25-2938

United States Court of Appeals

for the

Second Circuit

RARITAN BAYKEEPER, INC., FOOD & WATER WATCH, PROTECTORS OF PINE OAK WOODS, INC., SIERRA CLUB, SURFRIDER FOUNDATION, NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AMANDA LEFTON, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondents.

ON PETITION FOR REVIEW FROM THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

PETITIONERS' FINAL FORM REPLY BRIEF

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GLOSSARY

FEIS	Final Environmental Impact Statement
NESE	Northeast Supply Enhancement pipeline project
NYSDEC	New York State Department of Environmental Conservation
Transco	Transcontinental Gas Pipe Line Company, LLC
WQC	Clean Water Act Section 401 Water Quality Certification

PRELIMINARY STATEMENT

Petitioners' opening brief demonstrated three fundamental errors in the New York State Department of Environmental Conservation's ("NYSDEC") decision to grant a Clean Water Act Section 401 water quality certification ("WQC") for Transco's Northeast Supply Enhancement ("NESE") Project, after denying an essentially identical application years earlier. First, NYSDEC failed to provide the required substantial justification for its change in position on whether NESE could comply with New York's water quality standards. Second, NYSDEC based its about-face on materials submitted after the public comment ended, denying Petitioners the ability to review and comment on that critical information. And third, unable to determine how NESE would comply with water quality standards, NYSDEC punted key compliance planning to after the WQC issued, in violation of Section 401 and principles of reasoned decision making.

In response, NYSDEC and Transco attempt two tacks. First, they deny reality: claiming, for instance, that granting the WQC after previously denying it was not a change in position requiring justification, or that critical information provided to NYSDEC after the

public comment period ended was somehow available to the public for review and comment. Second, they double down on NYSDEC's errors, endorsing a regulatory regime divorced from accountability to the public the Clean Water Act is meant to protect: One where an agency can deny an application for failure to show compliance with water quality standards, take public comment on an essentially identical application years later, receive new information from the applicant after the close of public comment, and then grant the new application based on 1) the information shielded from public comment and 2) a promise that the applicant would figure out key aspects of compliance in a later, non-public process.

Such a regulatory approach is fundamentally arbitrary and contrary to law. The WQC should be vacated.

I. The 2025 Water Quality Certification Represented a Change in Position That Required a Detailed Justification.

In its 2025 WQC, NYSDEC concluded that the use of a 500-foot mixing zone was appropriate in the hard clam area. Based on the mixing zone, NYSDEC determined that NESE would comply with New York's water quality standards. This decision was a substantial and

significant change from NYSDEC's 2020 decision rejecting the 500-foot mixing zone. In changing its position, NYSDEC relied on contradictory facts Transco provided after the public comment period had closed. First, it accepted Transco's representation that there had been a twenty-fold mistake in the hard clam density; second, it accepted Transco's representation that the sediment loss rate would be 5% or lower. Given this about-face in reliance on contradictory facts, Supreme Court precedent required NYSDEC to provide a "more detailed justification than what would suffice" if it were acting "on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

NYSDEC was obligated to explain these contradictions when it issued the WQC, but it did not. It never explained the error in the hard clam density or why, given that the project was in a critical resource area, it could accept the adverse impact even at a lower density. Nor did it explain why, in accepting the 5% sediment loss rate, it relied on descriptions of other projects that did not quantify the lower rate. What Transco and NYSDEC claim is an "explanation" for the reversal is in fact a recitation of a one-sided record. NYSDEC's failure to provide opportunity for public comment on the late-submitted information

undermines the validity of the record and any purported explanation. That failure also runs afoul of NYSDEC's obligations to ensure public participation in the permitting process.

Respondents fail to substantiate their assertion that the *Fox* standard does not apply. Instead, they argue that the change was not a change, the factual contradictions were not contradictions, and the explanation was sufficient. In doing so, they impermissibly offer post hac rationalizations for the change of position that do not appear in the decisional documents.

A. The 2025 WQC was a change of position.

In 2020, NYSDEC denied the WQC, finding that given the density of 69.6 hard clams per square foot and the impacts to the population and its critical resource area from contaminated sediment, a mixing zone was not appropriate in the designated hard clam area.[1] In 2025, relying on Transco's sudden discovery that the hard clam density was off by more than twenty times, and that a less conservative sediment loss rate was acceptable, NYSDEC allowed the mixing zone. That

[1] 2020 Denial at 4 [A0437].

change was dispositive. It relied on contradictory facts and required a "more detailed justification." *Fox*, 556 U.S. at 515.

