Contact

Full Name: Dominique Burkhardt
Last Name: Burkhardt
First Name: Dominique

E-mail: dburkhardt@earthjustice.org

Message

From: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]
Sent: 2/13/2023 5:56:56 PM
To: Freeman, Caroline [Freeman.Caroline@epa.gov]; Chaffins, Randall [Chaffins.Randall@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Blevins, John (he/him/his) [Blevins.John@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Johnson, Terry [Johnson.Terry@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]
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Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

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FYI – For Situational Awareness

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- processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4
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Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
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Hi Jeaneanne ,

Yes it is. Just making sure that SEMD and everyone else knows what's coming to ARD.

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To: Freeman, Caroline [Freeman.Caroline@epa.gov]; Chaffins, Randall [Chaffins.Randall@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Blevins, John (he/him/his) [Blevins.John@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Johnson, Terry [Johnson.Terry@epa.gov]
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Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Attachments: DiazBalart Letter to EPA Admin Regan on Doral FL Fire 02.13.23

Also, for awareness. We are starting to see a bit of incoming on this and Jim and I worked on a statement this morning (see below). Rep. Mario Diaz-Balart (FL-26) has also sent a letter to Administrator Regan (see attached).

Allison and I will work with Randall and Jim on a communications strategy while we are in our current posture.

In coordination with the state of Florida, EPA is responding to a request from Miami-Dade County Fire to provide air monitoring and sampling assistance, in support of their efforts to address the ongoing fire at the Miami-Dade County Resources Recovery Center. At this time, EPA is deploying an emergency responder with contractor support to the Miami-Dade area to assist with air monitoring efforts as impacts to the ambient air are assessed. We will keep you abreast of any updates.

Brandi

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MARIO DIAZ-BALART
26TH DISTRICT, FLORIDA
APPROPRIATIONS COMMITTEE
SUBCOMMITTEES:
STATE FOREIGN OPERATIONS, AND RELATED PROGRAMS
CHAIRMAN
TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES
DEFENSE
DEPUTY WHIP
CONGRESSIONAL HISPANIC CONFERENCE
CHAIRMAN

Congress of the United States
House of Representatives
Washington, DC 20515–0926

374 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4211
FAX: (202) 225-8576

DISTRICT OFFICES:
8669 N.W. 36TH STREET
SUITE 100
DORAL, FL 33166
(305) 470-8555
FAX: (305) 470-8575
4715 GOLDEN GATE PARKWAY
SUITE ONE
NAPLES, FL 34116
(239) 348-1820
FAX: (239) 348-3589

February 13, 2023

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Regan,

I write to express significant concerns regarding the health and wellbeing of my constituents following a massive fire erupting at a renewable energy facility in the city of Doral, Florida, located in my district. On February 12, 2023, at approximately 2:15 pm the brave men and women of the Miami-Dade Fire Rescue Department responded to a fire of approximately the size of 2 football fields[1] at the heart of the city. This fire, located at NW 70th Street and NW 97th Avenue, has quickly spread, involving 4 buildings and which, according to Miami-Dade Fire Chief Ray Judallah is expected to be "a long-term fire, a multi operational period looking at several days"[2] before it can be contained.

The city of Doral, Florida is a vibrant community with approximately 76,000 people, 40 schools, several houses of worship, parks, and more. As parents take their children to schools, as residents commute to and from their workplaces, it is critical that the air each resident breathes is clean, safe, and hazard-free. As the Environmental Protection Agency (EPA) works to send a crew down to my district to conduct several air quality and environmental reviews, I respectfully request the following:

- Prompt and timely notification to all local officials on air, water, and soil quality levels.
- Sharing of critical information, in real time, of any precautions that are advisable for residents, to include specifically any guidance on whether individuals in the area should take precautions, such as the use of hazmat materials for their safety.
- Timely status updates from the EPA to local officials on the reviews being conducted in and around the area.
- Transparent and immediate publishing of any reviews and advisories regarding this incident on the EPA's website, which will be shared with all local officials so that residents and others affected may easily access this critical information.

I appreciate your consideration of my request, within all applicable rules and regulations, and look forward to your timely response on this critical matter.

Sincerely,

Mario Díaz-Balart
Member of Congress

[1] https://www.nbcmiami.com/news/local/crews-battle-massive-fire-at-energy-facility-in-miami-dade/2971949/
[2] https://www.cbsnews.com/miami/news/huge-three-alarm-blaze-at-doral-recyclable-energy-plant-under-investigation/

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Thank you,

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EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

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Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Jonathan J. Smith <jjsmith@earthjustice.org>
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- https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/
- https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/
- processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4
- processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4
- original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
www.earthjustice.org

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Message

From: Hoang, Anhthu [Hoang.Anhthu@epa.gov]
Sent: 3/14/2023 1:12:36 AM
To: micah.west@splcenter.org; cflowers [cflowers@creej.org]; mgraham@creej.org; acolangelo@nrdc.org; stallman@nrdc.org; rhammer@nrdc.org; kleefatt@nrdc.org; alyssabrown@nrdc.org
CC: Dorka, Lilian [Dorka.Lilian@epa.gov]; Goerke, Ariadne (she/her/hers) [Goerke.Ariadne@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Harrison, Brenda [Harrison.Brenda@epa.gov]; Stein, Jonathan [Stein.Jonathan@epa.gov]; Vong, Suong [Vong.Suong@epa.gov]
Subject: re: EPA Complaint No. 03R-23-R4
Attachments: 2023.03.06 03R-23-R4 CP Ack.pdf

Dear Messrs. West, Colangelo, Graham and Mss. Flowers, Tallman, Hammer, Leefatt, and Brown:

The attached letter is to notify you that the U.S. Environmental Protection Agency (EPA), Office of Environmental Justice & External Civil Rights Compliance, Office of External Civil Rights Compliance (OECRC), received a complaint on March 6, 2023, involving the Alabama Department of Environmental Management alleging discrimination based on race in violation of Title VI of the Civil Rights Act of 1964.

If you have any questions about the status of this correspondence, please contact me by telephone at (202) 809-3297 or by email at hoang.anhthu@epa.gov.

Anhthu Hoang
Acting Director
Office of External Civil Compliance
Office of Environmental Justice and External Civil Rights

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D C. 20460

Office of Environmental Justice and External Civil Rights
Office of External Civil Rights Compliance

March 13, 2023

In Reply Refer to:
EPA Complaint No. 03R-23-R4

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Re: Acknowledgement of Administrative Complaint

Dear Messrs. West, Colangelo, Graham and Mss. Flowers, Tallman, Hammer, Leefatt, and Brown:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA), Office of Environmental Justice & External Civil Rights Compliance, Office of External Civil Rights Compliance (OECRC)[1] received your correspondence on March 6, 2023, involving the Alabama Department of Environmental Management alleging discrimination based on race in violation of Title VI of the Civil Rights Act of 1964.

OECRC is responsible for processing and resolving complaints alleging discrimination by

[1] On September 24, 2022, EPA announced the establishment of the Office of Environmental Justice and External Civil Rights (OEJECR). The new Office includes the External Civil Rights Compliance Office, which was renamed the Office of External Civil Rights Compliance (OECRC). OECRC continues to enforce and ensure compliance with federal civil rights laws, which prohibit discrimination by applicants for and recipients of EPA financial assistance. OECRC accomplishes in accordance with the procedure described in the Case Resolution Manual.

Micah West (Southern Poverty Law Center)
Catherine Flowers, Michael Graham (Center for Rural Enterprise and Environmental Justice)
Aaron Colangelo, Sarah Tallman, Rebecca Hammer, Kimberly Leefatt, Alyssa Brown (Natural Resources Defense Council)

programs or activities that receive financial assistance from the EPA. OECRC will review the correspondence in light of EPA's nondiscrimination regulation to determine whether it is a complaint that falls within OECRC's jurisdiction. Once this jurisdictional review is completed, OECRC will notify you as to whether it will accept the complaint for investigation, or reject, or refer the complaint to another Federal agency.

Please be advised that, if your complaint is accepted for investigation, a copy of the complaint will be shared with the Recipient, consistent with 40 C.F.R. § 7.120(e). OECRC will release the complaint with appropriate redactions consistent with the Freedom of Information Act (FOIA) and the Privacy Act) and will only release identifying information to the extent necessary to comply with 40 C.F.R. Parts 5 and 7.[2]

In the interim, if you have any questions about the status of this correspondence, please contact me by telephone at (202) 809-3297 or by email at hoang.anhthu@epa.gov.

Sincerely,

ANHTHU HOANG

Digitally signed by ANHTHU HOANG
Date: 2023.03.13 18:51:11 -04'00'

Anhthu Hoang
Acting Director
Office of Environmental Justice and
External Civil Rights Compliance

cc: Ariadne Goerke
Deputy Associate General Counsel
Civil Rights & Finance Law Office

Jeaneanne Gettle
Deputy Regional Administrator
Deputy Civil Rights Official
US EPA Region 4

Leif Palmer
Regional Counsel

[2] Freedom of Information Act, 5 U.S.C. § 552(b)(6) and (7)(c) and the Privacy Act of 1974, 5 U.S.C. § 552a.

October 7, 2022

Joseph M. Goffman
Principal Deputy Assistant Administrator
Office of Air and Radiation
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460
Goffman.Joseph@epa.gov

Dear Principal Deputy Assistant Administrator Goffman:

National Parks Conservation Association, Sierra Club and Earthjustice ask EPA to swiftly act to ensure compliance with the Clean Air Act's (CAA) regional haze program. To this end, this letter identifies the sources and states with high Class I area contributions of visibility impairing pollution with the most opportunity for emission reductions to assure reasonable progress. We recommend each EPA region issue a Federal Implementation Plan (FIP) to replace deficient regional haze State Implementation Plans (SIP). EPA action is necessary to realize the objectives of the regional haze program and correct the many egregious SIP deficiencies identified in our comment letters and expert reports.[1]

EPA must address systemic problems across states as it applies the CAA and Regional Haze Rule (RHR) requirements as identified in the letter we sent January 21, 2022.[2] This letter first summarizes the fundamental legal and analytical flaws common to many of the SIPs submitted thus far across the country. In taking action

[1] A list of the Conservation Organizations' comment letters and expert reports on the priority states appear at the end of this letter in Exhibit 1.
[2] Letter from Stephanie Kodish, Senior Director and Counsel, Clean Air and Climate Programs, National Parks Conservation Association, Sara L. Laumann, Principal, Laumann Legal, LLC, Counsel for NPCA, Gloria D. Smith, Managing Attorney, Sierra Club, Environmental Law Program, Charles McPhedran, Senior Attorney, Earthjustice, to Joseph M. Goffman, Principal Deputy Assistant Administrator, Office of Air and Radiation, Environmental Protection Agency (Jan. 22, 2022) ("Conservation Organizations' January 2022 Letter") (Ex. 2).

