some indiscriminately of whatever kind.”’” Ali v. Fed’l Bureau of Prisons, 552 U.S. 214, 219 (2008)(quoting U.S. v. Gonzales, 520 U.S. 1, 5 (1997)) (emph. added); see also id. at 219-220 (discussing case regarding construction of the Clean Air Act). Here, the use of “with” *and* the use of “any” “offer[] no indication whatever that Congress intended the limiting construction” that the EPA and the dissent in P.U.D. No. 1¹⁸ propound. Harrison v. PPG Indus., Inc., 446 U.S. 578, 589 (1980).

There is an additional problem with EPA’s proposed narrow scope of “condition.” It is not clear what an EPA-approved state regulatory program, or regulatory provision is. In fact, it is not even clear if EPA is limiting states to approved programs or regulations. EPA’s proposed definition of “water quality requirements” says “EPA-approved state or tribal Clean Water Act regulatory program *provisions*.” Proposed Section 121.1(p)(emph. added). Meanwhile, while discussing the same thing in the preamble, EPA refers to “EPA-approved state and tribal CWA regulatory *programs*.” 84 Fed. Reg. at 44103-104 (emph. added). This lack of clarity is a problem because a state may have a set of regulations that apply to multiple permitting regimes, regardless of whether the permitting program is under the Act, or EPA-approved. Thus, when is something an “EPA-approved regulatory program” or “program provision” under the Act? It is an EPA-approved program *and only* EPA-approved regulations therein? And EPA-approved program that also uses some state law regulations not reviewed by EPA? A state law program that uses EPA-approved regulations? EPA’s proposed regulations do not say, and leave a state at a substantial disadvantage to whatever the now-overseeing federal agency wants EPA’s proposed regulations to say. This is a substantial problem because a state may not be dealing with only one “overseeing” federal agency under EPA’s proposed regulations. As explained more in the next section, a state may quickly find its certification picked apart by *multiple* federal agencies, creating still more burdens on the state that the Act did not contemplate.

D. Extensive Justification Requirements for Certification Actions (Including Certification Conditions and Denials) and Expansive Federal Review and Disapproval Authority of State Certification Actions Conflict with the Act

¹⁸ The dissent also propounded that a broad construction of “any other appropriate requirement of State law set forth in such certification” would effectively swallow Section 401(a)(1). P.U.D. No. 1, 511 U.S. at 727(Thomas, J., dissenting; 84 Fed. Reg. at 44089-44090; see also 84 Fed. Reg. at 44095, 44097. This is incorrect. As discussed earlier, Section 401(a)(1) and Section 401(d) have different purposes. Section 401(a)(1) addresses itself to the certifying state’s compliance determination, and Section 401(d) addresses the scope and type of conditions that the certifying state can impose, once the state decides it does not need to deny a certification outright under Section 401(a)(1).

EPA proposes that states must extensively justify: 1) each and every condition that the state places into a certification, *and* 2) any certification denials. Proposed 40 C.F.R. § 121.5(d) and (e). Such proposed requirements for certifications with conditions include, *inter alia*, an explanation as to why each and every condition is necessary; and a statement as to whether less stringent requirements could apply instead. Proposed 40 C.F.R. § 121.5(d)(1), (d)(3). Justifications for certification denials must include, *inter alia*, “specific water quality data or information, if any, that would be needed to assure that the discharge” complies. Proposed 40 C.F.R. § 121.5(e)(3). There is no basis in the Act for this. Legally, the Act and Congress, when drafting the Act, did not intend for there to be any federal overlord interfering with the states’ decisions. See also Section IV., infra.

Further, proposed Section 121.6 grants the federal permitting entity the authority to review and to *reject* a state’s certification denial if the *federal* entity decides that the certification denial violates Section 401, proposed Section 121.5(e) (e.g. the federal entity is not satisfied by the state’s justification), and/or proposed Section 121.3 (regarding the illegally-narrowed scope of certification). Proposed 40 C.F.R. § 121.6(c); see also id. at 121.6(b)(federal agency to review certification denial, notify state that the federal agency agrees, and to deny the permit/license); proposed Section 121.1(f), (h), (p). If the federal agency *chooses* to allow the state to remedy what the *federal* agency deems to be the faults in the state’s certification, the state can attempt to satisfy the federal agency’s requirements before the federal agency’s “reasonable period of time” expires. Proposed 40 C.F.R. § 121.6(c)(1), see also proposed Section 121.4. However, the proposed regulations do not obligate the federal agency to allow the state to remedy the issue, allowing federal agencies to run roughshod over the certification conditions the state has determined to be necessary based on the state’s understanding of its laws and local environmental characteristics, which the federal agency certainly would not have. Even worse, if the state cannot satisfy the federal agency’s demands within the agency’s requisite period, under proposed Section 121.4, the proposed regulations provide for waiver.

All of these requirements that are unsupported by, and conflict with, the Act have severe consequences for states because any non-compliance with EPA’s proposed regulations results in waiver under proposed Section 121.7 and/or elimination of State conditions by the federal agency under proposed Section 121.8.

All of this is a massive federal administrative agency power grab by EPA and other federal agencies that the Act fails to support. Nothing in the Act grants any agency, including EPA, the ability to do what EPA has proposed in its regulations relative to federal oversight and rejection of state certifications and conditions therein. As already noted, Section 401 gives no authority to EPA or any other federal agency to question the substance or reasoning of a state’s certification decision, or to interfere with the state’s certification decision in such a way that waiver suddenly applies and thus the state loses the ability to ensure protection with its laws and local environmental characteristics. It follows that EPA cannot mandate justifications from states for states’ decisions, much less purport to authorize *other* federal agencies to decide whether those agencies agree with the certifying state’s judgment under the Act. This is the type of action that Congress takes, not an executive branch administrative agency like the EPA.

The proposed justification requirements under proposed Section 121.5 impose additional,

unfunded burdens on already-underfunded and understaffed state agencies. Aside from being contrary to Section 401, this directly conflicts with Section 101(f), which states:

It is the national policy that to *the maximum extent possible* the procedures utilized for implementing this chapter shall encourage *the drastic minimization of paperwork and interagency decision procedures*, and the *best* use of available manpower and funds, so as to *prevent needless duplication* and *unnecessary delays* at all levels of government.

33 U.S.C. 1251(f)(emph. added); see also H. Rep. 92-911 at 125 (Mar. 11, 1972);¹⁹ id. at 72.²⁰ The proposed regulations require *more* interagency decision procedures, put *more* obligations on limited state manpower and funds, and needlessly duplicate the state's decision-making, all without any statutory authority to do so. This is further complicated by the fact that a given project, such as an interstate natural gas pipeline, typically involves multiple federal agencies. Under the proposed regulations, each federal agency would have the ability to question whether the state has provided sufficient justification for its certification and the conditions therein. That is still *more* needless red tape and burdens on the state agency issuing the certification. It also poses problems for the state (and residents) in determining which federal agency is responsible for rejecting what parts of a state certification for purposes of holding the federal agencies accountable. For a further explanation of the problems with this setup, see Sections IV. and V.A. and B., infra.

Indeed, if each federal permitting/licensing agency is simply going to question states' decisions, including to the point of not even bothering to respect the state's decision, why have Section 401 at all? See, e.g., proposed Section 121.6. If Congress thought that federal agencies were capable of doing the best job at ensuring compliance with state water quality requirements, it would not have needed to include the certification process at all. It could have simply required that any federal licensing/permitting entity with a project that may result in the discharge to navigable waters ensure that the project will comply with state law, including that the federal entity include in the license or permit such state requirements as would be needed to protect local environmental characteristics.

Obviously, Congress did not do that. That is consistent with the balance struck in the Act between federal and state authority, and the Act's cooperative federalism. The Act clearly delineates the lines between federal and state authority, allowing states to take over matters, and for the EPA to act in particular areas, including setting water quality standards, when states failed to do so. The states always have the opportunity to take charge of matters, and to do *more* than the federal minimum *unless the Act expressly* states the contrary. See, e.g., 33 U.S.C. §§

¹⁹ "A system of permits which requires duplicative effort or destroys the initiative of the States and local governments is wasteful and non-productive."

²⁰ One of the purposes of the Act was to "eliminate red tape in the administration of water pollution control programs. It is stated to be the policy of the Congress to encourage Federal-State efforts in the water pollution control policy." H. Rep. 92-911, p.72.

1311(b)(1)(C), 1341(b), 1370. Section 401 does not expressly state the contrary. In fact, Section 401(b) expressly *affirms* state authority, and Section 401 goes further – states do not even *need* federal approval for their Section 401 certification programs, unlike other programs under the Act (e.g. Section 402 permits).

There is nothing cooperative about, and nothing that maintains the lines of the Act’s division of authority in, the proposed regulations, which set up an entirely new role for EPA *and* federal agencies *beyond* the EPA to look over states’ shoulders and disapprove states’ certification decisions, contrary to the Act. Likewise, requiring states to provide *less* stringent conditions than what the state has included in its certification is second-guessing the state’s judgment and gives federal agencies extra-statutory power to write certifications to their liking – a power federal agencies do not have. Proposed Section 121.5; 84 Fed. Reg. at 44106; Snoqualmie Indian Tribe, 545 F.3d at 1219 (finding that FERC could impose condition more *stringent* than state certification, *with* state’s agreement); Amer. Rivers, Inc., 129 F.3d at 109-110;

To the extent EPA is trying to give other federal agencies the ability to harmonize state certifications with other federal laws, such as the Natural Gas Act, that is not EPA’s job and it lacks the authority to do so. To the extent any conflict arises between a state certification and another federal law, the judiciary can resolve whether such a conflict is so irreconcilable that preemption is in order.

E. Provisions Allowing Federal Agencies to Define What is a “Reasonable Period of Time” Unsupported by the Act

EPA proposes that *each* federal permitting/licensing agency determine either on a case-by-case basis or a *categorical* basis what constitutes a “reasonable period of time” for state certifications. Proposed Sections 121.1(n), 121.4. States would then have to make certifications within that time period or face waiver. Proposed Sections 121.1(h), 121.5, 121.7.

Practically, allowing federal agencies to set *categorical* time limits without regard to the project, the applicant, the number of deficient submissions, or the site characteristics, is simply forcing the states to make hasty decisions, particularly when applicants do not submit complete applications, sometimes multiple times.

Further, with multiple federal agencies involved in a given project, the proposed regulations set the state up to figuring out how to handle different deadlines from each agency involved. The agencies have no obligation under the proposed regulations to coordinate timing, and so a state has to figure out how to deal with different deadlines and also the question of whether it still has a valid certification for one federal permit or license if it decides to work past the deadline of another agency. A state could also easily have to rush its decision-making to beat the clock on the earliest “reasonable period of time” set by one of the federal agencies, even if the other agencies provide more time. If EPA’s proposed regulations did not require such substantial justification for even a denial of a certification, this would normally backfire on project applicants, with states simply having to reject applications due to incomplete information to avoid waiver. Yet now, the federal agency can override even that action, and say the state has

merely waived its certification authority for failing to justify to the federal agency's standards (not the Act's) that the state certification denial was proper. The state can't win no matter what it does. See also Sections IV. and V.A. and B., infra.

If Congress thought providing more guidance on what meant a reasonable period of time was necessary beyond what it put in Section 401, it clearly could have said so. It did not, beyond setting the time frame of a year. This is recognition of the fact that projects, sites, and states differ, *and* that multiple federal agencies are typically involved, but that Congress at least wanted to ensure that there was some time limit. If Congress wanted EPA to give federal agencies authority to define time frames for themselves, and to make a bureaucratic mess contrary to what the Act intends to achieve, 33 U.S.C. § 1251(f); H. Rep. 92-911, p.72, it likewise could have delegated that to EPA. It did not.

What constitutes a reasonable period of time is not for EPA or any federal agency to decide. Since the Act does not provide for a federal role in determining what is reasonable, that task must fall to the courts. Perhaps that is a frustrating result for EPA or for industry. But the remedy is not to rewrite the Act with non-existent rulemaking authority to force overburdened and underfunded states to somehow act faster when they can barely keep up as it is.

F. EPA's Proposed Enforcement Regulations for Section 401 Certifications Conflict with the Act

Even though the Act already has a provision on enforcement (Section 309), EPA ignores this to claim that Section 401 does not provide a role for state enforcement. 84 Fed. Reg. at 44116. In reality, it appears that the Act is not sufficient for EPA and others because it *does* allow states a role in enforcement. In fact, Section 309 intends for states to have first crack at enforcement. However, the proposed regulations flip this concept on its head and force states out of enforcing *their own laws* by making enforcement of *state* certifications the *exclusive* job of the federal permitting/licensing agency. Proposed Section 121.9. Thus, the kind of enforcement action that Ohio brought against Energy Transfer Partners for violations of state law during Rover Pipeline construction²¹ would be no more under EPA's proposed regulations. This is a significant shift in federal-state power and significant policy change from the Act itself, for which EPA has no authority.

Section 309 expressly identifies only specific sections of the Act via which the Administrator may be involved in enforcement activities. However, EPA may only get involved *after* the state has had an opportunity to take action. 33 U.S.C. § 1319. Even more, Section 401 is not even listed. Thus, EPA has *no* role in enforcement of state certifications. Logically, EPA cannot then gift *other* federal agencies with enforcement authority that not even it has under the

²¹ <http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Environmental-Enforcement/2017-11-03-Rover-Complaint-Signed-for-Filing.aspx>

Out of an abundance of caution, the material linked to throughout the comment is attached. However, such material is incorporated into this comment by reference, and considered a part of this comment.

Act.

In the drafting process of the 1972 amendments to the Act, the relevant Congressional committees²² both expressed a sentiment *against* having extensive federal enforcement.

For example:

The Committee *does not intend* this jurisdiction of the Federal government to *supplant* state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.

...

The Committee again, however, notes that the authority of the Federal Government should be used judiciously by the Administrator in those cases deserve Federal action because of their national character, scope, or seriousness. *The Committee intends the great volume of enforcement actions be brought by the State.* It is clear that the Administrator is *not to establish an enforcement bureaucracy* but rather to reserve his authority for the cases of paramount interest.

S. Rep. 92-414 at *3730 (Oct. 28, 1971)(Cmte. of Public Works)(emph. added). Also:

Consistent with the general tenor of this Act, the Committee expects that the Administrator *will rely to the maximum extent possible upon the enforcement actions of the individual States*. The Committee in providing for Federal enforcement *does not intend to replace* enforcement by the States. The provisions of section 309 are supplemental to those of the State and are available to the Administrator in those cases where local, State, or interstate enforcement agencies will not or cannot act expeditiously and vigorously to enforce the requirements of this Act. The Committee clearly intends that the greater proportion of enforcement actions be brought by the Sta[t]es.

H. Rep. 92-911, p.115 (Mar. 11, 1972)(Cmte. of Public Works)(emph. added).

Obviously, if a federal agency's license or permit has as a condition that a pipeline company or other entity must comply with a state's certifications, and that entity fails to do so, the federal agency can enforce the violation of its license or permit. However, EPA's proposed

²² Section 309 was largely the same throughout drafting. There were only slight changes via the Joint Conference Committee regarding penalties and the Administrator's discretion regarding enforcement. S. Conf. Rep. 92-1236 at *3809 (Sept. 28, 1972).

regulations create federal enforcement of *state* certifications to the *exclusion* of the very states that issued the certifications and whose laws are being violated. Proposed Sections 121.9. This directly conflicts with the Act and Congress' intent. It also creates an absurdity because, under EPA's proposed regulations, the state who issued the certification cannot enforce against the violating entity, but state residents *can* sue under the Act's citizen suit provisions. 33 U.S.C. § 1365(a), (f). "A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results." In re Kaiser Aluminum Corp., 456 F.3d 328, 338 (3d Cir. 2006); see also U.S. v. Brown, 333 U.S. 18, 27 (1948).

G. It is Not for Federal Agencies to Decide when Waiver has Occurred

EPA proposes extremely strict and onerous requirements for states to avoid waiver, including through its definition of "fail or refuse to act." 84 Fed. Reg. at 44107-44110; Proposed Sections 121.1(h), 121.7; see also, e.g., proposed sections 121.1(f), (g), (n), 121.3-121.8. A state can "fail or refuse to act" simply by not jumping through all the illegal hoops that EPA proposes, whether by mistake or because the state considers the requirements to be *ultra vires*. Indeed, contrary to the Act's purpose of *decreasing* red tape, EPA's proposed regulations *increase* red tape that can easily ensnare overburdened state environmental regulators. H. Rep. 92-911, p.72 (Mar. 11, 1972). Further, as already explained above, the involvement of multiple federal agencies in picking apart or rejecting state certifications, and/or setting deadlines that states cannot get around, substantially increases the likelihood that a state may have, despite its best efforts, waived its certification authority to the detriment of its residents. This is certainly not what the Act intended. See also Sections IV. and V.A. and B., infra.

It is not for EPA, or any other federal agency, to decide when waiver has occurred. The Act is clear, and where situations have arisen in which states have arguably attempted to circumvent this requirement, the judicial branch has addressed such situations. See, e.g., Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019)(addressing agreements re: applicant withdrawal and resubmission). Nothing in the Act gives EPA or any other federal agency the authority to decide when waiver has occurred, just like Act does not give federal agencies the authority to decide what a "reasonable period of time" is.

Beyond the legal issues, practical concerns abound. State processes for certifications, including appeals of such decisions, differ across the country, with some state laws including any administrative appeals as prerequisites to a final agency action (i.e. a certification). See, e.g., Berkshire Envtl. Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC, 851 F.3d 105 (1st Cir. 2017); Delaware Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot., 903 F.3d 65 (3d Cir. 2018), cert. denied, 139 S. Ct. 1648 (2019). Cutting off appeals or other permit challenges is a serious due process issue. Applicant submissions are frequently deficient to the point that states have to deny certifications because the applicant simply failed to provide the necessary information. And if anything, one year is too *short* for complex and controversial projects requiring extensive state agency review and possibly spurring appeals by residents to protect their due process rights. However, it is not up to executive branch administrative agencies to address the matter – it is up to Congress, and, in a given case or controversy, the courts.

H. EPA Re-Writes Section 401(a)(2) and Would Leave Neighboring States in

Limbo

Section 401(a)(2) of the Act states: “Whenever such a discharge may affect, as determined by the Administrator, the quality of the water of any other State, the Administrator . . . shall so notify such other State” among other entities. 33 U.S.C. § 1341(a)(2). Thus, if the Administrator determines that a discharge *may* affect water quality in another State, the Administrator is to notify that State, among others. This focus on “may” is in line with the “may result in any discharge” language of Section 401(a)(1), putting the discharge-origin state on par with neighboring states.

EPA converts Section 401(a)(2) into something else. EPA claims that Section 401(a)(2) gives EPA the *option*, or fully discretionary authority, of determining whether the discharge may affect the neighboring state(s). Proposed Section 121.10(b); see also 84 Fed. Reg. at 44115. EPA’s proposed regulations give the impression that if the EPA is too busy, not that concerned about a discharge, or just wants to block state input, it can prevent neighboring states from having any input by outright refusing to make a decision on whether a discharge may affect the water quality of neighboring states. While it is true that Section 401(a)(2) does not say “EPA *shall* determine whether” a discharge may affect another state’s water quality, EPA’s construction would make Section 401(a)(2) meaningless and superfluous by letting EPA simply refuse to make a decision, and block neighboring states’ input. That is contrary to the Act and the very point of Section 401 to ensure state input on federal permits and licenses.

I. EPA’s Proposed Pre-filing Process for Its Certifications Cuts out the Public²³

EPA proposes that there be a pre-filing requirement for certifications within EPA’s scope of authority under Section 401. Proposed Section 121.12; 84 Fed. Reg. at 44108. However, EPA does not provide for the public to be involved. The Act promotes public involvement and transparency, not closed door meetings with the regulated and the regulator. See, e.g., 33 U.S.C. §§ 1251(e), 1314, 1316, 1317, 1322, 1329, 1341, 1342, 1365; see also 40 C.F.R. §§ 124.10-124.12 . EPA must do the same.

III. EPA Illegally Re-Writes the Act Via its Regulations Without Any Statutory Rulemaking Authority for Doing So, Contrary to the Act and the U.S. Constitution

A. EPA’s Proposed Regulations Would be Illegal Because EPA Lacks the Statutory Rulemaking Authority for Them And/or They Go Beyond the Agency’s Rulemaking Authority under the Act

²³ The proposed use of “certifying authority” in proposed Subpart D is confusing because that term already has another meaning throughout the rest of the proposed regulations. In fact, proposed Section 121.14 uses the term “Administrator” and not “certifying authority,” contrary to the rest of proposed Subpart D in which proposed Section 121.11(c) specifies that “the certifying authority is the Administrator.” Subpart D should just use “Administrator” and not “certifying authority.”

EPA does not have unlimited rulemaking authority under the Act. Section 401 provides no section-specific rulemaking authority. Thus, the only rulemaking authority that the EPA could rely on for its proposed regulations is the following: “The Administrator is authorized to prescribe such regulations as are necessary to carry out *his* functions under this chapter.” 33 U.S.C. § 1361(a)(emph. added).

EPA openly states:

Section 401 does not provide an express oversight role for the EPA with respect to the issuance or modification of individual water quality certifications by certifying authorities, other than the requirement that the EPA provide technical assistance under section 401(b) and the limited role the EPA is expected to play for ensuring the protection of other states’ waters under section 401(a)(2).