1. NYSDEC based the 2025 WQC on factual findings that contradict its 2020 denial.

a. Hard clam density

NYSDEC's primary explanation for its change was the twenty-fold reduction in hard clam density that Transco submitted after the comment period's close. Based on Transco's 2016 benthic survey, the 2019 FEIS reported 69.6 clams per square feet in the hard clam area of the project, a number consistent with previous surveys reported in the FEIS that found "high hard clam abundance" in the area.[2] Since 2019, in several applications to several agencies that Transco certified were accurate, Transco relied on the FEIS and hard clam density. NYSDEC's 2020 denial relied on it as well. There is no record of Transco or anyone else questioning the density.[3]

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[2] Final Environmental Impact Statement Part One ("FEIS") 4-101–4-102 [A0381–A0382].

[3] Raritan Bay is one of last known highly productive hard clam beds in the State, and its benthic habitat is particularly critical and sensitive. *See* 2019 Denial at 7, [A0428]. Had the density assessment been inconsistent with prior surveys, Petitioners and others well may

In its 2025 WQC application, Transco again relied on that number, verifying the accuracy of the FEIS and reiterating that it had determined the density. *See infra* n.9. Then suddenly, after the comment period closed, and after more than six years relying on the hard clam density, Transco presented a drastically lower number: 3.0 clams per square foot instead of 69.6.[4] This was not a minor math error.

Neither Transco nor NYSDEC publicly acknowledged the import of this substantive change to the WQC application or explained the basis for the error. In fact, Transco could not explain it.[5] And while Transco, at NYSDEC's request, informed FERC of its new calculation,[6] NYSDEC never noticed the public about this substantial change.

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have conducted their own benthic surveys, challenged the survey methods, included comments from marine biologists, or any number of other participatory efforts, but there was no need to do so.

[4] September 24, 2025 E-mail from Transco to NYSDEC [A1017]. Transco itself had trouble calculating the "revised" density, at different times claiming it was 3.7, 3.4, or 3.0 clams per square foot. Opening Br. 21–22 n.64.

[5] September 22, 2025 NESE NYSDEC 19Sep25 Call Item Response Final at 3 [A1011].

[6] September 24, 2025 Correspondence from Transco to FERC [A1018].

In its 2025 reversal, NYSDEC was explicit about the role of the hard clam density:

> As a threshold matter, since the time of the 2020 WQC denial, Transco identified and corrected an error in the underlying FEIS. Specifically, on September 25, 2025, Transco filed documentation on the FERC docket correcting the clam density stated in the FEIS from 69.9 individual clams per square foot to 3.0 individual clams per square foot.[7]

And as a result, NYSDEC adopted the 500-foot mixing zone it previously rejected, labeling it "conservative" instead of "inappropriate."[8] Relying on the mixing zone, NYSDEC was now able to find that NESE would not violate water quality standards and thus grant the WQC.

Transco seeks to dismiss the density reduction as FERC's mathematical error[9] and asserts that because no one claims that the

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[7] Responsiveness Summary at 20–21 [A1104–A1105].
[8] *Compare* Responsiveness Summary at 21 [A1105], *with* 2020 Denial at 8 [A0441].
[9] While Transco claims that FERC incorrectly calculated the hard clam density in the FEIS, Transco's Draft Mitigation Framework states clearly that "Transco determined average hard clam density for the offshore Project area." NESE Joint Application Appendix P-Draft Mitigation Framework at 4 [A0853].

underlying data from its 2016 benthic survey was inaccurate,[10] the twenty-fold reduction in clam density—the threshold basis for NYSDEC's reversal—was nothing new. It was, Transco claims, "merely" a clarification of existing data, not a contradiction. Transco Br. 38. But Transco ignores that the 2019 application and 2020 denial relied on the density calculation,[11] not the 2016 raw data buried in attachments to reports; that in NYSDEC's review of the 2019 application, staff cited the density calculation;[12] and that the July 2025 Notice of Complete Application directed the public to the FEIS, not the raw data in the 2016 Benthic Survey.[13]

What the record does demonstrate is that throughout its review, NYSDEC considered the 69.6 hard clams per square foot density[14] until September 19, 2025, when it appears that Transco first informed

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[10] *See* supra n.3.
[11] 2019 Denial at 10 [A0431].
[12] 2025.08.04 Calculations on HC Impacts 2018 [A0888].
[13] 2025.07.02 NESE Notice of Complete Application at 2 [A0750].
[14] *See e.g.* 2025.9.19 Calculations for HC impacts and burial 2025 [A1000].