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on each of the SIPs discussed below, EPA must ensure that any reasonable progress determinations comport with the legal requirements of the CAA and the RHR, that all emission limitations and assumptions are enforceable, and that the states properly consider environmental justice, as required by EPA's Clarification Memorandum and President Biden's Executive Orders. EPA must disapprove the state plans that fail to adhere to those fundamental requirements, and we urge the agency to implement federal plans that satisfy the CAA's mandate to adopt, after a robust evaluation of the statutory factors, "enforceable emission limitations" that ensure reasonable progress toward natural visibility goals.

This letter identifies the states that we believe should take priority for EPA attention and action. We present source emissions data for the facilities or sectors per state based on criteria specified below that captures a reasonable scenario of potential pollutant reductions necessary for achieving reasonable progress. We focus on the states with SIPs already submitted to EPA; however, we have also flagged states that have yet to submit SIPs for public comment that we have reason to believe will be priorities as well.

This letter also describes thematic, significant flaws in priority states per region that have submitted SIPs in Regions 3, 4, 5, 6, 7, 8, 9 and 10. With these common deficiencies in the SIPs, EPA has a strong analytical and legal basis for disapproving those plans and adopting a FIP per region. We then provide a high-level case study for states in Regions 3 and 4 to demonstrate how a streamlined FIP approach could work in practice. This is followed by common analytical and legal flaws in the priority states for the other named EPA regions. Because the states of Arizona and California in Region 9 have different and distinct issues, we recommend EPA act on those states in separate actions.

While we have provided a streamlined approach here for EPA to act by region, the same approvability problems can be used alternatively to justify EPA disapproving state SIPs individually. We welcome the opportunity to discuss the contents of this letter with EPA.

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Table of Contents

I. Every EPA Regional Haze Final Action Must Provide for the Following 4

A. Reasonable progress determinations must comport with the legal requirements ... 4

B. Emissions limitations and assumptions relied on for compliance must be enforceable 5

C. A source must not be exempt from reasonable progress measures just because other clean air program standards do or might apply to it 6

II. Consideration of Environmental Justice 7

III. Prioritization Analysis 8

IV. Streamlined Approaches to Achieve Reductions and Assure Reasonable Progress ... 12

A. EPA Regions 3 and 4: VISTAS Case Study 12

1. VISTAS Flawed Modeling 14

2. The Six Priority VISTAS States with Submitted SIPs 16

B. Common Legal and Analytical Flaws in EPA Regions and Issue Highlights 22

1. EPA Region 5 22

2. EPA Region 6 28

3. EPA Region 7 34

4. EPA Region 8 36

5. EPA Region 9 43

6. EPA Region 10 49

Conclusion 50

Exhibit 1 54

Exhibit 2 61

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I. Every EPA Regional Haze Final Action Must Provide for the Following

A. Reasonable progress determinations must comport with the legal requirements

EPA cannot approve SIPs that are based on flawed Four-Factor Analyses, which lack required documentation and reasonable assumptions and consider and weight issues beyond their legal scope. For example, our comments identified use of improper interest rates; shortened equipment life assumptions; disallowed costs such as escalation during construction; Allowance for Funds Used During Construction ("AFUDC"); unsupported contingency factors; and owners costs. Moreover, states routinely only considered controls if they are in the RACT, BACT, LAER Clearinghouse ("RBLC"),[3] which is inadequate on its own given that the data it hosts is incomplete because states do not generally upload determinations and therefore the information is out of date. While a number of states identified reasonable progress measures for selected sources, many rested a "no additional measures" decision on what they judged to be visibility benefits too small to warrant emission reduction measures despite the fact that the degree of visibility benefits is not a statutory factor nor a justifiable criteria to excuse an otherwise valid control measures.[4] Finally, most SIPs failed to document emissions and controls, and when

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[3] It is the state's responsibility to independently review, evaluate and verify a draft Four-Factor Analysis submitted by a source and submit a SIP that complies with the Act. 40 C.F.R. § 51.308(f)(2)(i)("The State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment. The State should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources. The State must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy. In considering the time necessary for compliance, if the State concludes that a control measure cannot reasonably be installed and become operational until after the end of the implementation period, the State may not consider this fact in determining whether the measure is necessary to make reasonable progress." (emphasis added); *see also* 42 U.S.C. § 7491(g)(1); *see also* 40 C.F.R. §§ 51.308(d)(3), (f)(2)(i); *see also* 42 U.S.C. §§ 7410(a)(2)(A); 7491(b)(2) (SIP must include among other things, requiring enforceable emission limitations necessary to ensure reasonable progress); moreover, EPA must not rely on unreasonable and inaccurate analysis.

[4] Visibility is not a consideration on par with the four statutory reasonable progress factors as is plain in the Act, and as consistently asserted by EPA may not purport a lack of perceptible or sufficient visibility improvements to excuse selecting emission controls. While visibility is the goal of the regional haze program, *id.* at 7491(a)(1), the four-factor reasonable progress evaluation does not itself incorporate visibility, and states may not give it the same weight as the four statutory factors. Regional haze is "visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area." 40 C.F.R. § 51.301. At any given Class I area, hundreds or even thousands of individual sources may contribute to regional haze. As EPA's Clarification Memorandum provides, "...a state should not use visibility to summarily dismiss cost-

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information requests were submitted to states for this information, we received incomplete information.[5]

B. Emissions limitations and assumptions relied on for compliance must be enforceable

Under the CAA, "[e]ach state implementation plan . . . *shall*" include "enforceable limitations and other control measures" as necessary to "meet the applicable requirements" of the Act. 42 U.S.C. § 7410(a)(2)(A) (emphasis added). The RHR similarly requires each state to include "enforceable emission limitations" as necessary to ensure reasonable progress toward the national visibility goal.[6] For example, SIPs that rely on source retirements must be enforceable in the SIP.[7] Additionally, emission limits, monitoring, recordkeeping and reporting

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effective potential controls. ...a state that has identified cost-effective controls for its sources but rejects most (or all) such cost-effective controls across those sources based on visibility benefits is likely to be improperly using visibility as an additional factor." *See*, Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors Regions 1-10, "Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period," at 13, (July 9, 2021), https://www.epa.gov/visibility/clarifications-regarding-regional-haze-state-implementation-plans-second-implementation ("Clarification Memorandum"). Thus, it is not appropriate to reject a control measure for a single emission unit, a single source, or even a group of sources on the basis of the associated visibility benefits being imperceptible to the human eye or too small to justify emission reduction measures that would otherwise satisfy a Four-Factor Analysis.

[5] Conservation Organizations' January 2022 Letter at 6 ("... most of the proposed SIPs do not include any information on unit-specific emissions, making it impossible for the public to review, comment and determine if correct units in a facility are being analyzed, and the historical emissions of the units being analyzed. The public cannot meaningfully comment on the proposed SIPs. Moreover, commenters are forced to submit state freedom of information requests for the unit-specific emission information, which are generally ignored, untimely and/or incomplete.")

[6] *See generally* 40 C.F.R. § 51.308(d)(3).

[7] Memorandum from Peter Tsirigotis, Director at EPA Office of Air Quality Planning and Standards, to EPA Air Division Directors Regions 1-10, "Guidance on Regional Haze State Implementation Plans for the Second Implementation Period," at 22, EPA-457/B-19-003 (Aug. 2019), https://www.epa.gov/sites/production/files/2019-08/documents/8-20-2019_-_regional_haze_guidance_final_guidance.pdf ("Regional Haze Guidance") (if a state opts to exempt sources from further control analysis based on a planned retirement schedule, the source must "have an enforceable commitment to be retired or replaced by 2028.") Where the SIP relies on a source's plans to permanently cease operations or reduction in utilization to ensure reasonable progress or to avoid any control analysis, those parameters or assumptions must be included in enforceable emission limitations in the SIP itself.

40 C.F.R. pt. 51, App. Y § (IV)D.4.d.2. So-called "on-the-way" measures, including anticipated shutdowns or reductions in a source's emissions or utilization, that are relied upon to forgo a four-factor analysis or to shorten the remaining useful life of a source "*must* be included in the SIP" as enforceable emission reduction measures. *Id.* at 8-9 (emphasis added).

While the CAA does not define the phrase "remaining useful life," EPA has consistently stated that the retirement of a facility can be used to shorten a source's remaining useful life only if the retirement is enforceable. Thus, in order to affect the remaining useful life in a SIP, a state must incorporate the retirement requirements into its SIP. If a potential retirement is not enforceable in the SIP, it cannot be relied upon to shorten the remaining useful life of a source.

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requirements must be included in the SIP.[8] The CAA requires that states submit implementation plans that "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal" of achieving natural visibility conditions at all Class I Areas.[9] The RHR requires that states must revise and update their regional haze SIP, and the:

> Periodic comprehensive revisions must include the *enforceable emissions limitations*, compliance schedules, and other measures that are necessary to make reasonable progress as determined pursuant to [51.308](f)(2)(i) through (iv)."[10]

Furthermore, EPA's Regional Haze Guidance further explains these requirements:

> This provision requires SIPs to include enforceable emission limitations and/or other measures to address regional haze, deadlines for their implementation, and provisions to make the measures practicably enforceable including averaging times, monitoring requirements, and record keeping and reporting requirements.[11]

Thus, EPA's Regional Haze Guidance recognizes EPA's long-standing position that SIPs must contain provisions with enforceable emissions limitations. As discussed in our comment letters, many State SIPs failed to include these provisions.[12]

C. A source must not be exempt from reasonable progress measures just because other clean air program standards do or might apply to it

Many states erroneously relied on prior BART determinations,[13] despite the fact that BART-eligible sources must be reassessed for controls under the

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[8] 42 U.S.C. §§ 7410(a)(2)(A), 7491(b)(2) (SIP must include among other things, requiring enforceable emission limitations necessary to ensure reasonable progress), *see also* 40 C.F.R. § 51.308(f)(2) ("The long-term strategy must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv)."). These provisions are essential to successful implementation of the program, transparency and enforcement by EPA and the public.

[9] Regional Haze Guidance at 42-43 (While NPCA filed a Petition for Reconsideration regarding EPA's issuance of the Regional Haze Guidance, it does not dispute the information in the Regional Haze Guidance referenced here regarding enforceable limitations, which cites to the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 74 Fed. Reg. 13,498 (April 16, 1992).

[10] 74 Fed. Reg. 13,568 (emphasis added).

