No. 26-1252 (consolidated with No. 26-1253)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,
v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION;
ED POTOSNAK, ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents,
and

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Intervenor-Respondent.

On Petition for Review from
the New Jersey Department of Environmental Protection

PETITIONER'S FINAL REPLY BRIEF

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GLOSSARY

APA	Federal Administrative Procedure Act
ER-M	Ecological Saline Water Sediment Effects Range Medium
NESE	Northeast Supply Enhancement natural gas pipeline project
NJDEP	New Jersey Department of Environmental Protection
NRDC	Natural Resources Defense Council
MRA	New Jersey Department of Environmental Protection Marine Resources Administration
Transco	Transcontinental Gas Pipe Line Company
WQC	Section 401 Water Quality Certification issued by NJDEP for NESE on November 7, 2025
Section 401	Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341

INTRODUCTION

This case is about an agency's basic obligations to face facts, explain its rationale, and honor the plain text of controlling statutes and regulations. Respondent New Jersey Department of Environmental Protection (NJDEP) failed each of these obligations.

The procedural history here is essential. In 2019, NJDEP denied a Section 401 water quality certification for the Northeast Supply Enhancement (NESE) pipeline based in part on the project proponent (Transco)'s inability to show the pipeline would comply with state water quality standards, as mandated by the federal Clean Water Act. In 2020, NJDEP again denied NESE a certification, this time based solely on a lack of public need, and without reevaluating its 2019 water quality conclusion. Ultimately, Transco abandoned its proposal in 2024, only to apply again in early 2025, buoyed by support from President Trump. Both Transco and NJDEP characterized the 2025 application as essentially identical to the previous—denied—applications. Yet this time, NJDEP granted a water quality certification (WQC) for the NESE pipeline.

While the procedural history here is unique, NJDEP's legal obligations were not. Petitioner Natural Resources Defense Council (NRDC)'s opening brief explained the many flaws in NJDEP's approach: (1) its failure to even acknowledge its reversal from its 2019 conclusion that NESE would not meet water quality standards, let alone explain what had changed between 2019 and 2025 to justify that reversal; (2) its separate failure to explain, even in the first instance, how NESE would comply with numerous water quality standards protecting public health and the environment; and (3) its unlawful deferral of key compliance plans for NESE to future, closed-door processes.

Unable to cure these problems, Respondents distort the issues, record, and law. They attempt to rewrite history by cherry-picking a nearly-decade-old record, claiming the agency drew conclusions that its 2025 decision documents never draw, and citing scientific information those documents do not endorse. They point to state legal standards that have no bearing on the project's compliance with independent water quality standards implementing federal law. They cite permit requirements that NRDC does not contest, and that do nothing to

explain the deficiencies NRDC has identified. And they offer sweeping theories that would render key protections in the federal Clean Water Act dead letter, including its requirement that state regulators assure compliance with state water quality standards *before* issuing a certification and facilitate public participation in decisionmaking.

NRDC does not dispute that agencies can change positions in response to evolving circumstances and new information. But those changes must be acknowledged, explained, grounded in facts, and consistent with controlling law. NJDEP's reversal on the NESE pipeline does not meet these basic requirements. The Court should grant the petition and vacate the WQC.

ARGUMENT

I. NJDEP failed to adequately explain its change in position with respect to water quality impacts

The Clean Water Act required NJDEP to "assure" that NESE "will comply" with all the state's water quality standards before issuing the WQC. 33 U.S.C. § 1341(d). NJDEP's compliance with that requirement in federal law is subject to arbitrary and capricious review under the federal Administrative Procedure Act (APA). *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.*, 833 F.3d 360, 377 (3d Cir.

2016); *contra* NJDEP Br. 23. NJDEP thus had to consider all relevant factors, to make a rational connection between the facts found and choices made, and to acknowledge and adequately explain any change in position. *Comité de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 187–88 (3d Cir. 2014).

As NRDC has explained, NJDEP violated these canons of rational decisionmaking when it granted the WQC in November 2025 without acknowledging, let alone providing a substantial justification for, its reversal from the 2019 Denial's findings on NESE's water quality impacts. *See* Opening Br. 28–35. NJDEP failed to reasonably explain how NESE would comply with water quality standards designed to protect the Raritan Bay's designated and existing uses, including maintenance of native biota like shellfish. *See id.* at 36–43. And it also failed to explain how NESE would comply with certain numeric water quality standards, as well as the catchall standard prohibiting toxic substances at levels that harm humans or aquatic biota. *See id.* at 43–46.

NJDEP and Transco's principal arguments in response distort reality and miss the point, ignoring NJDEP's change in position and the

relevant water quality standards, while pushing legal arguments that lack support in the Clean Water Act or the APA.