NYSDEC of a change to the density.[15] On September 22, 2025, Transco responded to NYSDEC's request for clarification of hard clam density.[16] That is the first mention in the record of any change in hard clam density. It was only when NYSDEC asked Transco for the underlying benthic survey data on September 23, 2025,[17] that Transco provided it. Transco's twenty-fold revision of the hard clam density did not supplement information already in the record nor was it a mere "clarification" of "mathematical error"—it was new material dispositive to NYSDEC's changed determination.

b. Sediment loss rate

In its 2020 denial, NYSDEC also referred to Transco's failure to support a 5% sediment loss rate.[18] Transco correctly notes that the 2020 denial concluded that NYSDEC could not accept the 5% rate without

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[15] *See* 2025.09.22 Correspondence from Transco to NYSDEC [A1003] (purporting to respond to questions raised during a meeting on September 19, 2025).
[16] *Id.*
[17] 2025.09.24 Correspondence from Transco to NYSDEC [A1013]. Transco's claim in its brief that the public had access to the underlying 2016 data is disingenuous considering even NYSDEC had to ask for it and that it was not provided until September 24, 2025.
[18] 2020 Denial at 7 [A0440].

further documentation. Transco Br. 7. But Transco did not provide that documentation in its 2025 application. It waited until after the public comment period before providing any descriptions of other projects it claimed supported the rate,[19] and the information itself was inadequate. Here too, NYSDEC neither subjected the comparative information Transco offered to public comment nor did NYSDEC do any analysis with respect to its accuracy. That information was not supplemental. It was the material basis on which NYSDEC changed its position regarding the sediment loss rate and it was wholly absent from the application until after the public comment period.

2. NYSDEC cannot avoid its change in position by offering new reasons for its 2020 denial.

NYSDEC claims that there was no change. It asserts for the first time in its brief that it had to issue a denial in 2020 because the Clean Water Act's one-year deadline for state action was fast approaching. NYSDEC asserts that "the Department repeatedly acknowledged that

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[19] That submission failed to quantify the sediment loss rates of the referenced projects and nowhere documents a 5% loss rate. Jet Trencher Sediment Loss Rate Memorandum [A0917].

its determination might be different if Transco could provide additional relevant documentation." NYSDEC Br. 43.[20] But nowhere in the 2020 denial did NYSDEC say that it was denying the application because it needed more time or on any basis other than inadequacy of the materials submitted.[21] Recognizing *Transco's* burden to demonstrate compliance,[22] NYSDEC had the information it needed to reach a reasoned decision and it did so—issuing a well-supported denial of the WQC application.

NYSDEC cannot now offer a different explanation of its earlier denial to justify its failure to explain a change of position. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758

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[20] In stating the truism that different information might justify a different outcome, NYSDEC concedes that it in fact changed position here.

[21] *Compare* 2020 Denial [A0434], *with* 2019 Denial at 3 [A0424] ("The Department denied the original June 30, 2017 WQC application without prejudice on April 20, 2018, due to incomplete information . . . . ").

[22] 2020 Denial at 5 [A0438].

(2015)). Courts must reject an agency explanation that was not contemporaneous but instead formulated for litigation. *Kakar v. U.S. Citizenship & Immigr. Servs.*, 29 F.4th 129, 133 (2d Cir. 2022).

Nor does NYSDEC's new built-for-litigation claim make sense considering Transco's subsequent behavior. If more time could have resolved the obstacles to Transco's WQC, why did Transco abandon the project altogether instead of reapplying right away, as it did in 2018 and 2019? NYSDEC's post hoc rationalization does not match the facts.

NYSDEC did not issue the 2020 denial because it ran out of time—it did so because it found a mixing zone was not appropriate and, as a result, Transco had not demonstrated that it could comply with New York's water quality standards.[23] In 2025, NYSDEC changed its position and relied on facts that contradict its prior findings.

B. NYSDEC must provide a substantial justification for its change in position based on contradictory factual findings.

In changing its position from the 2020 denial to the 2025 approval, NYSDEC relied "as a threshold matter" on the "corrected" hard clam

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[23] *Id.* at 12–13 [A0445–A0446].

density calculation that it neither corroborated nor explained. And it found that it could now accept a 5% sediment loss rate for which it had previously found no factual basis. NYSDEC's reversal is exactly the change for which *Fox* demands a "more detailed justification." 556 U.S. at 515.

NYSDEC argues that even if its decision was a change in position, a more substantial justification would not be required because the determination was not based on "contradictory" facts. NYSDEC Br. 44.[24] But Respondents cannot have it both ways, arguing that were no contradictory facts and simultaneously expounding on the new facts that purportedly allowed the NYSDEC to reach a different than it had in 2020. *Id.* at 45.

