Carbon Regulation: The Holistic View

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4. Atlantic Coast Pipeline, L.L.C., et al., 161 FERC ¶ 61,042, LaFleur, Comm’r, dissenting.
National Regulatory Conference – May 17, 2019
Carbon Regulation: The Holistic View
Panel outline

1) Carbon tax
   a) Presentation by Bob Inglis
   b) Comparison to carbon regulation (i.e., cap and trade)
   c) ‘Energy Innovation and Carbon Dividend Act of 2018’ H.R.7173
      i. all the revenue from the tax would be distributed back to taxpayers to help offset
         the increased cost of fossil fuels
      ii. the bill would also prohibit the federal government from regulating emissions
         from sectors that pay the carbon tax, unless the taxes aren’t effective at cutting
         greenhouse gases after 10 years.

2) Green New Deal – see attached House Resolution
   a) Defining the Green New Deal
      i. Renewable energy: "meeting 100 percent of the power demand in the United
         States through clean, renewable, and zero-emission energy sources"
      ii. Smart grid: "building or upgrading to energy-efficient, distributed, and 'smart'
         power grids, and working to ensure affordable access to electricity"
      iii. Energy efficiency: "upgrading all existing buildings in the United States and
         building new buildings to achieve maximal energy efficiency, water efficiency,
         safety, affordability, comfort, and durability, including through electrification"
      iv. Transportation: "overhauling transportation systems in the United States to
         eliminate pollution and greenhouse gas emissions from the transportation sector"
as much as is technologically feasible, including through investment in (i) zero-emission vehicle infrastructure and manufacturing; (ii) clean, affordable, and accessible public transportation; and (iii) high-speed rail"

v. *Farming*: “working collaboratively with farmers and ranchers in the United States to remove pollution and greenhouse gas emissions from the agricultural sector as much as is technologically feasible.”

b) Cost benefit

c) Achievability

3) **Federal Carbon Regulation**


i. Building blocks for reducing carbon emissions:
   - heat rate improvements
   - generation shifting to natural gas
   - renewables

ii. United State Supreme Court petitioned for a stay.

iii. Feb. 9, 2016, the Supreme Court stayed the final rule pending litigation.

iv. In Sept. 2016, the parties argued the merits case before the D.C. Circuit.

v. In early 2017, the D.C. Circuit held the West Virginia v. EPA case in abeyance.

vi. The D.C. Circuit has denied motions from intervenors to decide the merits of the rule.

b) Affordable Clean Energy (ACE) rule

i. On August 21, 2018, EPA proposed the rule to replace the Clean Power Plan
ii. It would establish emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants.

iii. Defines the "best system of emission reduction" for GHG emissions from existing power plants as on-site, heat-rate efficiency improvements.

iv. Amends EPA’s New Source Review (NSR) Permitting program to incentivize efficiency improvements at existing power plants; and
   - Note: heat rate improvements may otherwise lead to additional dispatch and an increase in emissions, trigger NSR review.

v. Provides states additional time and flexibility to develop state plans.

vi. Rule expected to be finalized in spring/summer 2019. Litigation to follow.

4) The State Carbon Rule.

   a) Establishes a new regulation to reduce and cap carbon dioxide (CO2) from fossil fuel fired electric power generating facilities by means of an interstate trading program.

   i. The administrative means of accomplishing this will be effected by linking Virginia to RGGI, which is an emissions trading program of Northeastern states.


   iii. The re-proposed regulation includes a base budget of 28 million tons, which will determine, based on a 3% annual reduction, the annual budgets and allocations for future years.
iv. Discussion of job impacts, need for training & reeducation, and costs associated.

v. “Pencils down” budget item -- § 4-5.11 LIMITATIONS ON USE OF STATE FUNDING:

“Notwithstanding any other provision of the Code of Virginia, no expenditures from the general, special, or other nongeneral fund sources from any appropriation by the General Assembly shall be used to support membership or participation in the Regional Greenhouse Gas Initiative (RGGI) until such time as the General Assembly has approved such membership as evidenced by language authorizing such action in the Appropriation Act, with the exception of any expenditures required pursuant to any contract signed prior to the passage of this act by the General Assembly, nor shall any RGGI auction proceeds be used to supplement any appropriation in this act without express General Assembly approval.”

vi. Other budget item: REVENUES GENERATED FROM CLIMATE CHANGE COMPACTS:

“Any revenues generated through participation in any regional climate change compact, including but not limited to the Regional Greenhouse Gas Initiative and the Transportation Climate Initiative, shall be deposited in the general fund and shall not be transferred to any other entity as a condition of such compact nor shall such funds be expended for any projects or programs without the express approval of the General
Assembly as evidenced by an appropriation of such funds in a general Appropriation Act with the exception of expenditures required pursuant to any contracts signed prior to the passage of this act by the General Assembly.”

vii. April 2, 2019 Governor amendment to strike the "pencils down" provision; GA rejected the amendments.

5) Pipelines

a) General issues: the need vs. overcapacity capacity debate.

b) Carbon attributes of gas in context of reduction goals.

c) FERC certificates

i. Discussion of downstream GHG emissions: see attached excerpt of FERC order of Docket No. CP15-554-000 (October 13, 2017).

ii. For ACP, FERC staff estimated 29.96 million tpy CO2e from end-use combustion.

iii. LaFleur dissent (attached): “Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects. In so doing, I am not persuaded that both of these projects as proposed are in the public interest.”

d) Fourth circuit vacated and remanded Forest Service decisions related to the ACP:
i. COWPASTURE RIVER PRESERVATION ASSOCIATION v. FOREST SERVICE, No. 18-1144 (December 13, 2018). En banc court denied petition for rehearing. Petition for writ of certiorari with United States Supreme Court.


f) FERC Notice of Inquiry, Docket No. PL18-1-000 (April 19, 2018), invites comments on whether and how the Commission should revise its approach under its current policy statement on the certification of new natural gas transportation facilities pursuant to the Natural Gas Act ("NGA"). Key issues:

   i. FERC’s methodology for determining whether there is a need for a proposed project, including the Commission’s consideration of precedent agreements and contracts for service as evidence of such need;

   ii. its consideration of the potential exercise of eminent domain and of landowner interests related to a proposed project; and

   iii. its evaluation of the environmental impact of a proposed project.
Matthew L. Gooch  
Partner  
ReisingerGooch, PLC

Matt Gooch is a partner at the firm ReisingerGooch, specializing in energy and environmental law.

Previously, Mr. Gooch was an Assistant Attorney General in the Environmental Section of the Office of the Attorney General of Virginia where he served as counsel to the Air Pollution Control Board and the Department of Environmental Quality's Air and Renewable Energy Division. That representation included the state carbon cap and trade rulemaking and air permits for the Greensville Power Station and the Buckingham Compressor Station. He also represented the Commonwealth in federal court for cases involving EPA rules including the Clean Power Plan.

Mr. Gooch clerked for two years for Justice William C. Mims at the Supreme Court of Virginia. He is a graduate of the University of Richmond's T.C. Williams School of Law and Washington & Lee University.
Bob Inglis – Executive Director
republicEn.org

Bob Inglis was elected to the U.S. Congress in 1992, having never
run for office before. He represented Greenville-Spartanburg, South
Carolina, from 1993-1998, unsuccessfully challenged U.S. Senator
Fritz Hollings in 1998, and then returned to the practice of
commercial real estate law in Greenville, S.C. In 2004, he was re-elected to Congress
and served until losing re-election in the South Carolina Republican primary of
2010.

In 2011, Inglis went full-time into promoting free enterprise action on climate
change and launched the Energy and Enterprise Initiative ("E&EI") at George Mason
University in July 2012. In the fall of 2014, E&EI rebranded to become
republicEn.org.

republicEn is a growing grassroots community of over 5,000 Americans educating
the country about free-enterprise solutions to climate change. The organization is a
501(c)(3) operation hosted at the George Mason University Foundation and
educates, recruits and organizes conservative voices for action on climate change.

For his work on climate change Inglis was given the 2015 John F. Kennedy Profile in
Courage Award. He appears in the film Merchants of Doubt and in the Showtime
series YEARS of Living Dangerously (episodes 3 and 4), and he spoke at
TEDxJacksonville (watch) and TEDxBeaconStreet (watch).

Inglis was a Resident Fellow at Harvard University's Institute of Politics in 2011, a
Visiting Energy Fellow at Duke University's Nicholas School of the Environment in
2012, and Resident Fellow at the University of Chicago's Institute of Politics in 2014.

Inglis grew up in the Lowcountry of South Carolina, went to Duke University for
college, met and married his college sweetheart, graduated from the University of
Virginia School of Law and practiced commercial real estate law in Greenville, S.C.,
before and between his years in Congress. Bob and Mary Anne Inglis have five
children (a son and four daughters). They live on a small farm in northern Greenville
County, South Carolina.

About republicEn.org
republicEn.org is a 501(c)(3) educational initiative based at George Mason University.
We conduct educational programming on the power of free-enterprise solutions to
climate change. Our growing community of over 3,500 “republicEns” is dedicated to
building an #ecoRight movement to apply conservative principles to climate action.
Let's talk about you some!
Based on the evidence, about 97% of climate experts are convinced that human-caused climate change is happening.

Studies into scientific agreement on human-caused global warming:

- Carton 2015: 97%
- Steenhuisen 2014: 93%
- Verheugen 2014: 91%
- Cook 2013: 97%
- Anderegg 2010: 97%
- Doran 2009: 97%
- Kre看过 2004: 100%
Conservative and concerned about climate change?
You’re not alone.

republicEn.org

Energy Optimists Climate Realists
"Caring about climate change makes you a liberal."

"There's nothing we can do about it."

"China and India are going to go right on pumping out CO₂."

"Fixing it will destroy the American economy."

"We need to repent and do with less."

"It's going to take a bigger government to solve it."

You might have heard:
Are you in? Stand with us: republicEn.org/join

Sign up
Postal Code
Email
Last Name
First Name

Stand With Us
Join the republicEn community!
republicEn.org/join

Power by
Energy Optimists Climate Realists

republicEn.org™
Trieste Lockwood  
Senior Policy Advisor  
Virginia Department of Environmental Quality

Trieste Lockwood currently serves the Governor’s administration as the Senior Policy Advisor to the Virginia Department of Environmental Quality. She helps develop state regulations and policies to support renewable energy growth and to increase clean air and water.

Prior to joining the administration, Trieste was the Government Relations lead for the Virginia League of Conservation Voters and she has worked in policy at numerous nonprofit organizations. She recently joined the Board of the Virginia State Bar Environmental Law Section.

Trieste graduated from the Pennsylvania State University with a Bachelor of Arts and a Bachelor of Science. She earned a Juris Doctor and a Law and Public Policy Program Certificate from the Catholic University of America Columbus School of Law. In 2017, she graduated from the Sorensen Institute Political Leadership Program at the University of Virginia.
Virginia’s Proposed Carbon Reduction Regulation  
(Regulation for Emissions Trading, 9-VAC 5 - 140)

II. Background - Governor McAuliffe and Governor Northam administration actions 
   a. Motives for proposed rule 
      i. Mitigating climate change  
         1. Increase in severe weather events and storms 
            a. Sea level rise – Hampton Roads water levels 
            b. Agricultural impacts 
         2. Financial impacts from changing climate 
            a. Could cost at-risk properties billions of dollars 
            b. Energy efficiency needed 
   ii. Protecting public health  
      1. Proven health and economic benefits from cleaner air in states that have cut carbon pollution 
   b. Transitioning to more renewable energy 
      i. Anticipated reductions in carbon pollution 
      ii. Current permitted renewable energy projects and anticipated growth  
      iii. Investments in clean energy jobs 
      iv. Future revenue allocation to generate local and regional economic benefits through energy efficiency, renewable energy, etc.  
   c. Governor McAuliffe’s actions - Executive Order 57 and Executive Directive 11 
      i. Attorney General - official advisory opinion  
         1. State Air Pollution Control Board is legally authorized to regulate greenhouse gases 
      ii. Rule development under existing state authority 
      iii. Department of Environmental Quality outreach 
         1. Wide spread public hearings and presentations 
         2. Over 8,000 public comments 

II. Development of regulation in 2017 
   a. Linking to Regional Greenhouse Gas Initiative (RGGI) 
      i. Carbon cap-and-trade regional, market-based program covering fossil fuel-fired electric generating units in northeast states  
         1. Large carbon pollution reduction seen in RGGI states 
         2. Positive economic and health impacts 
         3. States receive revenue to use for energy efficiency, etc. 
   b. RGGI relationship to Virginia’s regulation 
   c. Covered carbon budget sources
d. Carbon base budget and declining carbon cap
   i. 30% carbon pollution reduction by 2030

e. Allowance auctions
   i. Sources must consign "conditional allowances" to quarterly
      RGGI auction for sale
   ii. Sources must buy enough to be covered

f. Revenue from allowance returned to budget source

g. Percent of base budget set asides

III. Status of proposed regulation
   a. General Assembly perspective
      i. Legislation to join RGGI
         1. Shoreline resiliency
         2. Energy Efficiency
         3. Coal mining communities
      ii. State budget items
      iii. State Corporation Commission
   b. Virginia's State Air Pollution Control Board
      i. Additions and recent re-proposal of rule
      ii. Public hearings and comments
   c. Current regulatory update

VI. Conclusion
Walton Shepherd

Virginia Policy Director,
Climate & Clean Energy Program
Natural Resources Defense Council

As Virginia Policy Director for the Natural Resources Defense Council, Walton Shepherd primarily focuses on Virginia’s clean energy policy. Prior to joining NRDC, he worked on economic transition issues in his native West Virginia. In previous lives, Shepherd worked as a schoolteacher in the Appalachian mountains of Georgia and in book publishing in New York City. Shepherd holds an MBA from the WVU College of Business and Economics and a JD from the West Virginia College of Law.
Brooks is an environmental and natural resources partner at Troutman Sanders, and also managing partner of the firm’s Richmond, Virginia office. Brooks leads the environmental practice in Virginia and helps lead the firm’s national strategic initiatives on energy, water, compliance assurance and enforcement defense. Prior to joining Troutman Sanders in August 2013, Brooks co-chaired the global environmental practice at Hunton & Williams. Brooks is widely recognized for his work, both locally and nationally. He is top ranked by Chambers USA, Best Lawyers, Super Lawyers and the Virginia Legal Elite. He has also been recognized as a Leader in the Law by Virginia Lawyers Weekly and one of the country’s 50 Energy & Environmental Trailblazers by the National Law Journal. Brooks has written and spoken extensively on developments arising under the Clean Water Act and other environmental laws. In addition, he has chaired several national conferences and given more than 300 presentations to audiences across the United States and Canada.

Brooks is also deeply committed to the local community. He serves on nine boards, the Valentine and CultureWorks. He is a founding board member (now emeritus) of the Capital Region Land Conservancy. For six years, Brooks contributed essays and poems on WCVE Public Radio through a commentary series called Rediscovering Richmond. Many of those commentaries have since been compiled into books accompanied by vintage photographs from the Richmond Times-Dispatch, the Dementi family and other local collections.
Natural Gas Pipeline Permitting in the Modern Era: A Tale of Two Decisions

Brooks M. Smith
National Regulatory Conference
May 17, 2019

I. Introduction

A number of large, interstate natural gas transmission pipelines have been proposed up and down the eastern seaboard in recent years, including two that will cross through Virginia: Mountain Valley Pipeline and Atlantic Coast Pipeline. Due to their long, linear paths across varying terrains and watersheds, these projects involve extensive routing constraints, including rivers and streams; wetlands; protected species habitat; archaeological, cultural and architectural resources; conservation easements; source water protection areas; karst terrain; federal and state public lands; and construction safety considerations (especially in steep mountainous terrain).

The required consultations and permitting actions for these kinds of projects take years to complete and have become increasingly more divisive, with highly emotional and sometimes inflammatory opposition, as well as protracted legal appeals of critical-path permits.

By way of example, the Atlantic Coast Pipeline involved more than 30 federal and state permitting actions over a four-year period, culminating in the issuance of a FERC certificate in October 2017. Since then, a number of key permits for the project have been appealed to the Fourth Circuit Court of Appeals (which has original jurisdiction under the Natural Gas Act for all federal permits, as well state water and air permits). Two recent decisions of the court highlight the unique challenges that agencies and applicants face in the permitting process, expose novel impediments to constructing these kinds of large infrastructure projects, especially
on the East Coast, and are bellwethers for a larger national debate on infrastructure that
permeates the legislative, administrative and judicial branches of government.

The first appeal challenged a decision of the Virginia State Water Control Board to issue
a certification for the project under Section 401 of the Clean Water Act, which prohibits such
certification unless the state “determines that there is reasonable assurance that the proposed
activity will not result in a violation of applicable water quality standards.” 40 CFR § 121.24. In
this appeal, the Fourth Circuit affirmed the Water Control Board’s certification, finding that the
Board considered all of the relevant factors and did not make a clear error of judgment. The
decision can be read as a classic example of judicial deference to the expert agency on complex
technical matters within its purview. Appalachian Voices v. State Water Control Bd., 912 F.3d
746 (4th Cir. 2019). And yet it stands in stark contrast to other 401 certification decisions made
in other recent pipeline proceedings, some of which have involved denials that have completely
stopped projects from proceeding,¹ and have so infuriated the Trump Administration that on
April 10, 2019, the President issued a new Executive Order specifically focused on constraining
state authority under Section 401 of the Clean Water Act.²

The second appeal challenged a decision of the U.S. Forest Service to issue permits and
approvals for the project to cross portions of the Monongahela and George Washington National
Forests, including a stretch of the Appalachian National Scenic Trail within the latter. In this
appeal, the Fourth Circuit vacated and remanded those permits and approvals, finding that the
Forest Service erred on multiple fronts and lacked statutory authority to grant a right-of-way

¹ See Constitution Pipeline Co., LLC v. New York State Dep’t of Envl. Conservation, 868 F.3d 87 (2d Cir. 2017)
(upholding New York’s denial of a 401 certification on grounds that the applicant failed to comply with requests for
relevant information nearly three years after its initial application, including two withdrawals and resubmissions);
cert. petition denied by Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Envl. Conservation, 2018 U.S. LEXIS
² Accessible here: https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-
infrastructure-economic-growth/.
across the trail in the first instance. *Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018). The court’s decision could imperil at least 50 existing pipeline crossings of the trail between Georgia and Maine and begs important questions about the interaction and responsibilities of different federal agencies for different federal public lands.

II. **Virginia 401 Certification**

Section 401 of the Clean Water Act is triggered by an application for a federal license or permit, such as a dredge-and-fill permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act. The Corps has developed a streamlined general permit called Nationwide Permit 12 to authorize stream crossings and wetland impacts for linear projects such as natural gas pipelines. And most states, including Virginia, have issued general or “blanket” certifications for projects covered by Nationwide Permit 12.

Inasmuch as Nationwide 12 and the state general certification cover direct stream and wetland impacts, the Virginia Department of Environmental Quality was concerned about potential indirect impacts from “upland” construction activities. As a result, the agency devised additional guidance and information requirements to assess such impacts. After months of additional review, the Department presented, and the Water Control Board approved, upland 401 certifications for both Mountain Valley Pipeline and Atlantic Coast Pipeline, imposing additional conditions beyond those in Nationwide 12 or the state general certification.

Both certifications were challenged by environmental opposition groups. In the Atlantic Coast Pipeline appeal, these groups raised several procedural and substantive arguments, including that the state (1) failed to assess the cumulative impacts of the project on individual watersheds, (2) lacked reasonable assurance because it failed to conduct a separate
“antidegradation” review, and (3) failed to properly assess water quality impacts in karst areas. The court rejected all of these arguments.

With respect to cumulative impacts, the court viewed the upland 401 as supplementing other pieces of the regulatory framework and concluded that the state was free to take action through multiple separate proceedings, as well as to determine the criteria to be used for its certifications. In short, “[g]overnmental agencies can always take additional steps to increase the protection of the environment.”

With respect to reasonable assurance, the court ruled that the state was not obligated to conduct a separate antidegradation review, especially since other required state permits had already been found to meet antidegradation requirements. The court also noted that the project impacts would be temporary in nature, a relevant consideration in the state’s antidegradation policy.

Finally, with respect to karst impacts, the court observed that the upland 401 included five specific requirements related to karst, and even though some of those conditions were prospective in nature, they could still be relied on to demonstrate reasonable assurance.

In each aspect of its opinion, the court applied the traditional, deferential standard of review for agency decisions under the Administrative Procedures Act and concluded that the state did not act arbitrarily or capriciously.

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3 State water quality standards consist of designated uses assigned to waterbodies, water quality criteria (both narrative and numeric) established to protect those uses, and an antidegradation policy designed to prevent degradation of water quality within waterbodies. A state’s antidegradation policy must apply with increasing stringency to existing quality waters, high quality waters, and exceptional quality waters, respectively.

4 Karst geology refers to geological formations of soluble limestone bedrock that creates underground water flow systems where the rocks have dissolved and created sinkholes, caves and underground springs and rivers. The constitution of these areas presents additional environmental considerations for pipeline construction including, sinkhole collapse, sinkhole flooding and associated groundwater contamination.
In context, the Virginia 401 proceeding involved a broader scope and more rigorous review than any comparable pipeline 401 proceeding across the country. In “raising the bar,” the state may have invited opposition from regulated parties like the two pipeline applicants. But after surviving judicial review (with direct support from the applicants), the state process has effectively become the “new normal” for state 401 proceedings involving the direct and indirect impacts from pipeline construction.

In contrast, in other controversial pipeline proceedings, states have ended up denying certification instead of granting certification with conditions. In those proceedings, the battleground issue has been whether the states timely granted their denials, since the statute calls for 401 decisions to be made within one year (or will be deemed waived). See, e.g., New York State Dep’t of Envtl. Conservation v. FERC, 884 F.3d 450 (2d Cir. Mar. 12, 2018) (holding that New York waived its authority to deny a 401 certification by missing the one-year deadline to act on a permit application).

With so much attention on a state’s ability to stall or stymie a FERC-approved pipeline project using Section 401 of the Clean Water Act, it should be no surprise that President Trump just issued an Executive Order in which he directs EPA to immediately review existing federal 401 regulations and procedures with a focus on:

1. the need to promote timely Federal-State cooperation and collaboration;
2. the appropriate scope of water quality reviews;
3. types of conditions that may be appropriate to include in a certification;
4. expectations for reasonable review times for various types of certification requests; and
5. the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.