A. NJDEP concluded in 2019 that Transco had not shown NESE could comply with all water quality standards

In light of Respondents' attempts to downplay the importance of the 2019 Denial, it is worth reiterating the Denial's core findings. NJDEP determined that NESE's construction would kick up sediment containing toxic pollutants from the Raritan Bay seafloor. 2019 Denial at 12–14 [JA_0112–14]. NJDEP compared sediment sampling along NESE's proposed route to its *Ecological Saline Water Sediment Effects Range Medium* (ER-M), "measures of toxicity in marine sediment that are used in assessing toxicity hazards for trace metals and organic contaminants." *Id.* at 12 [JA_0112]. That comparison showed exceedances of ER-M values for mercury, arsenic, manganese, bis(2-ethylhexyl)phthalate, phenanthrene, 4,4'-DDE, and polychlorinated biphenyls (PCBs). *Id.* at 12–13 [JA_0112–13]. NJDEP explained those exceedances indicated a "greater than 50% incidence of adverse effects to benthic communities," including shellfish. *Id.* at 12 [JA_0112].

Based on these findings, NJDEP concluded that "proposed dredging could adversely impact surface water quality," and that

"Transco ha[d] not sufficiently demonstrated how it would avoid adverse impacts to surface water quality." *Id.* at 14 [JA_0114]. It reached that conclusion despite Transco's promise to "implement appropriate best management practices." *Id.* at 13 [JA_0113]. And this conclusion alone required denial of the certification. *See* 33 U.S.C. § 1341(a)(1) (requiring an affirmative finding that a project "will comply" with water quality standards).

B. NJDEP's did not acknowledge, let alone explain, its change in position between 2019 and 2025

NJDEP's insistence that there was "no shift at all" in its position on NESE's water quality impacts since the 2019 Denial defies the record and logic. *See* NJDEP Br. 2. The 2025 and 2019 applications posed the same question: whether the NESE pipeline "will comply" with all water quality standards. 33 U.S.C. § 1341(a)(1). And on that question NJDEP gave a different answer in 2025 than it did in 2019. That is, by any definition, a change in position.

This is not to say that NJDEP was bound to its 2019 conclusions. An agency can change its position. But it must do so rationally. The agency must both acknowledge and provide a reasoned explanation for the change. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221

(2016). And if the new position contradicts earlier factual findings, the agency must offer a "more substantial justification" than it would need on a blank slate. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015); *see also Logic Tech. Dev. LLC v. FDA*, 84 F.4th 537, 549 (3d Cir. 2023). NJDEP fell far short of this established standard.[1]

NJDEP cannot escape its obligation to acknowledge and explain its departure from the 2019 Denial's findings by pointing to the 2020 application. Respondents admit that Transco's 2025 application was "essentially identical" to, at the very least, the 2020 application. 2025 Application Cover Letter at 1 [JA_0564]; *see also* NJDEP Public Comment Response at 1 [JA_0419]; Transco Br. 16. But as NJDEP acknowledges, the agency "never considered the merits" of the 2020 application and instead based its 2020 Denial on New York's decision to deny a certification. NJDEP Br. 24. Because of that, the 2019 Denial is the baseline for evaluating the rationality of NJDEP's 2025 decision as to water quality impacts. *See* Opening Br. 29–30. NJDEP's failure to

[1] Transco cites no authority for its claim that the change-in-position doctrine is limited to regulatory interpretations. *See* Transco Br. 24. To the contrary, the doctrine is a general "constraint[] on agency decisionmaking," *Perez*, 575 U.S. at 106, that applies to decisions on permits and authorizations, *e.g.*, *Logic Tech. Dev.*, 84 F.4th at 540, 549.

acknowledge and directly explain its departure from that baseline was arbitrary.

Respondents' claim that the 2025 application was "materially different"—even if true[2]—is also not enough. *Contra* NJDEP Br. 24; Transco Br. 28. When facts change, "it is the agency's responsibility to provide a reasoned explanation of why those facts matter." *See New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018). Yet NJDEP's principal 2025 decision documents—the WQC and response to comments—do not acknowledge the departure from the 2019 Denial's findings on water quality impacts, much less explain what factual changes justified that departure. *See* Opening Br. 34. It is thus not NRDC that "skip[s] over" the differences between the 2019 and 2025 applications. *Contra* NJDEP Br. 24. It is NJDEP that skipped over its obligation to affirmatively explain in its decision documents why those alleged differences mattered.

[2] As late as October 2025, NJDEP's website told the public that the "NESE Project *has not changed since* the first permit applications were submitted to [NJDEP] in *2017*." *See* NJDEP, *Northeast Supply Enhancement Project*, https://perma.cc/C6HH-HTH6 (emphases added) (archived version of website as of October 21, 2025).

