August 2, 2021

Via www.regulations.gov

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

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on "Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule"
Docket No. EPA–HQ–OW–2021–0302; FRL–10023–97– OW

Dear Administrator Regan and Ms. Kasparek:

The Appalachian Trail Conservancy (ATC or Conservancy) is the lead non-profit cooperative manager of the Appalachian National Scenic Trail (ANST), a unit of the National Park System. ATC appreciates the opportunity to offer comments on the Advanced Notice of Proposed Rulemaking for the Clean Water Act §401 Rule (Future Rule) as the Clean Water Rule §401 Certification Rule finalized on July 13, 2020 (Current Rule) improperly disrupted the balance between regulators and regulated and between advancing infrastructure projects of high value and thoughtfully conserving our public trust resources. The Future Rule must provide clarity to project proponents without extralegally removing, as the Current Rule does, the ability of states and tribes to manage their resources based on sound science and local prerogatives.

ATC is the frequent intermediary between governments, communities, and developers, and therefore understands the pressures of certainty and expense as well as the danger of an improperly considered or executed project. The Conservancy relies on the federal government and states to work collaboratively for the public benefit in managing our trust resources, and for tribal sovereignty to be respected. In order to achieve the most equitably balanced process in the Future Rule, the Environmental Protection Agency (EPA) must focus on advanced disclosure, forthrightness, and the criticality of cooperative federalism.

The Conservancy believes that, contrary to the clear text of that statute, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[1] that, as stated in Executive Order

[1] 33 U.S.C.A § 1251(a) (West 2021).

13868 (the Order) initiating the Current Rule, the purpose of the Current Rule is to, in summary, "enable the timely construction of the infrastructure needed to move our energy resources through domestic and international commerce."[2] The Current Rule appears, in its explanation and impact, to be not for the benefit of clean water and the right of states and tribes to manage their resources; rather, it seems designed to benefit the development of infrastructure on an accelerated timeline and without the ability to provide substantive input from states and tribes as required by Congress. Our public trust resources must be managed for the greatest benefit to the public, not to private entities or for the convenience of developers.

As the organizer and lead cooperative manager of the ANST, ATC has extensive experience in managing public trust resources and achieving consensus whenever possible. CWA §401 has been triggered in the Conservancy's experience most recently and commonly as a natural gas/methane pipeline is considered to cross from the Marcellus and Utica shale gas plays of greater Appalachia to the highly developed and densely populated East Coast. To build a such a pipeline from west to east in most of the eastern United States, the ANST will, in some way, need to be crossed and federal authorization will ultimately need to be granted by the Federal Energy Regulatory Commission (FERC). In offering these comments, ATC recognizes that much of our concerns with the national infrastructure authorization process are better addressed to FERC, which does not consider many of the critical data points that states and tribes do in offering their §401 Water Quality Certification (WQC). In both its issuance of the One Federal Decision Executive Order and resulting Memorandum of Understanding[3] and in the promulgation of the Current Rule, that Trump Administration unfortunately attempted to fix a faulty process overseen by FERC not by encouraging better policy making by that entity, but by restricting its sister agencies—and by the Current Rule, the sovereign states and tribes—preventing their ability to appropriately manage the trust resources in their charge.

The Current Rule, contrary to almost fifty years of largely successful implementation and the only two Supreme Court decisions on the relevant section of the CWA, extra-statutorily limits states and tribes in their ability to condition within their WQC "any activity…which may result in a discharge into navigable waters"[4] under both specifically enumerated preceding sections of the CWA and "any appropriate requirement of state law set forth in such certification."[5] It extra-legally creates a role for the federal agency in approving or disapproving conditions offered by states and tribes based on states and tribes' own analyses and best judgement of how to manage their resources. It does not consider the failure of applicants to provide information in a timely manner to states and tribes and it centralizes all final decision-making authority in federal entities that are not and have not been responsible for the regular consideration and enforcement of conditions contained within a water quality certification. The role of the federal government is to create a floor, and not a ceiling, for standards in managing trust resources, particularly when the statute preserves the broad authority not delegated to the federal government by the Constitution.

[2] 84 Fed. Reg. 15,495.
[3] Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).
[4] 33 U.S.C.A § 1341(a) (West 2021).
[5] 33 U.S.C.A. § 1341(d) (West 2021).