84 Fed. Reg. at 44117. When Section 501 is applied to Section 401, there is a very narrow set of regulations that the EPA could potentially propose and enact. This is because Section 401 provides a very limited role for the Administrator. Under Section 401, the Administrator:

- Issues certifications if no state or interstate agency has the authority to issue a certification, Section 401(a)(1); see also 401(a)(3) and (a)(4) (Administrator stands in position of state or interstate agency, as is applicable);
- Determines whether a discharge “may affect . . . the quality of the water of any other State” and must notify such states; if a hearing is held regarding the discharge, the Administrator also must submit evaluations and recommendations at that hearing, Section 401(a)(2); and
- “[S]hall, upon the request of” any federal, state, or interstate entity, provide “relevant information on applicable effluent limitations, or other limitations, standards, [and other requirements]” and “shall,” when requested by any federal, state, or interstate entity, “comment on any methods to comply with such” requirements, Section 401(b).

According to EPA, “all states have authority to implement section 401 certifications.” 84 Fed. Reg. at 44112. The Act has no requirement that states get approval from the Administrator of their Section 401 certification programs, in contrast to other programs under the Act (e.g. Section 402 permits). Thus, the Administrator has no role as to issuing certifications in the place of states under Section 401, or overseeing states’ Section 401 certification programs. The Act does not provide any other federal agency with oversight authority either.

Therefore, the only item regarding which that the Administrator has authority to make regulations “as are necessary to carry out his functions under this chapter” are: EPA’s role under Section 401(a)(2) as to neighboring states, its role in providing guidance and comment (when requested) under Section 401(b), and any certifications EPA issues on behalf of tribes without certification authority, and on lands that are exclusively federally-owned. 84 Fed. Reg. 44112.

EPA admits as much. 84 Fed. Reg. at 44117.²⁴ Beyond that, EPA has *no* role as to Section 401 and in turn, no functions of the Administrator for which regulations might be needed.

This eliminates most of EPA's proposed regulations, with perhaps the exception of proposed Section 121.10 (pertaining to Section 401(a)(2)) and Subparts D (Certification by Administrator) and E (Consultations). However, as noted *infra.*, many of these regulations are redundant and unnecessary given the clear language of the Act. The Act's limited role for the EPA, as described, likewise eliminates the EPA's attempt to give more power to *other* federal agencies to interfere with state Section 401 certifications, when the Administrator does not even have a role to begin with. *See, e.g.*, proposed Sections 121.5-121.8. In fact, the Act expressly quashes EPA's attempt to enlarge the authority of other federal agencies:

- (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to-
 - (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review . . . the adequacy of any certification under section 1341 of this title;

33 U.S.C. 1371(c)(2)(A).

EPA ignores this clear statutory limitation and the plain language of Section 401 (among provisions) and deliberately misrepresents case law on this issue to give itself and other federal agencies the authority to require states to justify their certifications and the conditions therein, and to review the substance of state certifications, including to reject conditions they find inappropriate. 84 Fed. Reg. at 44091-92, 44104-106, 44111; proposed Sections 121.3 and 121.5-121.8; *see also, e.g.*, proposed Section 121.1(b), (f), (h), (p). These arguments fail.

For example, EPA cites City of Tacoma, Washington v. F.E.R.C., 460 F.3d 53, 68 (D.C. Cir. 2006) and Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207, 1218 (9th Cir. 2008) as support for its ability to allow federal agencies to question the substance of state certifications and to reject state conditions in those certifications. However, these cases directly undermine EPA.

In City of Tacoma, the Court addressed FERC's obligation to determine whether the state had satisfied the *procedural* requirements (e.g. public notice) of Section 401(a)(1) and (a)(3). 460 F.3d at 67-69. This is different than the federal agency determining whether it agrees with the substance of the state's certification, including the conditions therein. In American Rivers, Inc., the Second Circuit addressed a similar argument to what EPA makes here; in that case, the

²⁴ EPA's gifting of oversight, including review of state certification conditions, to federal agencies appears to be EPA's attempt to get around this open admission. Yet, for the reasons stated herein, that fails also. Among other things, if EPA has no "express oversight role," than it is illogical that any other agency would be able to step into a non-existent role under Section 401.

argument was based on Keating v. Federal Energy Regulatory Comm'n, 927 F.2d 616 (D.C.Cir.1991). The Court rejected the argument, distinguishing between procedure and substance. In American Rivers, Inc., the Second Circuit stated:

Keating addresses the **narrow** question of the Commission's authority to determine whether a valid § 401 certificate exists prior to issuing its license. 927 F.2d at 625 (the Commission is authorized to "decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements—i.e., whether it is timely and motivated by some change in circumstances after the certification was issued"); *see also* 33 U.S.C. § 401(a)(1) ("No license or permit shall be granted if certification has been denied by the State...."). **Nothing in *Keating* supports a broad authority on the part of the Commission to review a state's designation of certain conditions in the state's § 401 certification.** *See Keating*, 927 F.2d at 622–23; *see also United States Dep't of the Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 548 (D.C.Cir.1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates") (citing *Keating*, 927 F.2d at 622–23); Lisa M. Bogardus, *State Certification of Hydroelectric Facilities Under Section 401 of the Clean Water Act*, 12 Va. Env'tl. L.J. 43, 95 (1992) (summarizing *Keating*, in part, to hold that "neither a federal agency nor a federal court may review the appropriateness of conditions attached to the certificate or review the grant or denial of a certificate").

129 F.3d at 109; *see also id.* at 109-110 (discussing Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians, 466 U.S. 765 (1984)). The Court clearly said: "While the Commission may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the Commission **does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.**" *Id.* at 110-111(emph. added).

Snoqualmie Indian Tribe does not justify EPA's regulations or support its rationale either. First and foremost, FERC *accepted* the state's certification and the conditions therein. What it did do was *strengthen* one of the conditions that the state called for regarding minimum flows through a hydroelectric dam by requiring greater flows during certain times of the year. The Court thus found that, in the case, "FERC may require additional license conditions **that do not conflict with or weaken** the protections provided by the WQC." 545 F.3d at 1219 (emph. added). The Court also found importance in the fact that the state had no objection, stating that the greater flows in that case did not violate their water quality standards. *Id.*

Neither case supports EPA's proposal to require states to justify their certification and conditions therein to the federal licensing/permitting agency, or to allow such agencies to reject conditions – conditions that EPA is proposing to narrow the permitted scope of.

As for the proposed regulations that EPA may have authority to promulgate, such regulations are unnecessary and duplicative, Section 401 is clear on the Administrator's obligations under, for example, Section 401(a)(2), making proposed Section 121.10 regarding neighboring states and discharges redundant. Section 401(b) is likewise clear, making proposed Section 121.15 redundant.

However, even here, EPA has used the small window it had under Section 401(a)(2) to completely alter the scope of its obligations under Section 401(a)(2). Thus, even the rulemaking authority EPA does have, it has abused to the end of making regulations that help industry, not that are consistent with the Act or with protection of water quality and human health.²⁵

The lack of statutory rulemaking authority has not stopped EPA, of course, as it claims that a judicially-created doctrine (Chevron doctrine) is effectively a grant of rulemaking authority. This is incorrect and unconstitutional, and demonstrates that it is time for the Chevron doctrine to meet its end.

B. EPA Claims *Chevron* and Similar Cases Are Rulemaking Authority That Allow it to Override Congress and the Judiciary, Contrary to Case Law, the Clear Language of the Act (Which Leaves No Room for Its "Gap-Filling" or for Deference) and the U.S. Constitution

EPA greatly abuses the Chevron doctrine and expands it beyond its breaking point in order to say that a judicial decision gives it rulemaking authority. EPA essentially says that it knows better than Congress what Section 401 and the Act *should* say, and uses the Chevron doctrine to get there by declaring anything it can to be "ambiguous," even to the point of absurdity and doing so contrary to the plain language of the Act.

Congress expressly said that it sought to give guidance to EPA in the Act "in as much detail as could be contrived." S. Conf. Rep. 92-1236, at *3826 (Sept. 28, 1972).²⁶ Further, as

²⁵ Relatedly, existing 40 C.F.R. § 124.53(e)(2) and (e)(3) conflict with the Act in that they require the state to provide citations for more stringent conditions than those in proposed draft permits, and the lack of a citation "waives the right to certify with respect to that condition." They also require a "statement of the extent to which each condition of the draft permit can be made less stringent," and lack of this statement waives certification as to that condition. EPA cannot require these things as to certifications. The proposed regulations only expand on these illegal requirements.

²⁶ "In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations. With respect to each of these actions, the Act provides Congressional guidance to the Administrator in as much detail as could be contrived." Id. at *3826-27.

Thus, there is not so much room for the EPA as it thinks. First, Congress had to give EPA the authority to act. Then, if Congress did give EPA authority to act, Congress had to give it the ability to add more detail (standards, effluent limitations, etc.) – in other words, Congress had to provide rulemaking authority. Where Congress did give EPA rulemaking authority and

illustrated in this comment, the Act and Section 401 are very clear about EPA's role, or general lack thereof, in the certification process.

Yet, EPA says that Section 401 and the Act do not, in *EPA's* view, provide for certain matters or include certain things that *EPA* thinks would be helpful, thus it can “gap-fill” and create regulations essentially by using the Chevron doctrine as non-statutory rulemaking authority. See, e.g., 84 Fed. Reg. at 44092-93, 44097, 44101, 44103, 44105, 44106, 44110. But to do so, EPA misrepresents Chevron and similar cases, and (as already explained) ignores the plain language of the Act.

EPA claims: “The Court explained that it is not the judiciary's place to establish a controlling interpretation of a statute delegating authority to an agency, but, rather, it is the agency's job to “fill any gap left, implicitly or explicitly, by Congress.” Id. at 843.” 84 Fed. Reg. at 44092). This is contrary to basic principles of judicial review laid down in Marbury v. Madison, 5 U.S. 137 (1803). Indeed, EPA ignores that Chevron *also* said: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” 467 U.S. at 843 n.9.

EPA also states: “When Congress *expressly* delegates to an administrative agency the authority to interpret a statute through regulation, courts cannot substitute their own interpretation of the statute when the agency has provided a reasonable construction of the statute. See id. at 843–44.” 84 Fed. Reg. at 44092-93(emph. added). Even if this were a correct statement of the law, which we do not concede, EPA hurts its own arguments with this statement because the only express rulemaking authority EPA has under the Act that could pertain to Section 401 is Section 501, which is not broad enough to cover EPA's wholesale re-writing of Section 401. 33 U.S.C. § 1361(a); see also City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 318 (2013)(Roberts, J., dissenting).²⁷

Simplified, EPA's argument in support of its proposed regulations is that Chevron *is* **rulemaking** authority allowing it to re-write the Act in the current Administration's image, rather than what Congress set down in accordance with its Constitutionally-delegated legislative authority. U.S. Const., art. I, § 1. In fact, EPA claims the authority to even give *other* federal agencies more power, and to expand the accumulation of power to more unelected agencies in the executive branch, in accordance with the Chief Executive's policy prerogatives, *not* those of

the ability to act, Congress was clear that it provided as much guidance to EPA as it could. Thus, EPA cannot simply make up where and when it is allowed to make rules and make up the policies and standards to guide its rules. That is usurpation of lawmaking. As an executive branch administrative agency, EPA lacks lawmaking authority under the Act and the U.S. Constitution.

²⁷ “*Chevron's* rule of deference was based on—and limited by—[a] congressional delegation. And the Court did not ask simply whether Congress had delegated to the EPA the authority to administer the Clean Air Act generally. We asked whether Congress had “delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation.” (emph. in original)

Congress as stated in the Act.

EPA even says it can override the judiciary's determination of what the law is because of Chevron, Brand X,²⁸ and similar cases – even when, in P.U.D. No. 1, the Court found that Section 401(d) was “most reasonably read” in a way that EPA wants to reject. 511 U.S. at 712. Yet, EPA claims that the Court's decision rested on prior and faulty EPA interpretations – which in fact, the Court's decision did not solely rest on such things – and thus it can come up with a *less* reasonable interpretation that the United States Supreme Court and make it law instead. See, e.g., 84 Fed. Reg. at 44097. Indeed, EPA openly admits it is taking the dissent's view in its proposed regulations, 84 Fed. Reg. at 44095, 44097, even though, as already demonstrated in this comment, that view is contrary to the plain language of the Act. See, e.g. Section II.C., supra.

EPA expands Chevron and similar cases beyond their original facts and limited scope, and crafts new rulemaking authority far broader than the Act's specific and limited rulemaking authority, and the limited role EPA has under Section 401. EPA gifts itself with the ability to draft legislation and overrule judicial opinions. This is the very result the Founders sought to prevent: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” United States v. Brown, 381 U.S. 437, 443 (1965)(quoting The Federalist, No. 47, pp. 373-374 (Hamilton ed. 1880)).

EPA's claim that the Chevron doctrine essentially is a grant of authority is not only contrary to the basic principles of our government, but ignores that the U.S. Supreme Court has said that “[a] *precondition* to deference under *Chevron* is a congressional delegation of administrative authority.” Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 649 (1990). “An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.” Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 374-75 (1986); see also Adams Fruit Co., Inc., 494 U.S. at 650 (1990)(quoting Fed'l Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)) (“it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction.’”).

The Chevron doctrine does not provide support for EPA's proposed regulations. If enacted, the proposed regulations would be a massive expansion of the Chevron doctrine. They demonstrate the unconstitutionality of the *Chevron* doctrine, and the reasons for why it must be overruled.

C. *Chevron* Doctrine is Contrary to the Founders' Constitutional Structure of Federal Government, and is Therefore Unconstitutional and Needs to be Overruled

EPA's proposed regulations expand the Chevron doctrine past its breaking point, illustrating that it is time to reject that analytical framework and its reworking of basic principles,

²⁸ Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs. (“Brand X”), 545 U.S. 967 (2005).

including separation of powers, that are the foundation of our federal government. Chevron, Brand X, and the many cases that have followed allow the courts to abdicate their core functions to unelected administrative agencies situated in and under the control of a politicized branch of government. See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016)(Gorsuch, J., concurring); compare Pereira v. Sessions, 138 S.Ct. 2105, 2120-21 (2018)(Kennedy, J., concurring). The Chevron doctrine is contrary to the basic structure of the federal government, including the powers allocated to each branch by the U.S. Constitution, and is therefore unconstitutional.

The very point of the Chevron doctrine – that Congress (without saying so) did not write what it meant or left “gaps” for an administrative agency to fill – is directly contrary to basic statutory construction.²⁹

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any *judicial addition to the language of the statute*.

United States v. Goldenberg, 168 U.S. 95, 102–03 (1897)(emph. added). If the judiciary cannot add to a statute, then an executive branch agency most certainly cannot either. “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government” I.N.S. v. Chadha, 462 U.S. 919, 944 (1983).

Basic constitutional law teaches, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” Marbury v. Madison, 5 U.S. 137, 177 (1803). It also teaches the importance of separation of powers to the foundation of the federal government established in 1789. Specifically:

The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. This ‘separation of powers’ was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked

²⁹ It also gives Congress a potential way out of its lawmaking duties such that Congress might not be as precise and careful in drafting as it should be.

to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

‘The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’ *The Federalist*, No. 47, pp. 373—374 (Hamilton ed. 1880).

United States v. Brown, 381 U.S. 437, 442–43 (1965). “[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.” New York v. United States, 505 U.S. 144, 187 (1992).

Accordingly, in 1952, the Supreme Court invalidated President Truman’s attempt to, via executive order, nationalize and operate (via an administrative agency) the country’s steel mills during a labor dispute. Youngstown Sheet & Tube Co. v. Sawyer (“Youngstown”), 343 U.S. 579 (1952). The President viewed the labor dispute as a threat to the supply of steel to defense contractors for weapons and other war materials manufacturing during the Korean War. Id. Lacking any statutory authorization for the executive order, the U.S. Government argued that the President had implied authority for the executive order, which stemmed from his executive powers under the U.S. Constitution.

The Court refused to accept this. “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” Id. at 587. In words prescient to current times, Justice Jackson stated:

Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. . . .

The essence of our free Government is “leave to live by no man’s leave, underneath the law”—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. . . .

With all its defects, delays and inconveniences, [people] have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. ***But it is the duty of the Court to be last***, not first, ***to give***

them up.

Id. at 654-655 (Jackson, J., concurring) (emph. added).

The United States Supreme Court determined that not even the President under the guise of a potential national emergency could take such action as he deemed warranted without some clear authority in a statute or the U.S. Constitution. How then, is it that unelected executive branch administrative agencies, under the directive of a Chief Executive beholden to a particular set of political interests, may be allowed to “gap-fill” whenever a word in a statute may seem ambiguous or be declared ambiguous by an agency? See Gutierrez-Brizuela, 834 F.3d at 1152-53 (Gorsuch, J., concurring).

EPA’s approach in this proposed rulemaking is to simply declare whatever it wants ambiguous to come up with an approach directly contrary to what Congress put down on paper. In Youngstown, Justices of the Court expressly recognized that the power of the President, the chief executive, was lowest when acting in an area that Congress had spoken to, and that to find Presidential power to address an issue anyway in such a situation “would be to disrespect the whole legislative process and constitutional division of authority between President and Congress.” 343 U.S. at 609 (Frankfurter, J., concurring); id. at 637-38, 640-41 (Jackson, J., concurring). What EPA does here is no different, and yet, at least according to EPA, it poses no constitutional problems because of Chevron, Brand X, and similar cases.

The most egregious example in the proposed regulations of how EPA has relied on the purportedly outer limits of these cases is EPA’s position that it can effectively *overrule* the United States Supreme Court, and can adopt a *less* reasonable framing of Section 401 than what the U.S. Supreme Court determined to be the “most reasonabl[e]” reading of the provision. P.U.D. No. 1, 511 U.S. at 712. EPA’s argument effectively is that it is also lawmaker and judge – it writes the laws, carries them out, and determines what they mean, even after the U.S. Supreme Court has interpreted the law.

Even if there were unclear aspects of Section 401 which we do not concede, it is not EPA’s job, nor anyone else’s job in the Executive Branch, to take on the job of “fixing” the situation, much less to do so in a way that promotes the policy agendas and political priorities of any given Administration and the agencies it directs. See Gutierrez-Brizuela, 834 F.3d at 1152-53, 1154, 1158. It is up to Congress to change the law, and up to the judiciary to interpret the law in the context of a given case and its facts, as the Supreme Court did in P.U.D. No. 1.

If EPA thinks that the scope of state certification authority under Section 401 is unclear, the remedy is not for it to make up what it thinks that scope should be based on an express policy directive from the Chief Executive to prioritize private industry interests that directly conflicts with the Act. (Executive Order No. 13868). The remedy is for Congress to amend the Act, or for companies who think a certifying authority (like a state) has stepped beyond its authority to seek relief before the judiciary.

We respectfully incorporate by reference the arguments cogently set forth in now-Justice Gorsuch’s concurrence in Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) as

additional bases for why the Chevron doctrine is contrary to the U.S. Constitution and the basic structure of the federal government, and thus must be overruled.

D. Even if Not Fully Overruled, the *Chevron* Doctrine must be Significantly Narrowed

Even if the Chevron doctrine were retained,³⁰ EPA has shown that the doctrine must be significantly reigned in to prevent unconstitutional results and the extensive abuse demonstrated by EPA's proposed regulations. The Chevron doctrine only can apply in certain limited circumstances, and constitute a narrow exception about agency deference, versus a rule that swallows constitutional rights and separation of powers.

Deference, to some degree, could make sense in expressly-delegated technical/scientific matters within the agency's scope of expertise. Deference, again to some degree, also could be logical if a statute clearly places a non-technical/scientific matter in the agency's hands for more detail. However, in none of these situations may a court abdicate its duty and simply rubber-stamp the agency's view. The court still must determine if the agency's interpretation or position is logical, consistent with the relevant statute, within the scope of the authority that Congress provided to the agency, and, where relevant, supported by the record (including science and technical information). If, for example, the record shows that the agency's technical view is scientifically-flawed, or simply a policy decision not grounded in science, no deference should be given. Likewise, statutory construction, at the end of the day, still must rest upon the shoulders of the judiciary, not administrative agencies.

As already explained, Section 401 is clearly not in EPA's hands primarily, and not at all when it comes to state-issued certifications. There are no technical scientific matters here that the Act expressly charges EPA with developing. There is certainly nothing in the Act that would permit EPA to create the heavy-handed federal big brother scheme that it proposes in its regulations. EPA deserves no deference even under a narrowed Chevron doctrine, and thus its proposed regulations still fail.

E. Even Under Existing *Chevron* Doctrine, EPA is Owed No Deference and its Proposed Regulations Fail

Even if the existing Chevron doctrine were retained, the Act is clear, as outlined earlier in this comment, and there is no need to advance to step two. EPA's attempts to cut language off from the rest of Section 401 or the Act, among other tactics, are contrary to basic statutory construction principles. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

Assuming for argument that there were any ambiguities, and the analysis were to advance to step two, EPA has gone far beyond its statutory rulemaking authority, as already discussed,

³⁰ It is strongly questionable as to whether this is wise because of the tendency of some agencies and courts to take exceptions and gradually expand them over time.

and thus its proposed regulations are still unauthorized. EPA is also not owed deference because of the extensive conflicts between its proposed regulations and the Act, as discussed throughout this comment. “[A] reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms.” Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992).