Equally unsurprising is the fact that many states have opposed recent Administration efforts to reign in their discretion and authority under Section 401. A good and timely law review article
on the growing importance of — and controversies associated with — Section 401 in the specific context of energy infrastructure just came out in the Hastings Environmental Law Journal (attached).

III. Forest Service Approvals

Both Mountain Valley Pipeline and Atlantic Coast Pipeline are routed through discrete portions of national forest land managed by the U.S. Forest Service, thus triggering the need for various Forest Service permits and approvals for construction and operation of the pipelines. Like the Virginia 401 proceeding, the Forest Service developed extensive administrative records for both projects, and for the Atlantic Coast Pipeline, the Forest Service also mandated a major reroute to protect sensitive species habitat. After completing its reviews, the Forest Service granted a special use permit to Atlantic Coast Pipeline, and simultaneously amended certain standards within the underlying Land Resource Management Plan to facilitate construction in exchange for extensive avoidance, minimization and mitigation measures from the project applicant.

These agency decisions were challenged by environmental opposition groups, who raised a number of procedural and substantive challenges, including that the Forest Service (1) misapplied its own regulations under the National Forest Management Act, (2) failed to consider alternative routes that would avoid national forest lands, (3) failed to take a “hard look” at the environmental consequences of the proposed crossing as required by the National Environmental Policy Act, and (4) lacked statutory authority to grant a permit to cross under the Appalachian Trail. The court agreed on all fronts.

With respect to the first three sets of arguments, the court purported to apply the same deferential standard of review for agency actions under the Administrative Procedures Act that it
did in the Virginia 401 appeal but reached a dramatically different outcome. The contrasting "narrative" in this appeal was the court’s perception that the Forest Service was at first quite critical of the proposed project, raising serious concerns about the route and environmental impacts, but then eventually acquiesced without specifically resolving (or at least documenting resolution of) its earlier concerns. The court pointed to specific moments in the four-year consultation history, before and after the Trump Presidency, to infer some kind of "political flip-flop" by the agency. Without question, this kind of searing review of the agency’s record and underlying motive is unusual in the Administrative Procedures Act context but may have been driven – at least in part – by the novelty of the court sitting essentially as a trial court in a case where it had original jurisdiction.\footnote{The concluding paragraph of the court’s opinion is particularly telling: “We trust the United States Forest Service to “speak for the trees, for the trees have no tongues.” Dr. Seuss, The Lorax (1971). A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service’s serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company’s deadlines.”}

As surprising as the court’s decisions on the first three sets of arguments, its decision on the fourth is what has galvanized the most attention and concern. With respect to the crossing of the Appalachian Trail, the court ruled that even though the Forest Service owned and managed the land being crossed, it lacked the authority to grant a permit under the Mineral Leasing Act, 30 U.S.C. § 181 \textit{et seq.} because the trail is “land in the National Park System” and thus excluded from the Act under 30 U.S.C. § 185(b). To reach this conclusion, the court went through the following basic analysis: (1) Congress designated the Secretary of the Interior to administer the Appalachian Trail; (2) the Secretary of the Interior delegated that duty to the National Park Service; (3) the Park Service considered the trail to be a “unit” of the National Park System; and
(4) for all of these reasons, the Appalachian Trail is "land in the National Park System."

_Cowpasture_, 911 F.3d at 179.

The court then proceeded to address a separate argument raised by the Forest Service under the National Trails System Act, 16 U.S.C. §1241 et seq., distinguishing "overall" administration of the trail (with which the Park Service is charged) from administration of the trail's underlying lands (most of which are under the jurisdiction of other agencies, like the Forest Service). Arguably, this portion of the opinion is dicta. In rejecting the Forest Service's argument, the court opined that the Secretary of the Interior (acting through the Park Service) administers the entire Appalachian Trail, even though other federal and state agencies manage components of the trail under their jurisdiction. _Cowpasture_, 911 F.3d at 181. And for this reason, under 16 U.S.C. § 1248(a), only the Secretary of the Interior (not the Secretary of Agriculture) may grant easements and rights-of-way affecting the trail.

Both the government and applicant sought rehearing en banc in _Cowpasture_, arguing that this kind of interpretation (as applied to lands owned and administered by the Forest Service) would violate basic principles of American property law (the government's petition is attached). However, both rehearing petitions were denied.

IV. **Looking Ahead**

_Cowpasture_ is headed to the U.S. Supreme Court on petitions for certiorari that must be filed by May 28, and for which the project applicant has already publicly announced its intentions. But in the meantime, much hangs in the balance. Besides Mountain Valley Pipeline and Atlantic Coast Pipeline, both of which must cross the Appalachian Trail, at least 50 existing natural gas pipelines already cross the trail. And although neither Mountain Valley Pipeline nor
any of the other existing pipelines are directly affected by *Cowpasture*, they may be vulnerable to similar challenges.

Like Atlantic Coast Pipeline, the Virginia 401 for Mountain Valley Pipeline was upheld on appeal, and the Forest Service approvals were vacated and remanded. Both projects also face other permit appeals, which will be heard by the Fourth Circuit in due course. Our country is in critical need of new energy infrastructure, but these proceedings highlight just how hard it is to obtain and defend the permits needed for such infrastructure to be constructed.
Impacts from Downstream Combustion of Project-Transported Natural Gas Pages

Excerpt from pages 118-122

161 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Atlantic Coast Pipeline, LLC

Docket Nos. CP15-554-000
CP15-554-001

Dominion Transmission, Inc.

CP15-555-000

Atlantic Coast Pipeline, LLC

Piedmont Natural Gas Company, Inc.

CP15-556-000

ORDER ISSUING CERTIFICATES

(Issued October 13, 2017)
Moreover, even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any induced production is not reasonably foreseeable. That there may be incentives for producers to locate wells close to pipeline infrastructure does not change the fact that the location, scale, and timing of any additional wells are matters of speculation, particularly regarding their relationship to the proposed projects. As we have previously explained, a broad analysis, based on generalized assumptions rather than reasonably specific information, will not provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to a specific proposal.423

ii. Impacts from Downstream Combustion of Project-Transported Natural Gas

Interveners and commenters also assert that the Commission must consider the impacts on climate change as a result of the end-use consumption of the natural gas transported by the pipeline.

With respect to impacts from GHGs, the final EIS discusses the direct GHG impacts from construction and operation of the projects and other projects that were considered in the Cumulative Impacts analysis, the climate change impacts in the region, and the regulatory structure for GHGs under the Clean Air Act. The final EIS also quantifies GHG emissions from the projects' construction (totaling 1,115,374 tons, CO2-equivalent [CO2e]) and operation (1,347,035 tons per year [tpy] CO2e).424

In addition, Commission staff used an EPA-developed methodology to estimate the downstream GHG emissions resulting from the ultimate use of the gas transported on the ACP and Supply Header projects.425 The final EIS includes a conservative estimate of induced natural gas production is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects”) (citing Pub. Citizen, 541 U.S. at 768).

423 Rockies Express Pipeline LLC, 150 FERC ¶ 61,161 at P 40. See also Sierra Club v DOE, 867 F.3d at 198 (holding that the dividing line between what is reasonable forecasting and speculation is the “usefulness of any new potential information to the decision-making process”).

424 See final EIS at 4-556 through 4-559.

of downstream GHG emissions of 29.96 million tpy CO$_2e$ from end-use combustion.$^{426}$ We note that this estimate represents an upper bound for the amount of end-use combustion that could result from the gas transported by these projects. This is because some of the gas may displace other fuels, which could actually lower total CO$_2e$ emissions. It may also displace gas that otherwise would be transported via different means, resulting in no change in CO$_2e$ emissions.

299. Sierra Club argues that because of the recent decision by the D.C. Circuit Court of Appeals in *Sierra Club v. FERC*$^{427}$ the Commission should reopen the record in this proceeding and issue a supplemental EIS to address GHG emissions and climate impacts. Sierra Club asserts that, although the final EIS did estimate the GHG emissions from combustion, the final EIS erroneously states that those emissions are not “causally connected” to the projects. To support its claim, Sierra Club cites Sabal Trail, in which the court stated that burning gas transported by pipeline “is not just ‘reasonably foreseeable,’ it is the project’s entire purpose.”$^{428}$

300. Sierra Club claims that the final EIS was not only required to quantify the GHG emissions, but also must include a discussion of their significance and any cumulative impacts associated with GHG emissions. Sierra Club argues that the final EIS only provides a cursory analysis of the impact associated with downstream combustion, comparing the emissions to state-wide totals.$^{429}$ Sierra Club also states that the final EIS relies on the assertion that the projects would result in the displacement of some coal, but that this approach was rejected by the court in Sabal Trail because the Commission failed to assess whether total emissions would be reduced or increased, or what the degree of reduction or increase would be.$^{430}$

301. Next, Sierra Club asserts that the final EIS should have used the social cost of carbon methodology to determine how the proposed project’s incremental contribution to

$^{426}$ Total annual emissions of GHG were estimated for ACP and Supply Header projects based on the total capacity of 1.5 billion cubic feet per day for the projects.

$^{427}$ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (Sabal Trail).

$^{428}$ Sabal Trail, 867 F.3d at 1372.

$^{429}$ Sierra Club states that the final EIS states both “we cannot determine whether the projects’ contribution to cumulative impacts on climate change would be significant,” and that “we conclude that ACP and SHP would not significantly contribute to GHG cumulative impacts or climate change.”

$^{430}$ Sabal Trail, 867 F.3d at 1374-75.
GHG emissions would translate into physical effects on the global environment. Sierra Club asserts that the court in Sabal Trail held that the Commission must explain why it did not use the methodology to determine project-specific impacts. 431

302. Last, Sierra Club states that the final EIS’s statement that “the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described” does not adequately address the cumulative impacts of the projects. Sierra Club avers that the final EIS incorrectly downplays the cumulative climate impacts associated with the natural gas infrastructure build out in Pennsylvania, West Virginia, Virginia, North Carolina, and surrounding states, and does not quantify the project’s GHG emissions in combination with these past, present, and reasonably foreseeable gas projects.

303. Sierra Club concludes that as a result of the final EIS’s failure to address these concerns, the Commission did not conduct an informed public process and failed to provide information necessary to assess potential alternatives and mitigation measures.

304. The court in Sabal Trail held that where it is known that the natural gas transported by a project will be used for end-use combustion, the Commission should “estimate[] the amount of power-plant carbon emissions that the pipelines will make possible.” 432 As Sierra Club acknowledges, the final EIS did just that. The fact that the final EIS stated that the emissions were not “causally connected” to the project is immaterial because the information was presented in both the draft and final EIS. 433 Thus, the Commission and the public were fully informed of the potential impacts from the project.

305. In an effort to provide some context to the GHG emissions from the ACP and Supply Header projects, the final EIS included the GHG inventory for Pennsylvania, West Virginia, Virginia, and North Carolina. 434 Table 1 compares the GHG emissions from the project to the GHG Inventories for the four-state region and nationwide. Table 1 includes two scenarios: (1) all natural gas transported by the projects is used for

431 Id. at 1375.
432 Id. at 1371.
433 Final EIS at 4-620; Draft EIS at 4-512 through 4-513.
434 Final EIS at 4-620.
end-use combustion (full burn) and (2) 79 percent of the natural gas transported by project is used for power generation (estimate of actual consumption).\footnote{Atlantic anticipates approximately 79.2 percent of the natural gas transported by project would be used as a fuel to generate electricity for industrial, commercial, and residential uses. \textit{Id.} at 1-3.}

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Estimate of Actual Consumption Emissions</th>
<th>Full Burn Emissions</th>
</tr>
</thead>
<tbody>
<tr>
<td>GHG Volume (Million Metric tons per year)</td>
<td>23.67</td>
<td>29.96</td>
</tr>
<tr>
<td>Percentage of Four State Inventory</td>
<td>4.12</td>
<td>5.2</td>
</tr>
<tr>
<td>Percentage of National Inventory</td>
<td>0.44</td>
<td>0.56</td>
</tr>
</tbody>
</table>

Thus, we estimate that the downstream use of the natural gas to be transported by the projects would potentially increase the GHG emissions inventory in the four-state region by up to 5.2 percent.

306. Moreover, the final EIS acknowledged that the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change.\footnote{\textit{Id.} at 4-620.} However, as the final EIS explained, because the project’s incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects’ contribution to cumulative impacts on climate change would be significant.\footnote{\textit{Id.}}

307. We also disagree with Sierra Club’s assertion that the Commission should have used the social cost of carbon methodology to determine how the proposed projects’ incremental contribution to GHGs would translate into physical effects on the global environment. While we recognize the availability of the social cost of carbon methodology, it is not appropriate for use in any project-level NEPA review for the following reasons: (1) EPA states that “no consensus exists on the appropriate [discount]
rate to use for analyses spanning multiple generations” and consequently, significant variation in output can result; (2) the tool does not measure the actual incremental impacts of a project on the environment; and (3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews. The methodology may be useful for rulemakings or comparing regulatory alternatives using cost-benefit analyses where the same discount rate is consistently applied; however, it is not appropriate for estimating a specific project’s impacts or informing our analysis under NEPA. Moreover, Executive Order 13783, Promoting Energy Independence and Economic Growth, has disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and directed the withdrawal of all technical support documents and instructions regarding the methodology, stating that the documents are “no longer representative of governmental policy.”

m. **Cumulative Impacts**

308. A number of commenters raised issues related to the cumulative impacts of the projects. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions . . . .” The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

309. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.” CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.” Further, a

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439 Depending on the selected discount rate, the tool can project widely different present day cost to avoid future climate change impacts.


441 40 C.F.R. § 1508.7 (2017).

442 Kleppe, 427 U.S. at 413.

LaFLEUR, Commissioner dissenting:

With the increasing abundance of domestic natural gas, the Commission plays a key role in considering applications for the construction of natural gas infrastructure to support the delivery of this important fuel source. Under the Certificate Policy Statement, which sets forth the Commission’s approach to evaluating proposed projects under Section 7 of the Natural Gas Act, the Commission evaluates in each case whether the benefits of the project as proposed by the applicant outweigh adverse effects on existing shippers, other pipelines and their captive customers, landowners, and surrounding communities.¹ For each pipeline I have considered during my time at the Commission, I have tried to carefully apply this standard, evaluating the facts in the record to determine whether, on balance, each individual project is in the public interest.² Today, the Commission is issuing orders that authorize the development of the Mountain Valley Pipeline Project/Equitrans Expansion Project (MVP) and the Atlantic Coast Pipeline Project (ACP). For the reasons set forth herein, I cannot conclude that either of these projects as proposed is in the public interest, and thus, I respectfully dissent.

Deciding whether a project is in the public interest requires a careful balancing of the need for the project and its environmental impacts. In the case of the ACP and MVP

¹ Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), order on clarification, 90 FERC ¶ 61,128, order on clarification, 92 FERC ¶ 61,094 (2000); 15 U.S.C. 717h (Section 7(c) of the Natural Gas Act provides that no natural gas company shall transport natural gas or construct any facilities for such transportation without a certificate of public convenience and necessity.).

projects, my balancing determination was heavily influenced by similarities in their respective routes, impact, and timing. ACP and MVP are proposed to be built in the same region with certain segments located in close geographic proximity. Collectively, they represent approximately 900 miles of new gas pipeline infrastructure through West Virginia, Virginia and North Carolina, and will deliver 3.44 Bcf/d of natural gas to the Southeast. The record demonstrates that these two large projects will have similar, and significant, environmental impacts on the region. Both the ACP and MVP cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Furthermore, the projects traverse many important cultural, historic, and natural resources, including the Appalachian National Scenic Trail and the Blue Ridge Parkway. Both projects appear to be receiving gas from the same location, and both deliver gas that can reach some common destination markets. Moreover, these projects are being developed under similar development schedules, as further evidenced by the Commission acting on them concurrently today.\(^3\) Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects. In so doing, I am not persuaded that both of these projects as proposed are in the public interest.

I am particularly troubled by the approval of these projects because I believe that the records demonstrate that there may be alternative approaches that could provide significant environmental advantages over their construction as proposed. As part of its alternatives analysis, Commission staff requested that ACP evaluate an MVP Merged Systems Alternative that would serve the capacity of both projects.\(^4\) This alternative would largely follow the MVP route to deliver the capacity of both ACP and MVP in a single large diameter pipeline. Commission staff identifies significant environmental advantages of utilizing this alternative. For example, the MVP Merged Systems Alternative would be 173 miles shorter than the cumulative mileage of both projects individually. This alternative would also increase collocation with existing utility rights-of-way, avoid the Monongahela National Forest and the George Washington National Forest, reduce the number of crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway, and reduce the amount of construction in karst topography. Commission staff eliminated this alternative from further consideration because it failed to meet the project’s objectives, in particular that it would “result in a significant delay to the delivery of the 3.44 Bcf/d of natural gas to the proposed customers of both ACP and

\(^3\) ACP and MVP filed their applications for approval pursuant to section 7(c) of the Natural Gas Act on September 18, 2015 and October 23, 2015, respectively.

\(^4\) ACP Final Environmental Impact Statement (FEIS) at 3-6 – 3-9.
MVP due to the significant time for the planning and design that would be necessary to develop a revised project proposal.

Similarly, in the MVP FEIS, Commission staff evaluated a single pipeline alternative to the MVP project that would utilize the proposed ACP to serve MVP’s capacity needs. While this alternative was found to have certain environmental disadvantages, such as the need for additional compression to deliver the additional gas, the EIS acknowledges that this alternative would “essentially eliminate all environmental impacts on resources along the currently proposed MVP route.”

I recognize that the two alternatives described above were eliminated from further consideration because they were deemed not to meet each project’s specific stated goals. However, I believe that these alternatives demonstrate that the regional needs that these pipelines address may be met through alternative approaches that have significantly fewer environmental impacts.

While my dissents rest on my concerns regarding the aggregate environmental impacts of the proposed projects, particularly given the potential availability of environmentally-superior alternatives, I believe that the needs determinations for these projects highlight another issue worthy of further discussion.

The Commission’s policy regarding evaluation of need, and the standard applied in these cases, is that precedent agreements generally are the best evidence for determining market need. When applying this precedent here, I believe there is an important distinction between the needs determinations for ACP and MVP. Both projects provide evidence of precedent agreements to demonstrate that these pipelines will be fully subscribed. ACP also provides specific evidence regarding the end use of the gas to be delivered on its pipeline. ACP estimates that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes, 8.9 percent will serve industrial purposes, and 2.8 percent will serve

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5 Id. at 3-9.

6 Staff also found that this alternative would likely limit the ability to provide additional gas to the projects’ customers, another of the stated goals for the original proposal. Id.

7 MVP FEIS at 3-14.

8 Id.
other purposes such as vehicle fuel. In contrast, "[w]hile Mountain Valley has entered into precedent agreements with two end users ... for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets, and thus, is unknown."  

In my view, it is appropriate for the Commission to consider as a policy matter whether evidence other than precedent agreements should play a larger role in our evaluation regarding the economic need for a proposed pipeline project. I believe that evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination. Indeed, the Certificate Policy Statement established a policy for determining economic need that allowed the applicant to demonstrate need relying on a variety of factors, including "environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure." However, the Commission's implementation of the Certificate Policy Statement has focused more narrowly on the existence of precedent agreements.

I believe that careful consideration of a fuller record could help the Commission better balance environmental issues, including downstream impacts, with the project need and its benefits. I fully realize that a broader consideration of need would be a change in our existing practice, and I would support a generic proceeding to get input from the

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9 ACP FEIS at 1-3.

10 Mountain Valley Pipeline, LLC, Equitrans, L.P., 161 FERC ¶ 61,043 at FN 286 (October 13, 2017).


12 I note that this approach would not necessarily lead to the rejection of more pipeline applications. Rather, it would provide all parties, including certificate applicants, the opportunity to more broadly debate and consider the need for a proposed project. This could, for example, support development of new infrastructure in constrained regions where there may be demand for new capacity, but barriers to the execution of precedent agreements that are so critical under the Commission's current approach. In such situations, evidence of economic need other than precedent agreements might be offered as justification for the pipeline.
regulated community, and those impacted by pipelines, on how the Commission evaluates need.\textsuperscript{13}

I recognize that the Commission’s actions today are the culmination of years of work in the pre-filing, application, and review processes, and I take seriously my decision to dissent. I acknowledge that if the applicants were to adopt an alternative solution, it would require considerable additional work and time. However, the decision before the Commission is simply whether to approve or reject these projects, which will be in place for decades. Given the environmental impacts and possible superior alternatives, approving these two pipeline projects on this record is not a decision I can support.

For these reasons, I respectfully dissent.

Cheryl A. LaFleur  
Commissioner

\textsuperscript{13} See also, National Fuel Gas Supply Corporation, Empire Pipeline, Inc., 158 FERC ¶ 61,145 (Bay, Comm’r, Separate Statement).
Notice of Intended Regulatory Action (NOIRA)
Agency Background Document

<table>
<thead>
<tr>
<th>Agency name</th>
<th>State Air Pollution Control Board</th>
</tr>
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<tbody>
<tr>
<td>Virginia Administrative Code (VAC) citation(s)</td>
<td>Part VII, 9VAC5-140</td>
</tr>
<tr>
<td>Regulation title(s)</td>
<td>Regulation for Emissions Trading</td>
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<tr>
<td>Action title</td>
<td>Establish a new regulation to reduce and cap carbon dioxide (CO₂) from fossil fuel fired electric power generating facilities by means of an interstate trading program (Revision C17)</td>
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<tr>
<td>Date this document prepared</td>
<td>May 22, 2017</td>
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</table>

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the Virginia Register Form, Style, and Procedure Manual.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of the proposed action is to develop a regulation, in accordance with Executive Directive 11 (2017), "Reducing Carbon Dioxide Emissions from Electric Power Facilities and Growing Virginia's Clean Energy Economy," that (i) ensures that Virginia is trading-ready to allow for the use of market-based mechanisms and the trading of carbon dioxide (CO₂) allowances through a multi-state trading program, and (ii) establishes abatement mechanisms that provide for a corresponding level of stringency to CO₂ limits imposed in other states with such limits.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

CO₂ - carbon dioxide
Legal basis

Please identify (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Statutory Authority

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare.

Promulgating Entity

The promulgating entity for this regulation is the State Air Pollution Control Board.