[11] Regional Haze Guidance at 42-43.

[12] Conservation Organizations' January 2022 Letter at 7-9 (*e.g.*, Indiana, Michigan, North Carolina, Tennessee, Washington).

[13] *See e.g.*, Conservation Organizations' Comment letters to Indiana, Michigan, South Carolina, Texas, West Virginia.

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reasonable progress requirements.[14] States also relied on coverage under CAIR/CSAPR, MATS and other existing programs to avoid Four-Factor Analysis and controls for the second planning period.[15] These state decisions are inconsistent with the RHR requirements. Likewise, looking ahead to other rules that may find intersection with sources of haze pollution, like the recently proposed Good Neighbor Rule, it would also be problematic for states or EPA to assume a facility would be adequately controlled by a forthcoming rule and/or absent reasonable progress analysis. While it may be the case that another program or standard resulted in "effective emission controls" that would also satisfy the RHR, this conclusion must be supported by analysis. EPA provides in the Regional Haze Guidance and the Clarification Memorandum that for a source with controls recently installed there may be a "low likelihood" of technological advances however the state must nonetheless specify why its decision is consistent with reasonable progress requirements. That is, "...why it is reasonable to assume for the purposes of efficiency and prioritization that a full four-factor analysis would likely result in the conclusion that no further controls are necessary."[16]

II. Consideration of Environmental Justice

As discussed in our January, 2022 letter, our comment letters to states have consistently identified reasonable progress sources located in and impacting environmental justice communities and Class I areas. Moreover, our comments also discussed state and federal authorities for state action on those sources that lack the best pollution controls or lack upgrades to reduce emissions and lessen the burden on air pollution on these communities.[17] Across the source tables presented herein facilities with an "*" denote the sources NPCA identified as sources of concern due to their potential to impair visibility at Class I areas *and* their likely impact to vulnerable communities. The selection was made using environmental justice markers such as people of color and people living below the poverty line. NPCA used American Community Survey data from the United States Census Bureau at the county and city levels to identify vulnerable communities. Additional information at the community or neighborhood levels was used when available for this selection. The sources identified lack the best pollution controls or lack pollution control upgrades to further reduce emissions and lessen the burden of air

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[14] 40 C.F.R. § 51.308(e)(5) ("After a State has met the requirements for BART or implemented an emissions trading program or other alternative measure that achieves more reasonable progress than ... BART, BART-eligible sources will be subject to the requirements of paragraphs (d) and (f) of this section."). Regional Haze Guidance at 25 (the RHR "anticipates the re-assessment of BART-eligible sources under the reasonable progress Rule Provisions" and "states may not categorically exclude all BART-eligible sources, or all sources that installed BART controls, as candidates for selection for analysis of control measures.")

[15] *See, e.g.*, Conservation Organizations' January 2022 Letter at 9-19, .

[16] Regional Haze Guidance at 23.

[17] *See, e.g.*, Conservation Organizations' January 2022 Letter at 41-45.

pollution in these communities. We will continue to make EPA aware of similar sources of concern identified in our future comment letters. We ask the agency to consistently evaluate environmental justice and recognize that in satisfying the CAA and RHR reasonable progress requirements not only will clean air to our public lands be restored, but also healthy air to our communities. Control measures that ought to be required for reasonable progress as recommended throughout our state, source and EPA specific haze comments will also deliver significant benefits to overburdened communities.

III. Prioritization Analysis

To identify the priority states and sources we considered the following factors:

- Level of source emissions
- Proximity to Class I areas
- Uncontrolled sources
- Underperforming sources
- Sources with retirement options
- Potential emission reductions (based on our experts' technical reviews)
- Adjacency to environmental justice communities.

We have identified the following 20 states that have provided for public comment on their SIPs by applying the above factors (AZ, CA, FL, GA, IN, LA, MI, MN, MO, NC, ND, OH, OK, SC, TN, TX, UT, WA, WV, and WY).

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Figure 1. Priority States with Completed Public Comment Opportunities.

The priority states include a total of 235 priority sources, as presented in the discussion on each of the EPA regional offices and includes:

- Sources without best pollution controls
- Sources not effectively controlled
- Sources with announced retirements (not enforceable)
- Sources with significant levels of nitrogen oxide (NO_X), sulfur dioxide (SO_2) and/or particulate matter (PM) emissions
- Sources located in or adjacent to EJ communities.

The degree of emission reductions feasible for sources by state and pollutants is illustrated below. Figure 2 is based on Conservation Organization submitted Four-Factor Analyses correcting cost analyses and other issues, as explained in our comment letters. Additionally, the potential emission reductions are from a selected number of sources where information about the cost of controls and other necessary information was available. Because most of the state SIPs failed to provide the required supporting documentation, there are a significant number of sources for which we cannot estimate the level of potential emission reductions, so the actual degree of emission reductions is likely far greater than that shown in Figure 2.

Figure 2. Potential Reductions NO_X and SO_2 Reductions for Selected Sources by Priority State.[18]

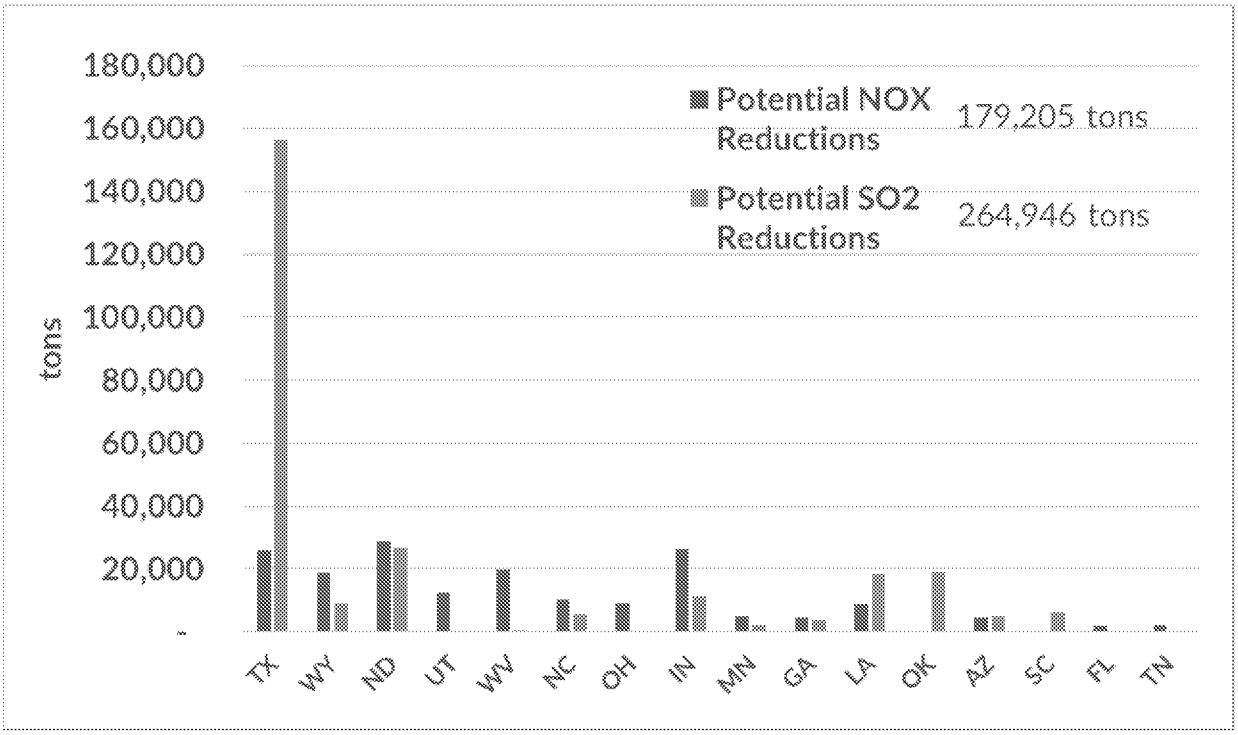

Figure 3 below shows in yellow the additional six priority states that have not yet provided public comment (*i.e.*, Alabama, Illinois, Kentucky, Nebraska, New Mexico, and Pennsylvania); however, this letter focusses on the SIPs where public comment has been provided.[19] We will submit additional analysis and recommendations as we receive additional information.

[18] This figure includes information for sources for which were able to obtain information about. As discussed elsewhere in this letter, because most SIPs failed to document emissions and controls, and when information requests were submitted to states for this information, we received incomplete information, which is why the potential for reductions is likely far greater than shown in the figure.
[19] Minnesota's public comment closes on October 7, 2022, and we will forward the Conservation Organizations' comments to EPA once our comments are submitted.

Figure 3. Priority States that have Not Issued SIPs for Public Comment (yellow).

Finally, the table below shows the degree of annual emissions from our analysis, including priority states that have not yet provided public notice on their SIPs.

Table 1. NO_X, PM_{10}, and SO_2 Emissions from Priority Sources.

State	NO_X (tons)	PM_{10} (tons)	SO_2 (tons)	Number of sources
AL	42,804	6,014	41,298	23
AZ	16,609	5,744	34,967	11
CA	23,448	11,002	8,911	31
FL	15,718	4,817	26,472	10
GA	21,401	2,790	21,779	9
IL	11,402	1,814	6,932	12
IN	49,963	13,068	58,519	11
KY	49,713	6,216	56,775	18
LA	23,823	3,050	76,546	14
MI	40,419	2,834	36,482	10
MN	39,796	9,413	14,319	15
MO	46,977	7,516	89,085	11
MS	37,176	7,779	40,545	7
NC	28,704	4,080	24,681	8

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ND	31,413	3,703	37,424	9
NE	18,918	1,185	41,502	6
NM	13,835	2,583	4,895	9
OH	38,202	5,830	69,457	7
OK	10,682	2,892	24,836	7
PA	35,531	5,980	52,745	14
SC	12,624	2,408	10,101	7
TN	18,026	8,122	22,664	8
TX	72,276	9,115	165,980	23
UT	29,876	1,038	9,464	9
WA	11,402	1,814	6,932	10
WV	37,176	7,779	40,545	11
WY	48,682	13,444	32,476	14
TOTAL	**816,997**	**148,223**	**1,071,812**	**324**

IV. Streamlined Approaches to Achieve Reductions and Assure Reasonable Progress

Our January letter identified common issues across states, Regional Planning Organizations and EPA Regions. While there are numerous ways EPA can streamline its disapproval and proposed actions on these SIPs to achieve reductions that will assure reasonable progress is made in the second round, we recommend the agency bundle regional haze actions by EPA region given the commonality of major errors per region that resulted in deficient SIP submittals. For example, EPA could streamline its resources in each Region as follows.