Further, EPA’s claim that it can pick and choose which court decisions it agrees with substantially undermines its credibility and the reasonableness of its interpretations by openly demonstrating that EPA is simply trying to get to the result sought by Executive Order (“E.O.”) No. 13868. As one example, EPA claims that it can simply take a different tack from the U.S. Supreme Court’s P.U.D. No. 1 determination, but ignores that the Court found that Section 401(d) is “most *reasonably* read” to allow conditions on applicants under Section 401(d) of the type that the State of Washington had included in its certification. 511 U.S. at 712 (emph. added); 84 Fed. Reg. at 44095, 44097. Thus, EPA is essentially propounding that it can come up with a *less* reasonable interpretation of Section 401(d) and have it pass muster under Chevron. That is absurd.

IV. EPA’s Proposed Regulations would Violate the Tenth and Fourteenth Amendments

EPA’s proposed regulations would violate the Tenth Amendment by forcing (i.e. commandeering) state governments into carrying out an executive branch policy and requirements – including requirements that are contrary to the Act. Further, in so directing state governments, EPA’s proposed regulations force state governments to violate the equal protection rights of their residents, contrary to the Fourteenth Amendment of the United States Constitution. This is best illustrated by projects requiring FERC approval under the Natural Gas Act (“NGA”).

A. EPA’s Proposed Regulations would Violate the Tenth Amendment

“The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” New York v. U.S., 505 U.S. 144, 166 (1992). In other words, Congress cannot command states to regulate interstate commerce in a particular way. It stands to reason that if Congress cannot do such a thing, no federal executive branch official or entity can either because Congress makes the laws in the first place that constrain the executive branch.

Typically, environmental statutes like the Clean Water Act have avoided Tenth Amendment problems by offering states a choice: take primacy over an issue (e.g. water pollution control) once the state’s program meets minimum standards, or leave the regulating to the federal government and have the state’s laws preempted. Id. at 167-68. Once a state takes primacy, the federal government is not looking over the state’s shoulder on every decision or giving itself the ability to override the state’s decision.

In contrast, EPA’s proposed regulations run right into the Tenth Amendment, in addition to exceeding the authority Congress provided to EPA.

The federal executive branch does not have the ability to fast-track Section 401 state certifications on its own because states are in charge of certification decisions. EPA openly admits that “all states have authority to implement section 401 certifications.” 84 Fed. Reg. at 44112. As already discussed, that means that EPA’s certification authority is limited to very specific situations.

However, state authority poses an obstacle to E.O. No. 13868 and the Chief Executive cannot directly implement his policies (as described in E.O. No. 13868) through the executive branch. The executive branch is also not Congress (although it tries to be in the proposed regulations) and cannot simply eliminate Section 401 from the Act entirely in order to achieve the Chief Executive’s goals.

Instead, to implement the policies in E.O. No. 13868, EPA has proposed a federal overlord regulatory system (via the proposed regulations) in order to force the states to do what the current Administration wants, which is get pipelines and other similar fossil fuel projects approved faster. “[I]t is the whole *object* of the [proposed regulations] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.” Printz v. U.S., 521 U.S. 898, 932 (1997). As discussed already, the Act preserves and specifies expansive state authority including under Section 401, not even requiring EPA approval of state certification programs like with other permitting programs. Despite this, EPA’s proposed regulations force states to carry out an authorized regulatory program the way the federal government wants for more and faster approvals regardless of state concerns, not the way that the state is entitled to do under the Act and wants to do to be properly responsive to state concerns. EPA’s proposed regulations effectively reduce states to giving advisory opinions that federal agencies can simply ignore.

Also, because Section 401 is not like other regulatory programs, in which the state could simply step aside and let the EPA take the reins, and not be concerned about potential liability for its decisions, states have no ability to opt out entirely from the Section 401 certification process. States must either extensively justify their decisions, and have their decisions overridden anyway (after which they have to decide if they will sue the federal government), or waive certification because the state simply cannot put up the fight with the federal government. Yet waiver is not liability-free either because the state still risks lawsuits from affected residents or other organizations. EPA is putting costs and burdens on state governments to do what the Act already allows them to do, and the states have no way out under the Act. This is massive overstep into state sovereignty, turns Section 401 and the Act on their heads, and raises extensive tensions and conflict between the federal government and states.

A key indicator of a Tenth Amendment violation are the significant accountability problems that EPA’s proposed regulations create. See New York, 505 U.S. at 168-69. Legal challenges to certifications are one example. Compare Printz v. U.S., 521 U.S. 898, 930 (1997). Who does an aggrieved resident sue if a certification is granted over state objections? The federal agency? The state? Both, if the resident thinks what the state offered to the federal agency, in order to get *some* condition in a certification, wasn’t protective enough? This is jurisdictional nightmare because in most cases, state certifications are reviewed at the state level,

not in federal court.³¹ It also is cost-prohibitive for most residents and many environmental organizations, with potential pitfalls and risks along the way that the Act does not provide for, but that EPA has set up on its own. A cynic might say that EPA has deliberately tried to make challenging certifications so difficult that they are not challenged at all, further to the benefit of industry, but to the detriment of those who have to live with what industry builds and harms along the way, including people's private property.

Another example involves administrative records and commenting. Must residents expected to comment to *federal* agencies to preserve their claims in an administrative record? To *state* agencies? In Pennsylvania, residents do not have to comment on a proposed Pennsylvania Department of Environmental Protection ("PADEP") action in order to challenge that action before the Environmental Hearing Board, and further, the Board reviews PADEP actions *de novo*, meaning that it is not bound to any administrative record. EPA's proposed regulations create significant confusion and ambiguity. In contrast, Section 401 specifically provides that states give public notice because states are meant to be the decisionmakers, *not federal agencies*. 33 U.S.C. § 1341(a)(1).

Another accountability problem relates to funding and the inability of state legislatures to address problems created by EPA's proposed regulations. See Printz, 521 U.S. at 930. EPA's proposed regulations place greater burdens on already underfunded, overburdened state agencies. The proposed regulations create significant obstacles for states to protect their residents' rights, and simply allow the federal government to step over what the state wants. Ordinarily, state legislatures would be the place for residents to go to change these types of situations. Yet here, it is EPA, an unelected administrative agency that has created the problem, along with the other unelected federal agencies that EPA has illegally empowered to oversee and second-guess state certification decisions. Id.; New York, 505 U.S. at 168-69. Are residents to spend their hard-earned money to travel all the way to Washington D.C. and Congress and fight against industry lobbyists there to address this matter? Compare Gutierrez-Brizuela, 834 F.3d at 1152. Again, EPA's proposed regulations transfer costs from industry to those with fewer means available, while attempting to shield the federal government and industry from opposition and challenge. See id. at 505 U.S. at 169.

One of the most egregious overreaches in the proposed regulations involves EPA's open admission that if a federal agency, using EPA's improperly-narrowed regulations, rejects a state certification and/or conditions in the certification, the state "that disagrees that its action was outside the scope of section 401 could consider its options for legal or administrative review against the federal agency for issuing the license or permit without considering its certification denial." 84 Fed. Reg. at 44110.³² This is a significant and outrageous transfer of costs and

³¹ Some federal courts have determined the NGA to be such an exception; however, it has taken years to get some measure of clarity on jurisdiction. See, e.g., Berkshire Env'tl. Action Team, Inc., 851 F.3d 105; Delaware Riverkeeper Network, 903 F.3d 65, cert. denied, 139 S. Ct. 1648.

³² This creates even further problems for states and residents – can residents sue a state for not suing the federal agency over a certification decision and thus not protecting the residents' property rights and, in some states, constitutional environmental rights? Can states *and* residents

burdens from private industry onto state governments without any statutory or other authority for doing so. As noted earlier, a state could be suing multiple federal agencies depending on which one refused to include which condition of a state certification (or just outright refused to accept the state's certification). Literally *requiring* a state to sue the federal government to protect its residents *as a matter of course* (as distinguished from when states voluntarily sue the federal government over certain policies or regulations), is a severe violation of state sovereignty and one that literally subordinates states to the federal government where Congress and the Constitution do not provide for it.

EPA's proposal to prohibit states from enforcing their own certifications (including *state law* in such certifications) is also an incredible overreach into state sovereignty, and one for which EPA cites *no* competent legal authority. Again, there is no preemption here (e.g. because it is the Act), and EPA could not preempt the states from enforcement anyway because it has no authority under the Act to do so. In fact, as noted earlier, the Act speaks to the opposite – states very much have a role in enforcement, in addition to having extensive authority under Section 401. Thus, EPA is saying that it can, on its own, bar states from enforcing their own laws, and from acting even if the states want to act because EPA's position is that the federal government has it handled. The ridiculousness of EPA's proposal is illustrated by the fact that, under EPA's proposed regulations, state residents could bring a citizen suit for violations of a Section 401 certification, but not the state government in which the residents live. 33 U.S.C. § 1365(a), (f). State residents cannot even seek recourse from their own governments to fix this situation, again demonstrating classic Tenth Amendment accountability problems. The federal government is simply using the states to get a result the federal government wants, regardless of what states have in place and think is best for their residents. EPA's proposed regulations set a dangerous precedent and an absurd one at that when the federal government – absent preemption of state laws – says that *it* will enforce certifications (including state law therein) to the *exclusion* of states.

B. As a Further Violation of State Sovereignty and the Tenth Amendment, EPA's Proposed Regulations Force States to Violate Equal Protection Rights of their Residents, Contrary to the 14th Amendment

The best way to illustrate how and why EPA's proposed regulations force states to violate their residents' equal protection rights under the Fourteenth Amendment is by examining facilities that require FERC under the Natural Gas Act ("NGA").

1. Background on the NGA³³

challenge the federal decision, or are residents at risk of a court finding they cannot do so, and that the state can only raise the challenge?

³³ We focus on natural gas in this comment due in part to E.O. No. 13868's partial emphasis on natural gas and LNG. However, the severe consequences of EPA's illegally narrowed scope of state authority under Section 401 may extend to other types of projects, including hydroelectric dams and certain interstate electric transmission lines that are covered by the 2005 Energy Policy Act.

Congress enacted the NGA to protect consumers from natural gas companies seeking to exploit regulatory gaps in state public utility jurisdiction, including to ensure uniformity of rates and service regulations. See, e.g., Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621, 631 (1972); Atl. Ref. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 388-89 (1959); Phillips Petroleum Co. v. State of Wis., 347 U.S. 672, 682-84 (1954). This regulatory gap resulted from the inability of state public utility commissions to exercise authority over certain interstate natural gas companies, due to a series of court decisions holding that states lacked the constitutional authority to regulate these interstate entities. Phillips Petroleum Co., 347 U.S. at 682-84; Interstate Natural Gas Co. v. Fed. Power Comm'n, 331 U.S. 682, 689-91 (1947). The NGA imposed on what is now the Federal Energy Regulatory Commission (“FERC”) duties that demonstrate that Congress intended FERC to be the interstate equivalent of a state public utility commission. Such duties include, *inter alia*, ensuring natural gas companies charge “just and reasonable” rates, 15 U.S.C. § 717c, and requiring that interstate natural gas entities seeking to begin, abandon, or extend service were doing so in a manner that “will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). Thus for purposes of potential preemption, where a state agency has some degree of public utility or securities authority as to interstate natural gas pipelines, and that agency regulates in the NGA’s field or conflicts with the NGA, the state’s authority is usually preempted. Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); see also Nat’l Fuel Gas Supply Corp. v. Pub. Serv. Com’n, 894 F.2d 571 (2d Cir. 1990) (addressing preemption of New York Public Service Commission pipeline safety and public utility requirements); Northern Natural Gas Co. v. State Corp. Comm’n, 372 U.S. 84 (1963).

In contrast, the NGA says nothing whatsoever about substantive environmental regulation of interstate natural gas pipelines. It only designates FERC as the lead agency for NEPA purposes, 15 U.S.C. § 717n(b)(1), and requires FERC to coordinate the permitting timetable for other agencies. 15 U.S.C. § 717(b)(2). NEPA is merely a procedural statute, not a substantive one – meaning, a federal agency need not choose the least environmentally-damaging option. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 370-71 (1989).

The only language in the NGA that would purport to constitute field preemption pertaining to substantive environmental regulation lies in a section dedicated to liquefied natural gas (“LNG”) facilities³⁴ and the importation and exportation of LNG. There, Congress expressly

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“LNG terminal” includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but **does not** include--

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) **any pipeline** or storage facility **subject to the jurisdiction of the Commission under section 717f** of this title.

stated that “[t]he Commission shall have the *exclusive* authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” 15 U.S.C. § 717b(e)(1)(emph. added). Section 717b-1 further provides for a consultation process regarding state and local safety considerations. 15 U.S.C. § 717b-1. That said, Congress still specifically preserved state authority in certain areas, including under Section 401 of the Act:

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under--

- (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
- (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or
- (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

15 U.S.C. § 717b(d).

In contrast, industry has argued that the NGA preempts the field when it comes to substantive state environmental regulation over interstate natural gas pipelines. Some courts have found this as well, but by relying on language from other judicial decisions taken out of context, failing to inquire into the language of the NGA, and skipping over the pattern of preemption cases involving a state public utility-type commission with utility and/or safety regulations (or even a procedural NEPA-type review requirement) and not an state environmental protection agency engaged in substantive environmental regulation. See, e.g., Nat’l Fuel Gas Supply Corp., 894 F.2d at 576, 577 (citing Schneidewind, 485 U.S. at 300-01, 310)).

If the NGA’s field preemption for interstate natural gas pipelines and other facilities were to extend to state substantive environmental regulations, which is not consistent with the NGA, states would have to rely on the savings clause language in Section 717b(d) to protect their ability to address substantive environmental regulation over pipelines. See Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, 921 F. Supp. 2d 381, 385-388 (M.D. Pa. 2013)(bypassing deciding preemption and focusing on Clean Water Act authority preserved under Section 717b(d)). That savings clause expressly preserves state authority under Section 401 of the Act, including the ability of states to protect their residents and the local environment by denying approval to interstate natural gas pipelines via Section 401 certification, or issuing approvals with necessary protective conditions. See Islander E. Pipeline Co., LLC v. McCarthy (“Islander II”), 525 F.3d 141 (2d Cir. 2008)(upholding Connecticut Section 401 certification denial for natural gas pipeline under Long Island Sound).³⁵ This savings clause also preserves

15 U.S.C. § 717a(11)(emph. added). However, FERC has declined to exercise jurisdiction over LNG export facilities that are not connected to pipelines.

³⁵ The Islander East cases point to a provision of the NGA that may already address situations of courts remanding certifications to state agencies and providing timeframes in which to act. Yet, EPA seeks comment on these same issues (e.g. regarding waiver and potential regulations on

states' ability to enforce certifications.

It is this authority that Congress has expressly provided for that EPA's proposed regulations directly target.

2. Consequences of NGA Field Preemption of State Substantive Environmental Laws and EPA's Proposed Regulations

Assuming for the sake of argument that the NGA does have wide field preemption of substantive state environmental regulation beyond LNG facilities, EPA's proposed regulations are significantly harsh and damaging for states, their residents, and the local environment in shale gas infrastructure buildout areas. This is because of how extensively EPA has sought to illegally narrow the "scope of certification," including what conditions states may include in certifications. EPA's proposed regulations show a deliberate attempt to eliminate states from protecting their residents through certifications and through enforcement activity in order to push

modifications). 84 Fed. Reg. at 44117; see 84 Fed. Reg. at 44109-10; see also Islander E. Pipeline Co., LLC v. Connecticut Dep't of Env'tl. Prot. ("Islander I"), 482 F.3d 79, 105 (2d Cir. 2006). EPA does not have the authority to address such issues, and would again be stepping into the realm of Congress and the judiciary, and rewriting, in this instance, the NGA in addition to the Act.

15 U.S.C. § 717r(d)(1) of the NGA provides, for certificates of public convenience (e.g. for natural gas pipelines) and for LNG facilities, that the relevant U.S. Circuit Court of Appeals has "original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law" except for the Coastal Zone Management Act. That can include final state action on Section 401 certifications. See, e.g., Delaware Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot., 903 F.3d 65 (3d Cir. 2018), cert. denied, 139 S. Ct. 1648 (2019).

Section 717r(d)(3) states that, if a court finds the state certification inconsistent with the relevant laws, and such certification:

would prevent the construction, expansion, or operation of the facility . . . , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the . . . State agency, the Court ***shall set a reasonable schedule and deadline for the agency to act on remand.***

15 U.S.C. § 717r(d)(3)(emph. added). In Islander East I, the Court provided the state with seventy-five days upon issuance of the opinion. 482 F.3d at 105.

Section 717r(d)(2) also provides for judicial review of an "alleged failure to act" by a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law" for an LNG facility or facility (e.g. a natural gas pipeline) requiring certificate of public convenience and necessity. Again, the same remedies are provided for, under Section 717r(d)(3). Thus, once again, EPA is trying to propose conflicting and/or unnecessary regulations.

through the Chief Executive’s policies in E.O. No. 13868 for more pipelines, regardless of the costs to residents and their communities. EPA is doing its best to constructively eliminate the certification denials or even very protective certification conditions, even though Congress intended that Section 401 certifications be a means for states to deny approval to projects based important on local environmental concerns, or, in approval situations, include the conditions the state considers necessary to protect the local environment if the project proceeds.

To best illustrate this, assume the same company is proposing an interstate, FERC-licensed natural gas pipeline and a state-permitted interstate hazardous liquids pipeline of the same diameter and same right-of-way width through a state. The only variables differentiating the degree of adverse impacts from construction on the local environment and communities through which the pipelines are constructed are local topography, geography, and other environmental characteristics crossed by the pipelines’ routes – not the differences in the dimensional aspects of the pipelines themselves. For instance, both pipelines will result in stormwater runoff issues during and after construction.

However, under EPA’s proposed regulations, the “scope of certification” limits states to “assuring that a” *point source* “discharge from a Federally licensed or permitted activity will comply with” the “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.”³⁶ Proposed Sections 121.3, 121.1(g), (p); see also, e.g., 84 Fed. Reg. at 44093-44095, proposed Sections 121.1(b), (f), (h); 121.5 through 121.9. Thus, any state-level stormwater regulations pertaining to oil and gas facilities that are not subject to EPA review due to the exemption in 33 U.S.C. § 1342(l)(2)³⁷ are at substantial risk of being deemed outside the scope of certification and rejected – whether because a federal agency considers the regulations to address stormwater as non-point source pollution, and/or because EPA did not approve the regulations and/or the

³⁶ This narrow scope of certification is wrong for the reasons already stated throughout this comment. See, e.g., Section II.C., supra.

³⁷ “The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, ***for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.***” 33 U.S.C. § 1342(l)(2)(emph. added).

“The term ‘oil and gas exploration, production, processing, or treatment operations or transmission facilities’ means all field activities or operations associated with exploration, production, processing, or treatment operations, ***or transmission facilities***, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.” 33 U.S.C. § 1362(24)(emph. added).

permitting program because the state did not need EPA approval. Section II.C., *supra*. Thus, residents along or near the *federally*-licensed pipeline are at substantial risk of having little to no protection from stormwater impacts to their properties, water resources, and other important places because EPA's proposed regulations allow federal agencies to block application of state law stormwater protections. Meanwhile, residents along or near the state-permitted line would see such protections applied. The disparate treatment is even more stark if you assume co-location of the lines, which is not an unreasonable assumption considering that it is often proposed or suggested as a means of minimizing impacts.

As for states, the penalty for a state that does not fall in line behind EPA's corrupted version of the Act is harsh – waiver of conditions, or an entire certification, and a decision to make about whether to fight the federal government to protect state residents. Proposed Sections 121.1(h), 121.7(b). This is clearly intended to force states to comply whether they want to or not, or to attempt to bankrupt states even if they try. Such a result is contrary to the U.S. Constitution, the Act, and general principles of what it means for there to be a federalist system in this country. But it also forces states to choose from an array of options that, regardless of what the state does, it violate its residents' rights because of the disparate, and worse, treatment of residents along or near FERC-licensed pipelines than those who live along or near interstate hazardous liquids lines. The same can be expected with LNG export facilities subject to FERC's jurisdiction, and those that FERC over which has declined jurisdiction or otherwise are not within FERC's jurisdiction. There is no rational basis on which to subject the FERC-licensed pipelines and other facilities to lesser environmental standards.

Congress already set down the policy choices in the Act, including that it did *not* want to have federally-licensed/permited facilities receive laxer treatment than similar state-permitted facilities. *See, e.g.*, 33 U.S.C. § 1341. Yet, here, the executive branch (e.g., the Chief Executive and EPA) are trying to override Congress' decisions with a different set of choices. Because this is the executive branch, the amount of deference typically given to *Congress* cannot apply and closer examination must be applied to determine whether there is a rational basis for EPA's proposed regulations that would force states to treat similarly-situated people differently. *See Freeman v. U.S. Dept. of the Interior*, 37 F. Supp. 3d 313, 347 (D.D.C. 2014)(requiring a “firm rational basis” for Fifth Amendment analysis);³⁸ *State of La., ex rel. Guste v. Verity*, 853 F.2d 322, 333 (5th Cir. 1988)(stating that federal agency action must, under the Fifth Amendment, “bear a rational relationship to the legislative purpose of the enabling statute.”). There is none. EPA's proposed regulations completely conflict with the purposes of the Act, including the Act's clear respect for state authority and the very point of Section 401.