Transco points to *Association of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332 (S.D.N.Y. 2015), for the uncontroversial proposition

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[24] NYSDEC asserts that Petitioners have not alleged "any reliance interests that would require a more substantial justification." NYSDEC Br. 44, n.9. But Petitioners relied on Transco's certification that its application materials, including the analysis of hard clam density, were accurate. Petitioners relied on this evidence demonstrating the threat to the benthic species and obviating the need for additional experts, studies, or analysis. *See supra* n.3.

that an agency can rely on additional data to support a changed position. Transco Br. 34–35. But the facts in *Duncan* are not the facts here. In *Duncan*, the court considered whether it was arbitrary for the Department of Education to adopt a final rule that differed from its prior iteration that never went into effect. 107 F. Supp. 3d at 365–67. The *Duncan* court found the agency provided an explanation for the change that relied on extensive data and analysis provided *before* the rule proposal. *Id.* at 367. Unlike in *Duncan*, NYSDEC failed to provide the requisite explanation; it changed its position based on facts that contradicted those it previously relied on; it failed to identify any substantial investigation of the new information; and it never gave the public a chance to review, analyze, or comment on that information before changing its position.

C. NYSDEC's reliance on new and different facts that it failed to make available to the public for comment was arbitrary and contrary to law.

Respondents claim that NYSDEC sufficiently explained its change of position. Not so. NYSDEC did not explain the dramatic change in hard clam density or why, even at the lower number, the impacts were acceptable in a critical resource area, or why, having discovered that

Transco's long-term representation was wrong, it was justified in relying on the new number or the underlying data. Nor did it explain its embrace of the 5% sediment loss.

Further compromising any purported explanation was NYSDEC's failure to subject the newly discovered information to public comment. That failure not only violated core procedural values but also deprived the public of the opportunity to analyze and refute the newly introduced information. Ultimately, NYSDEC's failure prevented the development of a robust record on which it could make a reasoned decision.

Notably, while New York state laws applied, they are not the sole standards for assessing whether NYSDEC provided adequate notice and comment. The federal Clean Water Act's requirements for meaningful public participation still applied—after all, this is a state action taken pursuant to federal law. *See Riverkeeper, Inc. v. Seggos*, 75 N.Y.S.3d 854, 870–71 (N.Y. Sup. Ct. 2018) (concluding that NYSDEC violated the Clean Water Act when it "deprived" the "public . . . of the opportunity to review and comment on" a nutrient management plan before issuing a permit). The principles of reasoned decision making, which relate closely to adequate notice and comment, *see United States*

v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977), apply as well.

Respondents' attempts to avoid the Clean Water Act's independent requirements are futile. The Act's requirements for notice and comment are not limited to materials in the "application" submitted. *Contra* NYSDEC Br. 67. Section 401(d) instead requires public notice "*in the case* of all applications," 33 U.S.C. § 1341(a)(1) (emphasis added), a requirement that must be read in context of the Act's broader instruction that "public participation in the development, revision, and enforcement of any . . . effluent limitation . . . shall be provided for, encouraged, and assisted," including by "the States." *Id.* § 1251(e). The WQC contains and otherwise purports to enforce "effluent limitations." *Id.* § 1362(11). Yet Respondents ignore Section 101(e)'s broad mandate for public participation in the "development" of the WQC, *id.* § 1251(e)—not just notice of the (deficient) materials Transco included in its 2025 application. Because the Clean Water Act's requirements for public participation clearly apply, so too does federal law on what constitutes adequate public notice in federal regulatory processes.

1. NYSDEC's failure to provide public notice and comment on the new information violated federal law.

Here, relying on a twenty-fold reduction of the hard clam density—information that was not subject to public notice and comment—NYSDEC reversed its determination that a mixing zone was inappropriate and that, without the mixing zone, Transco could not demonstrate compliance with New York's water quality standards. Instead, NYSDEC determined that Transco could rely on a mixing zone and could meet the water quality standards.[25] NYSDEC denied the public a chance to address the contradictory facts on which it based its change of position. That was reversible error.

Respondents fail to meaningfully distinguish the cases establishing the importance of public notice and comment on dispositive information an agency receives after a comment period closes. While applicants may provide information after the comment period, an agency's reliance on new, material information that is a central factor in its permitting decision "deprive[s]" the public of their right to comment

[25] Responsiveness Summary at 21 [A1105].

"intelligently." *See Ohio Valley Env't Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 804 (S.D.W. Va. 2009). Transco's argument that *Ohio Valley* is inapposite hinges on its false refrain that, here, "all the underlying data was disclosed" for public comment. Transco Br. 43.[26] As in *Ohio Valley*, the information that ultimately "constitute[d] the rationale and pivotal data underlying" NYSDEC's decision was never subject to public comment. *Ohio Valley*, 674 F. Supp. 2d at 805.