A. EPA Regions 3 and 4: VISTAS Case Study

Our recommendation for the states in Regions 3 and 4 is for EPA to issue a FIP on the failure of Visibility Improvement State and Tribal Association of the Southeast (VISTAS) states to consider NO_X. The VISTAS states we have commented on thus far (Florida, Georgia, North Carolina, South Carolina, Tennessee, West Virginia) relied on flawed RPO modeling methods and analysis solely focused on SO_2.[20] The states of Alabama, Kentucky and Mississippi are also

[20] *See*, Letter from National Parks Conservation Association, Coalition to Protect America's National Parks and Sierra Club, to Ashley Kung, Florida Department of Environmental Protection, "Conservation Organizations' Comments on Florida's Proposed Revisions Regional Haze State Implementation Plan for the Second Implementation Period," (July 9, 2021), https://drive.google.com/file/d/1D_I9oqlbHFLAcGDGNSgfU-QGJ4vbd_N9/view?usp=sharing, with

priority states; however, they have not yet issued their regional haze SIP for public notice and comment. EPA must not allow NO_X to be ignored as a visibility impairing

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enclosure, Joe Kordzi, "A Review of the Florida Regional Haze State Implementation Plan," (July 2021), https://drive.google.com/file/d/1X2onXDgY4WhbO0D4FUT3F5t5Xmtv4dtg/view?usp=sharing ("Comment Letter to Florida"); *see also*, Letter from National Parks Conservation Association and Sierra Club to Karen D. Hays, P.E., Chief, Air Protection Branch, Georgia Environmental Protection Division, "Conservation Organizations Comments on the Pre-Hearing Draft Georgia Regional Haze State Implementation Plan," (July 26, 2022), https://drive.google.com/drive/folders/1zffUwEtMwq7tzc5JraDylhrJ8kWrSlfU ("Comment Letter to Georgia"); *see also*, Letter from National Parks Conservation Association, Sierra Club, Southern Environmental Law Center, CleanAIRE NC, Coalition to Protect America's National Parks, and NC League of Conservation Voters, Appalachian Voices, Alliance to Protect our People and the Places We Live, NAACP Stokes County Branch, Center for Biological Diversity, Environment North Carolina and North Carolina Conservation Network, to Randy Strait NC Division of Air Quality, "Conservation Organizations Comments on North Carolina's Proposed Regional Haze State Implementation Plan (SIP) for North Carolina Class I Areas for the Second Planning Period (2019 - 2028)," (Oct. 15, 2021), https://drive.google.com/file/d/1WFPsE_TFWvz0r4TIOmUjqvdJ6T0frm0F/view?usp=sharing, with enclosures, Joe Kordzi, "A Review of the North Carolina Regional Haze State Implementation Plan" (Oct. 2021), https://drive.google.com/file/d/1RDCnruI8EX9TyPzp25M-M3NdnXPBqA_i/view?usp=sharing; D. Howard Gebhart, "Technical Review of North Carolina Regional Haze State Implementation Plan Second Round of Regional Haze State Implementation Plans Supplemental Report" (Oct. 2021), https://drive.google.com/file/d/1UYHgQQAx5xKhItnEuQ3fkFpOk4EtMZ_E/view?usp=sharing ("Comment Letter to North Carolina"); *see also*, Letter from Sierra Club, National Parks Conservation Association, Coalition to Protect America's National Parks, Coastal Conservation League, South Carolina Environmental Law Project, Southern Environmental Law Center, to Scott Bigleman, Air Regulation and Data Analysis Section, "Conservation Organizations' Comments on South Carolina's Regional Haze State Implementation Plan," (Jan. 5, 2022), https://drive.google.com/file/d/1JYrFTBefdsIdK-dVRngRNAbqQyB-0fpe/view?usp=sharing; with enclosure, Joe Kordzi, "A Review of the South Carolina Regional Haze State Implementation Plan" (Dec. 2021), https://drive.google.com/file/d/1R4C0iELLi4RcIrSYN5FCmGOOs4ox727p/view?usp=sharing (Comment Letter to South Carolina"); *see also*, Letter from National Parks Conservation Association, Sierra Club, Tennessee Citizens for Wilderness Planning and Coalition to Protect America's National Parks, to Michelle Owenby, Director, Division of Air Pollution Control, Tennessee Department of Environment and Conservation, "Conservation Organizations Comments on the Pre-Hearing Draft Tennessee Regional Haze State Implementation Plan," (Dec. 10, 2021), https://drive.google.com/file/d/1x4accQc5zY5PjzRk545gUM1gKaBryUzM/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the Tennessee Regional Haze State Implementation Plan" (Nov. 2021), https://drive.google.com/file/d/1IVKUs9_L4nWXfky7NgO9Bw23z5R7XXok/view?usp=sharing ("Comment Letter to Tennessee"); *see also*, Letter from National Parks Conservation Association, Sierra Club, Appalachian Mountain Advocates, West Virginia Rivers Coalition, Mid-Ohio Valley Climate Action, Eastern Panhandle Green Coalition, West Virginia Highlands Conservancy, West Virginia Climate Alliance, to Todd Shrewsbury, WV Department of Environmental Protection, Division of Air Quality, Conservation Organizations' Comments on the Proposed Regional Haze State Implementation Plan," (Jan. 10, 2022), https://drive.google.com/file/d/15Y5tMGFBrFl5kODmH9y0RSpgvKEmbhgF/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the West Virginia Regional Haze State Implementation Plan" (Dec. 2021), https://drive.google.com/file/d/1N6BPgPyVClNmLhFcS7poLTVVSYhJ9eFW/view?usp=sharing ("Comment Letter to West Virginia").

pollutant nor dismiss the pervasive availability of cost-effective opportunities for reducing NO_X in the VISTAS states, as well as opportunities for SO_2 controls.

The Class I areas in the VISTAS states include the following:

- Cape Romain Wilderness Area
- Chassahowitzka Wilderness Area
- Cohutta Wilderness Area
- Dolly Sods Wilderness Area
- Everglades National Park
- Great Smoky Mountains National Park
- James River Face
- Joyce Kilmer-Slickrock Wilderness Area
- Linville Gorge Wilderness Area
- Mammoth Cave National Park
- Okefenokee Wilderness Area
- Otter Creek Wilderness Area
- Shenandoah National Park
- Shining Rock Wilderness Area
- Sipsey Wilderness Area
- St. Marks Wilderness Area
- Swanquarter Wilderness Area
- Wolf Island Wilderness Area.

NPCA has identified 83 priority sources in KY, TN, NC, SC, MS, AL, GA, WV, and FL that are likely degrading visibility in Class I Areas. These sources emit more than 185,000 tons of NO_X and more than 200,000 tons of SO_2 each year. In addition to impacting national parks and wilderness areas, the emissions from these sources also negatively impact vulnerable communities. According to data from the EJSCREEN tool, out of the 83 identified polluting sources in EPA Region 4 alone, 47 of them are in communities with more than the 50%ile values for either the $PM_{2.5}$ environmental justice index, ozone environmental justice index, people of color, low income, or unemployment rate. Moreover, EPA Region 4 is home to the federally recognized Tribes: Catawba Indian Nation, Eastern Band of Cherokee Indians, Miccosukee Tribe of Indians of Florida, Mississippi Band of Creek Indians, and Seminole Tribe of Florida. Emission reductions from these sources as part of the regional haze program will not only benefit Class I Areas but also multiple vulnerable populations in the region.[21]

1. VISTAS Flawed Modeling

[21] In the coming weeks, the Conservation Organizations will send a letter to EPA Region 4 communicating additional information regarding environmental justice considerations at a localized level around key sources of haze pollution in Region 4 states.

VISTAS conducted an extensive visibility modeling effort (VISTAS II Comprehensive Air Quality Model with Extensions (CAMx) Modeling),[22] which was intended to assist the states in the development of the second-round regional haze SIPs. The specific goal of the modeling effort was to identify pollution sources negatively affecting Class I Area air quality, thus meriting evaluation through the CAA's four-factor reasonable progress analysis to reduce visibility impairing pollution in the 18 national parks and wilderness areas located within the VISTAS region.

We commissioned an expert modeler to better understand the VISTAS II CAMx modeling approach and found critical problems with the VISTAS model itself as well as the approach recommended to and adopted by the Southeastern states.[23] The states' reliance on the VISTAS modeling resulted in ignoring significant sources of NO_X pollution giving rise to SIPs that if approved would fail to achieve reductions necessary to assure reasonable progress is made in the second round. NPCA's commissioned independent review revealed that the VISTAS modeling effort suffers from the following four serious flaws. Specifically, VISTAS' modeling:

- Results did not accurately reflect sulfate concentrations and excused heavy SO_2 polluters from review.
- Inputs used unreasonable emissions projections for 2028 emissions from the EGUs, which produced model results that do not accurately reflect the EGUs' contributions to visibility impairment, which resulted in exclusion of EGUs that must be analyzed for emission reductions.
- Used outdated monitoring data that does not represent the dramatic shift in nitrate contribution to visibility impairment, which erroneously excluded from review the sources emitting NO_X.
- Used high thresholds and additional unnecessary filters that resulted in an unreasonably low number of sources chosen for consideration of the four-

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[22] VISTAS Regional Haze Program, *see generally*, https://www.metro4-sesarm.org/content/vistas-regional-haze-program; VISTAS Regional Haze Project, Regional Haze Modeling: Task 6, "Regional Haze Modeling for Southeastern VISTAS II Regional Haze Analysis Project Final Modeling Protocol Update and Addendum to the Approved Modeling Protocol for Task 6.1 (June 2018, Final - August 31, 2020), https://www.metro4-sesarm.org/content/task-6-air-quality-modeling; *see also,* VISTAS Regional Haze Project Update (May 20, 2020), https://www.metro4-sesarm.org/content/vistas-haze-presentations.

[23] Letter from Stephanie Kodish, National Parks Conservation Association, Leslie Griffith, Southern Environmental Law Center, and David Rogers, Sierra Club to VISTAS State Air Directors, "Significant Flaws in VISTAS Regional Haze CAMx Modeling and Methods; Recommendations to Develop Compliant State Implementation Plans" (May 12, 2021), https://drive.google.com/file/d/1e0KAljsvNm3Wmj3HRVeyKvafaI-dza0c/view?usp=sharing, with enclosure, D. Howard Gebhart, "Technical Review of VISTAS Visibility Modeling for the Second Round of Regional Haze State Implementation Plans" (May 2021) ("Gebhart 2020 Report"), including attachment "Gebhart Resume Final 2020," https://drive.google.com/file/d/1aMKbgtFxJqvrEVxeSOy96CNvoQ0xhUUv/view?usp=sharing.

factor reasonable progress analyses. The VISTAS analysis failed to consider all visibility impairing pollutants and failed to consider them together.[24]

EPA must not rely on VISTAS unreasonable and inaccurate analysis. EPA has explained its expectation regarding the pollutants considered for source selection and control strategy analysis for the second planning period is that "each state will analyze SO_2 and NO_X in selecting sources and determining control measures."[25] The VISTAS states failed to consider NO_X. Moreover, EPA also explained that "[a] state that chooses not to consider at least these two pollutants in the second planning period should show why such consideration would be unreasonable, especially if the state considered both these pollutants in the first planning period,"[26] which the VISTAS states have not done.