While NJDEP claims that several "reports explain[] its reasoning," NJDEP Br. 32, those documents do not provide the necessary explanation either. At most, those four documents discuss Transco's application without regard for the findings in the 2019 Denial. *See, e.g.*, ODST Dredging Review Form (Dredging Form) at 11–13 [JA_0535–37]. None discuss the specific 2019 findings on the threats dredging posed to compliance with water quality standards, much less explain how any new facts in Transco's 2025 application changed the compliance analysis. One report does not address offshore water quality impacts at all. *See generally* NJDEP Engineering Report [JA_0448–59]. Another concerns only threatened and endangered species, but not the shellfish relevant to the 2019 Denial. *See generally* Endangered & Threatened Species Habitat Review [JA_0546–49]. And the Dredging Form and Environmental Report, while addressing NESE's compliance with *some* water quality standards, do not confront the 2019 findings. In fact, the Dredging Form does not mention the 2019 Denial at all. *See generally* [JA_0525–45]. And the Environmental Report mentions the 2019 Denial only as part of NESE's lengthy procedural history. NJDEP Env't Report at 3 [JA_0462]. In short, none of the "reports" NJDEP

touts explain what changed since the 2019 Denial that allows NJDEP to conclude in 2025 that the NESE pipeline will meet water quality standards.

This case exemplifies why it is critical for agencies to acknowledge changes in position. NJDEP's failure—and continued refusal—to do so leaves Respondents trying to reverse-engineer from a decade-long record a rationale that the agency never gave. *See, e.g.*, Transco Br. 25–28 (pointing to exchanges between NJDEP staff and Transco shortly after the 2019 Denial). But counsel cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *See Christ the King Manor, Inc. v. Sec'y Health & Human Servs.*, 730 F.3d 291, 305 (3d. Cir. 2013) (cleaned up). NJDEP's unacknowledged and unexplained departure from its 2019 findings renders the WQC arbitrary and capricious.

C. The record does not provide a reasoned explanation for NJDEP's reversal on water quality impacts

Because NJDEP did not address its 2019 findings in its 2025 decision, Respondents offer a bevy of theories to explain NJDEP's tacit departure. But even accepting these mostly post hoc arguments at face value, *contra Christ the King Manor*, 730 F.3d at 305, they still do not

provide the substantial justification required to explain NJDEP's change in position or otherwise support Section 401's required finding that NESE "will comply" with all water quality standards.

1. *Treatment of ER-Ms.* While taking slightly different tacks, both NJDEP and Transco argue that NJDEP could ignore the ER-M exceedances because the ER-Ms are not a formal part of the state's water quality standards. *See* NJDEP Br. 38; Transco Br. 32. Maybe so, if NJDEP were acting on a blank slate. But it was not. NJDEP decided to rely on ER-M exceedances to justify a denial in 2019. Yet it discounted those *same exact* exceedances without explanation in 2025. *Compare* 2019 Denial at 12–14 [JA_0112–14], *with* Dredging Form at 11–12 [JA_0535–36]. That unexplained departure from its prior practice was arbitrary.

The fact that the ER-Ms are not "binding DEP policy on . . . whether a project meets water quality standard[s]," *see* NJDEP Br. 38, did not excuse NJDEP from explaining the departure from its 2019 approach. An agency's application of non-binding guidance is subject to the change-in-position doctrine. *See Logic Tech. Dev.*, 84 F.4th at 553–55. Indeed, the doctrine's constraints on agency decisionmaking are

especially important in that context, because it ensures that agencies treat like cases alike (or explain why cases are materially different). It was NJDEP's obligation to explain why the ER-M exceedances it relied on in 2019 no longer mattered in 2025. *See New England Power Generators Ass'n*, 881 F.3d at 211. Its failure to do so was arbitrary.

2. *Coastal Zone Management Rules.* Transco is wrong to suggest that New Jersey's rules for coastal zone management supplant its surface water quality standards. *See* Transco Br. 21–23. The Clean Water Act required NJDEP to conclude that NESE would comply with all water quality standards before issuing a certification. 33 U.S.C. § 1341(a)(1). And, as NJDEP explains, the coastal zone rules themselves "incorporate" the surface water quality standards "as part of the dredging regulatory regime." NJDEP Br. 9; *accord* N.J.A.C. 7:7-12.7(c)(10)(iii). Whatever "practical and flexible approach" the coastal zone rules embody, *see* Transco Br. 23, they do not excuse compliance with surface water quality standards, including those intended to protect human health and aquatic biota. *See, e.g.*, N.J.A.C. 7:9-1.14(d)(12).

3. *Temporary, Limited, or Minimal Impacts.* Respondents' suggestions that water quality violations are acceptable, so long as they are temporary, limited, or minimal, have no basis in law.