Transco's attempts to distinguish *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) and *National Wildlife Federation v. Marsh*, 568 F. Supp. 985 (D.D.C. 1983) likewise falter. *See* Transco Br. 44–45. The *Babbitt* court emphasized that "the necessity for notice and opportunity to comment . . . was greatly heightened because [the agency] relied largely on" the post-comment report at issue. 58 F.3d at 1403. Likewise, in *Marsh*, where the court found that an agency's reliance on a post-comment staff evaluation to issue a Clean Water Act dredge-and-fill permit had unlawfully "shield[ed] the essential data and

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[26] As noted earlier, there was no basis to question the validity of the hard clam density stated in the FEIS. Moreover, even the NYSDEC was unable to readily access the 2016 data. *See supra* nn.3 & 17.

the agency's rationale from public hearing and comment." 568 F. Supp. at 994.

Here, the late "correction" of the long-standing hard clam density in the record obscured previously undisputed scientific data that was key to the central question in the justification for the mixing zone—a question that NYSDEC viewed as a "threshold" to whether Transco's application would meet New York's water quality standards.[27] Additionally, NYSDEC concedes Transco did not provide the materials it relied on in concluding that a 5% sediment rate was an adequate model assumption until *after* the comment period concluded.[28] NYSDEC Br. 51. Far from "inconsequent[ial]" pieces of "background information," *see Marsh*, 568 F. Supp. at 995, that "merely supplement or confirm existing data," *see Babbitt*, 58 F.3d at 1402, these additional, dispositive, post-comment submissions required public comment.

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[27] *See* Responsiveness Summary at 20–21 [A1104–A1105].

[28] While the quality of these assessments is not an issue in this case, a review of Transco's submissions shows that the descriptions fail to quantify the actual sediment loss rate from those projects, an issue Petitioners would likely have raised had they had the opportunity. NYSDEC Br. 50; Sediment Loss Rate Memorandum [A0917–A0921].

NYSDEC instead shielded the new information from the public and precluded the public from meaningfully participating.[29]

Transco also argues that "none of the cases cited by Petitioners involve the notice and comment requirements for a WQC," Transco Br. 42, but fails to explain why the Clean Water Act's emphasis on public participation would apply to some approvals under the statute but not others. *See* 33 U.S.C. § 1251(e). In doing so, Transco ignores that "Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005).

Nor does Transco provide support for its claim that the submissions regarding the change in the hard clam density and sediment loss rate were "supplemental" and thus did not require notice and comment. Transco Br. 38–40. Indeed, in each case Transco cites, the materials at issue were truly supplementary: They were not the

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[29] Section 401's deadline was no barrier to public comment. *Contra* Transco Br. 47. If NYSDEC needed more time to provide necessary public comment on critical information, it should have denied the application without prejudice. *See infra* Section II.C.

basis for an agency reversing its position. Unlike here, the new materials "were not used to introduce a new premise, to justify independently the final decision, or to reach a different conclusion." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1075 (9th Cir. 2006); *see also Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 920 (D.C. Cir. 2017) ("These new studies did not provide critical new data."); *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (no significant change from proposed notice to final rule); *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 57 (D.C. Cir. 1984) (supplementary studies confirming conclusions of earlier studies); *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 224 (D.D.C. 2011) (supplemental data consistent with information in proposed rulemaking).

The reduced hard clam density did not expand and confirm data already in the record but instead contradicted the prior statements NYSDEC relied on and that Transco affirmed repeatedly to be correct. Additionally, the new sediment loss assessment Transco submitted after the application had been noticed for comment did not confirm data already in the record but significantly altered analysis that was material to NYSDEC's prior denial. The post-comment submissions

shielded the contradictory information from public scrutiny and denied Petitioners the ability to hire independent experts, take their own sampling of clams, evaluate the sediment loss studies, and fully analyze the impacts of the proposed NESE project.

2. Public comment is not limited to the initial application.

As explained above, New York law cannot supplant the Clean Water Act's independent requirements for meaningful public participation. *Supra* Section I.C. But even if it could, it did not do so here.

While conceding the significance of the change in hard clam density and sediment loss rate, NYSDEC asserts that it does not matter because the public is only entitled to comment on the "application" and not on anything submitted after the Notice of Complete Application. NYSDEC Br. 64–65. According to NYSDEC, no matter how significant, no matter how much new information undermines the verified application or changes the environmental assessment of the project, there is no further obligation to solicit public comment.

New York case law—and NYSDEC's past position—say otherwise. In *Global Companies LLC v. NYSDEC*, 64 N.Y.S.3d 133 (N.Y. App. Div. 2017), the court recognized NYSDEC's authority and obligation to revoke a Notice of Complete Application to give the public an opportunity to comment on significant material submitted after the public comment period. *Id.* at 138. There, taking a different tack than it has here, NYSDEC rescinded a notice of complete application after an applicant, among other things, submitted new modeling after the close of public comment. *Id.* The court upheld the rescission, concluding that NYSDEC had the authority to deem an application incomplete and provide a renewed opportunity for public comment "upon the receipt of relevant and substantial new information." *Global Cos.*, 64 N.Y.S.3d at 138.