Additionally, the VISTAS state SIPs failed to achieve SO_2 reductions that will ensure reasonable progress is made in the second round. The following discussion identifies priority sources in each of the states and provides summaries of select issues raised in our comment letters.

2. The Six Priority VISTAS States with Submitted SIPs

a. Florida

The eight priority sources in Florida appear in the table below.[27] Florida's Class I Areas impacted by these and other sources include: Chassahowitzka Wilderness Area; Everglades National Park; and St. Marks Wilderness Area. As discussed in our comment letter to the State, based on the flawed VISTAS report and other erroneous arguments, Florida wrongfully exempted the priority sources from the Four-Factor Analysis.[28] Additionally, as discussed below, Florida failed to consider and control emissions from pre-harvest sugarcane field burning, which are area sources that must be analyzed and controlled to achieve reductions that will assure reasonable progress is made in the second round. Florida is an example of a number of states where we are identifying non-point area sources as needing to be controlled and the tables in this letter only show point sources and should not be interpreted as displacing the need as displacing the need to remedy area sources.

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[24] *See generally*, D. Howard Gebhart, "Technical Review of VISTAS Visibility Modeling for the Second Round of Regional Haze State Implementation Plans" (May 2021) ("Gebhart 2020 Report"), including attachment "Gebhart Resume Final 2020," https://drive.google.com/file/d/1aMKbgtFxJqvrEVxeSOv96CNvoQ0xhUUv/view?usp=sharing.

[25] Clarification Memorandum at 4, citing Regional Haze Guidance at 12.

[26] Clarification Memorandum at 4-5.

[27] Florida selected 12 sources for Four-Factor Analyses, however, only four conducted the analysis (*i.e.*, Northside, Foley Cellulose and the Westrock sources). The rest of the sources were exempted based on the effectively-controlled argument, which resulted in excluding several large polluting sources as well as sugar cane burning.

[28] Comment Letter to Florida at 6, 13-20.

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Table 2. Priority Sources in Florida.

Facility Name	Description	NOx (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Crystal River -Duke Energy Florida, LLC. *	Electric Power Generation	1,152	3,179	519
Seminole Electric Cooperative, Inc.*	Electric Power Generation	2,203	4,563	338
Northside*	Electric Power Generation	2,864	1,917	297
Mosaic Fertilizer LLC (Mulberry)*	Phosphatic Fertilizer Manufacturing	225	6,887	268
Foley Cellulose LLC*	Pulp, Paper, and Paperboard Mills	1,776	1,538	265
Mosaic Fertilizer, LLC (Bartow)	Phosphatic Fertilizer Manufacturing	152	4,001	132
Westrock CP LLC (Bay County)	Pulp, Paper, and Paperboard Mills	1,645	1,016	132
Westrock CP LLC (Nassau County)	Pulp, Paper, and Paperboard Mills	1,645	1,016	132
Big Bend*	Electric Power Generation	1,279	1,156	104
Deerhaven*	Electric Power Generation	1,388	600	72

b. Georgia

The eight priority sources in Georgia appear in the table below. Our comments to the State explained that the SIP will not result in reasonable progress towards improving visibility at the Class I areas its sources impact, including those located in Georgia: Okefenokee, Wolf Island and Cohutta Wilderness Areas as well as those in neighboring states.[29]

[29] Comment Letter to Georgia at 2.

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Table 3. Priority Sources in Georgia.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Plant Bowen	Fossil Fuel Electric Power Generation	5,732	9,231	995
Plant Scherer*	Fossil Fuel Electric Power Generation	5,905	1,221	637
Savannah	Paperboard Mills	1,309	5,186	389
Rome Linerboard Mill*	Pulp Mills	1,665	1,429	185
Georgia-Pacific Cedar Springs LLC*	Paperboard Mills	2,605	512	170
Brunswick Cellulose Inc*	Pulp Mills	1,445	281	147
Plant Wansley	Fossil Fuel Electric Power Generation	977	1,654	109
Savannah River Mill*	Paper Mills	300	2,012	101
Augusta Mill*	Paperboard Mills	1,463	253	71

c. North Carolina

The eight priority sources in North Carolina appear in the table below. Our comments to the State explained that the SIP will not result in reasonable progress towards improving visibility at the Class I areas its sources impact, including those located in North Carolina: the Great Smoky Mountains National Park; Shining Rock, Linville Gorge and Joyce Kilmer-Slickrock Wilderness Areas; and Swanquarter National Wildlife Refuge as well as Class I areas in neighboring states.[30] North Carolina's SIP dismissed cost-effective upgrades and new controls for SO_2 and NO_X, asserting that visibility benefits are too small to warrant them.[31]

[30] Comment Letter to North Carolina at 3.
[31] Comment Letter to North Carolina at 3.

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Table 4. Priority Sources in North Carolina.

Facility Name	Description	NO_x (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Blue Ridge Paper Products Inc. - Canton Mill	Paper (except Newsprint) Mills	3,419	5,875	2,040
Marshall Steam Station	Fossil Fuel Electric Power Generation	8,751	4,878	859
Belews Creek Steam Station*	Fossil Fuel Electric Power Generation	5,668	3,370	507
Roxboro Steam Electric Plant*	Fossil Fuel Electric Power Generation	4,886	4,142	492
Cliffside Steam Station*	Fossil Fuel Electric Power Generation	2,486	1,383	274
PCS Phosphate Company, Inc. - Aurora*	Phosphatic Fertilizer Manufacturing	408	3,140	267
Domtar Paper Company, LLC*	Paper (except Newsprint) Mills	1,806	770	118
Mayo Electric Generating Plant*	Fossil Fuel Electric Power Generation	1,280	1,123	93

d. South Carolina

The four priority sources in South Carolina appear in the table below. As discussed in our comment letter to the State, the SIP does not result in reasonable progress towards improving visibility at the Class I areas its sources impact, including the Cape Romain Wilderness Area, as well as Class I areas in neighboring states.[32] Despite the thousands of tons of controllable pollution from South Carolina sources, and the many opportunities for cost-effective controls, South Carolina improperly concluded that almost no new reductions in pollution are warranted.[33] Although the four priority sources submitted Four-Factor Analyses, South Carolina arbitrarily refused to require cost-effective emission reductions at any of those facilities to ensure reasonable progress.[34] For example, while the State included a summary of control options for Santee Cooper's Winyah Generating Station, it erroneously concluded that the source was already "effectively controlled," and therefore did not require any additional emission reductions.[35]

[32] Comment Letter to South Carolina at 3.
[33] Comment Letter to South Carolina at 3.
[34] Comment Letter to South Carolina at 3.
[35] Comment Letter to South Carolina at 3.

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Table 5. Priority Sources in South Carolina.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Santee Cooper Cross Generating Station*	Fossil Fuel Electric Power Generation	3,150	3,538	396
Kapstone Charleston Kraft LLC	Pulp Mills	2,119	913	263
International Paper Georgetown Mill*	Paper (except Newsprint) Mills	1,808	919	229
SCE&G Williams	Fossil Fuel Electric Power Generation	2,194	548	181
Westrock CP LLC*	Pulp Mills	1,654	1,480	156
Century Aluminum Of South Carolina Inc	Alumina Refining and Primary Aluminum Product	97	2,046	102
SCE&G Wateree	Fossil Fuel Electric Power Generation	1,602	658	80

e. Tennessee

The six priority sources in Tennessee appear in the table below. Tennessee improperly concluded that almost no new reductions in pollution are warranted.[36] Our comment letter to the State explained that its State's SIP will not result in reasonable progress towards improving visibility at the Class I areas its sources impact, including those located in Tennessee: Great Smoky Mountains National Park and Joyce Kilmer-Slickrock Wilderness Areas as well as Class I areas in neighboring states.[37] Tennessee evaluated just two sources (Eastman Chemical Company and TVA Cumberland Fossil Plant) in a Four-Factor Analyses, however, despite reasonable progress control options neither source was required to implement any additional controls or measures.[38] Furthermore, the State failed to require or conduct Four-Factor Analyses for additional sources to achieve reductions that will ensure reasonable progress is made in the second round.[39] Finally, Tennessee failed to include enforceable retirements in the SIP for sources the State relied on to retire for pollution reduction to help achieve reasonable progress,

[36] Comment Letter to Tennessee at 2.
[37] Comment Letter to Tennessee at 2.
[38] Comment Letter to Tennessee at 2.
[39] Comment Letter to Tennessee at 2.

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including the Kingston and Cumberland TVA coal plants and boilers at the Eastman Chemical Company.[40]

Table 6. Priority Sources in Tennessee.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Gallatin Units 1-4	Electric Power Generation	1,293	1,734	Δ[41]
Eastman Chemical Company	All Other Basic Organic Chemical	6,585	10,747	1,348
TVA Cumberland Fossil Plant*	Fossil Fuel Electric Power Generation	3,919	7,209	536
Trelleborg Coated Systems US, Inc.*[42]	All Other Rubber Product Manufacturing	2	0	422
TVA Kingston Fossil Plant	Fossil Fuel Electric Power Generation	1,259	1,917	245
AGC Industries - Greenland Plant	Flat Glass Manufacturing	2,068	441	161
Packaging Corporation of America*	Paperboard Mills	1,416	616	62
Tennessee Gas Pipeline Company, Station 860*	Pipeline Transportation of Natural Gas	1,484	0	29

f. West Virginia

The 10 priority sources in West Virginia appear in the table below and as our comments to the State explained, West Virginia's failure to require cost-effective emission reductions at any of these sources means the SIP will not result in reasonable progress towards improving visibility at the Class I areas its sources impact, including Dolly Sods Wilderness Area and Otter Creek Wilderness Area, as well as Class I areas in neighboring states.[43] Although the State requested Four-Factor Analyses from several sources, only one source conducted the statutory Four-Factor Analysis, and West Virginia arbitrarily refused to require cost-effective

[40] Comment Letter to Tennessee at 3.
[41] Sources with a Δ were not initially identified in the NPCA analysis.
[42] Source with extremely high PM emissions.
[43] *See generally,* Comment Letter to West Virginia.