As the Conservancy has made clear in its filings and submissions to EPA, FERC, and Congress, the development of energy infrastructure within the United States has operated for too long on too little information about the development of projects and too little understanding of the impacts of projects. For the federal government to issue authorization for infrastructure that will have local, national, and planetary impacts, there must be a full airing out of a proposal and input from all relevant stakeholders. §401 guarantees that the federal government cannot exclude, marginalize, or circumvent the states and tribes or injure their ability to provide for their citizens and to manage their resources. The Current Rule improperly and illegally attempts to do what Congress sought to prevent in the current law and it therefore must be repealed, revised, or replaced.

I. Pre-Filing Meeting Requests

There are exceedingly few opportunities for regulators such as the EPA, FERC, and state and tribal resource agencies to positively influence the development of project proposals clearly outlined in statute, nor are there many statutorily established opportunities for stakeholder groups to weigh in. It should not be assumed that prior to filing an application for federal authorization to construct and operate a methane pipeline, for example, that the project proponent will have extensively consulted community groups representing those who may be impacted, has researched the sensitive geological and ecological potential impacts of the project, or will have developed the pipeline route based on true market need and trends in energy usage. Because of the way in which FERC operates—occasionally by intention, if not design—once an application for project approval has been submitted, there are few opportunities for either FERC or the other agencies with an amount of approval authority under the Federal Power Act (FPA), Natural Gas Act (NGA), and CWA to improve a proposed project in the event that the proposal is poorly designed, of little public benefit, or unnecessarily negatively impacts trust resources. Pre-filing consultations provide the opportunity for a project proponent to hear directly from regulators on what they'll need to incorporate into their project proposal in order to meet what should be the extremely high bar of "public convenience and necessity" required for a methane pipeline under the Natural Gas Act.

Applicants recognize that after a formal application filing, there are truly only a very limited number of points during the federal application (more often than not, "approval") process that allow for significant course corrections or changes to a particular proposal; changes that do happen after a formal application is filed are often costly to everyone involved. This dynamic has important consequences for public participation and the obtaining of quality information. Even bad ideas are advanced absent applicant restraint or stakeholder engagement, because once a formal application is filed, the process tends toward approval. If an applicant ignores the perspectives of other interested parties, often the only viable way to influence a proposed project is through litigation. That is, of course, the least desirable of potential engagement methods and should be avoided whenever possible. It is therefore imperative that the applicants and regulators obtain the best information possible prior to a proposed activity moving forward through the permitting/licensing process.

The regulatory process for infrastructure subject to CWA §401 approval was built to be collaborative, in part to allow for stakeholder engagement at various levels, and that intention must be respected. Prospective applicants planning major energy infrastructure developments commonly take advantage of FERC's pre-filing consultation processes. This pre-filing request is supposed to include detailed

descriptions including routes, an approach to the NEPA process, an identification of other agencies (tribal, federal, and state) with relevant jurisdiction, and a public participation plan. Many also avail themselves of the opportunity to consult with the CWA §401 certifying authority prior to the filing of the application, for those that offer the opportunity. These conversations in advance of the formal filing of an application can be incredibly valuable not simply because they provide potential project proponents a window into how their applications may be considered, but because they provide potential project proponents an opportunity to collect information in advance of a formal submission so they may improve their project plan as well as expediate the review process once the application is formally submitted.

In particular, pre-filing consultation allows the federal, state, and tribal authorities to identify to the potential project proponent stakeholders who may support or oppose the project. A poorly developed project invites litigation and early stakeholder engagement may identify and eliminate or mitigate aspects of a project that may lead to unnecessary and avoidable costs and impacts to trust resources, community well-being, or individual property rights. ATC, for instance, is most available and freely able to provide the greatest amount of advisory assistance during pre-filing. In ATC's experience, its ability to engage prior to the formal submission of an application has yielded significant, positive impacts on project development and the protection and management of trust resources and community values.