So too here. Transco submitted substantial new information that significantly changed the application after the comment period closed. The public had neither notice nor opportunity to comment on it but NYSDEC nonetheless materially relied on it. That NYSDEC already had found the application complete was not a barrier to noticing for

comment the subsequent and dispositive submissions. NYSDEC's failure to do so was arbitrary and contrary to law.

II. NYSDEC's Reliance on Future, Uncertain Compliance Plans Was Unlawful.

Section 401 required that the WQC's terms "assure" compliance with the New York's water quality standards. NYSDEC violated this basic obligation by deferring key details defining how NESE would comply with those standards to future, uncertain plans. *See* Opening Br. 48–65. NYSDEC's deferral also violated the Clean Water Act's public-participation requirements. *Id.* at 65–67. Respondents' defenses lack any limiting principle, positing instead a certify-first, figure-it-out-later regulatory regime that finds no support in the Clean Water Act or under arbitrary-and-capricious review.

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

A state agency can issue a WQC only if it concludes the project "will comply" with all state water quality standards. 33 U.S.C. § 1341(a)(1). The certification must "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that [the project] will comply" with applicable standards. *Id.* § 1341(d).

Read together, the plain text makes clear that (1) an agency must conclude the project "will comply" based on facts before the agency *when* it issues the certification; and (2) the certification itself must *include* all terms "necessary to assure" compliance. Opening Br. 50–51. No provision in the Clean Water Act allows an agency to defer terms necessary for compliance until *after* the certification issues.

NYSDEC explains in detail *why* each future compliance plan is important. *See* NYSDEC Br. 59–62. This just confirms that NYSDEC considers the success of the plans' eventual development and implementation necessary to assure compliance. *See* Opening Br. 25, 51–52, 57, 62 (collecting cites of NYSDEC extolling importance of the plans). It does not address *how* the WQC's terms in fact assure that compliance.

Petitioners do not contend that an agency must have every detail of a compliance plan finalized before granting a certification. *Contra* NYSDEC Br. 54–55. But principles of reasoned decision making require the agency to have a reasoned basis for concluding that future plans required by a certification in fact will assure compliance. *See, e.g.*, *Nat'l*

Audubon Soc'y v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997).[30] This requirement that the efficacy of compliance plans "be supported by substantial evidence" is critical to "avoid creating a temptation" for agencies to rely on deferred compliance plans to skirt current statutory obligations. *Id.*

NYSDEC succumbed to that temptation here, punting multiple compliance plans until after it issued the WQC, contrary to Section 401's plain text and this Court's decision in *Waterkeeper Alliance*. Respondents' attempts to distinguish *Waterkeeper Alliance* fall short. *See* NYSDEC Br. 56–57; Transco Br. 51–52. While *Waterkeeper Alliance* concerned Section 402 permits, not Section 401 certifications, the statutory provisions relevant here are materially identical: Both require that agency approvals include the conditions necessary to "assure"

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[30] NYSDEC's dismissal of *National Audubon Society* because it is not a Clean Water Act case, *see* NYSDEC Br. 62, misses the point. The case illustrates how this Circuit assesses whether an agency's attempt to use *future* and *uncertain* compliance plans to justify *present* statutory findings is reasonable. *Nat'l Audubon Soc'y*, 132 F.3d at 17. NYSDEC provides no reason those general administrative law principles should not apply here.

projects "will comply" with applicable water quality standards. *Compare* 33 U.S.C. § 1341(d), *with id.* § 1342(a)(2) ("assure compliance").[31]

Moreover, NYSDEC's retention of approval authority over some of the future, uncertain compliance plans, is not enough.[32] *Contra* NYSDEC Br. 57. Indeed, *Waterkeeper Alliance* held that without reviewing a plan "*before issuing a permit*," an agency has done "nothing to *ensure*" compliance. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 499 (2d Cir. 2005) (first emphasis added). So too here: A post-certification, non-public review does nothing to "assure" the compliance that Section 401 mandates. *See* 33 U.S.C. § 1341(d).

The *Delaware Riverkeeper* cases Transco cites, Transco Br. 52–53, are not to the contrary. In those Third Circuit cases, the certifications were conditioned not on future *plans*, but on the project's future receipt of distinct state *permits*. *See Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Env't Prot.*, 903 F.3d 65, 76 (3d Cir. 2018); *Del. Riverkeeper*

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[31] For this reason, that the WQC is not technically a "permit," *see* Transco Br. 52, is irrelevant.