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emission reductions at any of these sources to ensure reasonable progress.[44] Furthermore, while West Virginia's SIP counted on emission reductions from retirements to achieve reasonable progress, the SIP failed to include enforceable requirements.[45]

Table 7. Priority Sources in West Virginia.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Harrison*	Fossil Fuel Electric Power Generation	5,575	11,270	1,047
Fort Martin*	Fossil Fuel Electric Power Generation	9,388	4,234	815
Pleasants*	Fossil Fuel Electric Power Generation	4,514	7,044	552
Mount Storm*	Fossil Fuel Electric Power Generation	1,789	1,874	418
John E Amos*	Fossil Fuel Electric Power Generation	4,648	3,516	411
Mountaineer	Fossil Fuel Electric Power Generation	3,579	4,600	384
Grand Town	Fossil Fuel Electric Power Generation	1,672	1,964	204
Longview	Fossil Fuel Electric Power Generation	1,532	2,158	191
Mitchel	Fossil Fuel Electric Power Generation	2,270	2,061	182
West Virginia Alloys, Inc.	Iron and Steel Mills and Ferroalloy	1,066	1,121	131
Morgantown	Fossil Fuel Electric Power Generation	1,142	703	70

B. Common Legal and Analytical Flaws in EPA Regions and Issue Highlights

As discussed in more detail below, and in our comment letters to each respective state, there are a number of common analytical and legal flaws in the SIPs submitted thus far per region to EPA Regions 5, 6, 7, 8, 9, and 10.

1. EPA Region 5

[44] Comment Letter to West Virginia at 3.
[45] Comment Letter to West Virginia at 3.

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Our prioritization list for Region 5 includes the states of Indiana, Michigan, Minnesota, and Ohio. The theme that collectively applies to these states is the states' decisions to unjustifiably disregard control measures that should have been found to satisfy a Four-Factor Analysis (and not consider some sources where that would have been the outcome).

The Class I areas in the Region 5 states include the following:

- Boundary Waters Canoe Area Wilderness
- Isle Royale National Park
- Seney Wilderness Area
- Voyageur's National Park.

a. Indiana

Indiana arbitrarily and unlawfully failed to conduct reasonable progress analyses or consider emissions reductions for many of the state's largest sources of visibility impairment, including the entire EGU sector. The state failed to conduct Four-Factor Analyses for the sources identified in the table below of which seven priority sources are EGUs. Our comments to the State demonstrated that cost-effective controls are available for these sources and should have been required to achieve reasonable progress.[46]

[46] *See*, Letter from Sierra Club, National Parks Conservation Association, The Coalition to Protect America's National Parks, Just Transition Northwest Indiana, Hoosier Environmental Council, Izaak Walton League, and Save the Dunes Comments on Indiana Department of Environmental Management's Proposed Regional Haze State Implementation Plan for Second Implementation Period (Nov. 15, 2021), https://drive.google.com/file/d/1XmXIZ28giuDhkcLlw5dDfX0esZa7pQiO/view?usp=sharing; with enclosure, Joe Kordzi, "A Review of the Indiana Regional Haze State Implementation Plan" (Nov. 2021), https://drive.google.com/file/d/1SUIxM5aRBCit4Wgrw6IURwrO_VD6x1VY/view?usp=sharing.

Table 8. Priority Sources in Indiana.

Facility Name	Description	NO_x (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Cayuga	Fossil Fuel Electric Power Generation	3,044	1,352	Δ[47]
Indiana Michigan Power Dba AEP Rockport	Fossil Fuel Electric Power Generation	6,093	14,341	970
Gibson Generating Station	Fossil Fuel Electric Power Generation	8,121	9,666	726
ArcelorMittal Burns Harbor LLC*	Iron and Steel Mills and Ferroalloy	9,001	12,959	691
Indianapolis Power and Light Petersburg	Fossil Fuel Electric Power Generation	6,946	6,586	556
Clifty Creek	Fossil Fuel Electric Power Generation	5,375	4,191	417
ArcelorMittal Indiana Harbor LLC*	Iron and Steel Mills and Ferroalloy	1,056	1,619	235
Alcoa Warrick Power Plant	Fossil Fuel Electric Power Generation	3,136	648	139
A.B. Brown*	Fossil Fuel Electric Power Generation	2,414	3,957	101
Lone Star Industries Inc - Greencastle	Cement Manufacturing	1,686	169	14
US Steel Gary Works*	All Other Petroleum and Coal Products	3,089	3,030	14

b. Michigan

[47] Sources with Δ were not initially identified in the NPCA analysis.

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Michigan's SIP failed to conduct Four-Factor Analyses for any of the EGU sources.[48] Although Michigan developed a list of sources for which it purported to conduct a Four-Factor Analysis, the State did not in fact evaluate and analyze emission reduction measures for any source.[49] Michigan also failed to properly conduct Four-Factor Analyses for several non-EGU sources, including the priority sources identified: paper mills, kilns, and mines.[50] Our prioritization analysis identified the eleven sources below in Michigan.

Table 9. Priority Sources in Michigan.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Belle River	Fossil Fuel Electric Power Generation	6,469	17,429	512
Tilden Mining Company	Iron Ore Mining	13,738	575	365
Dte Electric Company - Monroe Power Plant	Fossil Fuel Electric Power Generation	4,992	3,960	253
J. H. Campbell Plant	Fossil Fuel Electric Power Generation	3,217	5,780	237
Lafarge Midwest Inc.	Cement Manufacturing	3,734	2,232	138
EES\ Coke Battery LLC*	Iron and Steel Mills and Ferroalloy	1,351	2,820	113
Verso Escanaba LLC	Paper (except Newsprint) Mills	1,721	614	62
St. Marys Cement, Inc. (U.S.)	Cement Manufacturing	1,248	1,551	57
U S Steel Great Lakes Works*	Iron and Steel Mills and Ferroalloy	980	1,502	23
Midland Cogeneration Venture	Fossil Fuel Electric Power Generation	2,969	18	20

[48] Michigan Comment Letter at 6-9.
[49] Michigan Comment Letter at 7.
[50] Michigan Comment Letter at 12.

c. Ohio

Ohio's proposed SIP failed to result in reasonable progress towards improving visibility at the Class I areas its sources impact. Notably, Ohio failed to require controls on its sources, and relied on arguments that fail to comport with the Act and RHR requirements. For example, the State's technical analysis inflated cost effectiveness by using incorrect information for interest rates, equipment life, control efficiency, and retrofit factor and other factors.[51] Furthermore, the proposed SIP unreasonably screened sources from the required Four-Factor Analysis based on faulty assumptions regarding the effectiveness of current controls, and did not require sources to support suggested assumptions and proposed conclusions.

Despite the Act's Four-Factor Analysis requirement, Ohio relied on visibility impacts to reject controls, which is at odds with the plain language of the CAA.[52] A state cannot rely on visibility impacts to exclude emission reducing measures from a source that otherwise satisfies the four statutory factors.[53] Finally, as discussed in our comment letter to Ohio, the State failed to consider the AK Steel facility (now Cleveland-Cliffs) in its SIP, which is a significant source of visibility impairing pollution. The priority sources in Ohio are identified in the table below.

Table 10. Priority Sources in Ohio.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
General James M. Gavin Power Plant	Fossil Fuel Electric Power Generation	7,343	26,474	1,568
Miami Fort Power Station	Fossil Fuel Electric Power Generation	11,359	14,397	1,071

[51] Letter from National Parks Conservation Association, Sierra Club, Coalition to Protect America's National Parks, and Ohio Environmental Council, to Holly Kaloz, Ohio Environmental Protection Agency, Conservation Organizations' Comments on Ohio's Proposed Regional Haze State Implementation Plan for the Second Implementation Period, at 12-15, (June 28, 2021), https://drive.google.com/file/d/1nXb7mzCVx6RtJiz5VahDLlPvWihmOQok/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the Ohio Regional Haze State Implementation Plan," (June 2021), https://drive.google.com/file/d/1anyw5lJOyNPjqNmG_BbHdwkhMySDOPYR/view?usp=sharing ("Ohio Comment Letter").
[52] Ohio Comment Letter at 18.
[53] Ohio Comment Letter at 18.

Cardinal Power Plant	Fossil Fuel Electric Power Generation	3,887	9,453	568
Kyger Creek Station	Fossil Fuel Electric Power Generation	5,375	3,747	423
Carmeuse Lime, Inc. - Maple Grove Operations	Lime Manufacturing	2,945	5,761	282
AK Steel Corporation*	Iron and Steel Mills and Ferroalloy	1,963	1,963	179

d. Minnesota

Minnesota initially identified six taconite mining and processing plants that have among the highest Q/d values of sources impacting the state's two Class I areas for Four-Factor Analyses. And yet, MPCA failed to follow the Act's requirements and neither required that the sources conduct nor conducted its own Four-Factor Analyses for the taconite sources. The taconite sources are identified in the table below. For the EGU's the draft SIP unlawfully fails to include practically enforceable emission limitations, as required by the Clean Air Act; unlawfully relied on an announced retirement and failed to consider whether cost-effective control measures could be implemented in the meantime. Finally, the draft SIP unlawfully relied on unenforceable, recent emissions, which are lower than permitted emissions and failed to consider if there were additional cost-effective controls. The priority sources in Minnesota appear below. The Conservation Organizations will submit a comment letter on October 7, 2022, and will share that letter with EPA.

Table 11. Priority Sources in Minnesota.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Us Steel Corp – Minntac*	Iron Ore Mining	6,481	1,207	558
Xcel Energy - Sherburne Generating Plant*	Fossil Fuel Electric Power Generation	7,626	5,483	304
Hibbing Taconite Co*	Iron Ore Mining	3,981	824	274
Us Steel Corp – Keetac*	Iron Ore Mining	5,009	533	243
United Taconite LLC - Fairlane Plant*	Iron Ore Mining	3,743	275	199

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ArcelorMittal Minorca Mine Inc*	Iron Ore Mining	3,063	136	190
Northshore Mining Co - Silver Bay*	Iron Ore Mining	2,169	1,539	188
Boise White Paper LLC - Intl Falls*	Paper (except Newsprint) Mills	841	43	75
Minnesota Power Inc - Boswell Energy Ctr*	Fossil Fuel Electric Power Generation	2,352	577	75
Sappi Cloquet LLC	Paper (except Newsprint) Mills	1,439	152	51
Virginia Department of Public Utilities*	Electric Bulk Power Transmission and Control	299	296	21
American Crystal Sugar - East Grand Forks	Beet Sugar Manufacturing	676	1,301	19
Hibbing Public Utilities Commission	Electric Power Distribution	374	356	18
American Crystal Sugar - Crookston	Beet Sugar Manufacturing	740	775	12
Southern Minnesota Beet Sugar Coop	Beet Sugar Manufacturing	1,004	820	6

2. EPA Region 6

Our prioritization list for Region 6 includes the states of Louisiana, Oklahoma and Texas. The overarching theme for these three states is the states' failure to adequately control SO_2 to achieve reductions that will assure reasonable progress is made in the second round. In these states, the potential for SO_2 reductions from controls is significant – in fact, reductions available from these three states are among the top five states on this prioritization list.