Importantly, FERC does not view as one of its purposes the management of trust resources or the mitigation against negative externalities of infrastructure development. It has been the responsibility of the other governmental regulators to insist on incorporating those governmental responsibilities into a federal authorization for infrastructure development, making the pre-filing consultative process with them all the more important. Although ATC is hopeful that the development of the Office of Public Participation at FERC will improve the pre-filing consultative process, pre-filing consultations with both federal and state/tribal regulators, occurring at similar times, would benefit the overall CWA §401 process. A collaborative approach, such as is pursued via the FERC hydroelectric integrated licensing process (ILP) may be the ideal option. ATC believes that pre-filing is a valuable part of the project development and potential application process, that it should be encouraged, and that it should be an opportunity for substantive improvement of a project prior to its formal submission. The decision for a §401 authority to offer pre-filing consultation, however, must be its own, and not compelled by the EPA as nothing in §401 grants EPA such an authority, except as when EPA issues the §401 certification.

II. Certification Request

The Clean Water Act provides that the certification process under §401 must precede the issuance of the federal authorization and that no federal authorization may be granted until the §401 process has been completed, within a reasonable amount of time not to exceed one year. It does not explicitly state, however, when that one-year clock starts and to which authority an application must be submitted to start that clock. ATC is sympathetic to EPA in its attempt to make clear, via the Current Rule, when the §401 process definitively begins, but we believe imposing the boilerplate language fails to address the genuine issue, which is that oftentimes a state/tribal authority does not begin its evaluation of an application for a §401 certification not because it does not have an application seeking approval, but

because the application is incomplete and the state/tribal authority, based on the application's contents, lacks the ability to offer a scientifically based and legally defensible evaluation of the potential impact of the project on the navigable waters.

Unlike the National Environmental Policy Act (NEPA), the CWA is not merely a process statute. Its goal is not simply to ensure the orderly progression of a regulatory process in order to evaluate potential outcomes and ensure consideration of differing perspectives. The CWA is a resource management statute, intended to ensure the proper stewardship of public trust resources by evaluating the potential impacts on those trust resources by a proposed activity. States and tribes are empowered under their authority—authority that is recognized and respected by the text of the CWA—to manage their resources under their own laws. The CWA provides states and tribes the ability to ensure that their laws and managerial responsibilities to their citizens for their public trust resources are not trampled upon by a distant federal government, potentially unconcerned with the rights and responsibilities of the other sovereigns. In order to properly steward their trust resources, the non-federal governments must have sufficient information to properly evaluate the potential impacts and ensure that their local laws are not violated by the activity. If the federal government were so deprived of such information, the agency with responsibility for the final authorization would not allow the proposed activity to proceed.

It is ATC's position that the application for a §401 WQC should not be considered complete, and therefore subject to the one-year clock mandated by the CWA, until the project proponent's application is delivered to the §401 certifying authority including the information that the §401 agency requires to conduct its review according to its own laws. We believe that the certifying authority must be upfront about what its requirements are, and we urge those states/tribes that do not have a pre-filing consultation processes to establish them, so that project proponents have as much notice and information as possible in order to submit an application that may be reviewed as expeditiously as possible on the part of the state or tribe. By imposing a boilerplate request for certification into the text of the Current Rule that allows an application to be complete but does not require the application include any information, EPA trained its attention on process, rather than on the purpose of the CWA.

III. Reasonable Period of Time

Proponents of activities for which a federal license or permit is sought, and which may result in discharges to navigable waters, must obtain WQC before final federal authorization may be granted. Thus, §401 water quality certification serves as a precondition to any federal hydropower project licenses and interstate methane/natural gas pipelines Certificates of Public Convenience and Necessity issued by FERC. Because Congress granted FERC authority to regulate the licensing, conditioning, and development of hydropower and pipeline projects under the FPA and the NGA, respectively, it is important that certifying authorities for water quality certification do not unnecessarily delay the federal consideration of what may be important infrastructure while they conduct their own review, under their own laws, of the potential impacts of such infrastructure, hence the one-year clock. As discussed above, however, many delays may more appropriately be traced to the applicant, and not to the §401 authority.

As a threshold matter, there is nothing in the text of the CWA that purports to give the EPA or any other federal agency the ability to determine what, for the purposes of state and tribal review, a reasonable

period of time is. The Current Rule appoints federal agencies as the sole arbiter as to what constitutes a reasonable period of time for states and tribes to act on water quality certification requests, despite federal agencies lacking information on any number of factors that may contribute to an agency's ability to review applications. The only entity that is capable of determining what a reasonable amount of time for a state or a tribe is, in fact, that state or tribe, which is aware of its staffing, the complexity of pending applications, and the current state of resource management within that jurisdiction, all within the context of the one-year clock statutorily imposed by the CWA. It runs contrary to the fundamental purpose of §401, which is ensure the ability of states and tribes to consider the potential impacts of activity to impact navigable waters within their authority, to allow the EPA or the Army Corps of Engineers (the Corps) the ability to decide how much time, under a year, that a state or tribe may be allowed to have. Extralegally attempting to bestow onto federal agencies the authority to determine for a state or tribe what constitutes a reasonable period of time for their review is one of the ways the Current Rule hamstrings the ability of states and tribes to fulfil their obligations both under the CWA and under their own laws.