EPA is significantly harming states' ability to protect their residents and the local environment from the environmental impacts of facilities that FERC approves under the NGA. FERC does not protect people. States are the last line of defense. EPA's proposed regulations are a deliberate attempt to eliminate states from protecting their residents through certifications

³⁸ The Administrative Procedure Act (“APA”) also prohibits administrative agencies from “treating similarly situated individuals differently without providing sufficient justification.” *Id.* at 346. For the reasons stated throughout this comment, EPA's proposed regulations would also violate the APA.

and through enforcement activity for the sole benefit of industry.

V. EPA's Proposed Regulations Would Violate the Fifth Amendment

For the reasons already discussed regarding the Fourteenth Amendment, EPA's proposed regulations also violate the Fifth Amendment of the United States Constitution, which incorporates equal protection standards. U.S. v. Windsor, 570 U.S. 744, 769-770 (2013); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

As explained throughout this comment, EPA's proposed regulations would extensively entangle federal agencies in the Section 401 certification to achieve the disparate treatment of residents discussed above. Federal agencies will now be involved in rejecting conditions that state find necessary to protect the local environment and residents along or near proposed natural gas facilities under the NGA. There is no rational relationship between the proposed regulations and the Act's purpose, as noted above, because residents are being subjected to *more* harm for no other reason than a desire to fast-track select projects under E.O. No. 13868. Likewise, federal agency actions directed by the proposed regulations and E.O. No. 13868 would perpetuate the same unconstitutional results. Thus, the proposed regulations and the actions of federal agencies thereunder would also violate the Fifth Amendment's due process clause, which incorporates equal protection standards.

Further, if “a bare *congressional* desire to *harm* a politically unpopular group cannot’ justify disparate treatment of that group,” then it stands to reason that executive branch agencies *without* lawmaking authority cannot do the same. 570 U.S. at 770 (quoting Dept. of Agriculture v. Moreno, 413 U.S. 528, 534–535 (1973)). It likewise stands to reason that a bare desire to *benefit* those who are politically popular with the current Administration, regardless of the costs to residents along interstate natural gas pipelines and near other federally-licensed facilities, and the disparate treatment they receive in contrast to other state residents, cannot be constitutional under the Fifth Amendment.

VI. Other Significant and Damaging Consequences of EPA's Proposed Regulations

A. Added Burdens on Already-Underfunded and Overburdened Environmental Administrative Agencies and Violation of Unfunded Mandates Reform Act

The EPA has failed to comply with the Unfunded Mandates Reform Act (“UMFA”) (2 U.S.C. §§ 1531-1538). EPA has identified *no* estimate of aggregate costs that would be imposed on state and local governments (among others) that would result due to the proposed regulations, and in turn, whether that cost triggers UMFA obligations, such as the analysis under Section 1532, or requirements under Section 1535.

Absurdly, EPA claims that the proposed regulations would impose “no enforceable duty” on any government. 84 Fed. Reg. at 44118, when its proposed regulations would impose significant new obligations on state governments in order for their certification actions to be considered valid under Section 401. EPA even admits this, claiming that its “proposed requirements” for states to provide lengthy justifications for certification decisions “might create

new obligations for some certifying authorities.” 84 Fed. Reg. at 44105. It then goes on to claim that it expects such information to “far outweigh the *minimal* additional administrative burden” on states. *Id.* There is absolutely no data to support this abstract weighing of costs, and of course, EPA finds that it supports what it wants to do – if there is no data, then anything might be true. Further, EPA cites no authority for its determination that the absence of an “enforceable duty” is the standard under the UMFA. EPA openly admits that “all states have authority to implement section 401 certifications.” 84 Fed. Reg. at 44112. As noted already, Section 401 is not simply something states can opt out of under the Act without potential liability. Thus, the costs to be imposed on state governments is important to understand. Indeed, EPA states that it is placing the “burden” on the certifying authority “to act within the proper scope of authority granted by Congress,” which is in fact a lie, because EPA is actually hamstringing states to act within *EPA’s* scope of certification authority, or risk having a federal agency nix the conditions or certification denial, which the statute does not provide for. EPA then says that if a state disagrees with the *federal* agency’s action, the state “could consider its options for legal or administrative review against the federal agency for issuing the license or permit without considering its certification denial.” 84 Fed. Reg. at 44110. This is outrageous.

Basically, EPA is saying that underfunded states can sue a likewise-financially burdened federal government in order to get their certifications respected. While this certainly takes a financial burden off of private industry, who can certainly afford to challenge certifications it thinks are invalid, it places a substantial burden on states, and most likely would result in very few, if any states, being able to go into court on behalf of their residents. Yet, EPA’s economic analysis, and nothing in the preamble, discuss or identify these costs. EPA has failed to comply with the UMFA.

B. Lack of Consideration Given to Poor Quality of Applicant Submissions, and Impact on “Delays” in Certifying Authority Review

EPA’s proposed regulations provide no ability for states to deny certifications because of insufficient information upon which to determine compliance under Section 401(a). *See, e.g.*, Proposed Section 121.5, 121.6, 121.7, 121.8. Further, the proposed regulations do not require that federal agencies that determine what constitutes a reasonable period of time account for the fact that applicant submissions maybe sorely and repeatedly deficient. Rather, the proposed regulations allow federal agencies to set *categorical* time limits without regard to the project, the applicant, the number of deficient submissions, or the site characteristics. Proposed Section 121.4. Even EPA, as the certifying authority, proposes that it can only ask for more information within 30 days of the application submittal, which is absurd considering agency burdens and the frequency of repeatedly-deficient applicant submittals. Proposed Section 121.13;³⁹ *see also* Section VI.A. and B., *infra.*, Attachment B.

In contrast, the Act provides the ability for courts to judge what constitute a reasonable

³⁹ There is also a significant risk that this proposed regulation, which only is to apply to EPA, will be used by EPA, other federal agencies, and/or industry to cut down state certifications that are denied for lack of sufficient information to determine compliance, or that states take less than a year, but still many months to issue due to repeatedly-deficient applications.

denial within a reasonable amount of time by accounting for such facts.

As one example, PADEP has presented data showing that at least half, and sometimes more, of applications it receives are deficient, requiring PADEP to specify the issues to the applicant, and for the applicant to then take sometimes several weeks to respond. For instance, a program audit of solely Erosion and Sedimentation Control General Permit (“ESCGP-2”) applications under the “expedited” program (pertaining to only certain oil and gas projects) found that, between February 2014 and January 2016, approximately **60 percent** of applications submitted were deficient. (Attachment B). PADEP’s staff has continued to decrease, while the number of applications it reviews has increased. Id. The problem of deficient applications and underfunded/overburdened staff is no better at the County Conservation District level. Id.

If pushing approvals through, without regard to the fact that the applications are deficient due to the applicants’ own fault, and without regard to the need for considered review of sometimes thousands of pages of material with underfunded agencies – what is the point of the permitting process? Is it just to get a piece of paper to wave around and say “we’re regulated, everything is fine” so people look the other way? Why have a permitting process if the process is merely about getting a piece of paper to build a project that has not been carefully reviewed, and been required to avoid, minimize, and mitigate (in that order) its impacts? The proposed regulations would reduce Section 401 certifications to meaningless pieces of paper that say nothing about whether a proposed project is actually protective of water resources, the local environment, and those who live around the proposed facility.

C. Human-Scale Harms and Cumulative Harms

Rushing and constraining state environmental administrative agencies, given the problems discussed in this comment, and rejecting conditions that such agencies require based on their better knowledge of local conditions than the federal government, will have tangible, harmful impacts on private property owners and local communities. It will restrict public input into the process, which is absolutely necessary, as local residents know better than the federal government, and even the state, what impacts will or are likely to result from massive infrastructure being placed in their communities or across their land.

One need only look at what happened with the inaptly-named Constitution Pipeline to see how devastating an interstate natural gas pipeline can be. The Holleran family had a maple syrup farm in Susquehanna County, directly in the path of the Constitution Pipeline. Despite repeated requests to the pipeline permittee to move the line further off their property, FERC approved the pipeline to go through their property. The Hollerans lost approximately **90%** of the maple trees on that land in the middle of sugaring season.⁴⁰ It cut their business in half.⁴¹ U.S. Marshals with semi-automatic weapons even accompanied pipeline workers with chainsaws onto

⁴⁰ <https://stateimpact.npr.org/pennsylvania/2016/03/02/maple-syrup-trees-cut-to-make-way-for-the-constitution-pipeline/>; <https://www.citizensvoice.com/news/pipeline-squeezing-out-susquehanna-county-maple-sugar-farm-1.2002158>

⁴¹ <https://stateimpact.npr.org/pennsylvania/2017/09/18/conflicting-decisions-on-pipelines-frustrate-industry-landowners/>

the property to allow the tree-cutting to proceed.⁴² And, the tree-cutting occurred at a time when it was not even clear that the pipeline would be built due to pending authorizations (including a 401 certification) in New York State, where the pipeline also was to be routed.

In Pennsylvania and New Jersey, the Tennessee Gas Pipeline 300 Line and Northeast Upgrade Projects featured frequent noncompliance, with the 300 Line Project alone resulting in approximately **500 to 600** violations in Pennsylvania alone.⁴³ Delaware Riverkeeper Network (“DRN”) documented environmental damage along these pipelines, including, *inter alia*, sedimentation into wetlands and streams; failures to protect sensitive waterbodies, including Exceptional Value streams and wetlands; potential harm to private water supplies; failures to stabilize slopes; and failures of erosion and sedimentation controls.

Similar stories follow wherever these pipelines are located, and this country is in the middle of a massive infrastructure expansion for tar sands oil, Bakken crude, natural gas, natural gas liquids, and other such products. The harms include, but are certainly not limited to: residents’ land taken from them; businesses and farms destroyed; lives disrupted by construction; private water sources damaged, including wells; fishing streams and other aquatic resources devastated by spills and “inadvertent returns”,⁴⁴ important marshes and defenses against climate change harmed (e.g. the Atchafalaya Swamp)⁴⁵ and even homes damaged from blasting and construction activities.

Indeed, with all the massive infrastructure expansion and associated harm that has occurred, the proper response would be *better* environmental protections, not to make it easier to build these lines and destroy people’s land, their livelihoods, and communities. Clearly, there is not a dearth of construction. In New Jersey, there is no need for further pipelines, with more pipelines actually raising substantial risks of *higher* rates for consumers.⁴⁵ There is also a “glut

⁴² https://www.pennlive.com/opinion/2016/03/gov_wolf_put_pipelines_ahead_o.html

⁴³ <https://www.poconorecord.com/apps/pbcs.dll/article?AID=/20121127/NEWS/211270320/-1/rss01>

⁴⁴ An “inadvertent return” is when drilling mud used for horizontal directional drilling (“HDD”) a pipeline route under streams or other resources shoots out of the boring area into a geologic feature (like a fracture or bedding plane) and ends up, very often, in someone’s water well or a local stream.

⁴⁵ Comments of NJ Division of Rate Counsel to FERC re: proposed revisions to FERC processes for natural gas pipeline projects: https://www.nj.gov/rpa/docs/PL18-1_Comments_of_NJDRC.pdf; Brief and Addendum of NJ Rate Counsel re: PennEast <https://www.nj.gov/rpa/docs/Petitioners-brief-in-PennEast.pdf> (also noting that “electricity and gas price spikes during extreme weather events in the Mid-Atlantic were not caused by a lack of pipelines,” but rather “local delivery constraints in the winter,” and new pipelines would not remedy the situation); <https://www.nj.gov/rpa/docs/Petitioners-brief-in-PennEast-stat-addendum.pdf>.

of underutilized capacity on existing gas transmission systems into the Mid-Atlantic.”⁴⁶ Yet FERC approved the PennEast Pipeline, and many other pipelines in the Mid-Atlantic region, anyway. FERC is openly violating the plain language of Section 401 of the Act by issuing certificates to pipeline companies (e.g. for the PennEast, Millennium, and Mountain Valley Pipelines), allowing eminent domain of people’s land and destruction like the Hollerans experienced *despite the fact that the states get the final say* under the Act before anything authorized by a FERC approval even gets to happen.

Yet, despite this, this Administration has simply chosen to prioritize the shale gas industry desire for profit, regardless of cost to consumers and those in affected communities, and to the very survival of our planet and us due to climate change. It has likewise prioritized industry’s desire to squash those states, like New York and New Jersey, that have stood up for their residents’ rights and well-being in the face of such an industrial onslaught.

In New York, New Jersey, and Pennsylvania alone, since shale gas fracking development began, a significant number of new interstate gas transmission pipelines have been built, or existing lines upgraded. Examples include:

- Tennessee Gas Pipeline (Kinder Morgan)
 - 300 Line
 - Northeast Upgrade Project (illegally segmented for purposes of NEPA review from three other pipeline projects)⁴⁷
 - Orion Project

⁴⁶ Comments of NJ Division of Rate Counsel in CP15-558-000: https://www.nj.gov/rpa/docs/Comments_of_the_New_Jersey_Division_of_Rate_Counsel.pdf; see also NJ Division of Rate Counsel Leave to Answer and Answer of New Jersey Division of Rate Counsel to Comments of PennEast Pipeline Company, LLC <https://www.nj.gov/rpa/docs/Rate%20Counsel%20Answer%20to%20PennEast.pdf>

⁴⁷ Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304, 1314 (D.C. Cir. 2014). For example:

The disputed Northeast Project was the third of the four pipeline construction projects completed in quick succession on the Eastern Leg of the 300 Line. As noted above, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade. During the course of FERC's review of the Northeast Project application, the other three upgrade projects were either under construction (as with the 300 Line Project) or were also pending before FERC for environmental review and approval (as with the Northeast Supply Diversification Project and the MPP Project). The end result is a single pipeline running from the beginning to the end of the Eastern Leg. The Northeast Project is, thus, indisputably related and significantly “connected” to the other three pipeline upgrade projects.

- Williams (Transco)
 - Leidy Southeast Expansion Project
 - Atlantic Sunrise
- Constitution Pipeline Company (Williams) – Constitution Pipeline
- Central New York Oil and Gas – Marc I Pipeline
- Columbia Gas Transmission, LLC
 - East Side Expansion Project
 - Leach Xpress Project
- UGI Sunbury, LLC – Sunbury Pipeline
- Millennium Pipeline Company, LLC – Eastern System Upgrade
- Rover Pipeline LLC – Rover Pipeline Project
- Algonquin Pipeline Expansion (e.g. Algonquin Incremental Market)
- DTE Midstream Appalachia, LLC – Birdsboro Pipeline

Proposed and/or FERC-approved (but not yet built) pipelines include:

- Adelphia Gateway
- Williams (Transco)
 - Leidy South Expansion
 - Diamond East
 - Northeast Supply Enhancement
- Spectra Energy (now Enbridge)
 - PennEast
 - Greater Philadelphia Expansion Project
 - Marcellus to Market

This excludes the additional land area required beyond the pipeline right-of-way for construction and other construction-related workspaces. This also excludes the thousands of miles of new gathering lines, wellpads, compressor stations, processing plants, and other shale gas/crude oil infrastructure that have been built and/or upgraded across Pennsylvania, Ohio, West Virginia, North Dakota, and other states. It also excludes the new and proposed hazardous liquids lines whose locations are not federally-regulated, but that are being built throughout Appalachian states, along with ethane crackers, for plastics production and export of natural gas liquids for plastics production. Such pipelines include Sunoco/Energy Transfer Partners' Mariner East I and II pipelines and the Shell Falcon Ethane pipeline. It excludes proposed upgrades of oil and liquids lines, like Enbridge's Line 3. It excludes the home-destroying explosions caused by both new gathering and existing natural gas pipelines.⁴⁸ It excludes the tar

⁴⁸ <http://pstrust.org/about-pipelines/map-of-major-incidents/transco-virgina-accident/>; <https://stateimpact.npr.org/pennsylvania/2016/05/04/pa-pipeline-explosion-evidence-of-corrosion-found/>; <https://www.dispatch.com/news/20190122/investigation-begins-into-ohio-pipeline-explosion>; <https://www.post-gazette.com/business/powersource/2019/09/10/Revolution-pipeline-Energy-Transfer-Pennsylvania-DEP-Beaver-County-Conservation-District/stories/201909100007>; <https://www.timesonline.com/news/20190829/revolution-owners-fined-319000-for-pipeline-violations>; <https://stateimpact.npr.org/pennsylvania/2018/09/10/natural-gas-pipeline-blast-in-beaver-county-prompts-evacuation/>

sands/crude oil “bomb trains” being sent through highly-populated areas on a regular basis.⁴⁹ It excludes the potential for the Pipeline and Hazardous Materials Administration (“PHMSA”) to greenlight LNG transport by rail, facilitating more export of natural gas. And it excludes the LNG and other export terminals being proposed, built, and/or expanded – some in communities already heavily suffering the health and environmental impacts of the petrochemical industry.

And yet there are *still* new proposed interstate natural gas pipeline projects being proposed.

Residents throughout Appalachia and indigenous peoples have also disproportionately suffered. The Dakota Access Pipeline, the Rover Pipeline, the Mountain Valley Pipeline, and the Atlantic Coast Pipeline are only a few examples. These run through indigenous lands (including sacred spaces on such lands), swaths of national forest (including, ironically, the George Washington and Jefferson National Forest), the Appalachian Trail, the Blue Ridge Parkway, karst terrain, and thousands of small communities.

The President calls fracked gas “freedom gas,” but freedom for who? Certainly not the communities that are crisscrossed by pipelines and tanker trucks from shale gas development – many of whose communities are also crisscrossed by coal mine conveyor lines. And certainly not the Americans whose lands, businesses, recreational areas, and favorite places have been taken from them or otherwise destroyed for private profit. Those in shale gas country and the path of shale gas infrastructure have heard the refrain of “energy independence” for over a decade, and have seen only their communities and legislatures taken over by industry and their children, friends, and community members fall ill or die,⁵⁰ while the profits go to someone else,

⁴⁹ <https://stateimpact.npr.org/pennsylvania/2014/02/25/feds-issue-emergency-order-to-crude-oil-shippers/>; <https://www.mcall.com/news/pennsylvania/mc-phila-train-derail-20150131-story.html>; <https://www.cnn.com/2015/02/16/us/west-virginia-train-derailment/index.html>; <http://graphics.wsj.com/crude-oil-by-rail/>

⁵⁰ See, e.g., <https://www.bizjournals.com/pittsburgh/news/2019/10/07/canon-mac-parents-want-deeper-investigation-cancer.html>; <https://www.post-gazette.com/local/washington/2019/10/07/Canon-mcmillan-ewing-sarcoma-cluster-cancer-meeting-UPMC/stories/201910070110>; https://observer-reporter.com/opinion/letters/letter-health-department-asking-wrong-questions/article_39c97a38-ec63-11e9-b51c-e7492ebaf208.html

All of the impacts identified in this comment openly show that EPA has failed to comply with Executive Orders 13045 (protection of children) and 12898 (environmental justice). EPA makes similar conclusory statements regarding its supposed compliance with these Executive Orders as it does as to the Unfunded Mandates Reform Act, which it clearly has not complied with. Section VI.A., *supra*. It is well-known that poor communities and non-white communities are disproportionately impacted by the petrochemical industry and shale gas development and infrastructure. Indigenous communities have also endured significant harm from oil and gas development, including desecration of sacred places, an epidemic of missing and murdered indigenous women, and other harms. It is also well-documented in science that pollution affects children differently than adults. Children are more vulnerable to harm from pollution due to

and the extracted material to other states and countries.

Indeed, there is a glut of natural gas, including natural gas liquids such as ethane, due to companies' continued fracking in order to make any money off of their wells.⁵¹ That ethane is now being used to fuel plastics production here and abroad.⁵² It is thus glut of material that has driven prices down, making fracking companies even more desperate. This glut is not limited to this country either.⁵³ Now, the President, with the EPA's assistance, has determined that the rights of Americans are less important than the profits of the industries who have created their own problem of low prices and thus need help to override environmental protections and drive pipelines every which way across people's land to keep private profits flowing.

No one should be asked to *continue* to sacrifice their property rights, their well-being, their sacred lands, and their quality of life so private industry can export gas under the ridiculous claim that we are promoting freedom and democracy abroad. It is the very pinnacle of egotism, arrogance, and selfishness to tell local residents, including indigenous peoples, in the path of shale gas development and the petrochemical industry that the "freedoms" (in fact, the profits) of someone else matter more than their own quality of life, health, sacred places, property rights, environmental rights, and liberty that government is supposed to respect and promote. Compare U.S. Const., preamble.

many factors, including their smaller size in comparison to the "dose" of pollution. EPA says *nothing* about how pushing for *more* of the very things harming these communities, including their children, friends, and family, somehow shows compliance with E.O. 12898 and E.O. 13045.

⁵¹ <https://oilprice.com/Energy/Natural-Gas/Natural-Gas-Glut-Is-Crushing-US-Drillers.html>

⁵² <https://stateimpact.npr.org/pennsylvania/2019/10/02/shale-gas-off-ramp-pa-s-fracking-boom-produces-a-glut-of-ethane-thats-helping-fuel-plastics-production-overseas/> Even worse, the International Energy Agency has determined increases in greenhouse gas emissions from the petrochemical industry (which includes plastics production) will be the main driver of greenhouse gas emissions increases. <https://www.nytimes.com/2018/10/04/climate/climate-change-plastics.html>; <https://webstore.iea.org/the-future-of-petrochemicals> This is right at the time when the global climate is at a crucial tipping point. The proposed regulations, and the executive policy animating it, are irresponsible and furthering global ecological catastrophe, including human suffering in the years and decades to come. This is certainly not in line with any of the goals of the Act, which were precisely seeking to *reverse* decades (if not centuries) of blatant disregard for our waterways and the environment in which we live.