State Requirements

Executive Directive 11 (2017), "Reducing Carbon Dioxide Emissions from the Electric Power Sector and Growing Virginia's Clean Energy Economy," directs the Director of the Department of Environmental Quality, in coordination with the Secretary of Natural Resources, to take the following actions in accordance with the provisions and requirements of Virginia Code § 10.1-1300 et seq., and Virginia Code § 2.2-4000, et seq.:

1. Develop a proposed regulation for the State Air Pollution Control Board’s consideration to abate, control, or limit CO₂ from electric power facilities that:

   a. Includes provisions to ensure that Virginia’s regulation is "trading-ready" to allow for the use of market-based mechanisms and the trading of CO₂ allowances through a multi-state trading program; and

   b. Establishes abatement mechanisms providing for a corresponding level of stringency to limits on CO₂ emissions imposed in other states with such limits.

2. By no later than December 31, 2017, present the proposed regulation to the State Air Pollution Control Board for consideration for approval for public comment in accordance with the Board’s authority pursuant to Virginia Code § 10.1-1308.

Purpose

Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

Governor McAuliffe’s Executive Directive 11 (2017), "Reducing Carbon Dioxide Emissions from the Electric Power Sector and Growing Virginia’s Clean Energy Economy" states:
There is no denying the science and the real-world evidence that climate change threatens the Commonwealth of Virginia, from our homes and businesses to our critical military installations and ports. Rising storm surges and flooding could impact as many as 420,000 properties along Virginia's coast that would require $92 billion of reconstruction costs.

The challenges and costs of bolstering resilience and minimizing risk are too great for any locality to bear alone. While the impacts are significant, there are technologies in the clean energy sector that could help mitigate these impacts while simultaneously creating jobs in twenty-first century industries. The number of solar jobs in Virginia has grown by 65 percent in the last year alone, and Virginia is now the ninth fastest growing solar jobs market in the country. Revenue for clean energy businesses in Virginia has increased from $300 million in 2014 to $1.5 billion in 2016. Through state leadership, Virginia can face the threats of climate change head on and do so in a way that makes clean energy a pillar of our future economic growth and a meaningful part of our energy portfolio.

With these considerations in mind, I issued Executive Order 57 (EO 57) on June 28, 2016. Under EO 57, I directed the Secretary of Natural Resources to convene a work group to study and recommend methods to reduce carbon dioxide emissions from electric power facilities and grow the clean energy economy within existing state authority. The group consisted of the Secretary of Natural Resources, the Secretary of Commerce and Trade, the Director of the Virginia Department of Environmental Quality, the Director of the Virginia Department of Mines, Minerals and Energy, and the Deputy Attorney General for Commerce, Environment, and Technology. This group facilitated extensive stakeholder engagement over the last year, including six in-person meetings and a ninety-day public comment period, before compiling its recommendations and submitting a final report to me on May 12, 2017.

Among the most significant recommendations from the group is the need to develop regulations limiting the total amount of carbon dioxide emitted from electric power facilities. Given the nature of the climate change threat and the promise of clean energy solutions, I agree with this recommendation.

Accordingly, pursuant to the authority vested in me as the Chief Executive Officer of the Commonwealth, and pursuant to Article V of the Constitution and the laws of Virginia, I hereby direct the Director of the Department of Environmental Quality, in coordination with the Secretary of Natural Resources, to take the following actions in accordance with the provisions and requirements of Virginia Code § 10. 1-1300, et seq. and Virginia Code § 2.2-4000, et seq.:

1. Develop a proposed regulation for the State Air Pollution Control Board's consideration to abate, control, or limit carbon dioxide emissions from electric power facilities that:

   a. Includes provisions to ensure that Virginia's regulation is "trading-ready" to allow for the use of market-based mechanisms and the trading of carbon dioxide allowances through a multi-state trading program; and

   b. Establishes abatement mechanisms providing for a corresponding level of stringency to limits on carbon dioxide emissions imposed in other states with such limits.

2. By no later than December 31, 2017, present the proposed regulation to the State Air Pollution Control Board for consideration for approval for public comment in accordance with the Board's authority pursuant to Virginia Code § 10. 1-1308.

Additionally, Executive Order 57 Work Group's "Report and Final Recommendations to the Governor" states that:

3
The Work Group received a number of presentations and written comments from stakeholders advocating for a regulation to limit carbon dioxide from power plants. These comments included recommendations that the Commonwealth join or participate in the Regional Greenhouse Gas Initiative (RGGI) or another regional trading program, that a price be put on carbon, and that Virginia strive to reduce its greenhouse gases by 30 to 40 percent by the year 2030. Although many stakeholders provided feedback focused on specific in-state targets (such as 30x30), the Work Group believes that it is important and necessary that Virginia work through a regional model, like the established and successful RGGI, in order to achieve lower compliance costs and address the interstate nature of the electric grid.

The Work Group recommends that the Governor consider taking action via a regulatory process to establish a 'trading-ready' carbon emissions reduction program for fossil fuel fired electric generating facilities that will enable participation in a broader, multi-state carbon market.

**Substance**

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

The following is a general outline of the likely main elements of the new regulation directed by the Governor.

- CO₂ Budget Trading Program General Provisions (Purpose; Definitions; Measurements, abbreviations and acronyms; Applicability; Standard Requirements; Computation of time; Severability)
- Authorized Account Representative for CO₂ Budget Sources (Authorization and responsibilities of the CO₂ authorized account representative; Alternate CO₂ authorized account representative; Changing the CO₂ authorized account representatives and the alternate CO₂ authorized account representative; changes in the owner as and operators; Account certificate of representation; Objections concerning the CO₂ authorized account representative; Delegation by CO₂ authorized account representative and alternate CO₂ authorized account representative)
- Permits (General CO₂ budget permit requirements; Submission of CO₂ budget permit applications; Information requirements for CO₂ budget permit applications)
- Compliance Certification (Compliance certification report; Agency's action on compliance certifications)
- CO₂ Allowance Allocations (Virginia CO₂ trading program base budget; Timing requirements for CO₂ allowance allocations; CO₂ allowance allocations)
- CO₂ Allowance Tracking System (CO₂ Allowance Tracking System accounts; Establishment of accounts; CO₂ Allowance Tracking System responsibilities of CO₂ authorized account representative; Recordation of CO₂ allowance allocations; Compliance; Banking; Account error; Closing of general accounts)
- CO₂ Allowance Transfers (Submission of CO₂ allowance transfers; Recordation; Notification)
- Monitoring and Reporting (General requirements; Initial certification and recertification procedures; Out-of-control periods; Notifications; Recordkeeping and reporting; Petitions; CO₂ budget units that co-fire eligible biomass; Additional requirements to provide output data)
- CO₂ Emissions Offset Projects (Purpose, Definitions, General requirements, Application process, CO₂ emissions offset project standards, Accreditation of independent verifiers, Award and Recordation of CO₂ offset allowances)

**Alternatives**

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Alternatives to the proposal will be considered by the board. It has been tentatively determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulatory action. The alternatives being considered, along with the reasoning by which any of the alternatives have been rejected, are discussed below.

1. Adopt the regulations to satisfy the provisions of Executive Directive 11 (2017). This option is being selected because it meets the stated purpose of the regulatory action: to develop a regulation that (i) ensures that Virginia is trading-ready to allow for the use of market-based mechanisms and the trading of carbon dioxide (CO₂) allowances through a multi-state trading program, and (ii) establishes abatement mechanisms that provide for a corresponding level of stringency to CO₂ limits imposed in other states with such limits.

2. Make alternative regulatory changes to those required by Executive Directive 11 (2017). This option is not being selected because it would not meet the stated purpose of the regulatory action.

3. Take no action to adopt the regulation. This option is not being selected because it would not satisfy the provisions of Executive Directive 11 (2017).

**Public participation**

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: (1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _______; (2) a panel will not be used; or (3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: (1) ideas to be considered in the development of this proposal; (2) the costs and benefits of the alternatives stated in this background document or other alternatives; (3) potential impacts of the regulation; and, (4) impacts of the regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

The agency is seeking specific comment on how credits under a trading program should be allocated.
Anyone wishing to submit written comments may do so by mail, email or fax to Karen G. Sabasteanski, Department of Environmental Quality, P.O. Box 1105, Richmond VA 23218, phone 804-698-4426, fax 804-698-4510, email karen.sabasteanski@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall website (http://www.townhall.virginia.gov). Written comments must include the name and address of the commenter. In order to be considered, comments must be received before midnight on the last day of the public comment period.

Public hearing at proposed stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (http://www.townhall.virginia.gov) and on the Commonwealth Calendar website (https://www.virginia.gov/connect/commonwealth-calendar).

Regulatory panel

*Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.*

The Board is using a panel to develop a proposal. The primary function of the panel is to develop a recommended regulation for Department consideration through the collaborative approach of regulatory negotiation and consensus. Notification of the composition of the panel will be sent to all panel members. Panel meetings are open to the public and will be announced via the Department website (http://deq.virginia.gov/Programs/Air/PublicNotices/AirRegulations.aspx) and on the Virginia Regulatory Town Hall website (http://www.townhall.virginia.gov).

Family Impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not anticipated that the proposal will have a direct impact on families.

REGIDEVIC17-01PD
NRDC Comments on VA DEQ’s Proposed Regulation for Emissions Trading (9VAC5 Chapter 140, Rev. C17)

April 9, 2018
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NRDC Comments on VA DEQ’s Proposed Carbon Regulation

On behalf of our over 12,000 members across the Commonwealth, the Natural Resources Defense Council (NRDC) strongly supports the promulgation of the Department of Environmental Quality’s (DEQ) regulatory action, “Regulation for Emissions Trading” (9VAC5 Chapter 140, Rev. C17).

Just as important, NRDC also thanks the DEQ for its hard and ongoing work on this important issue on behalf of Commonwealth citizens.

The Threat of Climate Change to the Virginia Economy

The anticipated adverse impacts of climate change on Virginia’s economy are well documented. Rising sea levels and hotter summers come at significant cost. By 2030, projections estimate that $139M in Virginia property will lie below the mean sea level, and $17.4B below the mean high tide line. Additional climate-related damage from coastal storms could easily reach $135M by the 2030’s. By 2050, those numbers grow, with $306M below the mean sea level, and over $19B below the mean high-tide line. Additional storm damage could easily exceed $500M by 2050.

Metropolitan areas such as Hampton, Virginia Beach, and Norfolk – home to the largest US naval base – will bear a disproportionate share of those costs.²

By 2050, the Commonwealth’s commercial and residential sectors are projected to spend 8% more on electricity to keep cool during hot summers, at an estimated cost of $815M per year. Labor productivity, especially in high-risk sectors such as construction, manufacturing, agriculture, mining, and transportation, is projected to decline under such conditions – at a cost of $1.1B per year by mid-century. Extreme heat is also likely to impact crop yields for key agricultural commodities in Virginia: by the 2050’s, corn yields are likely to decline by

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² Id. at 97.
approximately 33%, while soybean yields fall roughly 16%.³

These projections demonstrate the economic costs of inaction. Rising seas levels will impact military facilities, a critical part of Virginia’s economy. Extreme heat will cost farmers both in lost productivity and shrinking yields, and small businesses will see revenues shrink as rising energy costs cut into earnings.

_The Threat of Climate Change to Virginians’ Human Health_

The dangers to Virginians’ human health of dumping into our atmosphere unlimited amounts of carbon dioxide pollution, the main driver of already-costly climate change, is also well-documented, including in DEQ’s “Regulation for Emissions Trading” NOIRA.

By the 2030’s, Virginia is likely to see upwards of 20 days per year with heat in excess of 95-degrees, a three-fold increase from 2015. By 2050, the count could reach 33 days per year.⁴ Such extreme heat results in not just rising energy expenditures, lost labor productivity, and depressed crop yields as discussed above.

This global warming is also bad for human health, mortality, and quality of life.

Excess heat increases death risk by 2.5% for every 1°F increase in heat waves, and average daily summer highs have already increased 3° since the 1960s. These dangers are real and already recorded: Virginia emergency departments and urgent care clinics recorded 498 heat-related visits over 10 days just last summer.⁵

In addition to heat-illness risks, increasing temperatures can also make Virginia shellfish and fish more dangerous to consume. As the Chesapeake Bay warms, both the _vibrio vulnificus_ and _V. parahaemolyticus_ bacteria can be more likely transmitted from seafood to humans.⁶

Global warming is also driving longer and more severe allergy seasons. In Richmond, 2017 saw the fourth highest tree pollen count recorded by Allergy Partners of Richmond, the increases of which also exacerbate asthma.⁷

Tick and mosquito-borne illness are also increasing in Virginia along with the temperatures of a warmed planet. Ticks carrying Lyme disease are rapidly spreading across a warming Virginia, increasing from only 12 Virginia counties to 72 counties over the past two decades. And the

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³ _Id._
⁴ _Id._
⁵ NRDC, “Climate Change and Health in Virginia,” April 2018, at 1.
⁶ _Id._ at 3.
⁷ _Id._ at 4.
annual number of West Nile virus cases in Virginia are expected to triple between 2036 and 2049.  

Because of these and other immediate and growing health and economic dangers discussed above, Virginia law unsurprisingly clearly encompasses carbon dioxide in its definition of air pollution: “Air pollution means the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people of life or property.”

Furthermore, limiting and reducing carbon pollution would also achieve the Air Pollution Control Board’s charge to prevent harm to “public health, safety or welfare; the health of animal or plant life; [and] property, whether . . . recreational, commercial, industrial, [or] agricultural.”

Because of the health and economic dangers that unmitigated carbon pollution poses to Virginia’s human health, its economy, and property, we therefore broadly support the DEQ’s proposed rule to limit carbon dioxide in the Commonwealth, using the same means already proven effective in 1 in 5 states in the country: a sensible, achievable limit on electric sector carbon pollution, with subsequent annual reductions.

The below comments are intended to improve the functionality and effectiveness of the strong framework of the proposed rule.

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8 Id. at 5.
11 9 VAC 10.
Section 1: Recommendations for Improving the Economic, Climate, and Health Benefits of the Proposed Rule

Section 1 outlines NRDC’s seven recommendations for improving the proposed rule. Each of these recommendations is focused on improving the proposed rule to ensure that the final regulation:

1) Maximizes Virginia’s mitigation of climate change through meaningful but achievable carbon pollution reductions, by starting from a realistic 2020 baseline budget that is not arbitrarily high;

2) Maximizes energy sector resiliency and economic benefits through a sensible allowance allocation mechanism; and

3) Treats all electric sector carbon emitters equally, thereby eliminating market distortions while also minimizing electricity cost increases for Virginia families and businesses.

Sections 2 through 4 address some issues in greater depth, specifically:

- Section 2 (page 12)—Baseline: NRDC’s updated IFM modeling illustrates that a 2020 baseline budget of 33 million is unjustifiably high, and that 28 million tons is more accurate. This section also outlines the environmental, economic, and human health benefits of capping and reducing Virginia’s carbon pollution;

- Section 3 (page 18)—Allowance Allocation: The best allowance allocation option to ensure consumer benefits is to allocate to electric distribution companies, co-ops, and municipals; and

- Section 4 (page 22)—Treatment of Woody-biomass: There is an environmental and economic benefit to include woody biomass generation-related carbon pollution within the proposed program and its associated annual carbon budgets.

Each of the seven recommendations outlined below in Section 1—if incorporated into the final regulation—will drive economic benefits and mitigate climate change in the most efficient and equitable means currently available to the DEQ.
NRDC Comments on Proposed Emissions Trading Regulation

Recommendation 1: Limit Emissions Starting at a 2020 Baseline of 28 Million Tons

With 2017 emissions already well below 33 million tons, the proposed rule’s 33 million-ton 2020 baseline is too high.

*NRDC recommends that the final rule instead set a 2020 emissions baseline of 28.0 million tons.*

In order to determine the state’s business-as-usual emissions and an appropriate annual reduction trajectory, the DEQ should review reputable data and projections to establish a baseline that is not artificially high.

To do so, the DEQ should rely on transparent, up-to-date estimates of what Virginia’s business-as-usual emissions will likely be in 2020. Similarly, the DEQ should avoid industry-derived emissions projections that appear to be set unrealistically high, such as Dominion Energy’s most recent Integrated Resource Plan, of 2017. DEQ’s own proposal of either 33 or 34 million tons in 2020 is similarly flawed.

An incorrectly high year-1 baseline budget would significantly undermine the entirety of the program and jeopardize Virginia’s ability to access the marked benefits of linking with the larger RGGI market.

To set an appropriate baseline, the DEQ should instead rely on and consider multiple up-to-date projections. One of these should be the federal EIA’s Annual Energy Outlook (AEO) from early 2018, which shows emissions decreasing in the Virginia-Carolina region by 27% between 2017 and 2020.14

NRDC’s own IPM modeling, conducted by ICF, also predicts similar emissions declines in Virginia between 2017 and 2020, a decline that continues the year-over-year reduction between 2016 and 2017. Preliminary results from NRDC’s updated IPM modeling for Virginia (utilizing an updated 2018 data set) projects the state’s power sector emissions to be 28.0 million short tons in 2020.

This more up-to-date modeling accurately reflects the reality of today’s power sector in Virginia. Not only are additional coal retirements already planned in the Commonwealth, but renewable energy installations – most notably solar energy – are increasing in Virginia, concurrent with recently lower – and sometimes even declining - demand growth across

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the state in 2017. Combined, the three factors of lower in-state electricity demand, persistently declining gas prices, and growing low-cost renewable energy resources mean the state’s emissions will be well under 33 million tons in 2020. As discussed in Section 2 below, NRDC’s own IPM modeling supports the adoption of a 28 million ton baseline as a likely-to-occur starting point in 2020.

As also discussed further in Section 2 below, a sufficiently ambitious program will drive significant economic and health benefits, including lower energy bills and rates, as well as improved public health resulting from cuts in co-pollutants like NOx and SOx.

Recommendation 2: Allowance Allocations Must Deliver Consumer Benefit, Avoid Generator Windfalls, and be Monitored by a Stakeholder Advisory Group

As discussed further in Section 3 below, the DEQ must ensure the economic efficiency of the program by directing allowance value toward consumer benefit, rather than toward utility or generator windfall profits.

Therefore, the DEQ’s proposed rule is correct to avoid imposing costs on Virginia families and businesses by awarding allowances directly to emitting generators for free. Doing so would allow the ultimate price of those allowances to be borne by Virginia families and businesses in the form of higher wholesale electricity costs, while providing an unreasonable windfall profit to generators.

NRDC therefore supports DEQ’s proposal to utilize a consignment auction, as that mechanism provides an opportunity to recapture revenue that would otherwise be a windfall to generators. Indeed, these carbon allowances are inherently a “public good,” and thus their value must be captured and utilized on behalf of all Virginians—not given away to polluters.

However, the DEQ should amend the proposed rule, specifically at 9VAC5-140-6215, to allocate allowances directly to distribution companies, based on pro rata share of load served, to ensure that allowance revenue goes directly to customer benefits.

In order to ensure market efficiency and a transparent, undistorted allowance price that levels the playing field for all generators, achieve maximum economic efficiency for Virginia citizens through allowance allocation, and align with the Grid Security and Modernization Act of 2018, a standing Emissions Trading Stakeholder Advisory Group (SAG) should also be established to monitor the implementation and performance of the final rule. The SAG’s purpose would be to ensure the overall program and use of revenue is functioning transparently, efficiently, and effectively.

The SAG should be comprised of representatives of the Attorney General’s Rate Counsel, low-

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15 See, e.g., EIA Electricity Sales Data for 2017, available at https://www.eia.gov/electricity/data/eia861m/.
income consumer advocates, NGOs, SCC Staff, the Department of Mines, Minerals, and Energy, Environmental Justice communities, and the regulated community.

**Recommendation 3: Net Carbon Emissions from Forest-derived Biomass Should be Covered by the Regulation**

NRDC recognizes that there are many forms of biomass fuel currently used or under consideration in Virginia. These include landfill gas recovery, brewery wastes, agricultural plant residues and animal wastes, forest harvest residues, energy crops, whole trees and boles, and industrial/mill waste, among others. Many of these feedstocks can generate carbon benefits compared with fossil fuels, while others can have significant negative carbon impacts.

In these comments, we focus entirely on “forest-derived” biomass, by which we mean a biomass fuel that originates in a forest. We focus on three categories of forest-derived feedstocks used to produce electricity: (i) whole trees, boles, and other large diameter wood that would otherwise be used in merchantable end uses; (ii) harvest residues including tops, limbs, and slash that would otherwise be discarded or left to decay in the forest; and (iii) industrial and mill waste produced at a forest products processing facility that would otherwise be burned.

We support DEQ’s draft proposal to require co-fired facilities to hold allowances for the carbon dioxide (CO$_2$) they emit, whether those emissions be from forest-derived biomass or fossil fuels. We urge Virginia to issue a final rule that covers the net carbon emissions from all utility sector biomass power facilities larger than 25 megawatts (MW). Specifically, the Commonwealth must account for the net emissions from forest-derived biomass combustion from power sector facilities greater than 25 MW, including both dedicated biomass-burning units and those that cofire with forest-derived biomass, and cover these facilities under the cap.

In Section 4, we describe a straightforward and easily implemented approach for the Commonwealth to determine the net emissions from these three categories of forest-derived biomass feedstocks. Based on this approach, we recommend that Virginia regulate net emissions from forest-derived biomass in the following manner:

(i) CO$_2$ emissions from onsite waste that would otherwise be burned in an industrial setting without energy recovery will require zero allowances for each ton of carbon emitted;

(ii) CO$_2$ emissions from forest-derived residues that would otherwise decay will require approximately 0.69 allowances for each ton of carbon emitted;

(iii) CO$_2$ emissions from whole trees, boles, and large diameter materials that would otherwise have a merchantable end-use, including pulp, paper, fiberboard,
engineered wood or lumber will require one allowance for each ton of carbon emitted.

Virginia should also require EGUs to furnish to DEQ an estimate of the proportion of their total forest-derived feedstocks annually that fall into these categories. Category (i) industrial wastes should only be certified by industrial facilities. In the event an EGU uses a de minimis amount of Category (iii) merchantable tree feedstocks, their total emissions can be treated as Category (ii) forest harvest residues.

Finally, Virginia must reject “sustainable forestry” as a proxy for carbon impacts of forest-derived biomass. “Sustainability,” however defined, is not a measure of carbon impacts. The designation says very little, if anything, about the amount of CO₂ emitted by a given biomass source or the net effect of those emissions on atmospheric CO₂ concentrations over time.

**Recommendation 4: The DEQ Should Monitor Potential Shifting of Emissions Out-of-State**

The DEQ should work to ensure the integrity of the program is not eroded by emissions leakage, which is the increase of emissions from power plants outside Virginia to supply in-state load due to a carbon price on in-state generation, beyond current business-as-usual levels of imports absent a Virginia carbon price.