The text of the CWA is clear that a reasonable amount of time cannot exceed one year. After that, it does not specifically empower EPA the ability to determine how much time the certifying authority may have to evaluate an application. Particularly when WQC applications are incomplete, states and tribes are unable to complete a scientifically based and legally defensible review to certify that the discharge will not violate their water quality or other appropriate standards as determined under their laws. Additionally, CWA §401 allows that states and tribes may subject the applications to notice and comment as their laws may allow or require. There is no guarantee in the Current Rule that the state's own laws, let alone their ability to ration their resources as they see fit within that one-year requirement, are worthy of EPA's consideration in its determining a "reasonable amount of time." The Current Rule, in effect, nationalizes state and tribal water quality agencies, making them outgrowths of the federal government, rather than respecting their status as dual sovereigns. The Future Rule may not allow a federal agency to set a "reasonable period of time," although it may recognize the ability of the state or tribe to do so.

IV. Scope of Certification

Section 401 of the CWA was written to require the evaluation of specific aspects of water quality as enumerated in the Act, but was intentionally written with an understanding that there may be additional needs specific to the resource conditions or citizens under a state or tribe's jurisdiction, and so included language guaranteeing that §401 water quality certification must ensure that discharges "comply with . . . other appropriate requirement[s] of [s]tate law set forth in such certification."[6] This purposefully broad language reflects an understanding that the federal government sets the floor, and not the ceiling when it comes to regulating the environment, and that individual states or tribes may have needs that dictate additional criteria be considered. Not included within the requirement that other appropriate requirements of state law is that any entity other than the state or tribe shall judge appropriateness. Despite this, the Current Rule limits the scope of certification with respect to water quality considerations that a state or tribe may factor into its review of an application in excess of what the

[6] 33 U.S.C.A. § 1341(d) (West 2021).

CWA specifically enumerates, in direct contravention of both the plain text of the statute and U.S. Supreme Court precedent on §401.

The Current Rule restricts the types of activity that may be subject to review under §401 by limiting the scope of "activity" to only "point source discharges."[7] In *S.D. Warren Co. v. Maine Board of Environmental Protection*,[8] the U.S. Supreme Court declined to make the distinction that discharges under §401 applied only to point source discharges. Rather, the Court ruled in that case that the alteration of the natural flow of the river and discharge into the river—even just of water that had originated upstream—constituted an "activity" that was subject to Maine's jurisdiction under §401. Additionally, impacts from activities not directly caused by the discharge are raised beyond the scope of the Current Rule. In *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*,[9] the U.S. Supreme Court held that §401 of the CWA gives states and tribes authority to prescribe conditions addressing impacts from the project activities as a whole, rather than only those impacts that result from the discharge itself. The scope of certification thus includes conditions relating to impacts to recreation access, impacts from non-point source pollution, impacts on reservoirs, and impacts on fish passage.

"Other appropriate requirements of state law," are not limited to those water quality criteria specifically listed in §401, and certainly not to point source discharges only. In fact, the language of §401 itself never mentions point source discharges. The determination as to what qualifies as an appropriate requirement of state law must be left to the certifying authority by the current text of the CWA. The EPA cannot promulgate a rule seeking to absorb from states and tribes authority the U.S. Supreme Court has said belongs to the states and tribes absent statutory language granting it such authority, regardless of a given administration's policy objectives.

V. Certifications Actions and Federal Agency Reviews

Under §401 of the CWA, federal agencies such as the EPA have no authority to interfere with state and tribal determinations as to certification actions. There is no utility in requiring specific components and information for certifications with conditions and denials unless they were determined to be necessary by the certifying authority. Requiring specific components and information for certifications with conditions and denials is only beneficial if the certifying authority has provided that such components and information are required under the applicable state and tribal laws for issuing a scientifically and legally defensible argument for a determination. If EPA, in the Future Rule, would recommit that the conditions set forth by the states and tribes offering the WQC are requirements of federal as well as state law, that would not be inappropriate.