⁵³ <https://www.bloomberg.com/news/articles/2019-08-20/gas-glut-risks-undermining-4-billion-bet-by-asia-s-richest-man>; <https://www.worldoil.com/news/2019/9/3/natural-gas-glut-grows-in-europe-as-prices-hit-10-year-low> In the meantime, solar energy production is projected to continue to increase substantially. <https://oilprice.com/Latest-Energy-News/World-News/IEA-Predicts-Spectacular-Solar-Growth-By-2024.html>; <https://www.iea.org/newsroom/news/2019/october/global-solar-pv-market-set-for-spectacular-growth-over-next-5-years.html>

VI. Conclusion

In closing, we urge the EPA not to enact its proposed regulations. They are unnecessary, exceed EPA's authority, are contrary to the Act, and would violate the U.S. Constitution. They would result in significant harm to communities throughout the country solely for the benefit of industry. That was never the point of the Act – in fact, the point of the Act was the very opposite because it recognized that pollution was detrimental not just to health and well-being, but also a healthy economy.

Thank you for your time.

Respectfully Submitted,



Maya K. van Rossum
the Delaware Riverkeeper
Delaware Riverkeeper Network



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Enclosures

Enclosures

Attachment A Summary Regarding Delaware Riverkeeper Network and Maya van Rossum-the Delaware Riverkeeper

Attachment B Example Documents Regarding Deficient Applications and PADEP Underfunding in Pennsylvania

Attachment C Resources Linked to Throughout Comment

Note: Out of an abundance of caution, the material linked to throughout the comment is attached. However, such material is incorporated into this comment by reference, and considered a part of this comment.

ATTACHMENT A

Summary About
Delaware Riverkeeper Network and Maya van Rossum-the Delaware Riverkeeper

The Delaware Riverkeeper is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats. Maya van Rossum has been the Delaware Riverkeeper for 25 years. As the Delaware Riverkeeper, Ms. van Rossum serves on a number of the region's water quality committees, including the Delaware River Basin Commission's PCB's Implementation Advisory Committee and Water Quality Advisory Committee, and on New Jersey's Stormwater Focus Group. Ms. van Rossum also serves as a member of the Area Plan Committee and the Area Maritime Security Committee, both of which are committees of the United States Coast Guard, the Philadelphia Group. Ms. van Rossum recreates throughout the watershed, including in areas adversely impacted by fracked gas infrastructure development.

The Delaware Riverkeeper Network ("DRN") is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and litigation throughout the entire Delaware River watershed. DRN is a membership organization with over 20,000 members and over 18,000 households throughout the watershed and beyond. DRN's staff and volunteers have a breadth of knowledge about the environment as well as expertise specific to rivers and watersheds. DRN also works in communities outside the Delaware River watershed to support organization members with shared interests in protecting water quality, quality of life, public trust resources, and the constitutionally-protected environmental rights in members' communities.

DRN was an integral party to the Pennsylvania Supreme Court's decision in Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (Pa. 2013), which recognized the significant rights protected under Article I, Section 27 of the Pennsylvania Constitution and reaffirmed that all citizens have an inalienable right to a clean and healthy environment.

DRN also developed "Green Amendments For the Generations," which is a nationwide effort designed to help advance constitutional rights to pure water, clean air and a healthy environment, understanding that only by advancing this call for protection throughout the Delaware River watershed's four states, across the nation and at the federal level will we be able to achieve the highest level of environmental protection we all need, deserve, and are entitled to.

DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects and public education. In addition, DRN goes to court when necessary to ensure enforcement of environmental and related laws. DRN has been highly active in litigation regarding fracked gas infrastructure, including but not limited to wellpad siting, compressor stations, and pipelines, whether FERC-licensed or state-regulated. DRN has challenged various approvals over interstate natural gas pipelines and been involved in other litigation to ensure protection of water quality and the local environment when natural gas and other pipelines are proposed. Examples of such cases include:

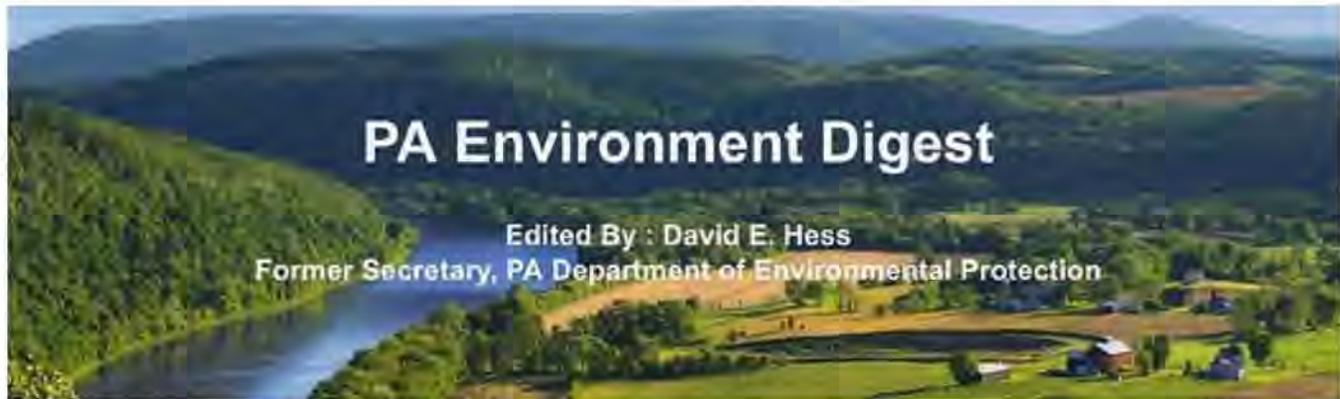
- Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, 921 F. Supp. 2d 381 (M.D. Pa. 2013)
- Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304 (D.C. Cir. 2014)
- Delaware Riverkeeper Network v. Sec'y of Pennsylvania Dep't of Env'tl. Prot., 870 F.3d 171 (3d Cir. 2017)
- Delaware Riverkeeper Network v. United States Army Corps of Engineers, 869 F.3d 148 (3d Cir. 2017)
- Delaware Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot., 903 F.3d 65 (3d Cir. 2018), cert. denied, 139 S. Ct. 1648 (2019)

DRN staff and its network of volunteers also documents violations and other problems along the path of pipeline construction, and brings such issues to the attention of relevant government agencies. For instance, DRN volunteers documented extensive violations and environmental destruction along the path of Tennessee Gas Pipeline's 300 Line Project. DRN also has an active monitoring initiative focused on securing volunteer response to catastrophic oil spills and other harmful events in the Delaware Estuary and the watershed. For example, DRN led the volunteer response to the Athos I oil spill and continues to be active with the U.S. Coast Guard on how to best engage volunteers in waterway response actions.

DRN also commissions experts to analyze and report on issues related to fracked gas development, including the economic harms to the Delaware River basin from such development, the environmental and health impacts of fracked gas development, the economic and environmental unsustainability of fracked gas development, other related issues.

ATTACHMENT B

**Example Documents Regarding Deficient Applications and PADEP Underfunding
in Pennsylvania**



DEP Review Of Drilling Erosion Permits Finds 60% Of Applications Deficient

The Department of Environmental Protection Wednesday announced it has begun revising eligibility standards for expedited review of Erosion and Sediment permit applications related to oil and gas drilling because a program audit found 60 percent of the applications submitted to the program were incomplete or had technical deficiencies.

The revisions follow an internal review of two years of permit authorizations, conducted to analyze the consistency and effectiveness of the program from when it began in February 2014 through January 2016.

The review revealed that the expedited process has limited application because of the technical deficiencies in almost 60 percent of the permit applications submitted.

“This review concluded that the expedited review process is very challenging for DEP to implement and has not resulted in higher quality applications nor consistency in environmental protections statewide,” said Acting DEP Secretary Patrick McDonnell.

“Through this internal review, we’ve learned that this program only works when DEP receives technically sound and complete application materials at the outset, and we will revise our eligibility requirements accordingly.”

During the review period, DEP received 624 applications for standard review, and 1,054 for expedited review.

Fifty-nine percent of the expedited review applications were disqualified because they were administratively incomplete or technically deficient, and 436 permits were issued.

DEP’s internal reviewers randomly sampled 23 permits proposing earth disturbance activities of 15 acres or more, and found that only 4 met all the applicable regulatory requirements at the outset.

Of the 23 approved applications, 16 had been inspected at least once, and 6 were never constructed, and one is under construction currently and has been inspected. Inspections of the reviewed project sites reveal one E&S violation of the expedited permit issued.

As a result of the internal review, DEP staff are developing revisions for eligibility for the expedited review, including objective and clear standards for eligibility, return of applications, removal of applications from the expedited process, improved training for staff and industry applicants, and regular evaluation of the program.

The Erosion and Sediment Control General Permits (ESCGP-2) are for earth disturbance of more than 5 acres for oil and gas projects. Under the general permit, projects that meet objective criteria are eligible for a 14-day permit review.

DEP studies of erosion and encroachment permits covering outside of oil and gas found 80 percent of the applications were not complete and 30 percent had technical deficiencies.

A copy of the audit is available online.

NewsClips:

DEP Revising Erosion Control Permits For Drilling Operations

DEP Review Reveals Flaws In Oil & Gas Erosion Permit Applications

Judge: PA State Senators Cannot Enter Delaware Watershed Drilling Lawsuit

Swift: PA's Natural Gas Impact Fee Draws Scrutiny

Editorial: Municipalities Must Be More Accountable For Impact Fees

Fire Erupts At Marcellus Drilling Pad In Washington County

Homeowner Near Washington County Gas Well Fire: We're Stuck

Pump Failure Caused Fire At Washington County Gas Well

Editorial: Not The Time To Hit Drilling Industry With New Tax

North Franklin Twp Amends Oil & Gas Drilling Ordinance

Elk County Community Drops Lawsuit, Repeals Drilling Bill Of Rights

Study: Economic Benefits Of Living Near Shale Drilling Sites Outweighs Costs

UPI: Oil & Gas Lobby Calls On Washington To Release The Reins Of Regulation

Natural Gas Production To Make U.S. Net Energy Exporter

Related Stories:

Conventional Drillers Have 5 Times The Violations, 3.5 Times The Enforcement Actions

Author Of Bill Killing Conventional Drilling Regs Wants To Rewrite Oil & Gas Act

[Posted Jan. 4, 2017]

1/9/2017

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House Environmental Resources & Energy Committee
Informational Meeting – E&S Permits
B-31, Main Capitol/May 1, 2019/8:30 a.m.

- 8:30 a.m. – 8:35 a.m. Opening Remarks
- 8:35 a.m. – 9:00 a.m. ✓ Brenda Shambaugh
Executive Director
Pennsylvania Association of Conservation Districts
- ✓ Vince McCollum
E & S Technician
Cumberland County Conservation District
- 9:00 a.m. – 9:25 a.m. ✓ Aneca Atkinson, MSWREE
Acting Deputy Secretary for Water Programs
Department of Environmental Protection
- ✓ Ramez Ziadeh, P.E.
Executive Deputy Secretary for Programs
Department of Environmental Protection
- 9:25 a.m. – 9:30 a.m. Closing Remarks

Pennsylvania Association of Conservation Districts, Inc.

Testimony before the

House Environmental Resources and Energy Committee

Submitted by:

Brenda Shambaugh, PACD Executive Director

and

Vincent McCollum, Cumberland County Conservation District
Assistant Manager and Erosion and Sedimentation Technician

Presented on:

May 1, 2019



Good Morning. My name is Brenda Shambaugh and I am the Executive Director for the Pennsylvania Association of Conservation Districts. Our association represents all 66 conservation districts across Pennsylvania. Each district is led by a volunteer board of directors consisting of farmers, public members, and a member of county government. The board identifies local conservation needs, decides which programs and services to offer, and develops a strategic plan so the district can continue to assist with their county natural resource projects. District boards may also enter into contracts and accept authority delegated by local, state and federal governments.

Related specifically to erosion and sedimentation control, conservation districts may enter into a delegation agreement with DEP to administer the Erosion and Sedimentation (E & S), Post Construction Stormwater Management (PCSM), and National Pollutant Discharge Elimination System (NPDES) programs including agricultural E & S projects. If the district chooses to enter into a delegation agreement, there are three levels of responsibilities.

Level I

Only one conservation district solely provides education and outreach services for each program through information and educational programs, maintains applications and agreements, provides DEP with quarterly reports, and refers complaints to DEP within eight days of receipt.

Level II

Fifty-four districts are Level II. In addition to performing all Level I responsibilities, these districts also receive, process, and review all permit applications for new or renewed general and individual NPDES permits associated with construction activities involving one or more acres of earth disturbance. Level II districts also maintain a system for assessment and resolution of complaints.

Completeness reviews for Individual and General NPDES permits must take place within 15 business days of receipt and the applicant is notified of the completeness review assessment. Once the application is found to be complete, an initial E&S technical review is performed. For General NPDES permits the technical review is completed within 22 business days, and for Individual NPDES permits the technical review is performed within 47 business days. The district then notifies the regional DEP office of permit coverage or technical deficiencies within this timeframe. If deficiencies are identified in the technical review, the applicant must address the deficiencies and resubmit the revised plans and documents. The revised submission is then reviewed within 15 business days for a General NPDES permit application



and 22 business days for an Individual NPDES permit application. If deficiencies still exist, the application moves into the elevated review process. This process is completed within 15 business days. The total processing time for a General NPDES permit without deficiencies is 71 business days. The total processing time for an Individual NPDES permit without deficiencies is 107 days. These timeframes are incorporated in the Program Administration and Compliance section of the delegated agreement between DEP and each conservation district.

Level III

There are currently eleven Level III conservation districts which perform all Level I and II responsibilities, and also issues notices of violation, schedules and conducts administrative enforcement conferences, seeks civil penalties and available remedies, and retains legal counsel. These districts advise DEP on enforcement actions.

Good Morning, I am Vincent McCollum, Assistant Manager and E & S staff supervisor for the Cumberland County Conservation District. Additionally, I process NPDES applications just as the other E&S staff.

In general, PACD believes that more than half of the E & S/NPDES plans submitted regularly to the conservation districts are administratively incomplete. Consultants and engineers often do not provide plans and drawings that contain sufficient information to perform a technical review of the application. Recently, I met with staff of the Legislative Budget and Finance Committee several times to discuss the NPDES program. In preparation for the meetings with the LBFC staff, I did some statistical analysis on our plan review performance and consultant resubmission performance. For an 18-month period in 2017 and 2018, our office performed the completeness review on an average of 8.7 business days for GP and 8.1 business days for IP. Initial E&S technical reviews were performed on average of 13.2 business days for GP and 24 business days for IP. Then we looked at consultant response times for GP and IP applications combined. During this same timeframe, the average resubmission time for completeness review revisions was 19 business days and for technical review resubmissions, the average response time was 33 business days. I recognize that this comparison is not perfect, however, if we look at it from averages of all plans, whether GP or IP, consultants took nearly twice as long to respond to deficiencies as our conservation district took to perform the reviews. I recognize we are only one example and not all conservation districts may have the same performance, however, this gives an indication of the performance



for conservation districts and the regulated community. We often hear from consultants and engineers that they just submitted what they had completed for review because of deadlines set by the applicant or other municipal reviews. To more effectively expedite the permit process, consultants and engineers must provide accurate and complete submissions. If that doesn't happen, delays are inevitable.

Currently, I am part of a workgroup whose goal is to transition to an e-Permitting application process for NPDES and E & S permits. Part of the problem with the permit authorization process is the difficulty of educating the regulated community and consultants of the details and requirements to obtain a permit. During the review process, a large percentage of the time, components of the application are missing, because the consultants did not know certain components were required. With ePermitting, we are striving to make the application process so that the system will lead the applicant or consultant through the process and tell them what information or components they are required to submit. Once implemented, ePermitting should dramatically reduce the overall time to authorize permit coverage.

Another strategy which should reduce the review process is the Clean Water Academy (CWA) online training tool for conservation districts and DEP employees. DEP recently created the CWA and new modules will be developed in the future. These tools include E & S training for new staff across the Commonwealth as well as advanced topics to increase the ability of all staff.

DEP is developing a new expedited permit for small, low hazard projects. When finalized, certain small projects may not have to apply for an NPDES permit, alternatively, they may just be required to submit more of a registration of their project which would not require a technical review process, but a certification of required documents that were developed for their project. This process for low hazard projects will significantly reduce the time for project authorization, while continuing to ensure resource protection.

Finally, and most importantly, adequate conservation district funding is vital to the success for future permit review timeframes. Conservation district funding comes from a variety of sources, but more significant to the E & S program is a "Transfer to Conservation District Fund" line in both the PDA (\$869,000) and DEP (\$2.506 m) budgets. These lines have not been increased since the 2004-2005 state fiscal year. This translates to approximately \$45,000 to our conservation district to implement the E & S/NPDES program. In Cumberland County, we have 3 full time E&S review



staff and one administrative support staff. We cannot support these four positions with the \$45,000 from DEP, so we have to charge fees associated with our plan reviews and site inspections. It costs approximately \$335,000 to implement the E & S/NPDES program annually in Cumberland County. Clearly, without adequate E & S staff, districts are hindered since staff is key for the entire permit process. As the PA General Assembly contemplates the 2019-2020 state budget, we implore you to provide a ten percent increase in both those lines.

Thank you for allowing PACD to provide information to the Committee and we would be happy to answer any questions to the best of our ability.





**Testimony of
Ramez Ziadeh, Executive Deputy Secretary
Pennsylvania Department of Environmental Protection
Hearing on Chapter 102 Permit Application Review Process
House Environmental Resources & Energy Committee
May 1, 2019**

Good morning Chairman Metcalfe and members of the committee. On behalf of the Department of Environmental Protection, I'd like to thank you for the opportunity to discuss the Department of Environmental Protection's process for reviewing permit applications for earth disturbance activities under Chapter 102 of the Department's regulations.

Chapter 102 was promulgated in 1972 under the authority of The Clean Streams Law to protect the Commonwealth's water resources from the impact of sediment and other pollutants due to earth disturbance activities such as land development and agricultural plowing and tilling activities.

In 2006, the Department published the Pennsylvania Stormwater Best Management Practices Manual, also called the Stormwater BMP Manual to assist developers in implementing the PCSM requirements to meet federal and state requirements. The Department is currently working with Villanova University to improve the Manual based on the latest advances in the science of stormwater management and clarify the flexibilities that exist within the program.

In 2010 Chapter 102 was amended to align with federal requirements and to codify the post construction stormwater management (PCSM) requirements for new development or redevelopment projects in Pennsylvania. Implementation of PCSM seeks to ensure that the change in stormwater runoff rate, volume and quality, as a result of development, does not cause harm to the Commonwealth's waters or increase the risk of flooding, sinkholes, landslides and other pollution.

Chapter 102 permit applications include an Erosion and Sediment Control or E&S Plan to illustrate the best management practices or BMPs that will be used during construction to minimize accelerated erosion and prevent sedimentation, and a PCSM Plan to demonstrate how the developer will use BMPs to implement PCSM requirements.

There are two types of permits in Chapter 102:

- First, if a person proposes an earth disturbance activity that involves at least one acre of earth disturbance that is not an agricultural plowing or tilling activity, animal heavy use area, timber harvesting activity, road maintenance activity or oil and gas activity, the person must obtain a National Pollutant Discharge Elimination System or NPDES permit. There is a general NPDES permit that is referred to as PAG-02, which covers approximately 85% of all earth disturbance activities requiring NPDES permit coverage in Pennsylvania. Where a person is not eligible for PAG-02, the person must apply for an individual NPDES permit. The most common reason that a person is not eligible for PAG-02 is where there will be stormwater discharges to a surface water with an existing or designated use of High Quality or Exceptional Value, including Exceptional Value wetlands. About 15% of the total number of Chapter 102 NPDES permits are individual permits.
- Second, if a person proposes a timber harvesting or road maintenance activity involving 25 acres or more of earth disturbance, or if a person proposes an oil and gas activity involving 5 acres or more of earth disturbance over the life of the project, the person must obtain an E&S permit rather than an NPDES permit. A general permit is available for oil and gas activities, referred to as the ESCGP-3. Individual E&S permits are issued for timber harvesting and road maintenance activities that involve 25 acres or more of earthmoving.

Overall, the Department and County Conservation Districts issue an average of approximately 2,000 NPDES permit authorizations. Approximately 1,700 of the NPDES permits issued are PAG-02 general permit coverages. Additionally, the Department issues approximately 500 E&S permits, 450 of which are ESCGP permit coverages for oil and gas activities.