Respondents' refrain that any contaminant and turbidity violations would be "temporary," *see, e.g.*, NJDEP Br. 36; Transco Br. 32, or limited to only parts of the Raritan Bay, *see* NJDEP Br. 34, does not hold water. Neither Section 401 nor New Jersey's water quality standards provide an exception for "temporary" violations—much less ones Transco admits may take years to resolve, *see* Transco Br. 31.[3] New Jersey's standards provide, for instance, that "[t]oxic substances shall not be present in concentrations that cause acute or chronic toxicity to aquatic biota," *see* N.J.A.C. 7:9B-1.14(d)(12)(iii); that turbidity levels "shall not exceed 10.0 NTU," *see* N.J.A.C. 7:9B-1.14(d)(13)(iii); and that designated and existing uses "shall be

[3] New Jersey's citation to a lone provision in New Jersey's surface water quality standards that references "irreversible" impacts, *see* NJDEP Br. 36, is a red herring. That provision—cited nowhere in NJDEP's decision documents—forbids "irreversible changes" to "existing water quality that would impair or preclude attainment of the designated uses." N.J.A.C. 7:9B-1.5(d)(1)(ii). That straightforward prohibition cannot be read to implicitly bless any "temporary" impacts that violate the plain language of other water quality standards.

maintained," N.J.A.C. 7:9B-1.5(d)(1). The Court should reject any attempt to rewrite these unambiguous standards to excuse "temporary" violations.

Respondents' insistence that any turbidity or contaminant increases would be "minimal" fare no better. To the extent Respondents mean to argue that exceedances of water quality standards should be ignored because they would be minor or infrequent, the relevant water quality standards again allow no such exception. And to the extent Respondents mean to argue that any increases in turbidity and contaminants will not result in exceedances, the record does not support that argument. Indeed, the Dredging Form does not show that NESE's "dredging met New Jersey's regulatory standards." *Contra* NJDEP Br. 29. To the contrary, even with best management practices, Transco's modeling still indicated that total suspended solids could exceed New Jersey's turbidity limits. *See* Baykeeper Opening Br. 38–40. And while the Dredging Form states that concentrations of toxic chemicals released will be "minimal," Dredging Form at 13 [JA_0537], it does not say whether levels of those chemicals, while exceeding the ER-M in the sediments, will maintain existing or designated uses. *See id.* at 11–12

[JA_0535–36]. NJDEP's failure to square this modeling with its conclusion that NESE "will comply" with all water quality standards was arbitrary.

4. *Shellfish impacts.* The Marine Resource Administration (MRA)'s memorandum does not justify NJDEP's sub silentio change-in-position on shellfish impacts. *Contra* NJDEP Br. 36–37; Transco Br. 31. As NRDC previously explained, *see* Opening Br. 40–41, the MRA found that NESE would harm "productive surf clam beds" and that surf clams were particularly "sensitive and susceptible to the impacts of increased turbidity and smothering" from dredging. MRA Memo. at 3 [JA_0313]. And the MRA did not endorse Transco's assessment that surf clam impacts would nonetheless be minimal. *See id.* [JA_0313].

NJDEP's claim in court briefing that it was enough that the MRA "did not disagree with Transco's suggestion that impacts would be temporary," NJDEP Br. 35, misunderstands the agency's obligation under the APA. It is the agency, not the project proponent, that makes findings and must justify conclusions. "[A]wareness" of the project proponent's self-interested position "is not itself an explanation." *See Ohio v. EPA*, 603 U.S. 279, 295 (2024). Nor does the passive

acknowledgment of Transco's application materials mean that MRA "found" that NESE was "consistent with New Jersey's water quality standards." *Contra* NJDEP Br. 35.

Transco's remaining attempts to fill in the gaps in NJDEP's explanation of surf clam impacts fail as well. NESE's purported compliance with the dredging standard prohibiting the "destruction, condemnation, or contamination of surf clam areas," N.J.A.C. 7:7-9.3(b), does not excuse compliance with distinct surface water quality standards. *Contra* Transco Br. 31; *see supra* p. 12. Nor does Transco's determination that its proposed path for NESE would have the "least impacts to existing uses and resources," *see* Transco Br. 29, address whether those impacts comply with the water quality standards requiring the "protection and propagation of fish, shellfish, and wildlife," 40 C.F.R. § 131.12(a)(2), and the "[m]aintenance, migration, and propagation of the natural and established biota," N.J.A.C. 7:9B-1.12(d)(2), (g)(3). As NJDEP admits, those standards require "preservation of the existing ecosystem," NJDEP Br. 8, not just prevention of the worst outcomes.

5. *Best Management Practices.* Respondents' repeated citations to "best management practices" (or "BMPs"), *see, e.g.*, NJDEP Br. 47; Transco Br. 33, also cannot cure NJDEP's lack of explanation. In 2019, NJDEP denied the certification despite Transco's promise to "implement appropriate best management practices." 2019 Denial at 13 [JA_0113]. Neither NJDEP nor Transco say in their briefs what *new* best management practices Transco has brought to the table since then. In any event, Transco's modeling still showed the potential for violations of turbidity and PCB standards over *five hundred feet* from pipeline installation. Baykeeper Opening Br. 38–40; Hydrodynamic Report at 341 [JA_0823].[4] The record does not square those findings with NJDEP's conclusion that NESE will meet all state water quality standards.