The DEQ can do so by 1). designing an economically efficient program with minimal market distortions; 2). maximizing consumer benefits through efficiency investments by allocating allowances to distribution companies; and 3). driving significant levels of in-state renewable energy development. These will all deliver least-cost carbon reductions and mitigate the impact of carbon prices on carbon-based power flows across state lines.

Emissions leakage can be minimized through the cost-effective development of Virginia’s largely untapped, clean resources like solar and energy efficiency in buildings.

To ensure the program does not inadvertently lead to increased fossil-based electricity imports from out-of-state, the DEQ should establish an annual program review process for the duration of the program, to assess whether interstate power flows are shifting as a result of the carbon price. (Importantly, a modest price on carbon is but one of many variables that can influence interstate power flows; any such analysis would need to account for those in a comprehensive manner to draw attribution conclusions.)

This work could be incorporated into the Emissions Trading SAG. The RGGI states have already built in such emissions monitoring and reporting that assesses leakage, and we urge Virginia to do so as well.¹⁶

Recommendation 5: The Proposed Rule is Correct to Minimize Administrative Cost by Relying on RGGI’s Allowance Tracking and Trading Infrastructure

NRDC supports the DEQ’s proposal to ensure allowances comport with, and are fully tradable on, RGGI’s pre-existing platform, due to its low administrative costs, third party market monitor reports, and robust cybersecurity.

Recommendation 6: Ongoing Review of the Program Should Include an Assessment of Benefits Delivered to Environmental Justice Communities

Climate change is inherently an environmental justice issue, as coastal communities and low-income communities ultimately bear the worst brunt of its impact. Therefore, the program should make significant cuts to carbon dioxide and ensure the consumer and energy efficiency benefits flow to the low-income citizens most impacted not just by climate change, but energy costs as well.

Additionally, because carbon dioxide is not harmful in locally-higher concentrations, and there do not appear to be specific Virginia plants in proximity to at-risk communities whose capacity factors will increase under a carbon program, a carbon market in Virginia appears unlikely to create “hot spots” of pollution in frontline communities. And as the cap for carbon emissions is lowered, it can also create additional benefits of further reducing associated co-pollutants that cause health problems in communities close to their source.

But to ensure this is the case over the course of the program, the regular program review recommended below should also incorporate an annual environmental justice review, including tracking and reporting on carbon and co-pollutant emissions trends over time from the state’s power plant fleet (and in communities in proximity to those plants).

Recommendation 7: The Regulation’s Design and Emissions Impact Must be Reviewed at Regular Intervals

As RGGI has demonstrated, it is good practice to build in regular program reviews to ensure the framework is working effectively. Similarly, as Virginia adopts and implements its program, it may need to be adjusted over time, to ensure it is functioning efficiently and is driving significant and additional carbon pollution reductions. Program reviews can ensure that the cap is set (and updated) at the correct level to drive carbon emissions reductions well beyond BAU, while also maximizing the development of a clean energy economy in the Commonwealth. Virginia’s program should thus undergo internal review on a regular basis, and this must include stakeholder and public input, as RGGI has done.

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The first review should occur in 2020, to review 2019 emissions and ensure the 2020 budget in the final rule reflects the reality of Virginia's power sector emissions. Additionally, as Virginia pursues linking with RGGI, it should integrate itself directly into that program's review processes.

Mitigating climate change in the manner as outlined in the proposed rule, by capping and annually reducing carbon pollution and linking to the already-successful RGGI program, will drive significant additional economic and health benefits in the Commonwealth (as shown below).

Those benefits are not limited to direct economic benefits in the form of lower electricity bills, and indirect economic benefits in the form of increased public health. The state will also benefit from increased energy sector diversity and from job growth associated with finally tapping into Virginia’s considerable renewable energy and energy efficiency potential in a meaningful way.

The state’s policy of increasing its energy independence can also be advanced through this regulation, by prioritizing and supporting the development of native Virginia resources — energy efficiency, solar, and wind energy — and sending fewer dollars out-of-state to import carbon-intensive gas.

However, to fully realize the rule’s environmental and economic benefits for the Commonwealth, the DEQ must first set both a meaningful and sufficiently stringent initial baseline budget. The proposed regulation fails to do this, and we urge DEQ to correct that flaw in the final regulation.

The 2020 Baseline Budget is Arbitrarily High and Must Be Revised Downward

The proposed rule’s initial 2020 baseline budget is set arbitrarily high, as it does not reflect the reality of a Virginia power sector that already emits less than 33 million tons annually. For the program’s stringency and success, NRDC recommends that the baseline be lowered to better reflect the expected energy market conditions and their impact on Virginia’s near-term electricity mix and system.

According to the latest EPA data, Virginia’s 2017 power-related emissions were 32.4 million, down 11 percent from 2016 levels. Power sector emissions are expected to continue declining, as the state, its residents, and its utilities continue to transition to cleaner, more efficient energy sources, driven by fundamental power market conditions, state policies, and customer choices.

It is true that the additional gas generation capacity of Dominion’s under-construction Greensville NGCC plant will emit significant carbon pollution. However, as reflected by federal projections and NRDC’s own modelling, carbon pollution from that plant will be less than the

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18 U.S. EPA, Data from EPA’s Continuous Emissions Monitoring System (CEMS), data query tool available at https://ampd.epa.gov/ampd/, accessed March 2018
net emissions reductions in Virginia attributable to reduced utilization of the state’s coal fleet.

Indeed, federal projections from the U.S. Energy Information Administration (EIA), for example, now anticipate a 27% decrease in power sector emissions between 2017 and 2020 in the combined Virginia-Carolina region. This finding of significantly decreasing emissions corresponds with NRDC’s own recently updated 2018 modeling.

NRDC retained ICF to conduct modeling with ICF’s Integrated Planning Model (IPM®). This modeling is a continuation of and update to NRDC’s prior modeling efforts with ICF, including for the federal Clean Power Plan and the VA DEQ’s NOIRA comment period. This recent modeling incorporates more up-to-date assumptions, all chosen by NRDC. (See Table 1 below.)

In NRDC’s initial comments to the VA DEQ in 2017, NRDC presented IPM modeling results based on government sources and market data as of Spring 2017. In that 2017 modeling effort, NRDC provided modeling of both “business-as-usual” and carbon cap policy scenarios. In those comments, NRDC suggested a 2020 baseline of 30-32 million tons, based on the results of this 2017 modeling effort.

*Amid rapidly changing market conditions, that 30-32 million ton baseline recommendation is now out-of-date, and should be lower based on updated modeling.*

To reflect accelerating power sector shifts, NRDC now recommends a revised baseline of 28 million tons, based on our preliminary 2018 modeling results. The revision downward is a function of updated reference case assumptions, including lower gas prices and lower demand projections in U.S. EIA’s Annual Energy Outlook (AEO) 2018, as compared to AEO 2017. (See Figure 1 below.)

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20 ICF’s Integrated Planning Model (IPM®) is a detailed model of the electric power system that is used routinely by the electricity industry and regulators, including RGGI, to assess the effects of environmental regulations and policy. IPM® determines the most cost-effective pathway for the electricity industry, subject to reliability requirements and environmental constraints, and economically builds & retires new electricity capacity. The outputs of IPM® modeling include carbon and other pollutants, wholesale electricity prices, natural gas prices, retail bills, electricity generation by fuel type, & capacity retirements & builds. The modeling presented here reflect a NRDC analysis conducted by ICF. All assumptions and policy scenarios were developed by NRDC.

The downward emissions revision expressed in the figure above is generally consistent with EIA’s 2018 Annual Energy Outlook.

Based on federal projections and NRDC’s own updated modelling, therefore, the proposed rule’s 33 million-ton 2020 budget is out of date and therefore arbitrary for the purposes of finalizing the rule, and should be revised to 28.0 million tons.22

The proposed Emissions Containment Reserve (ECR) is an appropriate means for addressing lower than expected emissions, and NRDC supports DEQ’s inclusion of that mechanism. However, the ECR is not intended to close an emissions “hot air” gap of up to 5 million annual tons, between the baseline budget as proposed and the expected emissions in 2020. Rather, the ECR is intended to address outcomes in which emissions are lower than anticipated due to unforeseen circumstances.

Therefore, the DEQ should not rely on the ECR as a self-correcting tool, and instead must revise its proposed 2020 budget downward to 28.0 million tons—in line with the most up-to-date projections of what emissions are likely to be in the first year of the program.

22 A baseline overallocated by 5 million tons of “hot air” would erase nearly half of the net reductions the state would otherwise achieve through 2030 if it instead adopted a more accurate baseline of 28 million tons.
### Table 1: NRDC’s Modeling Assumptions

<table>
<thead>
<tr>
<th>Element</th>
<th>2017 Reference Case</th>
<th>2018 Reference Case</th>
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<tr>
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<td>Reflects announcements and state policies as of Q2 2017</td>
<td>Reflects announcements and state policies as of Q1 2018</td>
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<td>and State Policies</td>
<td>--------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
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<td>Demand</td>
<td>AEO 2017 Reference Case without the Clean Power Plan</td>
<td>AEO 2018 Reference Case without the Clean Power Plan</td>
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<td>Natural Gas Prices</td>
<td>Wind and solar costs from NREL’S 2017 Annual Technology Baseline; all other costs</td>
<td>Wind and solar costs from NREL’S 2017 Annual Technology Baseline; all other costs</td>
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<td></td>
<td>from AEO 2017. ITC/PTC extension included in renewable energy costs.</td>
<td>from AEO 2018. ITC/PTC extension and solar tariffs included in renewable energy costs</td>
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<td>Technology Costs</td>
<td>--------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
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<td>Nuclear</td>
<td>60 year life (no extension to 80 years allowed)</td>
<td>Extension to 80 year life allowed</td>
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<tr>
<td>Wind</td>
<td>Wind limit in VA (only 750 MW of new wind can be built).</td>
<td>Wind limit in VA (only 750 MW of new wind can be built); Model breaks reported wind</td>
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<tr>
<td></td>
<td>--------------------------------------------------------------------------------------</td>
<td>down into offshore and onshore wind</td>
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<td>Only savings included in AEO2018 baseline (e.g. no incremental savings added)</td>
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<td>Battery Storage</td>
<td>No Ability to Model Storage</td>
<td>Ability to Model and Economically Build 4hr Battery Storage</td>
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<td>Carbon Cap</td>
<td>No cap on Virginia emissions</td>
<td>No cap on Virginia emissions</td>
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<tr>
<td>RGGI Participation</td>
<td>NJ joins RGGI in 2020 (modeled as emissions capped as part of RGGI)</td>
<td>NJ joins RGGI in 2020 (modeled as emissions capped as part of RGGI)</td>
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<tr>
<td>RGGI Emissions Trajectory</td>
<td>2.5% annual decline in RGGI Cap from 2020-2030; cap held constant post-2030</td>
<td>RGGI’s 2020-2030 new model rule</td>
</tr>
</tbody>
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NRDC Comments on Proposed Emissions Trading Regulation

NRDC’s Updated Modelling Shows Economic and Health Benefits in Virginia under the Proposed Rule, Similar to Those Already Experienced in RGGI States.

Limiting power sector carbon pollution can be good for Virginia’s economy and the health of its residents.

In addition to a 2018 “business-as-usual” baseline case with no carbon limit, ICF also completed a preliminary case in which Virginia emissions are included in the RGGI program starting in 2020. In this case, Virginia’s cap was based on the VA DEQ’s proposed baseline of 33 million tons with an annual reduction target matching RGGI’s 2020-2030 new model rule.

This carbon policy modeling shows that Virginia can significantly reduce carbon emissions without hampering energy affordability. In addition, as discussed in Section 3, a well-designed program and allowance allocation process can drive significant economic, energy security, and public health benefits for families and businesses in the Commonwealth.

Retail Rates and Bills Are Not Negatively Impacted by Linking to RGGI

Reflecting the economic competitiveness of renewables and other lower-emitting resources, NRDC’s modeling finds no significant impact on retail rates or bills between a no carbon policy and carbon policy case. In fact, retail rates and bills are slightly lower. (See Tables 4 and 5.)

Tables 4 and 5: Decreased Rates and Increasing Clean Energy

<table>
<thead>
<tr>
<th>Retail Rates (2012$/MWh)</th>
<th>State</th>
<th>2020</th>
<th>2025</th>
<th>2030</th>
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<td>No Carbon Policy</td>
<td></td>
<td>$ 99.60</td>
<td>$ 98.10</td>
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<tr>
<td>VA in RGGI</td>
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<th>% Change in Final Bill versus “No Carbon Policy”</th>
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<th>2025</th>
<th>2030</th>
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</thead>
<tbody>
<tr>
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<td>-0.6%</td>
<td>-0.4%</td>
<td>-0.6%</td>
</tr>
</tbody>
</table>

In addition, the 2018 modeling scenarios above did not include the impact of additional energy efficiency or energy savings. If allowance revenue, as discussed in the next section, were directed toward energy efficiency programs, as has been shown to be effective in the successful RGGI program,23 bills and rates could be even lower under an improved final rule.

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NRDC Comments on Proposed Emissions Trading Regulation

Carbon Costs: Carbon Allowances Prices Will be Modest

NRDC’s preliminary modeling shows RGGI allowance prices will remain quite modest, even with the inclusion of Virginia’s emissions. (See Figure 6 below.)

**Figure 6: Projected Carbon Allowance Prices in Preliminary NRDC IPM Modelling**

<table>
<thead>
<tr>
<th>RGGI Carbon Allowance Prices (2012$/Ton)</th>
<th>State</th>
<th>2020</th>
<th>2025</th>
<th>2030</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No Carbon Policy</td>
<td>3.57</td>
<td>3.93</td>
<td>4.42</td>
</tr>
<tr>
<td></td>
<td>VA in RGGI</td>
<td>3.45</td>
<td>3.78</td>
<td>4.24</td>
</tr>
</tbody>
</table>

In fact, in the preliminary case above where Virginia joins RGGI (reflecting the Virginia DEQ Proposed Rule), the carbon allowance price is lower in the 2020-2030 period.

Given this, NRDC again recommends that Virginia revises its 2020 baseline downward to 28 million tons. This would provide the state with meaningful emissions reductions, while also keeping the state’s and region’s energy prices affordable and reasonable.

Health Impacts: A RGGI-linked Virginia Carbon Cap Directly Improves State Health

Reducing carbon pollution also significantly reduces the co-pollutants nitrous oxide (NOx) and sulfur dioxide (SOx). By 2030, the state could reduce NOx emissions by an additional 2,700 tons and SO2 emissions by an additional 400 tons. (See Figure 7.)

**Figure 7: Health Improvements by Reducing Co-Pollutants**

<table>
<thead>
<tr>
<th>Thousand Short Tons</th>
<th>2020</th>
<th>2025</th>
<th>2030</th>
<th>% Reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VA in RGGI</td>
<td>No Carbon Policy</td>
<td>VA in RGGI</td>
<td>No Carbon Policy</td>
</tr>
<tr>
<td>Emissions - NOX</td>
<td>9.45</td>
<td>11.56</td>
<td>8.77</td>
<td>10.68</td>
</tr>
<tr>
<td>Emissions - SO2</td>
<td>4.01</td>
<td>4.58</td>
<td>3.94</td>
<td>4.37</td>
</tr>
</tbody>
</table>

The reductions above represent a reduction in annual NOx and SOx emissions of 26 percent and 9 percent, respectively, by 2030.

*****
Section 3: Allowance Allocation Implications and Design Options

The final regulation should be designed not only to deliver meaningful reductions in carbon emissions and the related economic benefits of clean energy. The program should also be designed to maximize consumer benefits, namely by recovering and reinvesting the value of allowances for the benefit of all Virginians.

All emissions allowances have a dollar value as “discovered” in the marketplace, regardless of whether a generator pays for that allowance or receives it for free. After allowance are distributed (either through auction or other means), buyers and sellers, often with the help of emissions brokers, set a market price. The market then leaves plants owners with two options: (1) maintain emissions levels and purchase allowances to cover those emissions; or (2) reduce emissions levels and sell allowances to other plant operators or third parties.

Regardless of how the allowance was procured (for free or purchased, as discussed below), the dollar value of each held allowance must be included by generators in their wholesale market bids to PJM. The value of allowances utilized by carbon emitters are then recouped by the generator when the electricity is sold. If the DEQ does not design a carbon regulation and allocation method that ultimately delivers that allowance value back to Virginia families and businesses, such a giveaway would equate to a publicly-subsidized windfall to generators, while consumers are unnecessarily saddled with higher costs.

Thus, the program should be judged by the standard of whether or not the inherent full market value of allowances can be recovered from the generator that receives the electricity payment, and then reinvested in rebates, renewable energy, energy efficiency, and other investments that minimize compliance costs and maximize benefits to Virginia families. Conversely, the program should not allow the market value of allowances to accrue directly to generators as a windfall profit, with no benefit going to consumers to offset the higher wholesale electricity costs.

How the Value and Cost of Allowances Function

Regardless of how carbon allowances are allocated, the allowances function in the same way after the DEQ allocates them:

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24 See, e.g., SOX Market, NOX Market, and RGGI Carbon Market.
At the end of each compliance period, each generator must surrender sufficient allowances to cover all its emissions during that period, as allowed under its DEQ air permit(s). Under IRS\textsuperscript{27} and PJM\textsuperscript{28} rules, when a generator submits a bid into the wholesale market, it must include the value of any pollution allowances necessary to cover the emissions associated with that generation in that bid. That allowance value must be included in the bid, regardless of whether the generator had to purchase allowances (in which case the revenue can be reinvested on behalf of consumers) or received them for free (in which case the generator keeps the proceeds, in a significant wealth transfer from consumers to generators or utilities).

**Determining the Best Allowance Allocation Method**

While the basic framework of a carbon allowance program is relatively straightforward, the DEQ decides in advance how it will initially allocate allowances. In doing so, the DEQ should ensure the inherent market value of the allowances accretes to Virginians and the Virginia economy—rather than simply providing a windfall to generators by distributing them to polluters for free.

For example, according to the projected carbon allowance price of $4.24 in 2030 as outlined above in Section 2, the value of Virginia's proposed allocation of 23.8 million allowances in 2030 would be over $100 million in that year. That is real dollar value that the DEQ can ensure, through efficient regulatory design and interagency coordination, is ultimately returned to Virginia families and businesses. Generators will likely claim that they need allowances to fund their investments in equipment to reduce emissions, but because they are reimbursed for the allowance cost in the wholesale market, free allocation would result in a windfall to polluters at the expense of the consumer.

With that fundamental illustration of allowance value, we outline below three "menu" options for allocating valuable carbon allowances.

**Allocation Option #1: Full Consumer Benefit Allocation through Consignment Auction**

To ensure that the value of allowances is used for the benefit of Virginians, the DEQ could allocate allowance value on a pro rata basis to consumers via a consignment auction on behalf of electric distribution companies. Allowances (and subsequent dollar value) would be distributed based on each company's percentage of total state load (electricity need).

In this approach, the dollar value of the allowances (as determined in the marketplace in the consignment auction) can ultimately return to electric billpayers via their distribution company, under the direction and oversight of state regulators and other already-existing oversight bodies (importantly, this construct would require the active cooperation of the SCC.


as outlined further below).

The allowances are allocated on a pro rata basis to consumers via the distribution companies, based on each company’s percentage of total state load. For example, if the state’s emissions budget for a compliance period is 100 tons, a distribution company with 70% of load would receive 70 allowances, a distribution company with 15% of load would receive 15, a co-op with 13% of load would receive 13, and a municipal with 2% of load would receive 2.

How those allowances are utilized would be overseen by the SCC, in close consultation with DEQ, utilities, efficiency providers, DMME, consumer advocates, the Emissions Trading SAG, and other stakeholders, in the case of Dominion and Appalachian Power, and by the respective Boards in the case of co-ops and munis. Given the range of generator types and ownership structures, allowances should be sold in a transparent and open manner, with regulated monopoly generators competing in an open, transparent market with merchants. Sale and transfer of money from any one regulated monopoly affiliate to another should be supervised by the SCC.

The SCC would ensure, through the already existing IRP and rate cases proceedings, or perhaps through a new docket, that revenues from any allowances sold accrue to Dominion or Appalachian Power bill payers’ benefit. Indeed, the SCC has sufficient authority\(^29\) to decide directly how the allowance revenues are utilized, to ensure maximum customer benefit. Such benefits could take the form of cost-effective energy efficiency investments to lower customer bills (as well as further reduce carbon emissions from that distribution company); direct bill crediting; or investment in the most cost-effective zero-emissions resources to further reduce emissions and thus free up additional allowances. In RGGI, there have been significant benefits delivered to consumers as a result of smart investments of allowance proceeds.\(^30\)

In the event Dominion or Appalachian Power must purchase allowances to meet the permitting obligations of one of their generators, SCC oversight can assure that such a decision to comply was the least-cost means available to the utility for meeting its generator’s emissions obligations.

Municipal boards and co-op boards would serve in a similar capacity, ensuring that any revenues or costs associated with selling or surrendering allowances ultimately serve the best interests of their bill payers.

Merchant generators would be assured access to allowances through sale of allowances by the distributions companies, and the subsequent open allowance market.

This approach is most preferred for its efficiency. Administratively, the DEQ already has experience with a similar NOx allowance allocation and auction. Oversight bodies (the SCC


and muni and co-op boards) are in place to ensure that allowance costs and related
generation and compliance decisions are prudently incurred, and that any revenues are re-
invested in such a way that serves the bill payers’ best interests.

**Allocation Option #2: Allocation to Covered Generators, Based on Output**

A second approach to capture the economic value of allowances, as is proposed by DEQ, is to
allocate them to covered fossil generators, based on their previous MWh output of energy.

While this approach may have certain benefits over the option discussed below (allocation
based on emissions), in this approach electricity customers do not **directly** receive the
benefit of allowance-related revenue, nor will they necessarily receive the benefit of
oversight of the disposition of such revenues. In the case of merchant generators, they
will receive a windfall at customer expense.

**Allowance Allocation Option #3: Allocation of Allowances Directly to Fossil Emitters**

This method, most akin to the early sulfur dioxide acid rain reduction program in Virginia and
elsewhere, would allocate allowances directly to fossil generators, based on each generator’s
share of total emissions.

This is the worst approach for Virginia families and businesses, because neither the state nor
the bill payers recover any value; that value remains a windfall to generators and utilities.
While the value of allowances would be included in PJM wholesale bids, no mechanism
exists to ensure that recouped value (or the value of sold allowances) is returned to the final
electricity customer. Indeed, this windfall would essentially create transfer payments from
customers to generators.