[32] Contrary to NYSDEC's suggestion, NYSDEC Br. 34, the WQC contains no term requiring agency review or approval of the Transco-developed Dredge Management Plan. *See* NESE WQC ¶ 40 [A1056].

Network v. Sec'y Pa. Dep't of Env't Prot., 833 F.3d 360, 385–86 (3d Cir. 2016). Because those "substantive permits" would be subject to separate 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. In contrast, the compliance plans here are subject to no further public process and no binding standards—only an unenforceable promise that NYSDEC and Transco will figure it out later.

Respondents' refrain that agencies "frequently" defer details of key compliance plans until after the certification is issued, *see, e.g.*, NYSDEC Br. 38, 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 New Jersey v. Bessent*, 149 F.4th 127, 144 (2d Cir. 2025) ("[T]he question a court faces . . . is always, simply, whether the agency has stayed within the bounds of its statutory authority." (quoting *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 74 (2d Cir. 2020))). In any event, the cases Respondents cite—all out-of-Circuit—do not support their claim that it is "customary," *see* Transco Br. 53, for state

agencies to punt key compliance plans until after certification, based on a promise that the agency and project proponent will figure it out eventually. Instead, in each instance the state agency provided specific, substantial evidence to support its finding that the deferred plan—once finalized—would in fact assure compliance.[33]

The *Riverkeeper* cases, as explained above, involved an agency's reliance on future *permits,* subject to substantive standards and procedural protections. *Supra* Section II.A. Likewise, the Washington Supreme Court's decision in *Port of Seattle v. Pollution Control Hearings Board*, 90 P.3d 659 (Wash. 2004), concluded a certification supported by a 139-page agency decision could rely on forthcoming Section 402 permits, *id.* at 666, 677, as well as future compliance plans that were "set out in detail in the certification" such that they provided "reasonable assurance" of compliance, *id.* at 676. And in *Sierra Club v. State Water Control Board*, the agency determined that forthcoming

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[33] *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963 (D.C. Cir. 2011), did not address compliance plans. There, the court rejected an *applicant*'s claim that the state waived its certification authority by imposing a bond requirement that the company did not satisfy before Section 401's one-year deadline. *Id.* at 966–67, 973–74.

stormwater- and sediment-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, 397–398, 405 n.14 (4th Cir. 2018).[34] The record here lacks those kinds of detailed evidence supporting the adequacy of NYSDEC's deferred compliance plans.

Nor does Section 401(a)'s one-year deadline for action absolve NYSDEC of its substantive obligation to assure compliance. *Contra, e.g.*, NYSDEC Br. 38. 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 United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008). Even if it "was difficult" for NYSDEC to "determine[e] the proper" limits on NESE

[34] The contingency plans in *Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 758 (4th Cir. 2019) are different-in-kind than the compliance plans here. Those contingency plans were intended to address accidental spills in "unusual geology," *see* NYSDEC Br. 56, whereas the compliance plans here are necessary to monitor, respond to, and mitigate expected impacts.

within the time allotted, NYSDEC could not "simply give up and refuse to issue more specific guidelines." *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 578 (2d Cir. 2015). Rather than "thr[o]w up [its] hands and, contrary to the Act, simply ignore[]" its obligation to assure compliance, *see Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993), NYSDEC could have complied with both statutory requirements by doing what it had done three times before: denying Transco's application without prejudice. *See* NYSDEC Br. 13–15.

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

Petitioners' opening brief explains in detail why the WQC's reliance on each future, uncertain compliance plan fell short of Section 401's requirement to "assure" compliance. *See* Opening Br. 51–65. Far from "cherry-pick[ing]" text from the WQC, Transco Br. 49, Petitioners focused on terms that NYSDEC concluded were necessary to comply with water quality standards but left too uncertain to provide any reasonable assurance that compliance would be realized. *See City & Cnty. of San Francisco v. EPA,* 604 U.S. 334, 347 (2025) (explaining a permit must do more than "state[] the desired result").

NYSDEC's response confirms that it intends these plans to serve critical compliance functions: "explain[ing] . . . exactly how [Transco] will comply with the requirements in the certification;" identifying when Transco will slow dredging rates and how it will "respond to any unforeseen exceedances of water quality limits;" assuring "Transco will effectively monitor for any exceedances of water quality standards and address any exceedances;" "detailing how [Transco] will detect" and "implement best management practices" to protect sturgeon; and others. *See* NYSDEC Br. 59–62.[35] Yet NYSDEC cites no record evidence supporting its hope that these plans—to be submitted *after* the WQC issued—will actually achieve those important goals. *See Waterkeeper All.*, 399 F.3d at 499.