The Class I areas in the Region 6 priority states include the following:

- Big Bend National Park, Texas
- Breton Wilderness Area, Louisiana
- Guadalupe Mountains National Park, Texas
- Wichita Mountains Wilderness, Oklahoma.

a. Texas

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Despite the tens of thousands of tons of controllable pollution from Texas sources including coal-fired powered plants and oil and gas facilities, and the many opportunities for cost-effective controls, Texas's SIP did not require a single source to control emissions and thus fails to achieve reductions that will assure reasonable progress is made in the second round. A significant amount of SO_2 could be controlled through requirements for coal and other park-polluting facilities to install scrubbers.[54] Furthermore, three of the top five largest EGUs emit significant levels of haze causing pollution and are glaringly missing from the TCEQ analysis, including Harrington, Tolk and WA Parish stations.[55] The priority stationary sources for Texas appear in the table below.

Additionally, also absent from the Texas SIP was the inclusion of emissions from oil and gas development. With the CAA goal to eliminate all haze caused by "manmade air pollution," Texas must consider all air pollution sources contributing to impairment in Class I areas including minor, area, mobile, and other sources that can help achieve reasonable progress.[56] Emissions from the extensive oil and gas development in the Permian Basin contributes impaired visibility to nearby national park sites. Texas is one of the States that failed to analyze and include controls on emissions from oil and gas sources. NO_X and SO_2 emissions from point and non-point sources from the oil and gas sector are 326,208 tons per year. Technology is available to reduce these emissions in a cost-effective manner and must be required in a SIP/FIP.[57]

Table 12. Priority Sources in Texas.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Sam Seymour	Electric Power Generation	6,211	930	Δ[58]
Martin Lake Electrical Station	Electric Power Generation	9,489	46,549	1,339

[54] Letter from National Parks Conservation Association, Sierra Club, Environmental Integrity Project, Air Alliance Houston, Earthjustice, to Margaret Earnest, MC206 Air Quality Division Texas Commission on Environmental Quality, "SIP Project Number 2019-112-SIP-NR," at 3 (Jan. 8. 2021), https://drive.google.com/file/d/17LyjtAKVujdcaraMOzvdPlSchEH1guGd/view?usp=sharing ("Comment Letter to Texas").
[55] Comment Letter to Texas at 3.
[56] 42 U.S.C. § 7491(a)(1).
[57] Oil And Gas Sector Reasonable Progress Four-Factor Analysis of Controls for Five Source Categories: Natural Gas-Fired Engines Natural Gas-Fired Turbines Diesel-Fired Engines Natural Gas-Fired Heaters and Boilers Flaring and Incineration, Prepared for National Parks Conservation Association by Vicki Stamper & Megan Williams (March 6, 2020), https://drive.google.com/file/d/1RGWYqXKcfyWzBgxuRXzSiSaCZ9PWDH3y/view?usp=sharing.
[58] Sources with a Δ were not initially identified in the NPCA analysis.

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Harrington Station Power Plant*	Electric Power Generation	2,945	10,476	1,005
Tolk Station*	Electric Power Generation	2,488	7,225	780
WA Parish Electric Generating Station*	Electric Power Generation	4,589	28,811	476
Welsh Power Plant*	Electric Power Generation	4,951	11,178	407
Oklaunion Power Station*	Electric Power Generation	5,215	1,779	386
Limestone Electric Generation Station*	Electric Power Generation	7,470	5,685	255
Oak Grove Steam Electric Station*	Electric Power Generation	4,535	6,974	219
Works No 4	Flat Glass Manufacturing	3,575	526	207
Coleto Creek Power Station	Electric Power Generation	2,419	11,264	176
Oxbow Calcining*	All Other Petroleum and Coal Products	609	11,495	174
San Miguel Electric Plant*	Electric Power Generation	2,267	8,940	153
AEP Pirkey Power Plant	Electric Power Generation	2,804	3,073	145
Newman Station*	Electric Power Generation	1,875	9	89
Twin Oaks	Electric Power Generation	2,050	2,408	75
Streetman Plant*	Ground or Treated Mineral	681	3,493	74
Orange Carbon Black Plant	Other Basic Inorganic Chemical Manufacturing	431	4,078	68
Texarkana Mill*	Paper (except Newsprint) Mills	1,796	76	40
Midlothian Plant	Cement Manufacturing	1,057	971	15
Odessa Cement Plant*	Cement Manufacturing	938	19	12
Sabine Plant	Electric Power Generation	2,484	10	10
Jones Station Power Plant*	Electric Power Generation	1,395	6	6

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b. Louisiana

Louisiana did not conduct reasonable progress analyses or consider SO_2 emissions reductions for sources contributing to visibility impairment.[59] Instead, Louisiana simply attached Four-Factor Analyses conducted by the sources, which are woefully inadequate and fundamentally inconsistent with the CAA and the RHR.[60] Louisiana erroneously relied on unenforceable and unverifiable emission reductions, and decided to improperly defer making any four-factor determinations based on purported emission reductions from existing CAA programs.[61] The priority sources in Louisiana are identified in the table below.

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[59] Letter from Sierra Club and National Parks Conservation Association, to Vivian H. Johnson, Venetta Hayes, Louisiana Department of Environmental Quality, Office of Environmental Assessment, "Sierra Club and National Parks Conservation Association Comments on Louisiana Department of Environmental Quality's Proposed State Implementation Plan for Regional Haze Program for the Second Implementation Period, LDEQ AI# 174156 [LDEQ 2104Pot1, Doc. ID No. 12656414 (Apr. 20, 2021)]," (July 12, 2021), https://drive.google.com/file/d/1bTugkhwmi9LEvqHH3NgtL-vo9O-U8MzN/view?usp=sharing, with enclosures, Victoria R. Stamper, "Review and Comments on Reasonable Progress Four-Factor Analyses for Sulfur Dioxide and Nitrogen Oxide Pollution Controls Evaluated as Part of the Louisiana Regional Haze Plan for the Second Implementation Period," (July 8, 2021), https://drive.google.com/file/d/1pzRZpNW_c6rliibGlcy-WMPuaz6yh49c/view?usp=sharing; D. Howard Gebhart, "Technical Review of Visibility Modeling for the Second Round of Regional Haze State Implementation Plans: State of Louisiana," at 2 (July 2021), https://drive.google.com/file/d/1h93Ntoj4sNpTij2RedYxRexKgM9E6oCo/view?usp=sharing ("Comment Letter to Louisiana").

[60] Comment Letter to Louisiana at 2.

[61] Comment Letter to Louisiana at 2.

Table 13. Priority Sources in Louisiana.

Facility Name	Description	NO_x (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Baton Rouge Calcined Coke Plant	All Other Petroleum and Coal Products	740	15,473	430
Ninemile Point Electric Generating Plant	Fossil Fuel Electric Power Generation	8,334	18	270
Cabot Corp - Ville Platte Plant	Other Basic Inorganic Chemical Manufacturing	937	11,028	267
Big Cajun II Power Plant*	Fossil Fuel Electric Power Generation	1,334	6,015	209
Cabot Corp - Canal Plant	Other Basic Inorganic Chemical Manufacturing	1,035	7,487	202
Sid Richardson Carbon Ltd - Addis Plant	Other Basic Inorganic Chemical Manufacturing	307	7,074	200
Cleco - Brame Energy Center	Fossil Fuel Electric Power Generation	2,706	3,040	194
Columbian Chemicals Co - North Bend Plant	Other Basic Inorganic Chemical Manufacturing	546	6,907	175
Roy S Nelson Plant*	Fossil Fuel Electric Power Generation	2,427	7,674	164
Ivanhoe Carbon Black Plant	Other Basic Inorganic Chemical Manufacturing	732	6,152	150
Union Carbide Corp - St Charles Operations Site	Petrochemical Manufacturing	3,553	436	98

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Cornerstone Chemical Co - Fortier Plant	Plastics Material and Resin Manufacturing	920	1,112	17
Rain CII Carbon LLC - Norco Calcining	All Other Petroleum and Coal Products	128	1,977	16
Mosaic Fertilizer LLC - Uncle Sam Plant	Phosphatic Fertilizer Manufacturing	124	2,154	13

c. Oklahoma

As our comments to the State explained, Section 40 C.F.R. § 51.308(f)(2)(i) indicates that states should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources. The draft SIP indicated that nonpoint (area) sources, in particular those from the oil and gas sector, are the top NO_X emitters of any sector for ODEQ's 2017 emission inventory.[62] In fact, Oklahoma ranks second among the states (after Texas) in NO_X and SO_2 emissions from oil and gas point and nonpoint sources with 83,531 tons per year. Additionally, the State arbitrarily excluded sources of SO_2 pollution from its control analysis, including area sources and BART sources; prescribed insufficient pollution controls for those sources it considered, and relied on an unreasonable Q/d threshold, as well as incorrect cost and control data.[63] The priority stationary sources in Louisiana are identified in the table below.

[62] Letter from Coalition to Protect America's National Parks, National Parks Conservation Association and Sierra Club to Melanie Foster, Air Quality Division, Oklahoma Department of Environmental Quality, "Public Comments of Conservation Organizations on Oklahoma's Draft Regional Haze State Implementation Plan for the Second Period," at 12, (July 1, 2022), https://drive.google.com/drive/folders/1Lx0897l_MSke8f85hj9Flnur3ax4M-HG ("Comment Letter to Oklahoma").
[63] Comment Letter to Oklahoma at 2.

Table 14. Priority Sources in Oklahoma.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Kremlin	All Other Petroleum and Coal Products	769	16,682	781
PSO Northeastern Power Station	Fossil Fuel Electric Power Generation	2,289	4,222	242
Muskogee Generating Station	Fossil Fuel Electric Power Generation	1,753	1,696	73
Sooner Generating Station	Fossil Fuel Electric Power Generation	2,583	587	46
Hugo Generating Station	Fossil Fuel Electric Power Generation	572	1,640	41
Maysville Gas Plant	Natural Gas Liquid Extraction	1,485	2	13
Seminole Generating Station	Fossil Fuel Electric Power Generation	1,231	6	12

3. EPA Region 7

a. Missouri

For Region 7, the state of Missouri is a priority with significant opportunities for emissions reductions from EGUs. The Class I areas in Missouri include the following:

- Hercules-Glades Wilderness Area
- Mingo Wilderness Area.