The DEQ is correct not to propose this approach in the proposed rule, as doing so would mean
a transfer of the value of allowances from the businesses and families of the state directly to
the pockets of the power plant owners.

*****
116TH CONGRESS
1ST SESSION

H. RES.

Recognizing the duty of the Federal Government to create a Green New Deal.

IN THE HOUSE OF REPRESENTATIVES

Ms. OCASIO-CORTEZ submitted the following resolution; which was referred to the Committee on __________________________

RESOLUTION

Recognizing the duty of the Federal Government to create a Green New Deal.

Whereas the October 2018 report entitled "Special Report on Global Warming of 1.5 °C" by the Intergovernmental Panel on Climate Change and the November 2018 Fourth National Climate Assessment report found that—

1) human activity is the dominant cause of observed climate change over the past century;

2) a changing climate is causing sea levels to rise and an increase in wildfires, severe storms, droughts, and other extreme weather events that threaten human life, healthy communities, and critical infrastructure;
(3) global warming at or above 2 degrees Celsius beyond preindustrialized levels will cause—

(A) mass migration from the regions most affected by climate change;

(B) more than $500,000,000,000 in lost annual economic output in the United States by the year 2100;

(C) wildfires that, by 2050, will annually burn at least twice as much forest area in the western United States than was typically burned by wildfires in the years preceding 2019;

(D) a loss of more than 99 percent of all coral reefs on Earth;

(E) more than 350,000,000 more people to be exposed globally to deadly heat stress by 2050; and

(F) a risk of damage to $1,000,000,000,000 of public infrastructure and coastal real estate in the United States; and

(4) global temperatures must be kept below 1.5 degrees Celsius above preindustrialized levels to avoid the most severe impacts of a changing climate, which will require—

(A) global reductions in greenhouse gas emissions from human sources of 40 to 60 percent from 2010 levels by 2030; and

(B) net-zero global emissions by 2050;

Whereas, because the United States has historically been responsible for a disproportionate amount of greenhouse gas emissions, having emitted 20 percent of global greenhouse gas emissions through 2014, and has a high technological capacity, the United States must take a leading role in reducing emissions through economic transformation;
Whereas the United States is currently experiencing several related crises, with—

(1) life expectancy declining while basic needs, such as clean air, clean water, healthy food, and adequate health care, housing, transportation, and education, are inaccessible to a significant portion of the United States population;

(2) a 4-decade trend of wage stagnation, deindustrialization, and antilabor policies that has led to—

(A) hourly wages overall stagnating since the 1970s despite increased worker productivity;

(B) the third-worst level of socioeconomic mobility in the developed world before the Great Recession;

(C) the erosion of the earning and bargaining power of workers in the United States; and

(D) inadequate resources for public sector workers to confront the challenges of climate change at local, State, and Federal levels; and

(3) the greatest income inequality since the 1920s, with—

(A) the top 1 percent of earners accruing 91 percent of gains in the first few years of economic recovery after the Great Recession;

(B) a large racial wealth divide amounting to a difference of 20 times more wealth between the average white family and the average black family; and

(C) a gender earnings gap that results in women earning approximately 80 percent as much as men, at the median;

Whereas climate change, pollution, and environmental destruction have exacerbated systemic racial, regional, so-
cial, environmental, and economic injustices (referred to in this preamble as "systemic injustices") by disproportionately affecting indigenous peoples, communities of color, migrant communities, deindustrialized communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth (referred to in this preamble as "frontline and vulnerable communities");

Whereas, climate change constitutes a direct threat to the national security of the United States—

(1) by impacting the economic, environmental, and social stability of countries and communities around the world; and

(2) by acting as a threat multiplier;

Whereas the Federal Government-led mobilizations during World War II and the New Deal created the greatest middle class that the United States has ever seen, but many members of frontline and vulnerable communities were excluded from many of the economic and societal benefits of those mobilizations; and

Whereas the House of Representatives recognizes that a new national, social, industrial, and economic mobilization on a scale not seen since World War II and the New Deal era is a historic opportunity—

(1) to create millions of good, high-wage jobs in the United States;

(2) to provide unprecedented levels of prosperity and economic security for all people of the United States; and

(3) to counteract systemic injustices: Now, therefore, be it
Resolved, That it is the sense of the House of Representa-
tives that—

(1) it is the duty of the Federal Government to create a Green New Deal—

(A) to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers;

(B) to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States;

(C) to invest in the infrastructure and industry of the United States to sustainably meet the challenges of the 21st century;

(D) to secure for all people of the United States for generations to come—

(i) clean air and water;

(ii) climate and community resiliency;

(iii) healthy food;

(iv) access to nature; and

(v) a sustainable environment; and

(E) to promote justice and equity by stopping current, preventing future, and repairing historic oppression of indigenous peoples, communities of color, migrant communities, deindustrialized communities, depopulated rural
communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth (referred to in this resolution as "frontline and vulnerable communities");

(2) the goals described in subparagraphs (A) through (E) of paragraph (1) (referred to in this resolution as the "Green New Deal goals") should be accomplished through a 10-year national mobilization (referred to in this resolution as the "Green New Deal mobilization") that will require the following goals and projects—

(A) building resiliency against climate change-related disasters, such as extreme weather, including by leveraging funding and providing investments for community-defined projects and strategies;

(B) repairing and upgrading the infrastructure in the United States, including—

(i) by eliminating pollution and greenhouse gas emissions as much as technologically feasible;

(ii) by guaranteeing universal access to clean water;
(iii) by reducing the risks posed by climate impacts; and
(iv) by ensuring that any infrastructure bill considered by Congress addresses climate change;
(C) meeting 100 percent of the power demand in the United States through clean, renewable, and zero-emission energy sources, including—
(i) by dramatically expanding and upgrading renewable power sources; and
(ii) by deploying new capacity;
(D) building or upgrading to energy-efficient, distributed, and “smart” power grids, and ensuring affordable access to electricity;
(E) upgrading all existing buildings in the United States and building new buildings to achieve maximum energy efficiency, water efficiency, safety, affordability, comfort, and durability, including through electrification;
(F) spurring massive growth in clean manufacturing in the United States and removing pollution and greenhouse gas emissions from manufacturing and industry as much as is technologically feasible, including by expanding re-
newable energy manufacturing and investing in existing manufacturing and industry;

(G) working collaboratively with farmers and ranchers in the United States to remove pollution and greenhouse gas emissions from the agricultural sector as much as is technologically feasible, including—

(i) by supporting family farming;

(ii) by investing in sustainable farming and land use practices that increase soil health; and

(iii) by building a more sustainable food system that ensures universal access to healthy food;

(II) overhauling transportation systems in the United States to remove pollution and greenhouse gas emissions from the transportation sector as much as is technologically feasible, including through investment in—

(i) zero-emission vehicle infrastructure and manufacturing;

(ii) clean, affordable, and accessible public transit; and

(iii) high-speed rail;
(I) mitigating and managing the long-term adverse health, economic, and other effects of pollution and climate change, including by providing funding for community-defined projects and strategies;

(J) removing greenhouse gases from the atmosphere and reducing pollution by restoring natural ecosystems through proven low-tech solutions that increase soil carbon storage, such as land preservation and afforestation;

(K) restoring and protecting threatened, endangered, and fragile ecosystems through locally appropriate and science-based projects that enhance biodiversity and support climate resiliency;

(L) cleaning up existing hazardous waste and abandoned sites, ensuring economic development and sustainability on those sites;

(M) identifying other emission and pollution sources and creating solutions to remove them; and

(N) promoting the international exchange of technology, expertise, products, funding, and services, with the aim of making the United States the international leader on climate ac-
tion, and to help other countries achieve a
Green New Deal;
(3) a Green New Deal must be developed
through transparent and inclusive consultation, col-
laboration, and partnership with frontline and vul-
nerable communities, labor unions, worker coopera-
tives, civil society groups, academia, and businesses;
and
(4) to achieve the Green New Deal goals and
mobilization, a Green New Deal will require the fol-
lowing goals and projects—
(A) providing and leveraging, in a way that
ensures that the public receives appropriate
ownership stakes and returns on investment,
adequate capital (including through community
grants, public banks, and other public financ-
ing), technical expertise, supporting policies,
and other forms of assistance to communities,
organizations, Federal, State, and local govern-
ment agencies, and businesses working on the
Green New Deal mobilization;
(B) ensuring that the Federal Government
takes into account the complete environmental
and social costs and impacts of emissions
through—
(i) existing laws;
(ii) new policies and programs; and
(iii) ensuring that frontline and vulnerable communities shall not be adversely affected;

(C) providing resources, training, and high-quality education, including higher education, to all people of the United States, with a focus on frontline and vulnerable communities, so that all people of the United States may be full and equal participants in the Green New Deal mobilization;

(D) making public investments in the research and development of new clean and renewable energy technologies and industries;

(E) directing investments to spur economic development, deepen and diversify industry and business in local and regional economies, and build wealth and community ownership, while prioritizing high-quality job creation and economic, social, and environmental benefits in frontline and vulnerable communities, and deindustrialized communities, that may otherwise struggle with the transition away from greenhouse gas intensive industries;
(F) ensuring the use of democratic and participatory processes that are inclusive of and led by frontline and vulnerable communities and workers to plan, implement, and administer the Green New Deal mobilization at the local level;

(G) ensuring that the Green New Deal mobilization creates high-quality union jobs that pay prevailing wages, hires local workers, offers training and advancement opportunities, and guarantees wage and benefit parity for workers affected by the transition;

(H) guaranteeing a job with a family-sustaining wage, adequate family and medical leave, paid vacations, and retirement security to all people of the United States;

(I) strengthening and protecting the right of all workers to organize, unionize, and collectively bargain free of coercion, intimidation, and harassment;

(J) strengthening and enforcing labor, workplace health and safety, antidiscrimination, and wage and hour standards across all employers, industries, and sectors;

(K) enacting and enforcing trade rules, procurement standards, and border adjustments
with strong labor and environmental protections—

(i) to stop the transfer of jobs and pollution overseas; and

(ii) to grow domestic manufacturing in the United States;

(L) ensuring that public lands, waters, and oceans are protected and that eminent domain is not abused;

(M) obtaining the free, prior, and informed consent of indigenous peoples for all decisions that affect indigenous peoples and their traditional territories, honoring all treaties and agreements with indigenous peoples, and protecting and enforcing the sovereignty and land rights of indigenous peoples;

(N) ensuring a commercial environment where every businessperson is free from unfair competition and domination by domestic or international monopolies; and

(O) providing all people of the United States with—

(i) high-quality health care;

(ii) affordable, safe, and adequate housing;
(iii) economic security; and
(iv) clean water, clean air, healthy and affordable food, and access to nature.
Clean Water Act Section 401: Balancing States’ Rights and the Nation’s Need for Energy Infrastructure

Deidre Duncan
Clare Ellis

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Clean Water Act Section 401: Balancing States’ Rights and the Nation’s Need for Energy Infrastructure

Deidre Duncan* & Clare Ellis**

Over the past several decades, significant tension has developed between the federal role in overseeing and authorizing certain types of energy infrastructure projects and states’ roles in regulating water quality under the cooperative federalism structure of the Clean Water Act (CWA or the Act).¹ This tension has played itself out in various contexts, but the most pronounced in recent years has been the battle over CWA Section 401 water quality certifications for energy infrastructure projects, in particular interstate natural gas pipelines.

The CWA was enacted with the intent of preserving states’ roles in protecting water quality within their borders. The federal government plays the primary role in authorizing large-scale energy and infrastructure projects, however, in recognition of the fact that uniform and streamlined procedures are necessary for the review and approval of such projects and that local oversight and control could impede their development in a manner contrary to the national interest. Congress attempted to balance

* Deidre Duncan is a partner at Hunton Andrews Kurth LLP and Co-Chair of the firm’s Environmental Practice Group. Deidre represents energy and development clients on permitting, compliance, and litigation relating to the Clean Water Act and other environmental statutes. She is well known for obtaining permits for complicated infrastructure projects including oil and natural gas pipelines and defending those permits in litigation. Prior to joining Hunton, Deidre served as Assistant Army General Counsel, advising the Secretary of the Army on environmental matters involving the Corps of Engineers’ civil works and regulatory programs. JD, University of Cincinnati College of Law, Order of the Coif, 1996; BA, Duke University, cum laude, 1993.

** Clare Ellis is an associate at Hunton Andrews Kurth LLP, focusing on regulatory matters related to transportation and energy project planning and execution. She advises clients on compliance, permitting, and other matters arising under state and federal environmental, safety, and transportation laws. JD, University of Georgia School of Law, summa cum laude, Order of the Coif; MA, Literature, University of Georgia; BA, University of Virginia.

¹ See, e.g., Clean Water Act, 33 U.S.C. § 1251(b) (2012) (setting forth congressional policy under the CWA to “recognize, preserve, and protect the primary responsibilities and rights of States” to address pollution and to conduct planning for development and use of land and water resources within their borders).
these state and federal oversight roles by expressly preserving states’ authority over water quality and other types of environmental impacts for certain infrastructure construction projects, such as interstate natural gas pipelines built under the Natural Gas Act (NGA), which are otherwise subject to comprehensive and exclusive federal oversight. This overlay of state and federal authority has become fraught with tension in recent years, as pipeline projects have become a symbolic focus for states and activist groups politically opposed to the use of fossil fuels generally. It is increasingly common for states to use their CWA Section 401 water quality certification (WQC) authority to stall or to impede these and other infrastructure projects for reasons unrelated to water quality, such as the state’s stance on energy policy, a perceived need to placate local opposition to a project, or other localized political concerns. Even where certification is granted by the state, it can become a focal point for opposition groups seeking to challenge the state’s decision in hopes of stopping projects they find objectionable.

Section I of this article provides background on the CWA Section 401 certification process and the statutory framework for interstate natural gas pipeline authorization under NGA Section 7. Section II discusses specific problems with the Section 401 process, explaining several ambiguities that have sparked litigation, causing costly delays or altogether obstructing the development of needed infrastructure and energy projects. Section III evaluates the various avenues for addressing these problems via legislative, administrative, judicial, or executive action. Section IV concludes by advocating for Section 401 reform, starting with congressional efforts to revise the CWA to enhance clarity and to reduce inefficiencies in the WQC process.

I. Background

Under CWA Section 401(a), any applicant for a federal license or permit to conduct activities that may result in discharges to navigable waters must provide the federal authorizing agency a certification from the state in which the discharge originates that the discharge will comply with specified requirements of the Act, including state water quality standards.

2. See Islander E. Pipeline Co. v. Connecticut Dept. of Envt’l Prot., 482 F. 3d 79, 84 (2d Cir. 2006) (quoting Islander E. Pipeline Co., 102 FERC ¶ 61,054, at P 115 at 61,130 (2003) (order on rehearing) for the proposition that “[w]hile state and local permits are preempted under the NGA, state authorizations required under federal law are not.”).

3. Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012); see also 40 C.F.R. § 131.6(2018) (providing that State water quality standards are generally comprised of designated uses for waterbodies, water quality criteria sufficient to protect the designated uses, and an anti-degradation policy).
The state’s certification must set forth any effluent and other limitations, and monitoring requirements necessary to assure compliance with the Act and with any other appropriate requirement of state law set forth in the certification. These requirements specified in the state’s certification become conditions on the federal license or permit.

The CWA places a one-year limit on the amount of time that a state has to respond to a request for Section 401 certification, providing that if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." Congress intended this time limitation to prevent projects from being subjected to unreasonable delays because states failed to act in a timely fashion on requests for certification. Representative Edmondson, who sponsored the amendment, made clear that a state must do more than merely make efforts towards certification within the time allotted: "the State must act, either to grant or to deny the certification."

The federal license or permit may not be granted until WQC has been obtained or certification waived by the state. Likewise, if a state denies certification, the federal license or permit may not be granted. CWA Section 401 thus provides a powerful tool for states to impose conditions upon federal authorizations for a wide range of activities, or to deny certification altogether—allowing "a single state agency [to] effectively

5. Id.; see also Sierra Club v. U.S. Army Corps of Eng’rs, 909 F.3d 635, 648 (4th Cir. 2018) (finding Corps, as federal permitting agency, cannot override or alter state WQC conditions, even where Corps deemed alternative condition more environmentally protective).
7. See 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson explaining that the amendment intended to "do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" by states). Based upon the legislative history of the provision, the D.C. Circuit has said of CWA Section 401 that, “[i]n imposing a one-year time limit on States to ‘act,’ Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request” and that “this [interpretation] is clear from the plain text” of the CWA. Alcoa Power Generating Inc. v. FERC, 643 F. 3d 963, 972 (D.C. Cir. 2011) (“Moreover, the Conference Report on Section 401 states that the time limitation was meant to ensure that ‘sheer inactivity by the State...will not frustrate the Federal application.’”).
8. 115 Cong. Rec. 9,264, supra note 7 (emphasis added).
10. Id.
veto[] an energy [project] that has secured approval from a host of other federal and state agencies."^{11}

Interstate natural gas pipelines are also subject to the NGA requirement to obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) authorizing construction and operation.^{12} NGA Section 7 confers upon FERC "exclusive jurisdiction over the transportation . . . of natural gas in interstate commerce,"^{13} including via pipeline.^{14} In enacting the NGA, Congress "intended to occupy the field to the exclusion of state law by establishing through the NGA a 'comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.'"^{15} While state laws touching upon topics within FERC's regulatory purview under NGA Section 7 are preempted, such as the environmental effects of interstate natural gas pipeline construction,^{16} the NGA saves from preemption states' statutory roles under the CWA, Coastal Zone Management Act (CZMA), and the Clean Air Act (CAA).^{17}

11. Islander E. Pipeline Co. v. McCarthy, 525 F.3d 141, 164 (2d Cir. 2008); see also H.R. Rep. No. 911 at 122 (1972) (explaining that "[d]enial of certification by a State . . . results in a complete prohibition against the issuance of the Federal license or permit.").

12. Natural Gas Act, 15 U.S.C. § 717f(f)(1)(a) (2012). FERC has long taken the position that issuance of a Certificate of Public Convenience and Necessity under NGA Section 7 does not trigger the CWA Section 401 certification requirement. See, e.g., Ruby Pipeline, L.L.C., 133 FERC ¶ 61,013 at P 23 (Oct. 6, 2010). This is because the Certificate does not in itself authorize activities that will result in a discharge under the CWA, and thus certification is not required. Id. The D.C. Circuit affirmed FERC's position on this issue in Delaware Riverkeeper Network v. FERC, 857 F.3d 388, 398-99 (D.C. Cir. 2017).


16. Northern Natural Gas Co. v. Iowa Utilities Board, 377 F. 3d 817 (8th Cir. 2004) (holding that an Iowa regulation of the environmental effects of interstate natural gas pipeline construction was pre-empted by FERC oversight under the NGA).

II. The Problem

States have on several occasions used their Section 401 authority to veto projects sited in their jurisdictions for a variety of reasons, often unrelated to water quality. Even where the state issues certification, WQC issues are commonly the subject of litigation, particularly where opponents of a specific project use water quality-related objections as a proxy for their objections to other aspects of the project. Such litigation significantly impedes the ability of proponents to deliver needed energy projects in a timely manner and on a schedule that is predictable enough to encourage investment.

Judicial oversight of the Section 401 process through litigation also creates a patchwork of precedent on the scope and timing of certifications, making the process even more unpredictable for future projects. In this section, we survey the principal issues to arise in recent years in the Section 401 context and the manner in which courts and agencies have attempted to address these issues, which include: (1) the limitations on the one-year period for state WQC review; (2) the proper scope of such review and the types of conditions that states may impose upon certification; and (3) finality and reviewability of the certification once issued.


20. New England states are already feeling the effects of constraints on new natural gas pipeline infrastructure, as has been widely reported and explained in report published last year by ISO New England. See ISO NEW ENGLAND, OPERATIONAL FUEL-SECURITY ANALYSIS, 16 (2018), https://perma.cc/F4MM-RDHQ (explaining that “during the coldest weeks of the year,” New England’s natural gas pipeline infrastructure “can’t meet all the demand for natural gas for both home heating and power generation” and that, as a result, natural-gas-fired power plants in New England “may not be able to access natural gas”).
A. One-Year Waiver Period

Timely and predictable issuance of certification is crucial for energy and infrastructure construction projects, which are subject to tight and highly-prescribed schedules. Delays and uncertainty can be costly and, depending upon the circumstances, can kill a project. 21 Section 401 certification has historically been one of the most common causes of delay in project execution and delivery. 22 In the past few decades, the problem has become more pronounced—with state agencies taking a liberal view of when the one-year clock for acting on a certification request begins. Further, state agencies have adopted certain tactics to extend their time for review, such as asking that a project withdraw and re-submit its application so as to restart the waiver clock, or requesting that project sponsors specify by agreement a particular date that the clock is deemed to have begun (regardless of when the project’s application was actually submitted). Finally, project sponsors have received mixed messages on who ultimately determines whether the one-year waiver period has run. These issues have been the subject of recent agency and judicial pronouncements, as summarized below.

When does the one-year clock start? Under the plain language of CWA Section 401, the one-year 23 waiver period begins to run “after receipt

21 Delays or impediments to natural gas infrastructure project construction can also result in unintended consequences such as requiring end users to employ more costly alternative energy supplies, prohibiting new hookups that would deliver needed energy to certain parts of the country (particularly in states subject to high energy demands over cold winters, such as the New England states), and forcing increased reliance on higher-emitting fuels such as coal and oil.


23. Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012). While the CWA sets one year as the outside timeframe considered “reasonable” for a state to act on a WQC request, certain agencies implementing Section 401 have designated shorter amounts of time by regulation. For example, the U.S. Environmental Protection Agency (EPA) regulations provide that six months shall “generally be considered” to be a reasonable timeframe for issuing certification, “but in any event (this time period) shall not exceed one year.” 40 C.F.R. § 121.16 (2012). The U.S. Army Corps of Engineers (USACE or the Corps) regulations governing the Section 404 dredge-and-fill permitting process specify that a state waives certification if it fails or refuses to act on a “valid request” for certification “within sixty days after receipt of such a request,” unless the District Engineer determines a shorter or longer period is reasonable for the state to act. 33 C.F.R. § 325.2(b)(1)(ii) (2012). The Assistant Secretary of the Army recently issued an internal memorandum explaining that the six-month period specified in the Corps regulations begins with receipt of a request for

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of [a] request." While the CWA is clear on the one-year deadline, several states, such as New York and New Jersey, have historically taken the position that the one-year waiver period does not begin to run until the state deems a project’s application “complete.” The CWA Section 401 handbook published by the U.S. Environmental Protection Agency (EPA) adopts this view, stating that “the certifying agency determines what constitutes a ‘complete application’ that starts the timeframe clock.” By engaging in a subjective, case-by-case inquiry as to whether a WQC request is “complete,” states have been able to manipulate the timing of the Section 401 certification process, often putting off consideration of a project’s application well beyond the one-year statutory deadline.