* * *

[4] The modeling suggested that PCB exceedances could be avoided by implementing a "1-hour slack tide pause" when "operations were halted and no dredging was performed." *See* Hydrodynamic Report at 341 [JA_0823]. But that requirement is not part of the WQC. *See* WQC at 5 [JA_0017] (requiring only that, in certain segments, "all dredging activities must operate at slack tide" at a lower dredging rate).

NJDEP did not consider all relevant factors when it issued the WQC. *Contra* NJDEP Br. 32. Indeed, the record shows it did not even consider all relevant water quality standards, much less acknowledge and address the specific concerns and findings underpinning its 2019 Denial. NJDEP's rationale thus fell far short of the substantial justification needed for its change in position, rendering its issuance of the WQC arbitrary and capricious.

II. NJDEP's reliance on uncertain, future compliance plans was unlawful

Section 401 required that the WQC "assure" compliance with New Jersey's water quality standards. NJDEP violated that obligation by deferring to future, uncertain plans key details about how NESE would comply. *See* Opening Br. 46–58. That deferral also violated the Clean Water Act's public-participation requirements. *Id.* at 58–61. Respondents' defenses embrace a certify-first, figure-it-out-later approach that violates the Act and basic principles of reasoned decisionmaking.

A. NJDEP's reliance on future, uncertain compliance plans was arbitrary and contrary to law

1. Section 401's mandate to "assure" compliance requires more than a promise to figure out compliance later

A state agency can issue a water quality certification only if it concludes the project "will comply" with all state water quality standards. 33 U.S.C. § 1341(a)(1). The certification, in turn, must "set forth any . . . limitations, and monitoring requirements necessary to assure that [the project] will comply" with applicable standards. *Id.* § 1341(d). Read together, the plain text requires that (1) an agency must conclude the project "will comply" based on facts before it when it issues the certification; and (2) the certification itself must include all terms "necessary to assure" compliance. No provision in the Clean Water Act allows an agency to defer the determination of terms necessary for compliance until *after* the certification issues.[5]

[5] State regulations authorizing NJDEP to issue permits with conditions, *see* N.J.A.C. 7:7-1.4(a) (cited at Transco Br. 34); N.J.A.C. 7:7-26.6 (cited at NJDEP Br. 42), also contain no such provision. But even if they did, it is axiomatic that state regulations and caselaw, *e.g.*, NJDEP Br. 44, cannot supplant the federal Clean Water Act's requirements. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 779 (3d Cir. 1992).

NJDEP acknowledges that the deferred water quality monitoring and adaptive management plans are necessary to "reduce or mitigate the effects of observed exceedances" of water quality standards. NJDEP Br. 42. But NJDEP's mere confirmation that it considers the plans important to NESE's compliance does not address *how* the WQC's terms relating those future, uncertain plans in fact assure that compliance.

NRDC does not contend that an agency must have every detail of a compliance plan in place before granting certification. *Contra* NJDEP Br. 41; Transco Br. 33. But bedrock administrative law principles require an agency to provide a reasoned basis for concluding that future plans required by a certification *will in fact* assure compliance. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 259 (3d Cir. 2018) (requiring that plans be "supported by substantial evidence" (cleaned up)); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) (explaining that "generalized contingencies" and "hopeful plans" are inadequate). This requirement is critical to "avoid creating a temptation" for agencies to use deferred compliance plans to skirt current statutory requirements. *See Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997).

NJDEP succumbed to that temptation here, punting key compliance plans until after it issued the WQC, contrary to Section 401's plain requirements. On this point, Respondents' attempts to distinguish *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), fall short. *See* NJDEP Br. 42–43; Transco Br. 34–35. While *Waterkeeper Alliance* concerned Section 402 permits, not Section 401 certifications, the relevant statutory provisions here are materially identical: both require that agency approvals include the conditions necessary to "assure" projects "will comply" with applicable water quality standards. *Compare* 33 U.S.C. § 1341(d), *with id.* § 1342(a)(2) ("assure compliance"). Courts presume that when Congress uses the same words within a statute, those words carry the same meaning.[6] *See United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 294 (3d Cir. 2013). Respondents provide no reason to abandon that presumption here.

[6] *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), is thus inapposite, because that case concerned an issue where Sections 401 and 402 both "serve different purposes *and use different language* to reach them." *Id.* at 380 (emphasis added).