Under the Current Rule, a federal agency may overrule the decision to include a condition within a WQC if it determines that the certification requirement or action does not satisfy the necessary requirements it, EPA or the Corps, has determined. Because federal agencies have no statutory authority to interfere with a certifying authority's determination as to certification actions, including denials, no

[7] 40 C.F.R. Part 121 (2020).
[8] 547 U.S. 370 (2006).
[9] 511 U.S. 700 (1994).

rule promulgated regarding §401 may contain such a federal role. If, for example, a certifying authority determines it does not have the information necessary to make a determination as to the adequacy of a proposed project's ability to comply with water quality requirements—or if the approval of such an activity would be contrary to the requirements of appropriate state law—that state or tribe should be able to deny the request, without interference from the EPA or Corps, and project proponents may then submit a new request with the necessary information provided.

Similarly, if a certifying authority determines that certain conditions are required for a certification to be granted, then the federal agency has no authority to reject any of the conditions set out by the state or tribe; a federal agency may never reject tribal or state-imposed conditions. If a project proponent feels as though conditions were included that should not have been, given the relevant state or tribal laws, then the project proponent may seek redress in the courts. Courts can cure the license or certificate if necessary after determining whether the conditions were appropriate for inclusion or not. Neither the CWA nor the FPA allow the EPA or FERC, respectively, to "cure" deficient WQC conditions—neither statute recognizes the existence of such "deficiencies," which is the crux of *Jefferson County*.

It is not appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, because federal agencies do not have such authority under §401. If the project proponent believes that the certifying authority has issued an improper water quality certification under that state or tribe's laws, it is empowered to seek redress through the judicial process or through the process that may be outlined in state law for such a review. If there are deficiencies, those deficiencies are the domain of the courts, and it is the applicant, the licensee, or the certificate holder who would be in the position to declare such a potential deficiency, not any federal agency. Any declaration would be done on the basis of the tribe or states' own laws because federal agencies do not interpret state laws unless a federal law tells them to, which is not the case with respect to §401 of the CWA.

VI. Enforcement

Under the Current Rule, once a certification is issued, certificating agencies have no continuing jurisdiction over compliance with conditions in the certification. Rather, federal agencies are given responsibility to ensure that certification conditions are being complied with. This stands in direct opposition to the text of the CWA itself, which states that, "any other appropriate requirement of state law set forth in such certification . . . shall become a condition on a federal license or permit subject to the provisions of this section."[10] If the certification requires that the state be responsible for monitoring the conditions set forth in the certification, there is nothing in the CWA that prevents the state from enforcing that condition. Furthermore, as the impetus behind §401 was to ensure that states and tribes were not unnecessarily deprived of their inherent authority to manage resources, in the hands of an EPA that is not interested in respecting that authority, the Current Rule prevents those state or tribal laws from being enforced at all, thereby obviating the purpose of §401. Furthermore, as the local resource manager, states and tribes are in the best position to monitor compliance with the certification conditions

[10] *See* 33 U.S.C.A §1341(d) (West 2021).

and are possessed of their own resources to enforce the conditions of their WQC. They would be the first to know if conditions are violated and would be the quickest to respond. Congress has the authority to determine whether a party can seek relief from the courts, not the EPA. The EPA has exceeded its authority by limiting the ability of states, tribes, and individuals to engage in enforcement proceedings. The Future Rule, if it makes mentions of state or tribal authority to enforce conditions included within the WQC, should reaffirm their ability to do so without interference from the federal authority.

VII. Modifications

Federal licenses are often granted for many decades; hydropower licenses may be granted for fifty years[11] and natural gas/methane pipeline licenses are permanent.[12] The licensing process currently allows certifying authorities to prescribe conditions based on past, ongoing, and future impacts from project operations. But future impacts are often projections based on currently available data, and conditions will certainly change during the license term or life of a methane pipeline. When and if new information arises that was not available or knowable at the time of certification/licensing, or if circumstances applicable to the project and its impacts change over time, certifying authorities should be permitted to make modifications to, or "reopen," the certification.