County Conservation Districts play a large role in the Department's Chapter 102 permitting program. There are 66 Conservation Districts and 65 of them have delegation agreements with the Department to review Chapter 102 permit applications and authorize permit coverage under the general NPDES and E&S permits. Within the Department there are numerous programs involved with administering and implementing Chapter 102 permitting as well. The following is an overview of roles and responsibilities for Chapter 102 permitting:

- The Bureau of Clean Water in the Department's Central Office establishes policies and procedures for Chapter 102 permitting. The Bureau of Clean Water also provides training to Department and Conservation District Staff, issues the statewide PAG-02 NPDES general permit, and develops and maintains other permit templates and application materials.
- The Regional Permit Coordination Office in the Department's Central Office reviews Chapter 102 permit applications and issues permits for interstate natural gas pipelines requiring a FERC Certificate, non-FERC regulated transmission pipelines proposed within 3 or more counties and 2 or more Department regional office territories, linear projects such as fiber optic lines located within 3 or more counties and 2 or more Department regional areas, Pennsylvania Turnpike Commission projects, some PENNDOT projects and other large or complicated projects.
- The Office of Oil and Gas Management in Central Office and the Department's three Oil and Gas District Offices review applications for ESCGP permit coverage and issue coverage to oil and gas activities for projects other than transmission facilities.
- The Office of Active and Abandoned Mine Operations in Central Office and the Department's six district mining operations offices review applications for E&S and NPDES permit coverage and issue coverage to persons proposing activities on active or abandoned mine lands.
- The Waterways and Wetlands Program within the Department's six regional offices reviews Chapter 102 permit applications and issues individual permits for all other activities not permitted by the Department's Regional Permit Coordination Office, Office of Oil and Gas Management, and Office of Active of Active and Abandoned Mine

Operations and provides support to Conservation Districts in the review of Chapter 102 general permits.

- Delegated Conservation Districts in 65 of Pennsylvania's counties are the initial recipient of NPDES permit applications and conduct the permit application completeness reviews. Conservation districts conduct technical reviews of E&S Plans. Where a Conservation District has been delegated PCSM responsibilities by the Department, and has a professional engineer on staff, the Conservation District will conduct technical reviews of PCSM Plans. There are currently 8 Conservation Districts with PCSM delegation. Where a Conservation District has not been delegated PCSM responsibilities, the Conservation District will conduct only a completeness review of PCSM Plans. The Department's regional Waterways and Wetlands Program is the initial recipient of NPDES permit for projects that span three or more counties and projects located in Forest and Philadelphia Counties.

When a Notice of Intent or NOI is submitted to a Conservation District for PAG-02 general permit coverage, the NOI will contain an administrative fee, a disturbed acreage fee, and any other fees that are charged by the Conservation District. The Conservation District transmits the disturbed acreage fee to the Department's regional Waterways and Wetlands Program when the application is deemed complete. The Conservation District will retain the other fees. After this transmission, in general there is no additional involvement by the Department with the PAG-02 general permit NOI except:

- The Department will provide technical support when specifically requested.
- The Department will publish notice of the approval of coverage under PAG-02 in the Pennsylvania Bulletin.
- The Department would be the responsible authority if an application were to be denied.
- The Department will participate in a hearing if there is an appeal of approved coverage.

In general, the developer and their consultant deal directly with the Conservation District and the Conservation District issues approval of permit coverage.

When an application for an individual NPDES permit is submitted to a Conservation District, the Conservation District will also transmit the disturbed acreage fee to the Department's regional Waterways and Wetlands Program. After the permit application package has been deemed complete, the PCSM Plan will be forwarded to the regional Waterways and Wetlands Program. The Department publishes notice of the receipt of the application and of issuance of the permit in the Pennsylvania Bulletin. The Department coordinates with the Conservation District on the technical review of the E&S and PCSM Plans. For example, if the Conservation District determines there is a technical deficiency in the E&S Plan, the Conservation District will notify Department staff so that this deficiency may be addressed in the same correspondence that transmits notice of technical deficiencies on the PCSM Plan. Regardless of whether the Conservation District is or is not PCSM delegated, the Department ultimately issues the final individual NPDES permit.

It is noted that there are slight variations to this process when development occurs in the city of Philadelphia, in which the Philadelphia Water Department reviews the PCSM Plans to ensure adherence to their standards, and the Department conducts reviews of both E&S and PCSM Plans. There is no Conservation District for Philadelphia county.

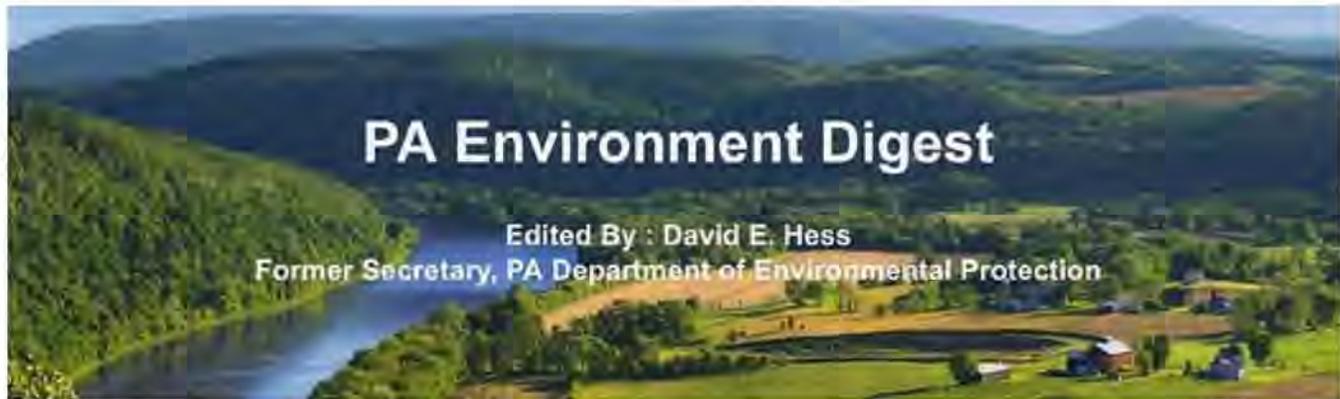
The Department is in the process of developing an electronic permitting or "ePermitting" system for Chapter 102 NPDES permit applications. It is expected that this system will improve the efficiency of the Chapter 102 permitting program by ensuring all submissions are complete and reducing processing time for correspondence and documentation. The system will not, however, address fundamental issues that result in deficiencies. The Department is seeking to improve the technical understanding of the regulated community through the update to the Stormwater BMP Manual and new training initiatives. The Department has developed a Clean Water Academy website that serves as a resource for training Department and Conservation District Staff as well as the regulated community. At this time, all of the training resources are available only to

Department and Conservation District staff, although we plan to open this site up for the regulated community in the future.

The Department is also moving forward with plans to issue a new statewide NPDES general permit for small construction activities under 5 acres of earth disturbance, which would be in addition to the current PAG-02. This proposed general permit, which is being referred to as PAG-01, will include a standard suite of low maintenance BMPs to select from, which will streamline the development of PCSM Plans and their review.

Finally, the Department has approved a statewide alternative BMP known as the Managed Release Concept that will allow projects in sensitive environmental areas to move forward. These sensitive areas include contaminated sites, sites in karst areas, sites with limited infiltration capabilities, and for sites which otherwise cannot reduce the post-construction runoff volume.

Thank you again for inviting the Department to testify before the committee on this important topic. We look forward to continuing to work with the legislature to address these issues. I thank you for your time, and I am available to respond to any questions you may have.



What DEP Said Before About 3rd Party Permit Reviews, Speeding Up Permitting

With the discussion of proposals in the Senate-passed budget bills on how to speed up DEP permit reviews now front and center, it is worth a look-back to see what DEP has told the Senate and House this year about speeding up permit reviews.

Incomplete Applications

John Stefanko, then DEP Executive Deputy for Programs, told the Senate Transportation Committee on February 9 one of the keys to improving turnaround times for environmental permits for PennDOT projects (or any permit reviews) is to get complete applications in the door.

DEP has found in its own reviews of permit programs sometimes up to 60 percent of the applications coming in the door for review are either incomplete or have deficiencies which significantly delays permit review times.

DEP receives an average of about 30,000 permit applications to review every year across its programs.

Budget/Staff Cuts

Stefanko, like every recent DEP Secretary regardless of party affiliation, also acknowledged that significant cuts to DEP's budget over the last decade and the resulting 25 percent cut in staff also has had a big impact on permit review times at the agency.

3rd Party Permit Reviews

With respect to the suggestion of having third party reviews of permit applications, Stefanko told the Transportation Committee there are a number of significant concerns with that approach, not the least of which is the statutory requirements requiring DEP make its own independent determination when taking permit actions.

"Only the Commonwealth has constitutional obligations to the public and our natural environment," said Stefanko. "Absent direct supervisory oversight and Commonwealth parallel review, the quality of review and application of constitutional, statutory and regulatory

requirements is difficult to control. Sufficient QA/QC requires time and personnel, likely eliminating any cost benefits and time savings assumed by the third party review structure.”

He noted third party reviews would required DEP to providing training of third party reviewers by the Department.

“The Department has made staff training a priority. This is a complex and time consuming activity. It will take a great deal of time, effort and energy to insure that the third party reviewers are properly trained and understand Department regulations and guidance,” explained Stefanko. “This time effort and energy would be better spent by enhancing Department staff capabilities to deliver training to both Department and County Conservation District staff.”

Stefanko also pointed out, during an appeal of a permit approved under a third party review, that third party would be required to defend its actions before the Environmental Hearing Board and Commonwealth Court.

The third party reviewer would not defend its reviews for free and impose additional costs on the agency. The third party could also be responsible for attorney’s fees and other costs if they lose.

He also said there is a significant concern over potential conflicts of interest and ethics with third party contractors.

DEP Permit Reform Initiatives Underway

At his May 15 Senate confirmation hearing, Secretary McDonnell summarized his approach to dealing with the challenges at DEP--

“Over my almost 20 years in state government, I’ve had the chance to see almost every aspect of our agency. From our policy making and regulatory functions to our budget and human resources apparatus.

“Through it all I prided myself on being open to collaboration, being honest about problems and listen to all perspectives to help my colleagues make meaningful decisions.

“It is no secret the Department faces challenges. Over the past year we’ve continued to address those issues.

“We are modernizing and improving our permitting processes, collaboratively addressing the Commonwealth’s Chesapeake Bay obligations, and we’ve created an e-permitting platform and e-inspection app to improve our partnerships with the regulated community and increase our transparency.

“We’ve refocused on engaging with stakeholders to identify problems and solutions and we’ve begun investing in the most critical asset we have in the Department, our people.”

Among the reform measures DEP has underway are--

- Listening Sessions To Hear About Issues From Consultants, Permittees:** DEP completed a series of 7 regional listening sessions with consultants and permit applications early in the year to learn what DEP is doing right and wrong with its basic Chapter 102 erosion and sedimentation control and NPDES water quality permitting process. The results of that process and recommended changes will be ready to release in mid to late June. ([Click Here for more.](#))
- New General Permit For Low-Impact Projects Of 5 Acres Or Less Instead Of Full Permit:** One result of the listening sessions is already being started-- developing a new General Permit for Chapter 102 erosion and sedimentation control permits for low impact projects like projects on farms, instead of a full permit. DEP's workload evaluation found as many as 40 to 50 percent of the projects DEP now requires full permits for are projects of 5 acres or less. ([Click Here for more.](#))
- Shifting Permit Work Between Regions:** DEP has a pilot project underway to shift some of the erosion and sedimentation permit work for oil and gas operations from the Southwest Regional Office to the Northcentral Office to speed permit reviews.
- ePermitting Platform:** Secretary McDonnell told both the [Senate](#) and [House](#) Appropriations Committees in March DEP's new ePermitting platform has already reduced the modules required for [mining permits](#) by 20 percent. Since the system requires correct, step-by-step input of information, it also reduces errors and deficiencies in applications submitted significantly. This is potentially huge because up to [60 of many of the 30,000 permit applications](#) DEP receives contain errors or other deficiencies. He said DEP would be expanding the system to erosion and sediment permits next. ([Click Here for more.](#))
- Electronic Documents System:** Secretary McDonnell told both the [Senate](#) and [House](#) Appropriations Committees in [his budget testimony](#) in March DEP has already taken the first steps toward an agency-wide electronic documents management system that will speed submissions to the agency and make the agency more transparent to the public by giving better access to documents without taking staff time for document reviews. ([Click Here for more.](#))
- Regional Permit Coordination Office:** Secretary McDonnell told both the [Senate](#) and [House](#) Appropriations Committees in March he formed a special Regional Permit Coordination Office to better coordinate the handling of pipeline and other projects that cross DEP regional office boundaries
- Electronic Field Inspection Reports:** Secretary McDonnell told both the [Senate](#) and [House](#) Appropriations Committees in [his budget testimony](#) in March DEP has now equipped its Oil and Gas Program inspectors with iPads to fill out inspection reports electronically and submit them to agency databases making staff much more efficient and effect. Previously staff worked with paper and had to recopy field notes into a database at the office. He said he hopes to expand the initiative to other programs. ([Click Here for more.](#))
- [Click Here](#) for a copy of Stefanko's written testimony. [Click Here](#) to watch a video of the Senate Transportation Committee hearing.

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[Posted: August 24, 2017]

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Testimony of John Stefanko
Executive Deputy Secretary for Programs
Pennsylvania Department of Environmental Protection (Department)
Before the Pennsylvania Senate Transportation Committee
Wednesday, February 8, 2016

Chairman Rafferty, Chairman Sabatina, and members of the committee, thank you for the opportunity to submit testimony regarding Innovative Transportation Project Delivery and share feedback on the draft legislation (D02342). We would also like to offer suggestions that the Department believes are needed to improve timely delivery for the citizens of the Commonwealth. As we have testified previously before this committee, the Department understands the significance of transportation infrastructure projects in enhancing public safety and a sustainable economy in the Commonwealth.

This understanding is reflected by the long-standing relationship between the Department and PennDOT designed to expedite transportation projects. The agencies formed a formal partnership under a Memorandum of Understanding (MOU) that is intended to guarantee that PennDOT road and bridge projects get the highest priority for permit application review at the Department. Under that MOU, the Department has 13 staff dedicated to environmental permit review for transportation projects. In Fiscal Year 2015-2016, those staff reviewed a total of 751 applications, for an average of approximately 58 applications each.

As we have previously testified, a Department engineer and biologist in each of the six regional offices maintain an increased level of involvement during program planning and transportation project development in order to facilitate the permitting process. During permit review, PennDOT projects receive priority review by these dedicated staff, while ensuring protection of the Commonwealth's water resources.

The dedicated transportation staff strives to provide cooperation and quick responses to questions raised during the planning and permitting processes, rather than requiring a

formal application submission. This service aids PennDOT in maintaining its schedules and is only available because of the relationships that have been built between the PennDOT Districts and the dedicated Department staff as well as the fact that both entities have missions that place the focus of our work on the citizens of Pennsylvania and the environment.

This service is helpful to the Department in streamlining its review. Often, potential adverse environmental impacts are discussed in pre-application meetings. These impacts must be considered prior to and for proper project design and permit application submittals. Adequately addressing these impacts reduces the number of technical deficiencies found in applications and leads to more timely reviews. Data show that Department's permit reviewers are performing well under the terms of the MOU. The Department's dedicated staff continually partner with PennDOT staff to ensure that submitted applications can be reviewed in a timely manner.

The average review time for permits by this staff is 45 days for applications free from deficiencies. That number increases to 63 days for applications with only one deficiency, but increases to 94 days when there are two deficiencies. By working collaboratively with PennDOT, the Department has sought to reduce delays resulting from technical deficiencies.

During our review of permit applications, Department staff follows a standard process for receiving, prioritizing, accepting, reviewing, denying, and approving applications for permits or other authorizations. Applicants are to submit complete, technically adequate applications that address all applicable regulatory and statutory requirements. Through its review of a permit application, the Department must ensure that the project does not adversely affect air, water or natural, scenic, historic or cultural resources. Ensuring that there are no adverse impacts is a regulatory, statutory and constitutional obligation, including Article 1, Section 27 of the Pennsylvania Constitution.

Applications that are deficient – that is, applications that do not meet all of the regulatory requirements for completeness and technical content – require inquiries to and additional information from the applicant, and as a result, take longer to review. Where additional submissions are required, the back and forth can add considerable time to the review process. It is important to note, however, that as long as the Department has been tracking this metric, no permit delay has caused PennDOT to miss a contract let date.

While the most significant cause of permit review delays is deficient applications, Department staffing levels also play a role. The number of applications reviewed by the Department T21 staff has continued to rise over the years, while the number of dedicated staff has not increased.

Additionally, the public private partnership (P3) contract agreement between PennDOT and Plenary Walsh Keystone Partners (PWKP), under which PWKP will replace 558 aging bridges in just three years, has generated a large number of permit applications in a short period of time. No additional positions were provided to the Department to prioritize these permit reviews. Due to the tight timeline for review of these bridge projects many of the applications do not contain final designs, which causes the Department to have to work with the applicant to determine which type of modifications are needed for a revised submission or what type of public notice may be required. The applications have not been submitted based on the original scheduling, which causes the Department to move other applications in the queue in order to avoid PennDOT construction delays.

The draft legislation (D02342) proposes a solution to these challenges faced by the Department in the form of contracting some of the Department's review work to third party consultants. Third party evaluation of permit applications is not a new idea being proposed for Department permit authorizations. This suggestion has been evaluated in the past and has resulted in a number of changes implemented by the Department to make the permit process flow more smoothly, including the PennDOT MOU discussed

previously. This solution has and continues to work well. The MOU and arrangement have led to other process improvements, including collaborative investments in upgrades to electronic permit applications and transmittal of data that will bolster these successes going forward.

There are a number of issues that are of significant concern related to third party review of Department permit applications, not the least of which is the statutory requirements that require the Department to make its own independent determination when taking a permit action. This means that even if a third party concludes that an application complies with all technical and legal requirements, the Department would have to perform its own review of the permit application and third party reviewer's work prior to issuing the permit. The Commonwealth has a number of applicable statutory obligations and a constitutional duty to administer its programs. Any time saved by contracting to third parties would result in some time savings but no cost savings to the Commonwealth.

There is also the possibility that a permit action may be appealed. If the third party reviewer were to be responsible for the technical review of the permit, they would also be responsible to defend the action before the Environmental Hearing Board and perhaps Commonwealth Court on appeal. The third party reviewer would charge the Commonwealth for this additional work to defend the action. Commonwealth attorneys can represent the Commonwealth, but where a third party reviewer is involved, legal representation issues become blurred, likely increasing legal costs of defense. The Commonwealth could potentially be liable for its costs, the third party's legal costs and appellants' attorney fees should there be an adverse decision before an adjudicating body. Would the third party consultant be responsible for these costs in these circumstances? The proposed legislation does not address these significant issues.

There is also a potential challenge with the quality of review that can be expected from a third party reviewer. As stated, one of the issues that has been documented repeatedly by the Department is the frequency of incomplete and technically inadequate

permit applications submitted to the Department. Given this data, it raises concerns with third parties performing adequate technical reviews of the same documentation. Significantly, the Commonwealth is not able to transfer its constitutional obligations to a third party contractor. Only the Commonwealth has constitutional obligations to the public and our natural environment. Absent direct supervisory oversight and Commonwealth parallel review, the quality of review and application of constitutional, statutory and regulatory requirements is difficult to control. Sufficient QA/QC requires time and personnel, likely eliminating any cost benefits and time savings assumed by the third party review structure. There is also reason to be concerned with potential conflicts of interest and ethics with third party contractors.

The proposed bill would require training of third party reviewers by the Department. This is also viewed as a great concern. The Department has made staff training a priority. This is a complex and time consuming activity. It will take a great deal of time, effort and energy to insure that the third party reviewers are properly trained and understand Department regulations and guidance. The Department's permitting obligations serve many sectors, the transportation sector being one. The Department's review staff must be responsive to all applicants and training third parties will further remove them from their duties, adding to permit backlogs indefinitely as training is an ongoing obligation. This time effort and energy would be better spent by enhancing Department staff capabilities to deliver training to both Department and County Conservation District staff.

The Department is aware of the concerns underlying the legislative proposal and has been taking serious and meaningful steps to address the concerns and improve the system. One of the program areas of most concern, erosion and sediment control and post construction stormwater management (Chapter 102 related) activities, within the Department has been reassigned to the Bureau of Clean Water. The Department is currently holding listening sessions for the public, including private sector consultants, and will be taking action on many of the ideas gathered during those sessions. We anticipate that a large number of necessary changes will be rolled out in 2017.

Mr. Chairman, in your recent memorandum inviting the Department's participation in this hearing, you asked that we provide solutions to what we see as the challenges to delivering environmental permitting expeditiously for these important transportation infrastructure projects. Our proposed solutions to the challenges we have identified are few and simple.

First, given the costs and associated risks with third party permit application reviews outlined above, the Department believes that public funds would be more efficiently used to increase the number of Department staff who review permit applications for these types of projects.

And second, the quality of permit applications must be improved. It is proven that this shortens review times. The Department is actively developing methods to assist applicants in preparing good applications.

Thank you for this opportunity to provide Department's perspective and recommendations today. This concludes my testimony.



More Than Half Of E&S Permit Applications Submitted Are Incomplete; Consultants Take 6 Weeks To Respond To Deficiencies

On May 1, the House Environmental Resources and Energy Committee heard testimony from the Cumberland County Conservation District saying more than half of the erosion and sedimentation control/NPDES plan applications submitted to the district are incomplete and consultants (almost all registered engineers) take an AVERAGE of 33 business days to respond to technical deficiencies-- more than 6 calendar weeks.