Nor is it enough that NJDEP claims to retain approval authority over the future, uncertain compliance plans. *Contra* NJDEP Br. 43; Transco Br. 35. The WQC itself says nothing about NJDEP needing to *approve* either plan before Transco starts construction.[7] *See* WQC at 4–5 [JA_0016–17]. And Transco's fleeting reference to an "NJDEP-approved water quality monitoring plan" buried a hundred pages into an appendix to its application cannot create an approval process the WQC never mentions. *See* Transco Env't Report at 111 [JA_0612].

But even if NJDEP did retain authority to reject Transco's compliance plans, that still would not excuse its deferral of those plans to a future, non-public process. Indeed, *Waterkeeper Alliance* explicitly held that without reviewing a plan "*before issuing a permit*," an agency does "nothing to *ensure*" compliance. 399 F.3d at 499 (first emphasis added). So too here: a post-certification, behind-closed-doors review does nothing to "assure" the compliance that Section 401 mandates. *See* 33 U.S.C. § 1341(d).

[7] Indeed, the WQC does not even require NJDEP to *review* (let alone approve) the adaptive management plan: it says only that Transco "shall submit" that plan at some undefined time. WQC at 5 [JA_0017].

Respondents' reliance on this Court's decisions in the *Delaware Riverkeeper* cases, *see* NJDEP Br. 41; Transco Br. 36, is misplaced. In those cases, the certifications were conditioned not on future *plans*, but instead on the project's future receipt of distinct state *permits*. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.*, 903 F.3d 65, 76 (3d Cir. 2018); *Del. Riverkeeper Network*, 833 F.3d at 385–86. Because those "substantive permits" would be subject to additional public notice requirements and specific environmental protection standards, the deferral was an issue of "timing rather than substance." *See Del. Riverkeeper Network*, 903 F.3d at 76. The public, in other words, still had "a full opportunity to weigh in" on and, if necessary, challenge the sufficiency of those future permits. *See id.* In contrast, the compliance plans here are subject to no further public process, no binding standards, and no possibility of judicial review—only an unenforceable promise that NJDEP and Transco will figure it out later.

Respondents' suggestion that agencies routinely defer the details of key compliance plans until after the certification is issued, *see* NJDEP Br. 39, fares no better. Even if true, "longstanding practice under [a] statute" cannot abrogate the statute's "plain command." *See*

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998); *accord In re FTX Trading Ltd.*, 91 F.4th 148, 155 n.7 (3d Cir. 2024). In any event, the cases Respondents cite do not support their claim that it is "well-established," *see* NJDEP Br. 39, for state agencies to punt key compliance plans until after certification, based only on a promise that the agency and project proponent will agree on terms for those plans eventually. Instead, in those cases the state agency provided specific, substantial evidence to support its finding that the deferred plan—once finalized—would in fact assure compliance.[8]

For instance, the *Delaware Riverkeeper* cases, as explained above, involved an agency's reliance on future *permits,* subject to substantive standards and procedural protections. *Supra* p. 23. Likewise, in *Port of Seattle v. Pollution Control Hearings Board*, 151 Wash. 2d 568 (2004), a state court held that a certification supported by a 139-page agency decision could rely on forthcoming Section 402 permits, *id.* at 581, 603, as well as future compliance plans that were "set out in detail in the

[8] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011), did not address compliance plans. There, the court merely affirmed that a federal agency could proceed with licensing notwithstanding a future bond requirement in the state's certification. *Id.* at 972–74.

certification" such that they provided "reasonable assurance" of compliance, *id.* at 602. And in *Sierra Club v. State Water Control Board*, the agency determined that forthcoming pollution-control plans would assure compliance because they would have to meet standards the agency "had already determined complied with the applicable statutory and regulatory requirements." 898 F.3d 383, 398–399, 405 n.14 (4th Cir. 2018).[9] The record here lacks those kinds of detailed evidence supporting the adequacy of NJDEP's deferred compliance plans.

Finally, amici are wrong to suggest that Section 401(a)'s one-year deadline could absolve NJDEP of its obligation to assure compliance. *See* NGAA Amicus Br. 20–21. The deadline "to act" on an application, 33 U.S.C. § 1341(a), and the requirement that any certification "shall set forth" those "limitations . . . necessary to assure" the project "will comply" with water quality standards, *id.* § 1341(d), are both entitled to full effect. *See Yi v. Maugans*, 24 F.3d 500, 504 (3d Cir. 1994) ("The

[9] The contingency plans at issue in *Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 758 (4th Cir. 2019), differ materially from the compliance plans here. Those contingency plans were intended to address "accidental spills," *see* NJDEP Br. 41, whereas the compliance plans here are necessary to monitor, respond to, and mitigate expected impacts.

statute must be construed so as to give effect to each provision."). Even if it "was difficult" for NJDEP to "determin[e] the proper" limits on NESE within the time provided—something neither NJDEP nor Transco assert—NJDEP still could not "simply give up and refuse to issue more specific guidelines." *NRDC v. EPA*, 808 F.3d 556, 578 (2d Cir. 2015). Instead, NJDEP could have complied with both statutory requirements by doing what it had done multiple times before: denying Transco's application without prejudice.