If state or tribal law so provides, there is nothing in the CWA that otherwise would prohibit states from being able to enforce requirements for changing conditions that they may outline in a WQC. The inclusion in a WQC of anticipated but not explicitly delineated changing conditions that may require alterations to the operation of an activity causing a discharge does not require a new application for WQC. Even absent the jarringly cumulative effects of anthropogenic climate change, weather events, developments, changes in law, etc. stand to impact, among other things, the condition of water quality and of navigable waters. Furthermore, for example, the listing of a species under the federal Endangered Species Act, or under a state or tribe's own law, can be anticipated, but not necessarily augured with any degree of exactness. The additional level of protection for habitat may substantially alter the operation of an activity that may cause a discharge into navigable waters. A WQC should not be expected to lock in in perpetuity the method of management of resources that themselves are guaranteed to change over time. Changes in resource condition, anticipated in the WQC, may reasonably require alterations in the operation of an activity subject to WQC. Capricious or unfounded alterations are not advisable and likely would not hold up under judicial scrutiny. While ATC believes in a degree of certainty, no managerial responsibility or method of operation is ever absolute or eternal.

VIII. Neighboring Jurisdictions.

ATC has not been involved in any recent proceedings in which the pre-Current Rule method of neighboring jurisdictions engaging in the evaluation of an activity that may cause a discharge into navigable waters was deficient. The Conservancy defers to those states and tribes offering responses to this advanced notice on their perspectives as to the necessity of any regulatory process in excess of what pre-dated the Current Rule.

[11] *See* 16 U.S.C.A. § 799 (West 2021).
[12] *See* 15 U.S.C.A. § 717f(e) (West 2021).

IX. Data and other information.

The Conservancy believes that the Current Rule is the wrong rule for 2021, let alone the renewable energy future that the United States must achieve in order to maintain an ecologically healthy and livable planet. Section 401 presupposes that state and tribes may determine resource management needs for their jurisdictions that go beyond the explicitly referenced requirements of the Current Rule, which is why Congress included the broad reservation of state and tribal authority of "any other appropriate requirement of state law." The Clean Water Act does not purport to be the be-all and end-all authority on what is required to keep waters swimmable and drinkable or otherwise able to sustain life. Given the rapidly mounting negative conditions caused by anthropogenic climate change, the manners in which a state or tribe must study the potential impacts of an activity that may cause a discharge into navigable waters may change. Any rule, if a rule clarifying anything under §401 must exist, must maintain the flexibility that Congress baked into the law—and that has worked—for the past 50 years

X. Implementation coordination.

The collaborative review process that §401 is a foundational aspect of requires the state, tribal, and federal authorizing authorities to work together to provide for the public benefit. It is imperative that FERC and Corps coordinate with one another and with states and tribes—and moreover that FERC and the Corps respect the role of states and tribes and their authorities—in the licensing and permitting of activities that may result in a discharge into navigable waters. In recent years, FERC has licensed an overwhelming number of projects, specifically methane pipeline projects, while simultaneously refusing to evaluate those projects with a critical eye as required by Congress in statute and as reaffirmed by the courts, most recently in *EDF v. FERC*.[13] While there is room for improvement within the §401 certification processes on behalf of the states, tribes, and the federal agencies—specifically in ensuring that §401 authorities have the information necessary to issue a scientifically based and legally defensible WQC within the one-year timeframe—it is critical that FERC and the Corps update their policies to be consistent with any new rules, and even more imperative that they affirmatively comply with the processes set out in those policies. Without commitment to the collaborative process envisioned in the CWA and in the FPA, the positive impacts of increasing coordination in one part of the process, only to be met with willful intransigence in another, may make any rulemaking an effective wash.

Conclusion

The EPA erred substantially in both its information-gathering regarding the Current Rule and in its construction of the Current Rule. ATC recognizes the need for a high degree of certainty and the importance of understanding how decisions will be made by a state or a tribe in their exercise of §401 authority, but the Clean Water Act does not provide the EPA the authority it sought to use in promulgating the Current Rule and the Current Rule removes from states and tribes authority intentionally preserved for them in the Clean Water Act. The Appalachian Trail Conservancy urges the

[13] No. 20-1016, 2021 WL 2546672 (D.C. Cir. June 22, 2021).

EPA to repeal the Current Rule and, if a new rule is to be promulgated, that the rule be drafted according to the guidance contained within this letter.

Respectfully,

Brendan Mysliwiec
Director of Federal Policy and Legislation
Appalachian Trail Conservancy