Vincent McCollum, E&S Staff Supervisor for the District, said this analysis was based on a review of the 112 General Permit and NPDES applications the District received in 2017-18.

McCollum said, "Consultants and engineers often do not provide plans and drawings that contain sufficient information to perform a technical review of the application."



He said it could be something like not having separate pre-construction and post-construction maintenance plans to trying to put a stormwater infiltration pond in an area that has a high groundwater table where infiltration is not possible.

And, he added, he felt consultants in Central Pennsylvania do a better job than consultants in other parts of the state.

"We often hear from consultants and engineers that they just submitted what they had completed for review because of deadlines set by the applicant or other municipal reviews," explained McCollum.

McCollum also said, in response to a question, engineers are invited in to meet with District staff to go over the issues and to educate them on the proper submissions, but incomplete or deficient submissions still happens often.

"To more effectively expedite the permit process, consultants and engineers must provide accurate and complete submissions," said McCollum. "If that doesn't happen, delays are inevitable."

[**Note:** The basic Chapter 102 regulations were adopted in 1972 and updated in 2010 and DEP published a Stormwater Best Management Practices Manual in 2006 to provide more guidance to consultants on approved design practices, yet consultants (all most all engineers) still make these fundamental mistakes that significantly delay permit reviews.

[DEP's own analysis of applications it receives found in 2017 60 percent of erosion and sedimentation permit applications were incomplete or had technical deficiencies in the Oil and Gas Program and outside of that program as many as 80 percent of the permit applications DEP received were incomplete or had deficiencies.]

Public Participation

McCollum also noted part of the permit application review process is a public participation requirement which requires them to be published in the PA Bulletin to allow the public the opportunity to comment for a 30 day period.

e-Permitting

McCollum and Ramez Ziadeh, DEP Executive Deputy For Programs who also provided comments to the Committee, said a new e-Permitting initiative covering erosion and sedimentation permit will eliminate many of the common completeness errors consultants make because it will not allow an applicant to proceed through the electric process if components are missed or if calculations are not correct.

Ziadeh said DEP is looking to have the e-Permitting system online this fall. The system will also have an element that allows the applicant and the public to see where the permit is in the process.

McCollum serves on a DEP workgroup helping to develop the e-Permitting system and estimated the new system may cut down review times by as much as one-third.

[**Note:** DEP already has an online eFACTS system that allows the public or anyone else to see what permit applications have been submitted to DEP in their municipality and their status, however, the interface system has not been updated since the early 2000s due to budget cuts by the General Assembly.]

New Low-Impact Project General Permit

McCollum, Ziadeh and Aneca Atkinson, DEP Acting Deputy for Water Programs, also described a new Low-Impact Project General Permit (PAG-1) DEP is developing for projects of 5 acres or less that could cover a significant number of the projects that now require a general or individual erosion sedimentation/NPDES permit.

[**Note:** In earlier comments on the low-impact General Permit, DEP staff said 40 to 50 percent of the erosion and sedimentation/NPDES permits reviewed are for projects of 5 acres or less.]

Atkinson said, while the details of the coverage for the permit are still being worked out, DEP hopes to publish the permit as proposed in June.

Applications Vary Considerably

Ziadeh also noted erosion and sedimentation permit applications can vary considerably in size from 5 acres to 200, and complexity from flat terrain to hilly, with landslide-prone soils and other conditions.

Trying to standardized how the permits are processed becomes difficult with this kind of variability.

Training

McCollum and Ziadeh said a new online DEP Clean Water Academy training tool on the permit review process for conservation district staff and DEP employees will increase the capacity of staff to do better and faster reviews.

Ziadeh said DEP plans to open the Academy to consultants who prepare applications later in the year so they can be educated in the same way about the permit requirements and review process.

McCollum said one of reasons his office in Cumberland County is better prepared to handle permit reviews is he has experienced staff. He has 20 years of experience and another person on his staff has 10 years.

Staff turnover in some Districts and certainly in DEP is also a problem because his office relies on DEP for technical support.

McCollum noted the same staff doing permit reviews also does onsite compliance inspections and other compliance duties associated with the erosion and sedimentation program taking time away from just doing permit reviews.

Adequate District Funding

McCollum said adequate funding of the permit review process is critical to its success. In the case of Cumberland County there are 3 full time E&S review staff and one administrative support person.

The District receives, through the Conservation District Fund line item in the DEP and Department of Agriculture budgets, \$45,000 a year to support the permit staff, when it costs about \$335,000 a year to implement.

McCollum said the balance has to be made up by charging applicants permit review fees.

Other Initiatives

Ziadeh and Atkinson outlined several other initiatives DEP has undertaken to improve permit review times and more clearly define responsibilities--

-- **Regional Permit Coordination Office:** This new Office opened in January and eviews erosion and sedimentation permit applications for interstate natural gas pipelines and other linear projects that cross DEP Regional Office borders, PennDOT and Turnpike projects and other large or complicated projects that require more staff time.

- **Realigned Regional Offices:** In January, DEP realigned its major Regional Office boundaries to move Armstrong and Indiana counties to the Northwest Regional Office to better balance permit workloads and staff resources.
- **Managed Release Concept** is a new statewide alternative Best Management Practice that will allow projects in sensitive environmental areas to move forward in areas like contaminated sites, sites in karst areas, sites with limited infiltration capabilities and sites which otherwise cannot reduce post- construction runoff volume. [Click Here](#) for Managed Release Standards. [Click Here](#) for MRS Design Summary.
- **An Update of Stormwater BMP Manual** is in process with DEP partnering with Villanova University. The goal of the project is to evaluate how well the existing practices perform and add new, updated practices. The manual will also encourage new green infrastructure solutions.
- **Pre-application Meetings:** DEP is encouraging pre-application meetings to make sure consultants and their clients understand the requirements and the review process.

Additional Background

In addition to McCollum comments, Brenda Shambaugh, Executive Director of the PA Association of Conservation Districts, Inc. provided an overview of the different levels of participation in the erosion and sedimentation/NPDES permit application review process by districts across the state.

Both Shambaugh and DEP's Ziadeh noted, erosion and sedimentation/NPDES permit reviews are covered by DEP's Permit Decision Guarantee Program which sets deadlines, which are tracked, for the review of a wide variety of permits and approvals.

Ziadeh pointed out the deadlines apply to permit applications which are determined to be complete on the first submission since they can start being reviewed right away by technical staff.

DEP also has available an online DEP Permit Application Consultation Tool that allows applicants to determine when and what kind of environmental permit is required and how long it will take to receive a permit under the Permit Decision Guarantee Program.

A recommended follow-up to using the Application Consultation Tool would be to set up a pre-application meeting with DEP staff.

Concluding Remarks

Rep. Daryl Metcalfe (R-Butler), Majority Chair of the Committee, said the information meeting was prompted by the introduction of House Bill 414 (Zimmerman-R-Lancaster) which would require DEP and conservation districts to approve erosion and sedimentation permit applications within 20 days if they were submitted by a state licensed engineer. [**Note:** The Committee reported out the bill on a party-line vote April 16 (Republicans supporting).]

McCollum said if this requirement was implemented they would need additional staff, probably 2 new people.

As noted above, the permits also require notice in the PA Bulletin and a public comment period which would be eliminated by House Bill 414 or at least in direct conflict with this requirement.

Rep. Metcalfe said in response he did not want to hear about any solutions to permit review problems that involved more funding or people because taxpayers won't stand for it.

[Click Here for copies of written testimony.](#) [Click Here to watch a video](#) of the information meeting. [When posted]

Follow-Up Meeting

The Committee is scheduled to hold an informational meeting on May 8 to hear from the regulated community on their experiences with DEP's permitting program.

The meeting will be held in Room B-31 of the Main Capitol starting at 9:00. [Click Here to watch the meeting online.](#) [Click Here for more on the agenda.](#)

Rep. Daryl Metcalfe (R-Butler) serves as Majority Chair of the [House Environmental Committee](#) and can be contacted by calling 717-783-1707 or sending email to: dmetcalf@pahousegop.com. Rep. Greg Vitali (D-Delaware) serves as Minority Chair and can be contacted by calling 717-787-7647 or sending email to: gvitali@pahouse.net.

NewsClips:

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[Posted: May 1, 2019]

5/6/2019

Commonwealth of Pennsylvania



Expedited ESCGP-2 Process Internal Review

DECEMBER 27, 2016

Office of Oil and Gas Management
Pennsylvania Department of Environmental Protection
P.O. Box 2063
Harrisburg, PA 17105-8468
717-783-9438

www.depweb.state.pa.us

Summary

The Department of Environmental Protection's (DEP) Office of Oil and Gas Management (OOGM) conducted an internal evaluation of Authorizations for Coverage to use the Erosion and Sediment Control General Permit (ESCGP-2) reviewed by DEP under the 14 business-day expedited review process. The purpose of the internal review was to evaluate the quality of the Notices of Intent for Coverage (NOI) under ESCGP-2 submitted by applicants through the expedited review process, evaluate the effectiveness of the process, and to assist in identifying ways in which the existing expedited process can be improved. The results of the internal review indicate that the DEP should evaluate the expedited review permit authorizations and implementation of the process at regular intervals in order to achieve consistency, and to ensure that NOIs are technically adequate, that resulting permits meet applicable requirements, and that appropriate review is provided for applications that are eligible for the expedited review.

Context of Program Audit

Noting commonality in ESCGP-2 permit appeals and with interest in permitting consistency, in early 2015, DEP's Oil and Gas Management Program decided to internally review the ESCGP-2 expedited review process to evaluate consistency and effectiveness. The Office of Oil and Gas Management staff completed its review of ESCGP-2 NOIs (*i.e.*, applications) submitted for review between February 2014¹ and January 2016 under the expedited review process. This report presents the internal review results.

Background of Permit Program

The Office of Oil and Gas Management (OOGM) reviews NOIs for Authorization for Coverage under ESCGP-2 pursuant to Title 25, Chapter 102. 25 Pa. Code § 102.5(c) requires persons proposing oil and gas activities that involve 5 acres or more of earth disturbance over the life of the project to obtain an ESCGP-2 permit prior to commencing the earth disturbance activity. On December 29, 2012 DEP issued Erosion and Sediment Control General Permit No. 2 for earth disturbance associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities (ESCGP-2). ESCGP-2 allows projects meeting certain criteria to be eligible for a 14-day expedited review process.

¹ The ESCGP-2 program inception was February 2014.

ESCGP-2 permit and related guidance established two processes for review of NOIs:

- (1) A standard review process -- The standard ESCGP-2 NOI review entails a thorough administrative and technical review of the application materials. Pursuant to the Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee (PDG policy), OOGM guarantees that it will complete its review of complete and technically adequate applications within 60 calendar days of submission.
- (2) An expedited review process -- Applicants that qualify for the voluntary expedited review of ESCGP-2 NOIs are provided with an acknowledgement of coverage within 14 business days from the submission of a complete and acceptable NOI.²

The expedited permit process is not available for the following:

- Projects that are partially or fully located in or with the potential to discharge to waters that have a designated or existing use of High Quality (HQ) or Exceptional Value (EV) pursuant to 25 Pa. Code Chapter 93 (relating to water quality standards).
- Projects in which the area surrounding an oil or gas wellhead that is subject to earth disturbance and that is used or planned for use for the drilling, production or plugging of the well, including associated support activities (such as storage of chemicals, wastewater, drill cuttings, and equipment) will be constructed in or on a floodplain.
- Earth disturbance activities on lands that are known to be currently contaminated by the release of regulated substances as defined in Section 103 of The Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. § 6026.103.
- Transmission facility projects.

² NOIs submitted for expedited review must be prepared and certified by a licensed professional (*e.g.* engineer, surveyor, geologist or landscape architect) who is registered in Pennsylvania and who has attended up-to-date training provided by DEP's OOGM on erosion and sediment control and post construction storm water management for oil and gas activities. The work done by licensed and trained private professionals preparing the applications can determine whether the expedited review process is available for an application; it is not available where there are technical deficiencies, missing information, or incomplete information.

The licensed professional is responsible for the development of a complete and acceptable NOI package, including an Erosion & Sediment (E&S) Control Plan that specifies E&S Best Management Practices (BMP) design, implementation and maintenance requirements and a site restoration plan with Post Construction Stormwater Management (PCSM) BMPs that meet all regulatory requirements. All E&S Plan and PCSM/Site Restoration (SR) Plan drawings and plan narratives submitted for the expedited review process must be sealed by the licensed professional that prepared the application and plans. Where NOIs do not meet applicable requirements, they may be denied or removed from the expedited review process and placed in the standard 60-day review.

Audit Scope

- ESCGP-2 NOIs (i.e., applications) submitted between February 2014 and January 2016 were eligible to be reviewed.
- 1,678 ESCGP-2 NOIs were submitted for DEP review during this period.
- 1,054 ESCGP-2 NOIs were submitted for expedited DEP review during this relevant eligible period.
- Of the 1,054 NOIs submitted for expedited review, only 436 ESCGP-2 NOIs were eligible for expedited DEP review.
- During the audit eligible period, although 63% of all NOIs received by DEP were submitted for expedited review, only 26% of the NOIs were actually subject to the 14 business-day expedited review timeframe (i.e., 436/1,678 applications were eligible to be reviewed in 14 business days).
- 1,242 NOIs were deemed to be ineligible for expedited review either because they did not meet the expedited review criteria or because the NOIs were incomplete and/or technically deficient.

Below is a chart reflecting the statistics for ESCGP-2 permit applications from February 2014 - January 2016.

Number of ESGP2 authorizations issued through 01/05/2016:		
Submitted as standard review	624	37%
Submitted as expedited review	1,054	63%
Total	1,678	100%
Of the 1,054 that were submitted as expedited review:		
Number that had an expedited review process (based upon PDG status of “Active”)	436	41%
Number that fell out of the expedited review process (based upon PDG status of “Void”)	618	59%
Total	1,054	100%

- Of the 436 NOI's that were subject to and issued under expedited review,
- DEP evaluated the expedited NOIs that proposed earth disturbance of 15 acres or more, as these tend to be more complex applications and have more potential to impact the environment. DEP subjected these 'higher risk' and more difficult permit applications to internal review.

- 190 projects proposed earth disturbance activities of 15 acres or more and were thus eligible for internal review. Of these, DEP selected 23 permit applications for the intensive internal review. The 23 applications were selected randomly without regard to applicant, consultant or project characteristics.
- Applications from each oil and gas region were included in the 23 NOIs reviewed for this evaluation.
- The 23 permit applications represent a confidence level of 90% with a confidence interval of 15% in the results of the audit.³
- DEP staff across the Commonwealth participated in the internal review. No NOI was audited by the same person who reviewed the initial application.

Summary of Audit Results

- As shown in the above chart, 59% of all ESCGP-2 NOIs submitted for expedited review were disqualified from the expedited review process because they were either administratively incomplete and/or technically deficient when submitted for review.
- 41% of all of the NOIs submitted were reviewed and issued in the expedited review process.
- The internal review results indicate that approximately 19 NOIs (83% of the applications subject of this internal review) contained technical deficiencies.
- Reviewers agreed on the adequacy of 4 (17%) of the 23 expedited NOIs reviewed. These NOIs met all of the applicable regulatory requirements (*i.e.*, administratively complete and technically sufficient).
- Consistency in review is an issue that must be addressed by DEP.
- The results described herein reflect a small subset of the most challenging permit applications. The audit results indicate the difficulty in and necessity for conducting a thorough and appropriate review, even where technical professionals prepare applications.
- DEP's ESCGP-2 program includes field inspections of ESCGP-2 sites.
- Of the 23 sites subject of the review:
 - (i) sixteen (16) sites were inspected one or more times, and one of these sites had an E&S violation noted during the inspection;
 - (ii) six (6) of the sites were never constructed;
 - (iii) one (1) site is currently under construction, and was recently inspected.
- Most sites were inspected a number of times, and overall forty-seven (47) field inspections were conducted on these sites subject of the reviewed NOIs.
- Of the forty-seven (47) field inspections of the reviewed application sites, only one inspection documented an E&S violation.

³ The confidence interval represents that there is a 90% chance that what is observed in the audit sample group would accurately reflect the same results in a larger sample group, plus or minus 15%.

Conclusions and Recommendations

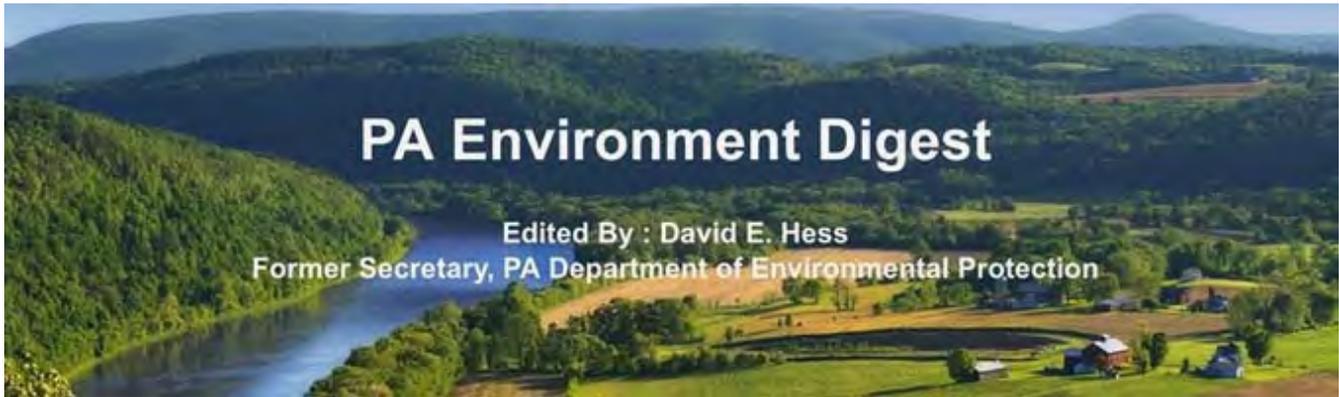
The expedited permit review process is very challenging for DEP to implement and has not resulted in higher quality applications nor consistency in environmental protections statewide. The results of this compilation and review indicate that DEP cannot rely on licensed professionals to submit technically sound, legally defensible application materials in the very first submission. As a result, the 14-day expedited review process has limited applicability, but will continue to be used where applications meet the eligibility requirements. All permit applicants must satisfy all applicable regulatory requirements in order to obtain approval under any DEP permitting program.

Continuation of the practices previously expected by industry, including unquestioning reliance on sealed NOIs is not advised based upon the last 3 years of review experience, partially reflected in this internal review. Refinement of the eligibility standards and DEP's review process is needed to adequately implement the statutes and regulations DEP administers in the ESCGP-2 program permitting process.

DEP is responsible for issuance of compliant authorizations in a timely manner. To accomplish this, *where necessary*, DEP program staff must: (a) remove an expedited permit application from the expedited review process; (b) require additional information from the applicant; and (c) deny a permit application. Further, DEP must consistently apply objective standards to the expedited applications that enable reviewers to make sound permit decisions within 14 business days.

DEP's Bureau of Oil and Gas Management recommends that it refine and improve the expedited review program implementation in the following ways:

- 1) Establish more objective and clear standards for expedited permit NOI review *eligibility* so that they can be implemented consistently statewide.
- 2) Establish more objective and clear standards for DEP's *return or denial* of ESCGP-2 NOIs so that program staff can take consistent action statewide regarding permit application return and/or denials.
- 3) Create and implement *internal program staff education* to ensure that DEP staff consistently apply standards for qualification for expedited review and standards for issuance of expedited ESCGP-2 permits.
- 4) Conduct *industry and third party technical training* for those entities and persons preparing and submitting applications. Sessions should be standardized and offered in at least three locations across the Commonwealth in 2017.
- 5) Conduct *regular internal reviews* for consistency, technical sufficiency, and proper implementation on a 2-year interval beginning in 2017 (year 1) after staff training referenced in #3 above is completed. (*i.e.*, another audit should be conducted in November 2017, and internal reviews should occur in every odd year thereafter.)



Pivot Points 2017: Facts Will Lead Us To Better Decisions On Protecting The Environment

Heading into a new year, it's worth laying out a few facts that might help guide state policymakers into making better decisions about supporting environmental and natural resource programs in Pennsylvania.



These facts have one thing in common-- they are facts, stubborn as they may be-- and if these realities are accepted like they should be-- environmental and natural resource programs will no longer be thought of as "extras" to be cut at will.

Instead, they will be thought of as what they are-- jobs programs that drive local economies, while solving real environmental problems.

Please consider--

-- DEP's Personnel Budget Has Already Been Cut 40 Percent, Cuts Don't Equal Efficiency: If budget cuts equaled more efficient government operations, then DEP should be 40 percent more efficient than it was 14 years ago because DEP's General Fund budget has been cut 40 percent and is now below 1994-95 levels.

Gov. Wolf's action December 16 to cut another 290 positions means DEP's staff losses are approaching one-third of 2002-03 levels.

This means job creators can expect delays in getting permits, although more on that later. Fewer staff, means more delays. It isn't rocket science.

These cuts have also resulted in a fundamental shift in the burden of funding these programs.

The shift puts the burden on business and local government permit applicants because funding has to come from somewhere to keep the permit programs running, albeit at reduced levels

DEP's budget is now just 22 percent General Fund, 28 percent federal funds and 50 percent from permit review and annual permit administration fees, the reverse of what it was a decade ago.