This practice was recently rejected, however, by the Second Circuit, in the context of an application submitted by Millennium Pipeline Company LLC (Millisennium Pipeline) to the New York State Department of Environmental Conservation (NYSDEC) for WQC for the Valley certification, and that District Engineers should determine that a longer timeframe is appropriate “only in special circumstances.” Memorandum from R.D. James, Ass’t Sec’y of the Army, to the Chief of Engr’s (Dec. 13, 2018). According to the memorandum, giving states an entire year to act on a Section 401 request is inconsistent with . . . existing Army regulations.” Id. at 3. The memorandum also directs the Corps to issue draft guidance based on this directive within forty-five days, establishing criteria to provide District Engineers for identifying reasonable timeframes for requiring states to provide WQC decisions. Id. at 4.


25. 6 NYCRR § 621.4(e); N.J.A.C. 7:7A-19.2. For a recent project proposed by PennEast Pipeline Company, LLC, the New Jersey Department of Environmental Protection (NJDEP) deemed the project’s WQC application incomplete (and eventually denied certification in February 2018) on the basis that the project had not provided NJDEP with surveys of the entire pipeline route. Letter from Virginia Kop’Kash, Assistant Comm’t, N.J. Dep’t of Envtl. Prot., Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FW/170001, PennEast Pipeline Project – Statewide, to Michael Mara (Feb. 1, 2018). For pipeline WQC applications, NJDEP thus appears to require that pipeline project proponents provide survey information for the entirety of a proposed route before it will deem the WQC application “complete.” Because many landowners deny project proponents access to perform surveys in the initial stages of a proposal, NJDEP’s standard for completeness effectively requires companies to have been issued a FERC Certificate of Public Convenience and Necessity (and thus vested with the power of eminent domain) in order to have access to sufficient information for their application to be deemed “complete.” See 15 U.S.C. Code § 717(h) (conferring upon the holder of an NGA Certificate the power of eminent domain).

Lateral natural gas pipeline project.\textsuperscript{27} In that case, Millennium Pipeline’s initial application for WQC was deemed received by NYSDEC on November 23, 2015.\textsuperscript{28} Nonetheless, over the course of the next several months, NYSDEC notified the project that it considered its application “incomplete,” requesting further information in the project’s potential environmental impacts.\textsuperscript{29} After several additional information submittals to NYSDEC, Millennium Pipeline petitioned the D.C. Court of Appeals in December 2016 for a finding that NYSDEC had waived its Section 401 authority by failing to act on the project’s application within one year.\textsuperscript{30} The D.C. Circuit dismissed the company’s petition for lack of standing, holding that Millennium Pipeline could seek a remedy for the delay only from FERC.\textsuperscript{31}

The project thus approached FERC, requesting authorization to proceed with construction on the basis that NYSDEC had waived its certification authority.\textsuperscript{32} While that request was pending, on August 30, 2017, NYSDEC denied Millennium’s application for certification, on the basis that FERC’s environmental analysis of the project was deficient in “fail[ing] to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project.”\textsuperscript{33} On September 15, 2017, FERC issued an order (the Waiver Order) finding that NYSDEC had waived its certification authority by not acting on Millennium’s application by November 23, 2016, one year from the date that the Department first received Millennium’s formal written application.\textsuperscript{34} FERC subsequently issued a notice to proceed with construction, which the project did, and the Valley Lateral Project was placed into service on July 9, 2018.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{27} N.Y. State Dep’t of Envtl. Conservation v. FERC 884 F.3d 450, 455-56 (2nd Cir. 2018).
\item \textsuperscript{28} Id. at 453.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Millennium Pipeline Co. v. Seggos, 860 F.3d 696 (D.C. Cir. 2017).
\item \textsuperscript{32} Letter from Barbara Deathe, Paralegal, Millennium Pipeline Co., Request for Notice to Proceed with Construction, Millennium Pipeline Company LLC, Docket No. CP16-17-000, to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (July 21, 2017).
\item \textsuperscript{33} Letter from Thomas S. Berkman to Ronald Kraemer, supra note 18, at 2.
\item \textsuperscript{34} Millennium Pipeline Co., 160 FERC ¶ 61,065 (2017).
\item \textsuperscript{35} Letter from George Flugrad, Counsel, Millennium Pipeline Co., Re: Valley Lateral Project In-Service Notification, Millennium Valley Pipeline LLC, Docket No. CP16-17-000 to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (July 16, 2018).
\end{itemize}
NYSDEC challenged FERC's Waiver Order in the Second Circuit, which upheld the Waiver Order and agreed with FERC that NYSDEC had waived certification authority for the project. According to the Second Circuit,

> The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.' It does not specify that this time limit applies only for 'complete' applications. If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.\(^{36}\)

With this ruling, the Court affirmed FERC's long-held position that the one-year waiver period begins upon receipt of a request for certification and is not tied to any subjective determination of the application's completeness.\(^{37}\) This interpretation has been enshrined in FERC regulations governing applications for hydropower licenses since 1987,\(^{38}\) and FERC has long recognized the "substantial benefits" flowing from its interpretation, including that it "provides the maximum allowable time prescribed by the [CWA]," but also serves the public interest by "avoiding uncertainty associated with open-ended certification deadlines."\(^{39}\) It also prevents states from "delay[ing] indefinitely"—via case-by-case assessments of whether a project's request is deemed acceptable for processing—"their acceptance of a certification request, in contravention

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36. N.Y. State Dep't of Envtl. Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018).


38. See 18 C.F.R. § 4.34(b)(ii) (2018) ("A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification."); see also Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. 5446 (Feb. 23, 1987). Note that there is no corresponding FERC regulation under the NGA.

of the Congress’ intent, through the waiver provision, to prevent unreasonable delays (i.e., of more than one year).\textsuperscript{40}

While the issue of when the waiver period begins has been judicially resolved in the Second Circuit, the question remains for projects being built in other regions of the country. The Second Circuit opinion also does not clear up the patchwork of interpretations by various state and federal agencies memorialized in their regulations and guidance. FERC’s interpretation appears to have been cited favorably on occasion in other circuits,\textsuperscript{41} yet it is generally accepted that FERC’s CWA interpretations are not authoritative, given that “FERC is not charged in any manner with administering the [CWA].”\textsuperscript{42}

\textit{May a state restart the statutory clock by asking an applicant to withdraw and resubmit its WQC request?} State agencies needing more time for their WQC review often request that applicants withdraw and resubmit their applications, taking the position that the waiver clock starts anew with each resubmittal. This tactic was used most recently by NYSDEC in the context of an interstate natural gas pipeline project proposed by Constitution Pipeline Company, LLC (Constitution). NYSDEC denied WQC for that project on April 22, 2016, nearly three years after receiving the project’s initial application.\textsuperscript{43} The NYSDEC denial came after years of back-and-forth and agency delays, including two requests by NYSDEC that the project withdraw and resubmit its application to restart the one-year waiver clock.

Constitution appealed the April 2016 WQC denial to the Second Circuit, on the grounds that NYSDEC had exceeded the statutory one-year

\textsuperscript{40} Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. at 5446.

\textsuperscript{41} See, e.g., State of California ex. rel. State Water Resources Control Bd. v. FERC, 966 F.2d 1541, 1553-54 (9th Cir. 1992) (discussing FERC’s approach).

\textsuperscript{42} AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 730 (4th Cir. 2009) (citing Alabama Rivers Alliance v. FERC, 325 F.3d 290, 297 (D.C. Cir. 2003)); see also Hoopa Valley Tribe v. FERC, 913 F.3d 1099, 1102 (D.C. Cir. Jan. 25, 2019) (“because FERC is not the agency charged with administering the CWA, the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states’ waiver.”); Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 972 (D.C. Cir. 2011) (“the Commission concedes that its interpretation of Section 401 is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the [CWA].”).

\textsuperscript{43} Letter from John Ferguson to Lynda Schubring, supra note 18, at 1. NYSDEC cited as reasons for its denial that “the Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards.” \textit{Id.}
time limit for review and that the denial was arbitrary and capricious.\textsuperscript{44} The Second Circuit dismissed the first claim regarding the timeliness of the NYSDEC decision for lack of jurisdiction under the NGA.\textsuperscript{45} The Court also denied the petition on the merits, deferring to the agency’s expertise in determining that it lacked sufficient information to issue WQC for the project.\textsuperscript{46} Constitution also petitioned FERC for a declaratory order finding that NYSDEC had waived its WQC authority. FERC denied the petition on January 11, 2018, finding that the one-year waiver period had re-started each time that Constitution, at NYSDEC’s request, withdrew and resubmitted its application.\textsuperscript{47} According to FERC’s January 2018 order denying Constitution’s petition, “once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1).”\textsuperscript{48}

\textsuperscript{44} Petition for Review, Constitution Pipeline Co. v. NYSDEC et al., No. 16-1568 (2d Cir. May 16, 2016).

\textsuperscript{45} Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017). The Court considered whether it had jurisdiction over Constitution’s argument that NYSDEC had waived Section 401 authority under the NGA exclusive jurisdiction provision at 15 U.S.C. § 717r(d)(1), which provides in relevant part that “[t]he United States Court of Appeals for the circuit in which a facility subject to . . . section 717 of this title is proposed to be constructed . . . shall have 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 . . . deny any . . . approval . . . required under Federal law . . .” (emphasis added). Id. at 99. By contrast, 15 U.S.C. § 717r(d)(2) (2012) provides that “The [D.C. Circuit Court of Appeals] shall have original and exclusive jurisdiction over any civil action for the 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 . . .” (emphasis added). The Second Circuit interpreted the latter provision to apply to Constitution’s argument that NYSDEC failed to act within a mandated time period. Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d at 99. It thus found that the D.C. Circuit Court of Appeals had “exclusive” jurisdiction over this claim pursuant to 15 U.S.C. § 717r(d)(2) and dismissed Constitution’s timeliness argument for lack of jurisdiction. Id. at 100.

\textsuperscript{46} Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d at 103. The United States Supreme Court subsequently denied Constitution’s petition for a writ of certiorari to review the Second Circuit ruling. See Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017), cert. denied, 584 U.S. (U.S. Apr. 30, 2018) (No. 17-1009).

\textsuperscript{47} Constitution Pipeline Co., 162 FERC ¶ 61,014 at P 23 (2018) (explaining that “once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1)”).

\textsuperscript{48} Id. The Second Circuit took a similar position in the context of the Millennium Pipeline Valley Lateral (albeit in \textit{dicta} in its 2018 order: upholding FERC’s Waiver Order), explaining that where a state deems an application to be incomplete and needs more time
Constitution sought review of the FERC decision in the D.C. Circuit in September 2018. The case was held in abeyance, however, pending the outcome of Hoopa Valley Tribe v. FERC, which also presented the question of whether a state agency may manipulate the one-year waiver period by requesting that an applicant repeatedly withdraw and resubmit their application. The D.C. Circuit issued a decision in Hoopa Valley in January 2019, staking out a contrary position to the one taken by FERC in its January 2018 order.

In Hoopa Valley, the Court considered whether California and Oregon had waived Section 401 certification for the relicensing of the Klamath Hydroelectric Project located on the Klamath River in both states. As part of negotiations over the project with several stakeholders, the project proponent and the state agencies had agreed to defer the one-year statutory limitation for Section 401 certification by annual withdrawal and resubmittal of the project's request for certification. After petitioning FERC unsuccessfully, the Hoopa Valley Tribe sued in the D.C. Circuit, alleging that the states had waived their Section 401 authority and that the project sponsor had correspondingly failed to diligently prosecute its licensing application for the project.

In resolving the case, the Court in Hoopa Valley addressed a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for WQC over a period of time greater than one year. According to the Court, "[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear," requiring action from the state within one year of "a request." The Court thus rejected the notion that applicants and state reviewing agencies may circumvent the congressionally prescribed one year period for review by repeatedly withdrawing and resubmitting the same WQC application in a way that could indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to

for information-gathering, one available option is to "request that the applicant withdraw and resubmit the application," presumably starting a new period for review. NYSDEC v. FERC, 884 F.3d 450, 456 (2d Cir. 2018).

51. Id. at 1103.
52. Id. at 1101.
53. Id.
54. Id.
regulate such matters. The Court emphasized that while a year was the "absolute maximum" amount of time for the state's certification, this "does not preclude a finding of waiver prior to the passage of a full year." The D.C. Circuit's decision would thus appear to prohibit the withdrawal-and-resubmission practice commonly requested by states (and used by NYSDEC in the Constitution pipeline project) to prolong the statutory review period, at least in instances where the applicant repeatedly withdraws and resubmits the same application, with no "new" request justifying additional time for review. In light of this decision, FERC filed a motion requesting that the D.C. Circuit remand its January 2018 decision denying Constitution's request for a declaratory order that NYSDEC had waived its WQC authority, in light of *Hoopa Valley*. The Court granted FERC's request on February 28, 2019.

**May a state extend the one-year review period by agreement with the applicant?** *Hoopa Valley* also casts doubt on a state agency's ability to extend its review time by agreement with the applicant, as done for the

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55. *Hoopa Valley Tribe*, 913 F.3d at 1104.
56. *Id.*
57. *Id.* *Hoopa Valley* has been read to apply narrowly to only the circumstances reviewed in that case, where a project repeatedly withdraws and resubmits the same application, without any new information included in any of the re-submittals. It is unclear, for instance, whether the D.C. Circuit would reach a similar decision in a case where the resubmittals contained new information at the request of the state reviewing agency. The Court did not provide any guidance in its decision as to how much new information included in a resubmittal would be enough to make a refiled application sufficiently "new" so as to restart the statutory clock. On March 11, 2019, several nongovernmental organizations who were intervenors in the case (American Rivers, California Trout, and Trout Unlimited) requested panel hearing or rehearing en banc. Petition for Panel Rehearing or Rehearing En Banc, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. Mar. 11, 2019). Numerous states and other parties filed amicus briefs in support of this request.

58. FERC Unopposed Motion for Voluntary Remand, Constitution Pipeline Co. v. FERC, No. 18-1251 (D.C. Cir. Feb. 22, 2019).
60. The D.C. Circuit decision in *Hoopa Valley* could also have potential implications for the currently pending WQC application for the Jordan Cove liquefied natural gas (LNG) export terminal project proposed to be located in Coos County, Oregon. In October 2017, the sponsor of that project—Jordan Cove LNG—applied for WQC from the Oregon Department of Environmental Quality (ODEQ) for a liquefied natural gas (LNG) export terminal proposed to be located in Coos County, Oregon. On September 25, 2018, however, Jordan Cove withdrew and re-submitted its request for WQC "to allow [ODEQ] additional time to consider Jordan Cove's certification request." Letter from Christopher Stine, Water Quality Engineer, to Tony DiCicco, Vice President of LNG Projects, Jordan Cove Energy Project L.P., Oregon Dep't of Env't Quality (Sept. 25, 2018), https://perma.cc/V5HV-FNX5. The request remains pending before ODEQ.
Northern Access natural gas pipeline project proposed by National Fuel Supply Corporation and Empire Pipeline, Inc. (together, “National Fuel”). National Fuel originally submitted a request for WQC to NYSDEC for that project on March 2, 2016. However, it signed a letter on January 20, 2017, at the request of NYSDEC, agreeing that for the purposes of CWA Section 401, that the project’s application would be deemed received on April 6, 2016, thereby extending the date for NYSDEC to make a final determination to April 7, 2017.\(^\text{61}\)

Nonetheless, when FERC approved the project on February 3, 2017, conditioned on receipt of authorizations required under federal law (including the WQC), National Fuel sought rehearing of the FERC order—claiming that it was not required to obtain a WQC from NYSDEC because the agency had waived certification. This request was still pending when NYSDEC denied the project’s request for certification on April 7, 2017, on the basis that the project’s application “fail[ed] to demonstrate compliance with New York State water quality standards.”\(^\text{62}\) On August 8, 2018, FERC issued an order on National Fuel’s request for rehearing, determining that NYSDEC had waived certification by failing to act within one year, and that the agreement between NYSDEC and the project sponsors was an invalid attempt to override the one-year statutory deadline in the CWA.\(^\text{63}\) NYSDEC and others requested rehearing of FERC’s August 8, 2018 order. FERC granted the requests for rehearing on September 12, 2018. While FERC rehearing proceedings on this order are still pending, it seems likely that FERC will stand by its original ruling in light of *Hoopa Valley*.

Meanwhile, National Fuel challenged the NYSDEC April 2017 denial in the Second Circuit, alleging that NYSDEC relied on improper considerations and applied a heightened standard of proof in its WQC decision, and that the decision was arbitrary and capricious.\(^\text{64}\) On February 5, 2019, the Court vacated the denial, remanding it to NYSDEC “for the limited purpose of giving the Department and opportunity to explain more clearly—should it choose to do so—the basis for its decision.”\(^\text{65}\) With respect to whether NYSDEC had waived certification by exceeding the


\(^{62}\) Id. at 1.

\(^{63}\) FERC, Order on Rehearing and Motion for Waiver Determination under Section 401 of the Clean Water Act, 164 FERC ¶ 61,084 (Aug. 6, 2018) at ¶ 42.

\(^{64}\) Final Br. for Pet’rs, Nat’l Fuel Gas Supply Corp. v. NYSDEC, No. 17-1164 (Sept. 1, 2017).

\(^{65}\) Nat’l Fuel Gas Supply Corp. v. NYSDEC, No. 17-1164 (2d Cir. Feb. 5, 2019).
one-year statutory timeframe, the Court explained that such a “failure-to-act claim is one over which the District of Columbia Circuit would have ‘exclusive’ jurisdiction.” It also explained that “Petitioners are free to present any evidence of waiver to FERC in the first instance.” The Court failed to acknowledge that FERC had in fact already deemed the certification waived in its August 2018 order and that, because rehearing on FERC’s order is still pending, it is not ripe for review. The ruling thus creates a situation where NYSDEC, at the direction of the Second Circuit, will be undertaking review and reissuance of its WQC decision, despite a determination from FERC that it waived its Section 401 authority.

Who determines if time is up and a state has waived certification?

There has also been ambiguity in the Section 401 process as to who a project may turn to for a definitive determination that a state has waived its certification authority. In its 2017 decision regarding the Millennium Pipeline Valley Lateral project, the D.C. Circuit ruled that—in the context of projects requiring FERC authorization under the NGA—if a project proponent thinks the state has delayed beyond one year (i.e., waived certification) the project must make its case for waiver to FERC and request a Notice to Proceed rather than petitioning a court for a waiver determination.

According to the Court, “[e]ven if [NYSDEC] ha[d] unlawfully delayed acting on Millennium’s application, its inaction would operate as a waiver, enabling Millennium to bypass the Department and proceed to obtain approval from FERC,” thus NYSDEC’s delay “cause[d] Millennium no cognizable injury” and the company “lack[ed] standing to proceed with its petition” in court. The Court reasoned that even if NYSDEC had delayed for more than a year, the delay could not injure Millennium; rather, the delay would trigger the Act’s waiver provision, and Millennium could then present evidence of waiver directly to FERC to obtain the agency’s go-ahead to begin construction. In accordance with the Court’s instruction, the project thus went directly to FERC and presented evidence of NYSDEC’s waiver. FERC issued its Waiver Order in September 2017.

66. Nat’l Fuel Gas Supply Corp., No. 17-1164 at 7 (citing Constitution Pipeline Co. LLC v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017)); supra note 45.
69. Id.
70. Id. at 700.
71. Id. at 701. The U.S. Army Corps of Engineers (USACE or the Corps) has recently issued guidance to the effect that it will acknowledge and defer to the waiver decisions of
and subsequently a notice to proceed, allowing construction to commence.\textsuperscript{72}

The D.C. Circuit’s decision on the Valley Lateral project is in tension with previous authority on this issue, apparently reflecting a circuit split as to who has the final say on waiver. In \textit{AES Sparrows Point v. Wilson}, for example, the Fourth Circuit deferred to the waiver period as it was interpreted by the U.S. Army Corps of Engineers (USACE or the Corps).\textsuperscript{73} Rather than directing the project to present evidence of waiver to FERC (the lead agency for the project at issue in that case) for a waiver determination, the Court held that the state agency had not, in fact, waived certification.\textsuperscript{74} Given the existence of contrary authority from different circuits, there is thus some ambiguity with respect to a project’s remedies for delayed certification decisions and the proper procedures for seeking a definitive determination of waiver at the conclusion of the one-year period.

\textbf{B. Proper Scope of States’ Review}

Under the plain language of Section 401, a state’s WQC review is limited to whether a “\textit{discharge into . . . navigable waters}” will comply with the applicable provisions of the CWA.\textsuperscript{75} While this language would seem to limit the scope of a state’s WQC review to water quality impacts from the “\textit{discharge}” in question, over time some states have adopted a much broader scope. In other states where review has been limited (in accordance

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\textsuperscript{72} \textit{Millennium Pipeline Co., L.L.C.}, 860 F.3d at 701. As explained above, NYSDEC subsequently challenged the Waiver Order in the Second Circuit, but that Court upheld FERC’s determination that NYSDEC waived its Section 401 authority by failing to act on the request within one year. \textit{NYSDEC v. FERC}, 884 F.3d 450, 452 (2d Cir. 2018).

\textsuperscript{73} \textit{AES Sparrows Point v. Wilson}, 589 F.3d 721, 729–30 (4th Cir. 2009).

\textsuperscript{74} \textit{Id.} (deferring to Corps regulations on waiver at 33 C.F.R. § 325.2(b)(1)(ii) and applying Chevron deference to the Corps’ interpretation of when the one-year waiver period had run).

\textsuperscript{75} 33 U.S.C. § 1341(a)(1) (emphasis added). Notably, however, EPA regulations implementing Section 401 take a somewhat broader view, stating that the state’s certification must contain “[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,” 40 C.F.R. § 121.2(a)(3) (emphasis added). PUD No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology, 511 U.S. 700, 712 (1994) (holding that that “[Section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied”).

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with the statute) to the direct effects of the proposed “discharge,” third parties have challenged certifications alleging that the state’s analysis did not sweep broadly enough. Thus, the question of the proper scope of a state’s WQC review—and the related question of what types of conditions a state may impose in issuing certification—has been the subject of recent litigation.