2. NJDEP's reliance on future, uncertain compliance plans did not "assure" compliance under Section 401

NRDC's opening brief details why the WQC's reliance on the future, uncertain adaptive management and water quality monitoring plans fell short of Section 401's requirement to "assure" compliance. *See* Opening Br. 48–58. As NJDEP appears to concede, the WQC does not explain "when Transco would be required to implement adaptive management practices" and does not include "details about how and for what Transco would conduct monitoring activities." NJDEP Br. 44. While NJDEP attempts to recast these inadequacies as mere "substantive disagreements" with its approach, *id.*, it makes no attempt

to explain how a certification missing these key details—what pollution will be monitored, how it will be monitored, and what will happen if there is an exceedance—can reasonably assure compliance with the water quality standards.

Indeed, in the few paragraphs NJDEP dedicates to defending the substance of its deferred monitoring and adaptive management plans, *see* NJDEP Br. 42–44, it avoids meaningful engagement with the WQC's vague requirements for those plans.[10] NJDEP does not explain, for instance, how the requirement that Transco prepare a plan that "consist[s] of a course of action, some or all of which may be employed in any given situation" to avoid or minimize violations, WQC at 5 [JA_0017], provides enough guidance to assure compliance. *See City & Cnty. of S.F. v. EPA*, 604 U.S. 334, 347 (2025) (explaining a permit must do more than "state[] the desired result"). Nor does NJDEP explain why the WQC is silent on basic questions like where Transco will monitor water quality, what pollutants will be monitored, and when adaptive

[10] NJDEP's recitation of specific conditions in the WQC that NRDC does not challenge, *see* NJDEP Br. 40, cannot cure the inadequacy of its deferred compliance plans. Those conditions instead show NJDEP can determine and set requirements for monitoring, preventing, and responding to exceedances *before* approving a certification.

management responses will be required. *See* Opening Br. 52, 54. By deferring these critical details to post-certification plans, NJDEP flouted its Section 401 obligation to include all terms "necessary to assure" compliance in the WQC, *see* 33 U.S.C. § 1341(d), and failed "to fulfill its duty to regulate in fact, not only in principle," *NRDC*, 808 F.3d at 578 (quoting *Waterkeeper All.*, 399 F.3d at 498).

That the Section 401 process is, by its nature, forward-looking, is beside the point. NJDEP's desire to ensure Transco can "adapt to circumstances as they evolve," *see* NJDEP Br. 39, could not excuse the agency from providing "substantial evidence" that the future plans would in fact assure compliance. *Twp. of Bordentown*, 903 F.3d at 259 (cleaned up); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 234 (5th Cir. 2007) (explaining "cursory details" about mitigation measures are inadequate); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1029 (9th Cir. 2011) (requiring "specific" information about how proposed plans are "reasonably likely to mitigate" impacts). Nor does NJDEP explain why the details in these plans had to wait until later: The envisioned plans do not hinge on unknown contingencies. They concern basic components of assuring Transco

meets water quality standards. Section 401 thus required them to be included in the WQC, not punted to a later, non-public process.

NJDEP's citation to Transco's May 2025 draft water quality monitoring plan to claim that the deferred monitoring and adaptive management plans would assure compliance, NJDEP Br. 45–46, is also misplaced.[11] As an initial matter, because NJDEP did not rely on—or even reference—the draft monitoring plan in its decision documents, it cannot do so in litigation. *See Calcutt v. FDIC*, 598 U.S. 623, 624 (2023).

NJDEP's belated reliance on the draft monitoring plan is also arbitrary. The draft was full of holes. *See* Opening Br. 55–57. NJDEP acknowledged that fact when it asked Transco to fix those problems before the agency issued the certification—something Transco never did. *See id.* at 55 (citing June 25–Nov. 7, 2025 Emails re Application at 2, 4 [JA_0900, 0902]). And NJDEP admits that it could not have approved the draft plan without "further development." NJDEP Br. 45.

[11] There is no draft adaptive management plan in the record. *Contra* Transco Br. 37. Indeed, the best Respondents can point to is a short list of "adaptive management actions" included in the May 2025 draft monitoring plan. *See* Draft Monitoring Plan at 3-1 to 3-3 [JA_0843–45]. And there is no record evidence to support NJDEP's speculation that Transco's future plan "is likely to include similar substantive conditions." NJDEP Br. 46.

NJDEP's decision to nonetheless rely on the admittedly inadequate draft monitoring plan underscores the limitless nature of its theory. As the agency tells it, it should get credit for acknowledging the draft's problems, but "cannot be faulted" for refusing to fix them before issuing the WQC. *See* NJDEP Br. 45. But if an agency can rely on deficiencies in draft compliance plans to justify deferring final plans to a non-public, post-certification process, Section 401's requirement that certification terms assure compliance "would be rendered meaningless." *See Christ the King Manor,* 730 F.3d at 312. Agencies could always grant certifications first and promise to figure out compliance later. The Court should reject such a backwards, atextual approach to Section 401.