That the record includes drafts of some of the six plans, *see* Transco Br. 48; NYSDEC Br. 27, is not enough. NYSDEC did not rely on—or even reference—those drafts in its decision documents, so cannot do so in litigation. *See Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 624 (2023). And even now, NYSDEC does not claim those drafts were

[35] *See also* Responsiveness Summary at 15–16 [A1099–A1100].

adequate. Nor could it. NYSDEC received a draft Monitoring Plan in August 2025 (while public comment was underway).[36] But rather than work to revise and finalize that (or any other) draft plan over the next three months, NYSDEC deferred those decisions to later. The record, moreover, contains *no* draft Dredge Management Plan: The first (and only) mention of that plan outside of the decision documents is a letter from Transco explaining that "potential adaptive management procedures" to address water quality exceedances "will be described in a dredge management plan, or equivalent" submitted sometime prior to construction.[37]

Respondents are thus left to argue that the WQC's text is sufficient to assure compliance. But in doing so, they cannot escape the open-endedness of the WQC's vague terms. It is Transco's future plans, not the WQC, that will: explain "exactly how [Transco] will comply" with applicable water quality standards, *see* NYSDEC Br. 59; "set

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[36] 2025.08.01 Transco Letter to NYSDOS in Response to Request for Additional Data and Information Request (ADI) at 1 [A0886]; 2025.08.21 Transco Correspondence 2.0 Action Item Responses for Technical Call Meetings at 1 [A0915].

[37] 10Sep25 Call Item Responses at 4 [A0994].

locational and temporal parameters for monitoring, and provide extensive details about how monitoring will be conducted," *id.* at 60; and "detail[] how [Transco] will detect the presence of sturgeon" and "implement best management practices" to minimize harms to sturgeon, *id.* at 61. By deferring these critical details to post-certification plans, NYSDEC flouted its obligation under Section 401 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 'regulat[e] in fact, not only in principle[,]'" *Nat. Res. Def. Council*, 808 F.3d at 578 (quoting *Waterkeeper All.*, 399 F.3d at 498). *See* Opening Br. 51–62.

The WQC's deferred Mitigation Plans fare no better. While mitigation planning is, by its nature, forward-looking, the need to "account for unanticipated changes" to the NESE project, *see* NYSDEC Br. 62, does not excuse NYSDEC from supporting the "adequacy" of anticipated, after-the-fact mitigation with "substantial evidence." *Nat'l Audubon Soc'y*, 132 F.3d at 17; *see also 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); *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225,

234 (5th Cir. 2007) (holding "cursory details" about mitigation measures is inadequate). NYSDEC's WQC—by failing to identify any potential mitigation measures, much less support those (unidentified) measures' efficacy[38]—fell short of that established requirement. Opening Br. 62–65.

For these reasons, NYSDEC's issuance of the WQC in reliance on future, uncertain compliance plans, was both arbitrary and contrary to Section 401.

C. NYSDEC's deferral of compliance plans violated the Clean Water Act's public-participation requirements.

Respondents' attempts to escape the Clean Water Act's "guarantee" that "the public [have] a meaningful role" in Section 401's implementation, *see Waterkeeper All.*, 399 F.3d at 503, fail for many of the reasons explained above. *See* NYSDEC Br. 71–72; Transco Br. 54.

New York law is not the only applicable law for purposes of public participation. *Supra* Section I.C. Public comment is not limited solely to the "application" submitted, especially when that application is facially

[38] NESE WQC ¶ 25(a)–(c) [A1045].

deficient. *Supra* Section I.C.2. *Waterkeeper Alliance*'s holdings—including the bar on "effectively shield[ing]" compliance plans "from public scrutiny and comment," 399 F.3d at 503—apply to Section 401. *Supra* Section I.C.1. And the *Riverkeeper* cases are inapposite because, unlike here, the public there retained the "full opportunity to weigh in" on the future permits. *Del. Riverkeeper Network*, 903 F.3d at 76; *supra* Section II.A.

What is left is the assertion that state agencies should be able to grant certifications while punting hard decisions about compliance to a future, non-public process, lest they miss the one-year deadline to act. *See* NYSDEC Br. 72. But NYSDEC did not face such a Hobson's choice. If NYSDEC lacked time to solicit input on these compliance plans and ensure their adequacy, it could—and should—have denied the application because it lacked a record sufficient to demonstrate compliance with water quality standards, as it had done before. *Supra* Section I.A.2. 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 a feature, not a

bug, of NYSDEC'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 WQC

Petitioners explained why vacatur is the default and appropriate remedy in this case. Opening Br. 67–68. While it was Respondents' 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 do so. Respondents therefore conceded the issue. *See City of New York v. Minetta*, 262 F.3d 169, 179 (2d Cir. 2001).

Dated: April 20, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Susan J. Kraham, do hereby certify, pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure as follows:

1. This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B), because it contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: April 20, 2026

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