**What kinds of impacts may a state reviewing authority consider?** States are increasingly using the WQC process to evaluate the broader environmental impacts of a proposed project, even those that are unrelated or only indirectly related to water quality. For instance, NYSDEC denied WQC for the Millennium Valley Lateral natural gas pipeline project, on the basis that FERC’s environmental analysis of the project was deficient in failing “to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project.” In doing so, NYSDEC cited a state regulation allowing the denial of environmental permits for failure to meet the requirements of the state’s environmental review procedures, which NYSDEC deemed applicable even though FERC’s environmental review under the National Environmental Policy Act (NEPA) took the place of environmental review conducted under the state’s environmental quality review act. NYSDEC’s denial was never challenged, as NYSDEC was subsequently deemed to have waived its certification authority by exceeding the one-year statutory deadline.

Other states have seen their certifications challenged on the basis that the scope of their Section 401 review was too narrow, with challengers alleging that states should evaluate not just impacts to waters and wetlands, but also “upland” impacts, i.e., terrestrial areas that are not covered by the CWA. The Fourth Circuit recently considered such arguments in a challenge to the WQC issued by the Virginia State Water Control Board (the Board) for the Atlantic Coast Pipeline project, a proposed interstate natural gas pipeline project in North Carolina and Virginia. The Board’s WQC actually contained two types of certification—one certification for the project’s use of Corps Nationwide Permit (NWP) 12, which applied to

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77. Id. at 1 (citing 6 NYCRR § 621.10(f)).
78. NYSDEC v. FERC, 884 F.3d 450, 452 (2d Cir. 2018).
79. See, e.g., Va. Code § 62.1-44.15:80 (allowing the Virginia State Water Control Board, in making a WQC decision, to consider activities of a proposed project that impact upland areas that have the potential to affect water quality where a proposed pipeline project is greater than 36 inches in diameter).
the pipeline's wetland, river, and stream crossings; and another "upland certification," which covered the project's proposed upland activities associated with construction, operation, maintenance, and repair of the pipeline as well as certain project-related surface water withdrawals. The upland certification was challenged by third party groups who alleged that it should be vacated because, among other things, the Board failed to assess "combined impacts" on water quality that would result from multiple areas of construction within individual watershed areas and because the Board failed to conduct an adequate anti-degradation review.

The Court upheld the Board's analysis, however, refusing to impose a requirement that the state agency conduct a separate review of the cumulative effects of pipeline construction in upland areas. As the Court explained, the Corps had already conducted such an analysis of the individual and cumulative impacts of linear utility projects using NWP 12 and concluded that such impacts would be "no more than minimal." There was thus no reason for the state to duplicate the Corp's review.

Additionally, the Court affirmed state expert agencies' "broad discretion when developing the criteria for their Section 401 Certification" and the fact that "Section 401 does not require states to undertake a single cumulative review of all possible impacts in a single certification." The Court also rejected the notion that the state was required to explicitly consider in its WQC review "the combined effects of multiple areas of construction within individual watersheds." Finally, the Court rejected the argument that the upland certification was deficient because the state failed to conduct a separate anti-degradation review. Because application of the state's technical standards and specifications for the project would prevent any degradation in water quality, and because the project's sediment impacts on water would only be temporary, there was no need for the Board to conduct an individualized anti-degradation review.

81. Id. at *3.
82. Id. at *5.
83. Id.
84. Id. at *3.
85. Id. at *7.
86. Id. at *7-*8; see also Sierra Club et al. v. State Water Control Board et al., 898 F.3d 383, 405 (4th Cir. 2018) (rejecting the notion that individual anti-degradation review is triggered by minor and temporary exceedances of the state's water quality criteria).
C. Finality and Reviewability

_When is the certification “final” and reviewable under the NGA?_ The question of when a WQC is “final” is important not only in terms of its effectiveness and a project’s ability to rely upon the certification, but also in terms of the availability of judicial and/or state administrative review of the certification decision. The issue of finality has been of particular concern for projects subject to FERC oversight under NGA Section 7, which provides for “original and exclusive jurisdiction” in the federal courts of appeals over any civil action for review of a state administrative agency order or action issuing, conditioning, or denying a permit or other authorization required under federal law for interstate natural gas pipeline projects subject to Section 7 certification.87

Many state laws also provide for review of such agency orders or actions via the state’s administrative appeals process. Some states issue WQC as a preliminary authorization that is not “final” until the period for seeking state-level administrative review of the certification has concluded. Other states make administrative review of a permitting decision available but not mandatory. In those states, a permit is final as issued but may be subject to further administrative review by the issuing agency or other reviewing body. State laws also vary on who has standing to invoke the review process, whether the permit is stayed pending review, and other procedural matters.

Until recently, there was little case law on whether conclusion of the state administrative appeal process is a prerequisite to judicial review under the NGA exclusive jurisdiction provision and how these avenues for review of state permitting decisions relate to each other. Recent decisions from the First and Third Circuit Courts of Appeals have attempted to “clarify” these issues but have, in practical effect, created more confusion than certainty.

In _Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC_, the First Circuit considered whether the Court’s “exclusive” jurisdiction under NGA Section 7 to review issuance of a WQC by the Massachusetts Department of Environmental Protection (MDEP) could be invoked even though the certification was undergoing review in the state administrative appeals process.88 Applying the “strong presumption that judicial review is available only following final agency action” and the principle that “[a]n agency action is ‘final’ only where it represents the culmination of the agency’s decision-making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue,” the Court concluded that the certification as


issued was not final agency action reviewable under NGA Section 7. Three aspects of Massachusetts law contributed to this conclusion: (1) that the project’s WQC request “initiated a single, unitary proceeding, an essential part of which ... is the opportunity ... to have an adjudicatory hearing; (2) that the review provided under state law was de novo, i.e., its focus was the project’s application to MDEP and not the agency’s decision on certification; and (3) the state’s procedures bore the hallmarks of internal decision-making by the agency, rather than of the type of judicial review that would be preempted under the NGA. Thus, because the WQC was not yet “final” action by MDEP, the Court dismissed the petition for review for lack of jurisdiction under the NGA.

In Delaware Riverkeeper et al. v. Sec PA Dept. Env. Protection, et al., the Third Circuit also concluded—as the First Circuit had—that only “final” state agency actions are reviewable under the NGA’s exclusive jurisdiction provision. The Court determined, however, that the state-issued water quality certification at issue was reviewable “final” action even though it was subject to further state-level administrative review because, under the relevant state law of Pennsylvania, the certification had legal effect as issued and was the final action of the agency that issued it. In so holding, the Third Circuit distinguished Berkshire Environmental, finding that under the Massachusetts procedures at issue there, a WQC was issued as a “provisional order that could become final in the absence of an appeal.” By contrast, the Pennsylvania WQC was final action by the Pennsylvania Department of Environmental Protection (PADEP) and was thus reviewable by the Court as issued despite the availability under state law of further administrative review by a separate environmental hearings board.

One day after issuing its decision in Delaware Riverkeeper, the Third Circuit issued its ruling in Township of Bordentown, New Jersey et al. v. FERC et al., in which it also considered whether state administrative processes for the review of environmental permits were preempted by the NGA exclusive jurisdiction provisions. In Township of Bordentown, the

89. Berkshire Environmental Action Team, Inc., 851 F.3d at 112.
90. Id.
92. Id. at 72.
93. Id. at 73.
94. Id.
95. Township of Bordentown, New Jersey et al. v. FERC et al., 903 F.3d 234 (3d Cir. 2018).
New Jersey Department of Environmental Protection (NJDEP) issued certain water permits required under the CWA (including WQC) and New Jersey law.\textsuperscript{96} Third parties requested that NJDEP grant an administrative adjudicatory hearing, as provided under state law, to contest issuance of the permits. NJDEP denied the hearing request, stating as the sole basis for its denial its belief that the Third Circuit has “exclusive jurisdiction to review the issuance of permits regarding interstate natural gas pipeline projects” and that, accordingly, by operation of the NGA, the state administrative hearing process was preempted.\textsuperscript{97} The third parties challenged this determination in the Third Circuit.

In analyzing their petition, the Court evaluated whether the term “civil action” in the NGA exclusive jurisdiction provision encompasses a state administrative proceeding and ultimately concluded that it does not.\textsuperscript{98} The Court explained that the term “civil action” applies exclusively to judicial cases and that state administrative review of interstate gas permitting decisions is not preempted by the NGA.\textsuperscript{99} The purpose of the NGA’s exclusive review provision therefore is “only [to remove] from states the right for their courts to hear civil actions seeking review of interstate pipeline-related state agency orders” made pursuant to federal law.\textsuperscript{100}

While these cases help to define the contours of federal appellate jurisdiction under NGA Section 717r(d)(1), they leave open several questions on the timing and effect of state administrative appeals of pipeline project permits, specifically whether such appeals may proceed concurrently with federal appellate review and whether and under what circumstances the state administrative process must be exhausted before seeking federal appellate review. These open questions are of significant consequence to the timing and progression of pipeline construction projects that rely on state authorizations issued pursuant to federal laws such as the CWA, CAA, and other statutes that delegate permitting authority to the

\textsuperscript{96} Township of Bordentown, New Jersey \textit{et al.}, 903 F.3d at 245.

\textsuperscript{97} \textit{Id.} at 246.

\textsuperscript{98} \textit{Id.} at 267.

\textsuperscript{99} \textit{Id.} at 268.

\textsuperscript{100} \textit{Id.} Having concluded that the NGA did not preempt the regular operation of New Jersey’s administrative review process, the court then analyzed whether the NJDEP’s erroneous interpretation violated New Jersey law—which, while it applies a deferential standard of review of state agency action akin to the federal standard, explicitly provides for no deference to the agency’s interpretation of a statute or its determination of a strictly legal issue. Finding that NJDEP’s interpretation of the NGA exclusive jurisdiction provision was unreasonable, the court remanded to NJDEP with instructions to reconsider the petitioners’ hearing request.
states. The cases also indicate that the resolution of these questions will ultimately turn on the particulars of the state administrative process.

The questions left open by the Third Circuit cases, at least, may ultimately be answered by the United States Supreme Court, before which a Petition for Writ of Certiorari requesting review of these decisions is currently pending.101

III. Possible Solutions

There are numerous avenues—legislative, administrative, judicial and/or executive—that could be taken to remedy some of the issues of uncertainty, unpredictability, and lack of finality discussed above.

A. Legislative

Legislation has been proposed on numerous occasions over the years in an attempt to clarify and refine the provisions of CWA Section 401, but unfortunately none have gained enough traction to become law.102 The latest attempt was the introduction of S. 3303, the “Water Quality Certification Improvement Act of 2018,” by Senator John Barrasso (R-WY) on July 31, 2018.103 This bill would, among other things: (1) require


103. S.3303 was proposed in response to the recent denial of WQC by the Washington State Department of Ecology (WDEC) for the Millennium Bulk Terminals Project, a $680 million coal export facility planned to be constructed on a former industrial site near the Columbia River in western Washington State. In its September 2017 decision denying certification, WDEC noted “significant unavoidable adverse impacts” identified in the environmental review conducted for the project, such as air quality, increased vehicle traffic, noise and vibration, construction impacts on minority and low-income populations, cultural and tribal resource issues, etc. WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017). WDEC also stated that the Project’s WQC application failed to demonstrate “reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law.” Id. at 13. The project appealed the denial to State superior court and the Washington State Pollution Control Hearings Board. The Superior Court dismissed the appeal, while the Board upheld WDEC’s decision in August 2018. The project also appealed the denial in federal District Court for the Western District of Washington, claiming among other things that WDEC’s WQC denial was preempted by various federal statutes governing rail and vessel transportation. The Court granted summary dismissal of the project’s preemption claims in December 11, 2018, on standing grounds and finding no preemption of the WDEC decision. Order on Defendants’
states to identify in writing within 90 days of receiving a request for certification all specific additional materials or information that will be necessary for the state to make a final decision on a request for certification; (2) make changes to the statutory text to clarify that the state’s review is limited to the impact of the “discharge” and not the activity as a whole and that the proper scope of review is limited to water quality concerns; (3) require states to publish their requirements for certification; and (4) require states to set forth the grounds for their decisions granting or denying WQC in writing to the applicant.104

S. 3303, if enacted, would make measurable improvements to the WQC process—but the bill’s provisions could be enhanced to provide even greater certainty to applicants by incorporating a clear avenue for federal-level appeals (and a means for federal override) of a state’s decision on a project’s WQC application or to adjudicate claims that the state waived its authority by exceeding the one-year time limit for review. Such a process could be modeled off of the process specified under CZMA Section 307, which requires applicants for federal licenses or permits to conduct activities affecting the coastal zone of a particular state to provide a certification that the proposed activity complies with the state’s coastal zone management plan.105 Such certifications are subject to state review and, within six months, a determination by the state whether it objects or concurs with the applicant’s certification.106 Like CWA Section 401, CZMA Section 307 provides that the federal license or permit may not be granted until the state has either concurred with the applicant’s certification or until, by the state’s failure to act, the concurrence is conclusively presumed.107 But unlike CWA Section 401, the CZMA provides a mechanism for an applicant to appeal a state’s objection to the Secretary of Commerce.108 The National Oceanic and Atmospheric Administration (NOAA), located in the Department of Commerce, has developed detailed regulations governing such appeals, which allow the Secretary to approve the activity seeking a federal license or permit over the state’s objection.


104.  S.B. 3303, 115th Cong. 2d Session (July 31, 2018).
106.  Id.
107.  Id.
108.  Id. The CZMA also allows the Secretary to override the state’s decision, on her own initiative, upon finding that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Id.
upon finding that the “activity is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security.”

Revising the CWA to incorporate a similar appeal and review process could help alleviate the ambiguities and uncertainties in the current Section 401 certification process, particularly if the revision allowed federal-level review of a state’s denial of WQC, and a definitive way to seek a determination that the state had waived certification by failing to act within one year. Congress would have to delegate authority over this process to a federal agency, likely EPA (given its statutory responsibility for implementing the CWA)—but such reviews could also go through FERC for projects under its jurisdiction, given the Commission’s role as lead agency for conducting NEPA review and coordinating federal authorizations for projects subject to NGA Section 7.

B. Administrative

As the agency charged with CWA implementation, EPA is in the best position to provide clarifying guidance on the Section 401 process via regulation. Unfortunately, EPA regulations implementing CWA Section 401 were promulgated in 1971 and have not been updated since 1979. They provide minimal criteria for states in issuing certifications, and they do little to clarify what constitutes a “request” for certification starting the statutory waiver period. Further, the EPA regulatory provision on “waiver” provides little specificity in describing the timeframe for a state to act on a WQC application before the requirement will be deemed waived. The regulations do not specify what constitutes a “request” for certification, nor do they clarify that one year is the outside time limit for certification.

109. 15 C.F.R. Part 940, Subpart H. The NGA specifically accounts for this appeal mechanism by excluding CZMA decisions (or alleged failures to act under the CZMA) from the judicial review provisions in 15 U.S.C. § 717r(d).

110. See 40 C.F.R. § 121.3 (providing, with respect to WQC applications, that “[a] licensing or permitting agency shall require an applicant for a license or permit to include in the form of application such information relating to water quality considerations as may be agreed upon by the licensing or permitting agency and the Administrator”) (emphasis added).

111. See 40 C.F.R. § 121.16 (providing that “[t]he certification requirement with respect to an application for a license or permit shall be waived upon . . . [w]ritten notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or . . . [w]ritten notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year)”.

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decisions—including the resolution of any state administrative appeals process to review a certification once issued.\textsuperscript{112}

To improve certainty in the CWA Section 401 certification process, EPA could modify its regulations to establish more clearly how the CWA one-year statutory deadline will apply to state certification decisions.\textsuperscript{113} Short of modifying its WQC regulations, EPA should withdraw its Section 401 Handbook, which was issued as “interim” guidance in 2010 without public comment and has never been updated or revised to reflect recent developments in Section 401 case law. Despite never being finalized, the Handbook is seen as authoritative by many federal agencies and states looking for definitive guidance on the Section 401 process.

In withdrawing the Section 401 Handbook and issuing revised guidance, EPA should clarify basic statutory principles of timing, waiver, and scope of review that are supported by recent developments in the case law. The revision could improve the process by establishing that state’s one-year clock begins to run upon receipt of an initial application and by explaining—in accordance with recent case law—that state agency practices intended to prolong the certification process (such as requiring an applicant to withdraw and resubmit a certification application) are inconsistent with the plain language and purposes of the CWA. It could explain that, in accordance with the D.C. Circuit’s decision in \textit{Millennium Pipeline Co. v. Segars}, the lead federal agency—not the State—determines whether a “reasonable period of time (not to exceed one year)” has been exceeded. It could also clarify that the state’s review under Section 401 is properly focused on water quality and that matters unrelated to water quality are outside of the intended scope of review.

\section*{C. Judicial}

As explained above, judicial decisions interpreting aspects of CWA Section 401 have in some instances created more questions than answers. Judicial resolution of some of the uncertainties in the WQC process is thus perhaps the least desirable avenue to Section 401 reform, because of the \textit{ad hoc} nature in which judicial decisions are handed down and the fact that

\textsuperscript{112} \textit{Cf.}, Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) (holding that the Corps, as the federal permitting agency, was required to incorporate into a Section 404 permit only those conditions included in a state’s certification that were issued within the CWA one-year statutory deadline, and that it had no obligation to include those conditions imposed as a result of a state administrative challenge that was not resolved until after the one-year statutory period for certification had concluded).

\textsuperscript{113} For example, EPA regulations governing the certification of federally issued CWA Section 402 NPDES permits allow states sixty days to issue certification, specifying that the period runs “from the date the draft [federal] permit is mailed to the certifying State agency.” 40 C.F.R. § 124.53(a)(3).
lower courts are not able to prescribe uniform solutions that apply nationwide.

There are, however, current opportunities for the courts to increase clarity in this area. For example, as noted above, there is currently a cert petition pending before the United States Supreme Court, seeking review of Third Circuit decisions that have created some confusion concerning the relationship between the state administrative review process for WQCs and federal appellate courts' exclusive review of state-issued authorizations for interstate natural gas pipeline projects under NGA Section 7. Uniform decisions from the Supreme Court on issues such as this could be helpful in providing guidance on the Section 401 process going forward.

D. Executive

Finally, it has been recently reported that the current presidential administration is considering an attempt at resolving issues with the CWA Section 401 certification process via executive action.\textsuperscript{114} While the contours and timing of such action remain unclear, it would be consistent with other initiatives of the administration to streamline regulatory reviews and permitting for needed energy and infrastructure projects.\textsuperscript{115}

IV. Conclusion

The Section 401 certification requirement is just one example of how the CWA preserves an important role for the states in the oversight of water quality. Congress intended this role, however, to compliment the federal government's role in approving and overseeing interstate energy and infrastructure projects—and never intended for local interests to override the federal interest in developing energy resources and related transportation infrastructure.

Since its original enactment, the implementation of CWA Section 401 has created tensions between state and federal oversight roles for large-scale energy and infrastructure projects. In recent years, this tension has reached a high watermark, with states using their WQC authority to impede projects that have received federal authorization to proceed or, where the


state issues certification, with advocacy groups targeting the certification to derail projects already determined to be in the public interest. Clarification of the fundamentals of the WQC process may help to provide clarity and to improve the process for all stakeholders, including the states. The best way to ensure durable reform of the WQC process is for Congress to revise the statute, as recently proposed by the introduction of S. 3303 in the Senate. Further improvements to increase clarity, efficiency, and finality in the Section 401 process could be achieved via administrative, judicial, and possibly executive action.
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1077

APPALACHIAN VOICES; CHESAPEAKE CLIMATE ACTION NETWORK; SIERRA CLUB; WILD VIRGINIA, INC.; COWPASTURE RIVER PRESERVATION ASSOCIATION; FRIENDS OF BUCKINGHAM; HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT; JACKSON RIVER PRESERVATION ASSOCIATION; POTOMAC RIVERKEEPER, d/b/a Potomac Riverkeeper Network, Inc.; SHENANDOAH RIVERKEEPER, a program of Potomac Riverkeeper Network; SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION; SHENANDOAH VALLEY NETWORK; VIRGINIA WILDERNESS COMMITTEE,

Petitioners,

v.

STATE WATER CONTROL BOARD; DAVID K. PAYLOR, Director, Virginia Department of Environmental Quality; ROBERT DUNN, Chair of the State Water Control Board; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; MELANIE D. DAVENPORT, Director, Water Permitting Division, Virginia Department of Environmental Quality,

Respondents,

ATLANTIC COAST PIPELINE LLC,

Intervenor.

No. 18-1079

CHESAPEAKE BAY FOUNDATION, INCORPORATED; ROBERT WHITESCARVER; JEANNE HOFFMAN,

Petitioners,
v.

STATE WATER CONTROL BOARD; MELANIE D. DAVENPORT, Director, Water Permitting Division, Virginia Department of Environmental Quality; ROBERT DUNN, Chair of the State Water Control Board; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; DAVID K. PAYLOR, Director, Virginia Department of Environmental Quality,

Respondents,

ATLANTIC COAST PIPELINE LLC,

Intervenor.


Argued: September 28, 2018                      Decided: January 14, 2019

Before GREGORY, Chief Judge, WYNN, and THACKER, Circuit Judges

Petition for review denied by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Wynn and Judge Thacker joined.

GREGORY, Chief Judge:

Pursuant to Section 401 of the Clean Water Act ("CWA"), the Virginia State Water Control Board ("Board") certified that it had reasonable assurance that activities related to the construction of a natural gas pipeline would not degrade the state's water resources. Environmental groups and their individual members disagreed with this certification, and they petitioned this Court to review the Board's decision. Because we conclude that the Board’s Section 401 Certification for upland areas was not arbitrary and capricious, we deny the petition for review.

I.

The Atlantic Coast Pipeline ("ACP"), a project developed and overseen by Atlantic Coast Pipeline LLC ("Atlantic"), is a proposed interstate natural gas pipeline, constructed by Atlantic, that will be approximately 604 miles long and 42 inches in diameter and will carry natural gas from Harrison County, West Virginia, to the eastern portions of Virginia and North Carolina. Approximately 307 miles of the ACP would traverse the Commonwealth of Virginia. There are a total of 890 water body crossings locations in Virginia, and the route of the ACP encompasses 74 migratory fish spawning waters or their tributaries. The proposed ACP access roads will intersect 89 Virginia rivers and streams and will require the clearing of thousands of acres in Virginia. To obtain approval for construction, Atlantic had to comply with the following federal and state laws and regulations relevant to this appeal.
II.