B. NJDEP's deferral of key compliance plans violated the Clean Water Act's public participation requirements

Respondents' efforts to escape the Clean Water Act's public-participation requirements for the deferred water quality monitoring and adaptive management plans, *see* NJDEP Br. 59–61; Transco Br. 37–38, also fail.

Respondents' attempts to distinguish *Waterkeeper Alliance* again fall short. *Waterkeeper Alliance*'s holdings—including the bar on

"effectively shield[ing]" compliance plans "from public scrutiny and comment," 399 F.3d at 503—apply equally to Section 401. *Supra* p. 21. That *Waterkeeper Alliance* concerned an EPA regulation governing permits, rather than a permit itself, is inapposite. *Contra* NJDEP Br. 61. The WQC, like the regulation in *Waterkeeper Alliance*, impermissibly shields "critical indispensable" compliance requirements from public view, *see* 399 F.3d at 504, preventing the public from participating in the development or enforcement of those requirements, *see* Opening Br. 59–61.

NJDEP's claim that it complied with state public participation requirements, *see* NJDEP Br. 61, is also beside the point. Those state rules cannot supplant the Clean Water Act's federal floor on public participation. *Supra* note 5. The Act mandates that "[p]ublic participation in the development, revision, and enforcement of any . . . effluent limitation . . . shall be provided for, encouraged, and assisted," including by "the States." 33 U.S.C. § 1251(e). NJDEP offers no explanation for its claim that enforcing this command here would

"undermine[] the Clean Water Act's statutory scheme."[12] NJDEP Br. 60. To the contrary, "Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act." *Waterkeeper All.*, 399 F.3d at 503.

Respondents' remaining arguments reinforce the importance of enforcing that guarantee here. Transco suggests that the future compliance plans are exempt from the Act's public participation requirements because they will be "developed by Transco." *See* Transco Br. 37. In addition to lacking statutory support, this suggestion reveals how little control Transco believes NJDEP has over any final plans and underscores the irrationality of NJDEP's reliance on those plans. It also runs afoul of this Court's admonition that "[e]ffective regulation must not depend on the candor or veracity of the very entit[y] being regulated." *Sierra Club v. EPA*, 972 F.3d 290, 308 (3d Cir. 2020).

What is left is Transco's assertion that the public's opportunity to comment on the draft monitoring plan was enough. *See* Transco Br. 37–

[12] Nor does section 401's specific requirement that states issue regulations governing "public notice," *see* 33 U.S.C. § 1341(a), override the Act's broader public-participation mandate, in the absence of any "conflict between the two" provisions, *see Nat'l Cable & Tele. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335–36 (2002). *Contra* NJDEP Br. 59.

38. But public comment on a draft is sufficient only if the draft bears some relation to the final. *See Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249–50 (3d Cir. 2010) (describing the "logical outgrowth" doctrine). And NJDEP has made that comparison impossible here. Indeed, by delaying the final compliance plans until *after* the WQC issued, NJDEP has effectively insulated those plans from public scrutiny, private enforcement, and judicial review. This hide-the-ball scheme prejudices NRDC and other interested parties who, even six months after the WQC issued, still do not know what the deferred compliance plans require or if they even exist.

NJDEP should have finalized the compliance plans before issuing the WQC. That it instead granted the WQC, without even providing an avenue for later public review and comment on the as-yet-submitted plans, confirms that the lack of public participation is an intended feature, not a bug, of NJDEP's approach. This violates the "plain dictates" of the Clean Water Act. *Waterkeeper All.*, 399 F.3d at 504.

III. The Court should vacate the water quality certification

NRDC explained why vacatur is the default and appropriate remedy in this case. Opening Br. 61–62. While Respondents have

burden to explain why vacatur should not apply here, *see All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018), neither attempted to carry it. They therefore waived the issue. *See Barna v. Bd. of School Dirs.*, 877 F.3d 136, 146 (3d Cir. 2017).

CONCLUSION

The Court should grant the petition and vacate the WQC.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and 3d Cir. L.A.R. 31(c), I certify:

(a) that this reply complies with the type-volume limitations of Rule 32(a)(7)(B)(ii) because it contains 6,498 words, excluding parts of the document exempted by Rule 32(f);

(b) that this reply complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point) using Microsoft Word (the same program used to calculate the word count);

(c) that the electronic brief filed is identical to the text of the paper copies submitted to the Court; and

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Dated: June 3, 2026

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that this final reply brief was filed electronically through the court's docketing system. All parties to this case are Filing Users and are served electronically by the Notice of Docket Activity.

Dated: June 3, 2026

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