Investments in technology that would actually make the permit process more efficient, but just as effective are down 30 percent from where they were a decade ago.

DEP's Drinking Water Protection, PennVEST, Chesapeake Bay, Stormwater Pollution Control, Air Quality and Surface Mining programs have ALL been criticized as inadequate by the U.S. Environmental Protection Agency and the federal Office of Surface Mining in the last year for not meeting minimum federal requirements due to the lack of staff and other resources.

At the same time, a 2015 Penn State poll found that 90.7 percent of Pennsylvanians surveyed would support increasing state funds to conserve and protect open space, clean water, natural areas, wildlife habitats, parks, historic sites, forests, and farms.

=Knowing these facts, is it logical to continue believing cutting DEP's budget is making them more efficient? Or that these cuts have no consequences on permit review times and aren't holding up local, private job-creating projects?

The most expensive item in permit reviews-- people-- have already been cut at DEP, and cut drastically.

Recognize now there are no free lunches or free permit reviews, but new investments in the right place COULD help significantly.

-- Parks, Recreation, Land Conservation Add Billions To PA's Economy: Recent economic studies show parks, recreation and land conservation support tens of thousands of jobs and contribute billions to Pennsylvania's economy--

-- State Parks contribute \$1 billion to local economies and support 13,000 jobs;

-- PA Heritage Areas generate \$2 billion to local economies and support 25,708 jobs;

-- The farmland in just one county-- Lancaster-- provides \$676 million in annual environmental and economic benefits-- water resource protection, recreation, flood protection, tourism-- NOT counting the agricultural products they produce; and

-- Cleaning and greening vacant city land through a LandCare-type program can return \$224 for every \$1 invested in direct economic benefits-- increasing housing values, stormwater reduction and even a decrease in gun violence.

Parks, protected farmland and open space aren't just nice, they work hard for our communities in many ways.

Knowing these facts, is it logical to continue to cut and divert funds from programs like recreation, land conservation and DCNR in ways that hurt clearly hurt local job creators and take away important local economic generators?

-- Green Infrastructure Solves Today's Water Pollution Problems: The top 3 causes of water pollution in Pennsylvania's 20,149 miles of polluted streams and rivers are: agricultural runoff, abandoned mine drainage and stormwater runoff, not municipal sewage plants.

Thirty years of experience tells us green infrastructure-- forested buffers, stormwater infiltration areas, porous pavement, parks and recreation areas, passive mine drainage treatment, stream restoration and preserved land-- offer a cheaper, more effective way to deal with the water pollution problems we face today.

These experiences have been documented by the Western PA Conservancy, LandStudies and Chesapeake Bay Foundation-PA.

Philadelphia, Lancaster, Harrisburg, Pittsburgh, and Lycoming, Monroe and York counties and many other communities are turning to green infrastructure with multiple benefits to meet water quality goals, improve recreation and achieve other objectives with a single investment.

Note that agricultural best management practices (green infrastructure) has accounted for 75 percent of the nitrogen pollution reduction in the Pennsylvania portion of the Chesapeake Bay Watershed, while municipal sewage plants generate about 11 percent.

A recent study shows using green infrastructure to help cleanup the Pennsylvania portion of the Chesapeake Bay Watershed would result in a \$6.2 billion annual economic benefit to the state's economy.

As the study of Lancaster farmland shows, there are real, measurable economic and environmental benefits from green infrastructure-- \$676 million worth every year in Lancaster County alone.

While bricks and mortar solutions, like manure treatment technologies, seem to offer big, shiny solutions, their ongoing operation and maintenance costs actually make them a more expensive option and control just 16 percent of just one of three significant water pollution issues we face.

Knowing these facts, policymakers should stop wasting time looking for some techno magic bullet, and focus on what 30 years of experience in Pennsylvania says works, but deliver those solutions in new and innovative ways; especially because Pennsylvania is under mandates in federal law and by the federal courts to cleanup our rivers and streams?

-- Harness The Power Of Local Partnerships To Solve Pollution Problems: Seventeen years worth of experience with the Growing Greener Watershed Restoration Program has conclusively demonstrated supporting local watershed groups-- volunteers-- and their partnerships will not only more than DOUBLE the state's investment in water quality improvement projects, but they will deliver the right kind of green infrastructure solutions.

Every dollar invested by the state has been more than matched by \$1.25 in local contributions to projects. This is the power of partnerships.

In addition to doubling your money, local people taking a proactive role in cleaning up local streams promotes a stewardship ethic that will extend to other community projects; something no state-paid, outside contractor can in any way match.

Knowing these facts, does it continue to make sense to cut funding for Growing Greener Watershed Restoration Projects and divert funding to other purposes; especially when Pennsylvania is under mandates in federal law and by the federal courts to cleanup our rivers and streams?

-- Eliminating Prevailing Wage Would Stretch Existing Resources By Up To 30 Percent:

Eliminating the prevailing wage requirement-- the state-mandated minimum wages groups with state grants must pay workers for construction activities-- would mean up to 30 percent of the existing funding for watershed restoration or mine drainage treatment projects could now be used for projects instead of paying wages not subject to competitive bids.

Overall, groups estimate the prevailing wage mandate costs Pennsylvania taxpayers \$1 billion a year.

Knowing these facts, wouldn't a good first step to expanding funding for green infrastructure be to actually use up to 30 percent more of the existing state funding for projects, rather than to fulfill an uncompetitive mandate the state imposed on itself?

-- Renewable Energy, Energy Efficiency Reduce Consumer Costs, Add Jobs: Energy efficiency and clean energy employs from 53,175 workers to over 66,000 workers at 5,900 clean energy companies in Pennsylvania, depending on your method of counting.

Either way, that's a big number. In 2015, the U.S. Energy Information Administration reported there were 4,780 workers employed in mining coal in Pennsylvania, down from 7,938 in 2014-- a 16.4 percent decrease.

The Commonwealth's existing Energy Efficiency Resource Standard has resulted in the state's utilities achieving a 2TWh/year energy savings cumulatively through May 2015 with a reported benefit-cost ratio of 1 to 1.64.

The PUC's 2015 Energy Efficiency Potential Study for Pennsylvania shows the maximum achievable potential cumulative energy savings is 13.2 percent (relative to the June 2009-May 2010 baseline) by 2025.

Groups as diverse as the nonprofit Philadelphia Energy Coordinating Agency and the Office of Consumer Advocate have been recommending energy efficiency as the cleanest, most cost effective way to solve the state's energy problems for years.

PJM, the 13-state electricity grid that serves Pennsylvania, found in a special study that increasing renewable energy penetration to 20-30 percent of the grid supply would result in electricity production cost savings of \$49.50 to \$70.60 per megawatt hour.

PJM also found that as a result of increasing renewable energy penetration on the grid, wholesale electricity prices to consumers would decrease from 4.2 percent to 21.5 percent from business as usual

Knowing these facts, why continue with business as usual? Let's find creative ways to direct existing resources, like the Utility Gross Receipts Tax, business technical assistance programs (PennTAP, EMAP) and other state resources now treating the symptoms of energy

use to investments in energy efficiency that result in multiple benefits of saving energy, permanently reducing energy use (and bills) for businesses and residents and producing jobs.

-- Coal Cannot Compete With Natural Gas In Today's Market: The demand for coal to generate electricity in Pennsylvania dropped by 44 percent between 2007 to 2015, according to the U.S. Energy Information Administration, driven by fuel market fundamentals (in particular in-Pennsylvania natural gas production) and environmental regulations that in most cases were put in place years ago.

But, it was only when a much cheaper and plentiful fuel alternative became available-- natural gas in Pennsylvania-- that the fuel market began to change in fundamental ways.

There are enough active permits for natural gas-fired power plants now being considered by DEP to replace ALL coal-fired power plants in Pennsylvania.

These applications represent investors and the private market speaking loudly about the fundamental change natural gas supplies have brought to electric generation.

The Public Utility Commission projected in August, natural gas-fired power plants will surpass coal in the generation of electricity in Pennsylvania in 2016.

Knowing these facts, how far are Pennsylvania policymakers willing to go to fight uphill against free market forces in the United States by picking winners and losers? Or provide subsidies to certain electric generation fuels at taxpayer expense?

Jobs are the real issue. No one has paid any attention to supporting the actual people who are affected by job loss in this industry in terms of retraining, education and placement in new jobs. Someone should.

--On-Time Permit Reviews Are A Shared Responsibility Between DEP And Consultants: Even with 40 percent cuts in its General Fund budget, DEP makes its permit review deadlines on the 37,000 or so applications it reviews each year 89 percent of the time.

This record is in the face of the fact that 80 percent of applications coming in the door at DEP are incomplete and the 30 percent have technical deficiencies.

Knowing these facts, the RIGHT question to ask is how to keep the 11 percent that miss the deadlines on time, and better yet, ahead of review deadlines.

Obviously, getting in complete applications is a key first step. Why not create a scorecard for each consultant submitting application to DEP just on the completeness issue and release it to the public? DEP already has the information and its staff knows, but the public doesn't.

Why not use this information and let the free market decide which consultants to use?

Why not do more to train consultants on how to prepare applications or ask them what they need to succeed, rather than putting the burden entirely on an already overburdened and under-resourced DEP?

Shared responsibilities for success mean there must be shared solutions. In other words, it isn't all DEP's fault or responsibility.

-- Endangered Species Permit Reviews Require Follow-Ups Just 2 Percent Of The Time: A recent study of 16,600 DEP permits requiring reviews for impacts on endangered and threatened animal and plant species and species of special concern found that in just 2 percent of cases-- 339-- were follow-up surveys required to confirm whether a species is present.

Research on the federal Endangered Species Act and the experience of the State Wildlife Grants Program suggest that threats to species and habitats can move very quickly, and protection has a better chance of leading to recovery if these impacts are addressed early.

Paying attention to species that are in decline, and taking reasonable steps to reverse this trend, can benefit both wildlife and the regulated community by preventing the need to list species as endangered and for the more involved regulatory requirements that can accompany such a designation.

Knowing these facts, is it logical to eliminate or severely restrict endangered species reviews when 98 percent of applications require no follow up, especially when DCNR just significantly upgraded the online tool used for these reviews? The tail is really wagging the dog on this one.

-- States Have A Right To Determine Their Own Standards, Not Blindly Follow The Feds: Asking whether Pennsylvania's environmental laws are more stringent than federal laws-- Yes or No-- like a recent Senate Resolution did is the WRONG question.

It's wrong because it implies the feds-- Congress and the President-- always have Pennsylvania's best interests at heart. They don't.

That's why states show leadership and act in their own interests, and with respect to protecting the environment, far ahead of the federal government. That's called states controlling their own futures.

On the other hand, if you believe the feds have all the answers, then you need to accept what the feds are saying about Pennsylvania's environmental programs.

DEP's Drinking Water Protection, PennVEST, Chesapeake Bay, Stormwater Pollution Control, Air Quality and Surface Mining programs have ALL been criticized as inadequate by the U.S. Environmental Protection Agency and the federal Office of Surface Mining in the last year for not meeting minimum FEDERAL requirements.

In announcing Oklahoma Attorney General Scott Pruitt as EPA Administrator, the Trump Transition Team was careful to say: "Pruitt agrees with President-elect Trump that states should have the sovereignty to make many regulatory decisions for their own markets."

Knowing these facts, the RIGHT question to ask is what is REALLY driving private compliance costs?

To make environmental regulations and policies less costly to comply with in the first place, use Gov. Ridge's Executive Order 1996-1 that's dormant, but still in effect and requires state agencies like DEP to evaluate existing regulations and policies related to costs and effectiveness and whether they go beyond federal requirements without justification.

At DEP in 1996, the Order resulted in a systematic review of regulations carried out over several years through the Regulatory Basics Initiative.

It worked through a transparent process with DEP's advisory committees and the public on section by section reviews of regulations and technical guidance. It also solicited suggestions from business and industry on which specific provisions were burdensome without protecting the environment.

The result of that effort was saving individuals, businesses and local governments \$138 million in compliance costs, the elimination of nearly 5,000 pages of outdated regulations and more than 1,700 pages of unneeded technical guidance and 29 packages of regulatory changes.

We need to go through a similar, transparent process today because we've added new regulations and policies since it was last done the last time and now DEP has far fewer resources.

Simple, Basic Principles

All these pivot points are based on three fundamental lessons: clean is better than dirty, saving money is better than wasting it and being organized and efficient is better than not.

Hopefully bringing a few facts to the coming debate over Pennsylvania's environmental and natural resource programs will yield better results for everyone.

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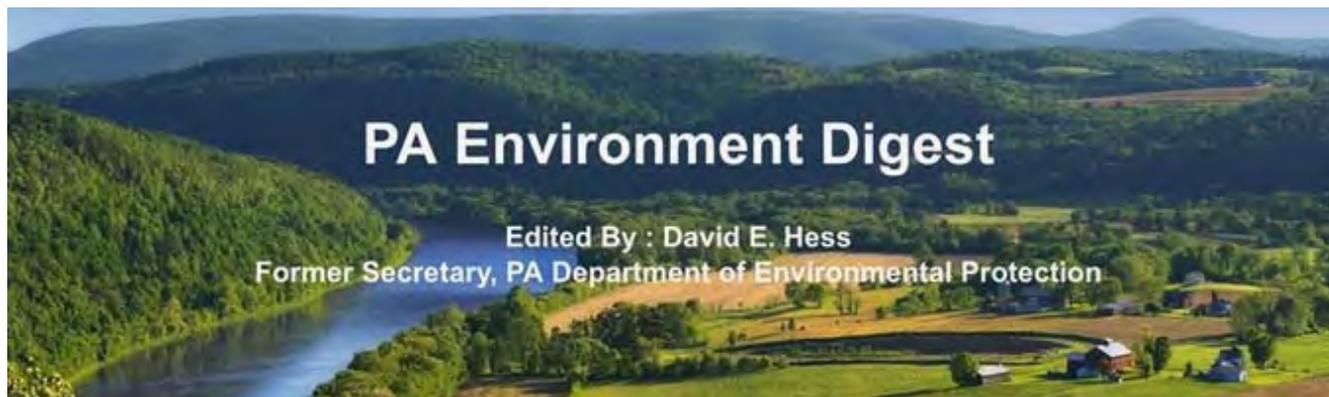
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[Posted Dec. 30, 2016]

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Gov. Wolf Proposes New Budget With Little New For The Environment

Gov. Tom Wolf Tuesday proposed a \$32.3 billion General Fund budget which he said includes \$2 billion in cuts and savings resulting from reinventing and reforming the way the public's money is spent and \$1 billion in new taxes, mostly on business.

The proposal is a slight increase from last year. The FY 2016-17 budget was \$31.52 billion on paper. On January 25 the Independent Fiscal Office projected FY 2017-18 revenue to be \$32.6 billion.



The proposal does include more funding for cleaning up Pennsylvania's rivers and streams flowing into the Chesapeake Bay, but goes back to relying on using the Oil and Gas Lease Fund to pay for DCNR's administrative expenses.

It also proposes a several part plan to fund the continuation of the Hazardous Sites Cleanup Program through several fund transfers.

The proposed budget does not end the downward spiral of funding and staffing at the Department of Environmental Protection.

Here are some highlights--

-- **Chesapeake Bay Watershed Restoration Funding:** The 3 year bond funding proposed by the Governor includes \$15 million per year for-- DEP-- \$8.3 million for farm conservation measures, DCNR-- \$2 million for riparian buffers and Agriculture-- \$4.7 million for erosion and sedimentation plan development) to fund watershed restoration work.

-- **Environmental Stewardship (Growing Greener) Fund Cut:** The Governor's plan for this Fund has several parts--

-- The required transfer of \$35 million in Act 13 drilling impact fees into the Fund is cut to \$25 million;

-- A new proposed \$37 million transfer out of the Fund to DCNR's Oil and Gas Lease Fund to then allow the transfer of funding to the Hazardous Sites Cleanup Fund. The Oil and Gas Lease Fund would resume its role of funding DCNR operations;

-- A proposal to backfill the new money transfer out of the Fund by floating a new \$387.4 million bond issue through the Commonwealth Financing Agency part of which would give the Growing Greener Fund \$52 million in 2017-18, \$53 million in 2018-19 and \$54 million in 2019-20. The current year Growing Greener funding is \$57 million.

-- After 3 years the funding would revert to existing levels since Environmental Stewardship Fund revenue sources would continue to go into the Fund.

DEP Funding

Here's a quick summary of DEP's proposed funding--

-- **General Fund Support Plummetts:** General Fund support for its programs dropped from \$245.6 million in 2003 (14 years ago) to \$148.8 million this year-- a 40 percent drop-- and is significantly below 1994 levels-- \$165.6 million (23 years ago). In FY 2017-18 General Fund support would increase slightly to \$152 million.

DEP has attempted to make up for these cuts by significantly increasing permit review fees and adopting new annual permit administration fees. DEP is also more reliant on federal funds to keep its programs going.

-- **Number Of Staff Plummetts:** The number of staff at DEP is 802 below where it was in 2003-- a 25 percent drop- and 778 below where it was in 1994. DEP has shifted its staff from other programs, particularly water quality protection, to what has become its largest program- - Oil and Gas Management.

-- **Total Budget Retreats To 2002-03 Levels:** In total, DEP's budget is just \$600,000 below where it was in 2003, essentially retreating 15 years. While it is \$198.1 million more than in 1994, that funding is primarily grants given out to others from the Growing Greener and Act 13 drilling fees, for example, and increases in federal funding and permit fee revenue.

-- **Cannot Enforce Minimum Federal Standards:** DEP's Safe Drinking Water, Air Quality, Surface Coal Mine Regulation, Chesapeake Bay, Drinking Water and Clean Water State Revolving Fund and other programs have all been warned they lack sufficient staff resources to enforce minimum federal standards required by primacy and DEP (rather the General Assembly and the Governor) need to address these deficiencies.

-- **Major Sources Of Funding:** Overall, roughly 22 percent of DEP's costs are funded by the General Fund, 28 percent are federal funds and 50 percent come from permit review and administration fees and a small percentage from penalties.

Here's a chart comparing the current and past budget years.

DEP	1994-95	2002-03	2015-16	2017-18
General Fund	165.6	245.6	148.8	152.0
Special	117.0	37.6	0	0

Fund				
Federal	102.4	142.2	193.0	217.9
Other Funds	223.8	302.8	341.7	357.7
Total	492.1	728.3	691.0	727.7
Staff	3,187 (95-96)	3,211	2,689	2,409*

Department of Conservation & Natural Resources

As noted, the FY 2017-18 budget returns to using revenue in the Oil and Gas Lease Fund to support DCNR’s administrative expenses. Here are some highlights--

-- **General Fund Support Plummetts:** General Fund support for DCNR dropped from \$108.8 million in 2003 to a low of \$14.5 million in 2014-15, but was bumped up again in 2016-17 to \$59.9 million, but is down to \$53.7 million. Much of the drop was made up by pulling money from DCNR’s Oil and Gas Lease Fund to support personnel and operating costs, rather than promoting long term conservation objectives.

-- **Number Of Staff Drops:** DCNR staffing levels now-- 1,312-- are below the 2003 complement level of 1,391 and approaching 1994 levels of 1,275.

-- **Total Budget Up, But:** While DCNR’s total budget is up since 2003-- \$47 million in 14 years-- and significantly since 1994, the added funding has come from more grant programs like Growing Greener and Act 13 drilling fees, its own Oil and Gas Lease Fund revenues and an increasing dependence on federal funds.

Here’s a chart comparing the current and past budget years.

DCNR	1994-95	2002-03	2015-16	2017-18
General Fund	73.7	108.8	59.9	53.7
Special Fund	0	119.0	7.0	7.0
Federal	16.7	18.4	41.3	32.5
Other Funds	53.1	76.5	223.7	276.6
Total	143.6	322.9	332.0	369.9
Staff	1,275 (95-	1,391	1,426	1,312*

	96)			
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Notes

- [2015-16 Budget Numbers](#)
- [2002-03 Budget Numbers](#)
- [1995-96 Budget Numbers](#)
- [1995-96 Complement Numbers](#)
- *Complement numbers as of December 1, 2016 (Right-To-Know Requests)

Tax Credits

The proposed budget retains existing environment-related tax credits, and increase others. A quick view--

- \$10 million Resource Enhancement and Protection (REAP) Tax Credit
- \$10 million Coal Refuse Energy and Reclamation Tax Credit
- \$3 million Historic Preservation Incentive Tax Credit
- \$1.5 million Waterfront Development Tax Credit
- No changes to Education Improvement Tax Credit, Entertainment Production Tax Credit

There is a 6.5 percent severance tax on natural gas production raising about \$293.8 million, but there's nothing for the environment. The amount paid in unconventional gas well impact fees can be taken as a credit against the new tax.

Overall Reductions Since 2003

From 2003 through 2015, the General Assembly and several Governors cut or diverted over \$2.4 billion of environmental funding to help balance the budget or to support programs that could not get funding on their own.

[Click Here](#) for Governor's Executive Budget Document (the big book). [Click Here](#) for a copy of the proposed FY 2017-18 budget spreadsheet. [Click Here](#) for Budget Secretary's presentation. [Click Here](#) for Gov. Wolf's budget address. [Click Here](#) for proposed legislation to implement the FY 2017-18 budget.

[Click Here](#) for House Democratic Appropriations Committee summary of the proposal.

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