As an initial matter, Atlantic had to comply with the Natural Gas Act ("NGA"). Under the NGA, a party is required to obtain authorization from the Federal Energy Regulatory Commission ("FERC") in the form of a certificate of public convenience and necessity to build or operate a natural gas pipeline. Upon receipt of an application for such a certificate, FERC undertakes a review of the environmental impacts of the proposed project under the National Environmental Policy Act ("NEPA") and the NGA. 42 U.S.C. §§ 4321 et seq.; 15 U.S.C. §§ 717 et seq. FERC accepts input from the public and then produces an environmental impact statement ("EIS"). Functioning as a "lead agency," FERC coordinates the required authorizations, including Virginia’s water quality certification under the CWA. See 15 U.S.C. § 717n(b).

Because the pipeline project involves the discharge of fill and dredged materials into waterways and wetlands, Atlantic needed to obtain not only a certificate of public convenience and necessity from FERC, but also a Section 404 CWA authorization from the U.S. Army Corps of Engineers ("Army Corps"). See 33 U.S.C. § 1344(a); AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 724 (4th Cir. 2009). The Army Corps provided the authorization necessary for the ACP through issuing Nationwide Permit 12, which covers "activities required for the construction, maintenance, repair, and removal of utilities lines and associated facilities in waters of the United States." See 33 U.S.C. 1344(e)(1) (allowing the Secretary of the Army to issue permits on a "nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in
nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment”).

III.

Atlantic was also required to obtain a Section 401 Certification. The NGA allows states to regulate the environmental impacts of pipelines under the CWA. Delaware Riverkeeper Network v. Secretary Pa. Dep’t of Env’t Prot., 833 F.3d 360, 368 (3d Cir. 2016) (citing 15 U.S.C. § 717b(d)). Virginia exercises this regulatory authority through the Board. See Va. Code § 62.1-44.15. Pursuant to Virginia law, the Board wields broad powers regarding regulatory matters impacting water quality in Virginia, and Section 401 Certifications fall under its authority. Id. The Virginia Department of Environmental Quality (“DEQ”) serves as the Board’s staff, and the Board may assign DEQ tasks and delegate DEQ the authority to make decisions. See Va. Code Ann. § 62.1-44.14. We will refer to the Board and DEQ together as “the State Agencies” when their actions are in concert.

Under the Virginia Water Protection (“VWP”) Program, the Board, after soliciting and considering public comment and consulting with relevant agencies, may issue a VWP permit “if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect in-stream beneficial uses.” Va. Code Ann. § 62.1-44.15:20(B). The Board may also certify a nationwide Corps permit, such as Nationwide Permit 12, as meeting these requirements so long as the permit meets specified criteria. See 9 Va. Admin. Code 25-210-130(H).
Specifically, Section 401 states “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters” must seek “a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions” of the CWA. 33 U.S.C. § 1341(a)(1). In addition, Section 401 states, “[n]o license or permit shall be granted if certification has been denied by the State.” Id. If the state grants the Section 401 Certification — whether with or without conditions — it must contain “[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3); see PUD No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology, 511 U.S. 700, 712 (1994). In addition, the regulations allow for Virginia to consider activities that impact the upland areas that may have the potential to affect water quality but do not fall under the scope of a VWP permit when the pipeline is over 36 inches inside diameter. Va. Code § 62.1-44.15:80.

IV.

Atlantic applied for the certificate of public convenience and necessity from FERC and Section 404 authorization from the Army Corps in September 2015. Atlantic filed an amendment to its FERC certificate application in March 2016. In October 2017, FERC issued the certificate to Atlantic to construct and operate the pipeline. On April 7, 2017, the DEQ issued a Section 401 Certification for the wetland, river, and streams crossings as covered in the Section 404 Nationwide Permit 12. In May 2017, the DEQ explained that the Section 401 Certification for the Pipeline would entail two separate parts: (1) the
certification for the Army Corps Nationwide Permit 12, issued in April, applying to the Pipeline’s wetland, river, and streams crossings (the “Wetlands and Streams Certification”), and (2) an additional Section 401 Certification review process to evaluate the “upland” impacts of the Pipeline, terrestrial areas that are not covered by the Army Corps Permit (the “Upland Certification”). Specifically, the Upland Certification would “include all proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way as well as certain project related surface water withdrawals.” J.A 1083.

On November 9, 2017, the DEQ recommended that the Board approve a Section 401 Upland Certification of the project. On December 20, 2017, the Board issued the Upland Certification for the ACP with conditions. This Certification was distinct from the Wetlands and Steams Certification. This Upland Certification provided that it “shall be effective only following submission, review and final approval as required by law of the Karst Mitigation Plan, Annual Standards and Specifications, and Erosion and Sediment Control Plans and Storm Water Management Plans, and a report to the Board and the public by DEQ on the adequacy of these materials.” J.A. 29.

Petitioners timely filed two petitions for review of the Certification on January 18, 2018. The petitions were consolidated by court order on January 31, 2018. We possess jurisdiction to review the Board’s Section 401 Upland Certification pursuant to 15 U.S.C. § 717r(d)(1).
The petitioners contend the Board's issuance of the Section 401 Upland Certification was arbitrary and capricious and should be vacated for four reasons: (1) the State Agencies effectively invalidated their own finding of reasonable assurance when it voted to reopen the comment period on the Section 401 Certification of the Army Corps of Engineers Nationwide Permit 12; (2) the State Agencies arbitrarily and capriciously failed to assess the combined impacts on water quality that would result from multiple areas of construction activities within individual watershed areas; (3) the State Agencies arbitrarily and capriciously failed to conduct an adequate antidegradation review; and (4) the State Agencies arbitrarily and capriciously failed to ensure that the water quality in karst geology regions would be protected. Respondents and intervenor in turn deny that the State Agencies acted arbitrarily and capriciously and argue that the petitioners lack standing to bring this petition.

On April 12, 2018, the Board approved a second 30-day public comment period related to the Wetlands and Steams Certification. On August 21, 2018, the Board heard a presentation from the DEQ summarizing the public comment period and denied a motion to reevaluate this contested Certification.

V.

The respondents and intervenor argue as an initial matter that petitioners do not have standing to litigate this petition for review. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (Article III standing requires (1) an injury-in-fact (2) that is fairly traceable to the
challenged conduct of the defendant, and (3) that is likely to be redressed through a favorable judicial decision). We disagree.

This Court has previously rejected respondents’ and intervenor’s arguments on standing. *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 400-02 (4th Cir. 2018). Petitioners have established an injury-in-fact even though the State Agencies could choose to waive certification. We have previously held that the denial of an opportunity, in this case, to have the project vetoed or have additional restrictions can constitute an injury-in-fact. *Id.* at 401. In addition, petitioners successfully establish traceability and redressability given that we could vacate the Board’s decision and determine that its decision was not based on a reasonable assurance and instead was arbitrary and capricious. Petitioners’ injuries could be remedied if the Board required Atlantic to take additional measures that would address petitioners’ grievances. In our previous decision we held petitioners established traceability and redressability in this very context. *Id.* Petitioners have demonstrated the requirements for standing.

VI.

We review Virginia’s Section 401 Certification under the standards set forth in the Administrative Procedures Act ("APA"). See *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009). This Court applies the arbitrary and capricious

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1 Asserting that the APA is not applicable to actions by State Agencies, respondents argue that Va. Code § 2.2-4027 establishes the applicable standard of review. That statute provides that issues of fact shall be decided based on “whether there was (Continued)
standard of the APA to the State Agencies’ challenged findings and conclusions. *Sierra Club*, 898 F.3d at 403.

To survive review under the arbitrary and capricious standard, an agency decision must show that the agency examined “the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Agency action is arbitrary and capricious if the agency relies on factors that Congress did not intend for it to consider, entirely ignores important aspects of the problem, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a difference in view.

*Bedford Cty. Mem’l Hosp. v. Health & Human Servs.*, 769 F.2d 1017, 1022 (4th Cir. 1985) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43). This Circuit has held that [r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid. Especially in matters involving not just simple findings of fact but complex predictions based on special expertise, a reviewing court must generally be at its most deferential. In determining whether agency action was arbitrary or capricious, the court must consider whether the agency considered the relevant factors and whether a clear error of judgment was made. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. Deference is due where the agency has examined the substantial evidence in the agency record to support the agency decision.” As we did in *Sierra Club*, we decline to resolve this issue because petitioners’ claims fail even under the substantial evidence standard. 898 F.3d at 403 n.13.
relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made.

*Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (internal quotation marks and citations omitted). Nonetheless, if a state agency’s Section 401 certification is found to be arbitrary and capricious, the Court must vacate the certification. 5 U.S.C. § 706(2)(A).

**VII.**

**A.**

Turning to petitioners’ first argument, we hold that the decision to reopen the comment period did not render the State Agencies’ Section 401 Upland Certification arbitrary and capricious. The comment period was re-opened for the Wetlands and Streams Certification and not the Upland Certification at issue in this case. In any event, the Wetlands and Streams Certification was not ultimately revoked.

**B.**

Moving to the petitioners’ second argument, we conclude that the State Agencies’ decision not to conduct a combined effect analysis does not render their issuance of a Section 401 Upland Certification arbitrary and capricious for three reasons.

First, the Section 401 Upland Certification in question deals with project-related activities taking place in upland areas. The Upland Certification supplemented the FERC certificate and the prior Wetland and Streams Certification of the Army Corps’ Nationwide Permit 12 regarding waterways and utility line crossings. As the State
Agencies explained, “the conditions in the proposed additional 401 Certification are in addition to any other Federal or State permit or regulatory requirements including the expressed conditions imposed by FERC.” J.A. 1059. The Upland Certification in question is not designed to function as a stand-alone document, comprehensively covering all pieces of relevant data and potentialities. For example, record evidence available to the State Agencies explains, “while the impacts to jurisdictional waters authorized by the Corps under Section 404 of the Clean Water Act are separate from upland activities that are the subject of this Certification, the Corps also analyzed the cumulative effects of linear utility projects and found that the individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by the Nationwide Permit 12 will be no more than minimal and each crossing is a single and complete project.” J.A. 999. The Army Corps examined cumulative impacts, and it would be redundant and inefficient for the State Agencies to duplicate these efforts. The Upland Certification works in conjunction with other regulatory tools and cannot be judged in a void, and it supplements other pieces of the regulatory framework. It is not required to cover combined effect analysis because other parts of the regulatory process sufficiently address that subject matter. The State Agencies in the current appeal used their resources to issue the Upland Certification to fill an information gap regarding the impact of upland activities, which were not typically covered under prior CWA certifications. The State Agencies properly made a unique contribution instead of duplicating the efforts of other regulatory bodies as petitioners’ request. See Sierra Club, 898 F.3d at 407.
Second, State Agencies have broad discretion when developing the criteria for their Section 401 Certification. The only requirement imposed by the regulations is that States must establish procedures for public notice when there are applications for certification, and to the extent deemed appropriate, procedures for public hearings in connection with specific applications. 33 U.S.C. § 1341(a)(1). Nonetheless, nothing in Section 401 restricts states to a single certificate proceeding, and Section 401 does not require states to undertake a single cumulative review of all possible impacts in a single certification.

Petitioners' rely on two federal regulations in arguing that a cumulative review is required, 40 C.F.R. § 230.7(a) and 40 C.F.R. § 230.11(g)(1), but those regulations impose duties—including a duty to make factual determinations and consider cumulative effects—on the Army Corps under Section 404, not on states under Section 401. Moreover, petitioners contend that two cases require State Agencies to take into account combined effects lest their decisions be rendered arbitrary and capricious. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir. 2004); Idaho Rivers United v. Probert, Case No.: 3:16-102, 2016 U.S. Dist. LEXIS 63767, at *32-34. Furthermore, petitioners invoke the Supreme Court's decision in Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Ins. Co., to argue that all "relevant data" must be considered. 463 U.S. 29, 43 (1983). We conclude, however, that both the Klamath-Siskiyou Wildlands and Idaho Rivers United cases are distinguishable and unpersuasive because in those cases the Bureau of Land Management and the Forest Service, respectively, faced violations under NEPA, not the CWA. Klamath-Siskiyou
Wildlands Ctr., 387 F.3d at 993–94; Idaho Rivers United, 2016 U.S. Dist. LEXIS 63767, at *33. Unlike the CWA, NEPA requires a cumulative effects analysis, and thus cases decided under NEPA are not dispositive authority here. Furthermore, Motor Vehicle Manufacturers Association, which deals with the National Highway Traffic Safety Administration, does not mention cumulative effects or the CWA, and thus the case does not stand for the proposition that the CWA should be broadened to encompass a combined impact analysis.

Finally, the State Agencies’ failure to explicitly consider the combined effects of multiple areas of construction within individual watersheds such as the Chesapeake Bay watershed and the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) did not render their decision arbitrary and capricious.\(^2\) As an initial matter, despite petitioners’ preferences, there are no express regulations that require the State Agencies to consider the combined effects of individual watersheds. In addition, the Ninth Circuit has explained that TMDLs like the Chesapeake Bay TMDL are “primarily informational tools that allow states to proceed from the identification of water requiring additional planning to the required plans.” Pronsolino v. Nasti, 291 F. 3d 1123, 1129 (9th Cir. 2002). Moreover, TMDLs do not give rise to an independent legal obligation. Pronsolino, 291 F.3d 1123, 1140. Consequently, the Chesapeake TMDL does not constitute a regulatory mandate that the State Agencies were required to address before issuing the Section 401 Upland Certification. Furthermore, protection measures for the

\(^2\) The Bay TMDL is a federal-state partnership that monitors the water quality standards in the Chesapeake Bay and its related tributaries. J.A. 888.
Chesapeake Bay TMDL are offered through other tools such as the FERC EIS and the Storm Water Prevention Plan. J.A. 664-665; 1138-1140.

The State Agencies more than satisfied their obligations by reviewing upland activities as well as stream and wetland crossings. The Board’s decisions are not rendered arbitrary and capricious because it did not conduct an independent review of the cumulative effects on water quality within individual watersheds, even if this was petitioners’ preference. To deem an agency action arbitrary and capricious their decision must be “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” State Farm Mut. Auto. Ins. Co., 463 U.S. at 43. The lack of an explicit combined effect analysis in the Section 401 Upland Certification does not rise to this level, especially given that there are other regulatory tools that were utilized to consider those impacts.

C.

1.

Turning to petitioners’ third argument, we do not find that the State Agencies’ reasonable assurance determination to be arbitrary and capricious simply because they relied on existing Virginia water quality standards and regulations to effectively address concerns regarding water quality deterioration.

Under the CWA, “states have the primary role in promulgating water quality standards.” Piney Run Preservation Ass’n v. County Comm’rs of Carroll Cty., 268 F.3d 255, 265 n.9 (4th Cir. 2001). States must initially classify the uses for which their water is to be protected and then determine the necessary level of water quality for their
preferred uses. See NRDC v. EPA, 16 F.3d 1395, 1400 (4th Cir. 1993). Virginia’s water-quality policy is relevant in two respects: its narrative water-quality criterion and its antidegradation policy.

Virginia’s water-quality criterion mandates that “State waters ... shall be free from substances attributable to ... waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.” 9 Va. Admin. Code § 25-260-20(A). The regulation explains that any substance “that produce[s] ... turbidity” is a substance to be controlled. Id. The regulation provides examples of “turbidity” such as floating debris, oil, and other materials that are suspended solids in a body of water.

In addition, Virginia’s antidegradation policy shall be applied whenever any activity is proposed that has the potential to affect existing surface water quality. 9 Va. Admin. Code § 25-260-30(A). The antidegradation policy classifies Virginia’s water into three tiers and provides differing levels of protection based on the water’s tier. See 9 Va. Admin. Code § 25-260-30(A).

3 waters] even if degradation may be expected to temporarily occur provided that after a minimal period of time the waters are returned or restored to conditions equal to or better than those existing just prior to the temporary source of pollution.” 9 Va. Admin. Code § 25-260-30(A)(3)(b)(3).

The Policy defines Tier 2 waters as those that “exceed water quality standards.” 9 Va. Admin. Code § 25-260-30(A)(2). The protection for these waters and their quality are lower and the regulation states that the quality of Tier 2 waters “shall be maintained and protected unless the board finds . . . that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” 9 Va. Admin. Code § 25-260-30(A)(2).

Last, Tier 1 waters constitute all Virginia waters that are not designated Tier 2 or Tier 3. The regulation classifying the level of protection for these waters’ states, “existing in-stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 9 Va. Admin. Code § 25-260-30(A)(1).


The CWA has an exemption for natural gas pipeline construction projects and therefore Virginia’s regulatory scheme diverges from the federal environmental protections. See 33 U.S.C. § 1342(I)(2). Consequently, Virginia still regulates natural

Nonetheless, once DEQ approves a developer’s annual standards and specifications as satisfying the requirements of the VSM and VESC, the entity generally need not submit site-specific VSM and VESC plans to DEQ for approval. See Va. Code § 62.1-44.15:55(D). This allows the projects to become more self-regulating.

Typically, ensuring an activity’s compliance with water quality standards requires an antidegradation review. See Nat. Res. Def. Council, Inc. v. EPA, 16 F.3d 1395, 1400 (4th Cir. 1993); see also 40 C.F.R. § 131.12 (requiring states to develop and adopt a statewide antidegradation policy). The CWA’s antidegradation policy requires that state standards be “sufficient to maintain existing beneficial uses of navigable waters, preventing further degradation.” 33 U.S.C. § 1313(d). State antidegradation policies must be consistent with 40 C.F.R. § 131.12(a), and must protect existing uses, maintain the existing quality of high-quality waters unless degradation is justified by important socioeconomic development, and prohibit degradation of national resource waters. Id. § 131.12(a).
2.

We do not find that the State Agencies’ failure to conduct a separate antidegradation review before issuing its Upland Certification renders their decision arbitrary and capricious for two reasons.

First, in Virginia, the AS&S program requires a project developer to submit annual standards and specifications for DEQ’s review and approval, thereby ensuring that projects will meet the same requirements that would apply were they covered by the Virginia Construction General Permit. See 9 Va. Admin. Code § 25-870-170(A). The AS&S also incorporate all the requirements of EPA’s Construction General Permit. J.A. 1124-1125. The AS&S in this case were developed over eighteen months and represent a thorough process of development, revision and refinement to ensure that the ACP meet the technical and legal requirements for Virginia. J.A. 1087. Both federal and state regulators have concluded that application of technical requirements like those in the AS&S “will not result in a lowering of water quality,” which renders the individualized review the petitioners suggest “unnecessary.” J.A. 11. There is no indication that these AS&S fail to protect water quality in Virginia. To the contrary, these regulations have been found as a matter of law to protect water quality in Virginia. See Kelble v. Commonwealth, Case No. CL 14-762, at 4-5 (Richmond Cir. Ct. Apr. 10, 2017).

Second, State Agencies did not have to conduct a separate antidegradation review because the impact on sediment on the water would only be temporary. Under FERC’s final EIS, it was determined that any water quality impacts stemming from construction would be temporary. J.A. 623. Even with respect to Tier 3 waters, the policy states that
“[a]ctivities causing temporary sources of pollution may be allowed in [Tier 3] waters . . . even if degradation may be expected to occur provided that after a minimal period of time the waters are returned or restored to conditions equal to or better that those existing just prior to the temporary source of pollution.” 9 Va. Admin. Code 25-260-30A(3)(b)(3). Even in the most protected state waters, Virginia does not consider temporary sources of pollution, such as the construction of the ACP, to violate antidegradation policies.

Thus, nothing was arbitrary and capricious about the State Agencies’ decision not to conduct a separate antidegradation review.

D.

Turning to the final challenge raised by petitioners, we find that the State Agencies’ treatment of karst terrain was not arbitrary or capricious because of the conditions imposed on the Section 401 Upland Certification.

Karst geology refers to geological formations of soluble limestone bedrock that creates underground water flow systems where the rocks have dissolved and created sinkholes, caves and underground springs and rivers. J.A. 669. The constitution of these areas presents additional environmental considerations for pipeline construction including, sinkhole collapse, sinkhole flooding and associated groundwater contamination. J.A. 904-905.

The record demonstrates that the State Agencies took petitioners’ concerns regarding karst geology into consideration. J.A. 31. Virginia’s Section 401 Upland Certification contains five specific requirements concerning the protection of karst
terrain. J.A. 31-32. First, Atlantic must provide the State an addendum to a 51-page Karst Survey Report prior to any land disturbing activities. J.A. 212-237; J.A. 31. Second, Atlantic must follow the Karst Terrain Assessment, Construction, Monitoring, and Mitigation Plan. J.A. 31. This plan allows for route adjustments to avoid karst terrain. J.A. 1001. Third, based on the conditions in the Section 401 Upland Certification, Atlantic must conduct contingency planning in order to address any accidental spills or releases during construction on karst terrain. Fourth, water surveys regarding drinkable water in karst regions are required under the Section 401 Upland Certification. J.A. 31. Finally, Atlantic has a liability of five million dollars to cover the cost of any impacts to private water supplies, which encompasses karst regions. J.A. 32.

Reliance on these conditions, even the prospective ones, does not render the State Agencies' issuance of the Section 401 Upland Certification arbitrary and capricious. See Port of Seattle v. Pollution Control Hearings Bd., 90 P.3d 659, 677 (Wash. 2004) (holding regulators did not act arbitrarily or capriciously by basing reasonable assurance "on future submissions of revised plans, reports, and studies, so long as their implementation and anticipated outcome meet the reasonable assurance test").

Moreover, the mere existence of risk to karst geology does not render the State Agencies' decision to issue the Section 401 Upland Certification arbitrary and capricious. Based on the information in the record, this Court finds that the State Agencies had reasonable assurance that karst regions would be protected given the conditions imposed on the Section 401 Upland Certification. We "see no purpose we would serve by stepping in and second-guessing the analytical methods Virginia deemed appropriate to
provide it with reasonable assurance that its water quality would be protected.”  *Sierra Club*, 898 F.3d at 407.

VIII.

Governmental agencies can always take additional steps to increase the protection of the environment. But that is not the applicable legal standard this Court utilizes when reviewing a state agency’s issuance of a Section 401 Certification. We must determine “whether the agency considered the relevant factors and whether a clear error of judgment was made.” *Ohio Valley Envtl. Coal.*, 556 F.3d 177, 192. There is no indication that the State Agencies did not consider relevant factors or that they clearly made an error of judgment. In conclusion, because we find that the State Agencies did not act arbitrarily and capriciously in issuing the Section 401 Upland Certification, we deny the petition for review.

*PETITION FOR REVIEW DENIED*