Although in 2020 Missouri was the second largest emitter of SO_2 and NO_X in the nation, emitting 91,921 tons of SO_2 and 50,219 tons of NO_X, respectively,[64] the State determined that no additional controls were necessary for any source. As detailed in our comment letter to the State, the State's SIP had numerous flaws, for example: used an underinclusive screening method, which resulted in the elimination of about half of Missouri's relevant sources; used an unreasonably low-cost threshold and used unreasonably high-cost estimates to screen out cost-effective controls for its large coal-burning power plants; failed to

[64] Letter from Sierra Club and the National Parks Conservation Association to Stephen Hall, Director, Missouri Department of Natural Resources, Air Pollution Control Department, "Comments on Proposed State Implementation Plan Submittal for Regional Haze Second Planning Period," at 2, (May 5, 2022), https://drive.google.com/drive/folders/1pXu2NS4n5cmlFZjW-8BOU9kyq9Fd9vnv.

consider all emissions control options for its coal-burning power plants, including the optimization of existing equipment; relied on outside agreements with unenforceable and vague terms in lieu of requiring emission standards in the SIP; wrongfully exempted coal-burning power plants from further control analysis based on the state's purported compliance with the Uniform Rate of Progress; and failed to conduct reasonable progress analyses or consider emissions reductions for many of the state's largest sources of visibility impairment.

Additionally, as we pointed out in our comments to the State, Missouri failed to consider environmental justice in its SIP.[65] As our comments to the State illustrated, Missouri's largest sources of haze-causing pollutants disproportionately affect low-income communities that are predominantly home to people of color. Missouri's large industrial cities have their own environmental justice communities. For example, four Ameren EGUs surround St. Louis City (Labadie, Rush Island, Meramec, and Sioux), which is approximately 50% Black.[66] Many parts of north St. Louis are above the 90th percentile nationally for persons of color and above the 80% percentile for low income, according to EPA's EJScreen tool.[67] Haze-causing pollutants have dramatically affected the health of Black children in St. Louis.[68]

The priority sources for Missouri are identified below.

Table 15. Priority Sources in Missouri.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
New Madrid Power Plant Marston*	Fossil Fuel Electric Power Generation	14,078	13,252	1,366
Ameren Missouri Labadie Plant*	Fossil Fuel Electric Power Generation	6,883	34,475	1,293
Thomas Hill	Fossil Fuel Electric Power Generation	8,985	16,697	683
Ameren Missouri Rush Island Plant*	Fossil Fuel Electric Power Generation	2,188	13,201	558
Mississippi Lime Company Ste. Genevieve	Lime Manufacturing	4,960	1,715	312
Ameren Missouri Sioux Plant*	Fossil Fuel Electric Power Generation	4,694	2,119	223

[65] Comments to Missouri at 30-35.
[66] Comment Letter to Missouri at 32.
[67] Comment Letter to Missouri at 32.
[68] Comment Letter to Missouri at 32.

Sikeston Power Station*	Fossil Fuel Electric Power Generation	812	3,668	211
John Twitty Energy	Fossil Fuel Electric Power Generation	702	1,558	69
Buzzi Unicem Usa Cape Girardeau	Cement Manufacturing	884	558	54
Iatan Generating Station	Fossil Fuel Electric Power Generation	2,326	446	20
Ameren Missouri Meramec Plant*	Fossil Fuel Electric Power Generation	465	1,395	19

4. EPA Region 8

In Region 8, our priority states are: North Dakota, Utah and Wyoming. Thematically the states all failed to consider oil and gas emissions and failed to include four factor emission controls. Beyond this, our recent analysis shows that of the sources that should be subject to emission reducing measures, half implicate environmental justice communities.

The Class I areas in the Region 8 priority states include the following:

- Anaconda-Pintlar Wilderness Area, Montana
- Arches National Park, Utah
- Bob Marshall Wilderness Area, Montana
- Bridger Wilderness Area, Wyoming
- Bryce Canyon National Park, Utah
- Cabinet Mountains Wilderness Area, Montana
- Canyonlands National Park, Utah
- Capitol Reef National Park, Utah
- Fitzpatrick Wilderness Area, Wyoming
- Gates of the Mountain Wilderness Area, Montana
- Glacier National Park, Montana
- Grand Teton National Park, Wyoming
- Medicine Lake Wilderness Area, Montana
- Mission Mountain Wilderness Area, Montana
- North Absaroka Wilderness Area, Wyoming
- Red Rock Lakes Wilderness Area, Montana
- Scapegoat Wilderness Area, Montana
- Selway-Bitterroot Wilderness Area, Montana and Idaho
- Teton Wilderness Area, Wyoming
- U. L. Bend Wilderness Area, Montana
- Washakie Wilderness Area, Wyoming
- Yellowstone National Park, Wyoming, Montana and Idaho
- Zion National Park, Utah.

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Region 8 EJ (from follow up letter to EPA R8)[69]

NPCA has identified several industrial facilities in ND, UT, and WY that are degrading visibility in Class I areas. These sources emit more than 120,000 tons of NO_X and close to 100,000 tons of SO_2 each year. In addition to affecting national parks and wilderness areas, the emissions from these sources also negatively impact vulnerable communities. According to data from the EJSCREEN tool, more than half of these facilities are in communities over the 50th percentile environmental index for $PM_{2.5}$, ozone, people of color, low income, or the unemployment rate. These communities include Indian tribes such as the UTE Indian Tribe of The Uintah and Ouray Reservation and the Navajo Nation in Utah, the Wind River Reservation in Wyoming, the Mandan, Hidatsa, and Arikara Nation in the Fort Berthold Indian Reservation in North Dakota, and the Crow Agency and the Northern Cheyenne Tribe in Montana, among others. Reducing emissions from these sources as part of the regional haze program will not only benefit Class I areas, but also multiple vulnerable populations in the region.

a. North Dakota

North Dakota control evaluation for the state's EGU sector—the Coyote, Coal Creek, Milton Young, Antelope Valley, and Leyland Olds power plants, in particular—relied on numerous unsupported or erroneous cost assumptions, and failed to satisfy the RHR's requirement that the state include the "robust" technical demonstration showing that no additional controls are reasonable. North Dakota arbitrarily concluded that selective catalytic reduction technology is technically infeasible for lignite-burning electric generating units, and failed to mention or evaluate extensive, updated technological data in the record demonstrating that SCR is feasible across lignite EGUs.[70] The State impermissibly exempted EGUs from technically feasible, cost-effective controls based on the purportedly insignificant modeled visibility benefits associated with individual source controls. North Dakota also erroneously and impermissibly relied on unenforceable emission reductions to avoid further control analyses for North Dakota sources. North

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[69] Letter from National Parks Conservation Association, Utah Physicians for a Healthy Environment, Sierra Club, o2 Utah, Healthy Environment Alliance of Utah, Montana Environmental Information Center, Powder River Basin Resource Council, Dakota Resource Council, Wyoming Wilderness Association, to K.C. Becker, Regional Administrator, EPA Region 8, regarding localized environmental justice analyses where NPCA identified 53 industrial facilities in ND, MT, UT, and WY that are degrading visibility in Class I areas, (Sept. 28, 2022), https://drive.google.com/file/d/1sGK1iXO1YIOoYzy8HQ1HuGy9fHIvMXO/view?ts=633b292d.

[70] Letter from National Parks Conservation Association, Sierra Club, and Badlands Conservation Alliance to Mr. Jim Semerad, Director, Division of Air Quality, North Dakota Department of Environmental Quality, "Comments of National Parks Conservation Association and Sierra Club on the Draft North Dakota State Implementation Plan for Regional Haze for the Second Planning Period," (June 1, 2022), https://drive.google.com/drive/folders/1V10mPDtTVqTlwTgyM-a3qE_eQz49899T.

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Dakota is one of the States that failed to analyze and require reductions on emissions from oil and gas sources. NO_X and SO_2 emissions from point and non-point sources from the oil and gas sector are 31,636 tons per year, emissions that must be reduced to make reasonable progress. Finally, the State improperly relied on on-the-books CAA programs to sidestep cost effective controls.

As the NPS explained in its Consultation comments to the State of North Dakota,

> … of all states, North Dakota has the biggest influence on haze in NPS Class I areas based on a cumulative analysis of surrogate visibility impacts (emissions/distance). Emissions from North Dakota point and area sources are significant across the region and specifically contribute to regional haze at Theodore Roosevelt National Park in North Dakota, Badlands and Wind Cave National Parks in South Dakota, and Voyageurs National Park in Minnesota.[71]

[71] National Park Service (NPS) Regional Haze SIP feedback for the North Dakota, Department of Environmental Quality (NDDEQ), at 3, (June 1, 2022).

Table 16. Priority Sources in North Dakota.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Coyote Station	Fossil Fuel Electric Power Generation	5,359	10,060	895
Antelope Valley Station	Fossil Fuel Electric Power Generation	3,563	10,763	847
Coal Creek Station	Fossil Fuel Electric Power Generation	6,515	6,282	669
Milton R. Young Station	Fossil Fuel Electric Power Generation	8,598	2,658	597
Great Plains Synfuels Plant	Natural Gas Distribution	2,580	5,207	486
Leland Olds Station	Fossil Fuel Electric Power Generation	3,982	1,314	373
Tioga Gas Plant	Natural Gas Liquid Extraction	627	749	64
Little Knife Gas Plant	Crude Petroleum and Natural Gas Extraction	19	389	12
Compressor Station No. 4*	Pipeline Transportation of Natural Gas	170	3	11

b. Utah

Utah is home to five iconic and treasured Class I areas—Arches, Bryce Canyon, Canyonlands, Capitol Reef, and Zion National Park—which Congress singled out for protections specifically because of their rare geologic formations, extraordinary landscapes, and awe-inspiring views.

Despite the thousands of tons of controllable pollution from Utah's sources including coal-fired power plants and cement kilns, among others, and the many opportunities for cost-effective controls, Utah improperly concludes that no new emissions reductions are warranted.[72] And the state ignores entirely oil and gas sector operations which emit significant amounts of visibility impairing pollutants and were overlooked in source selection and evaluation for reasonable progress measures. Utah's proposal would result in thousands of tons of SO_2 and NO_X

[72] Letter from National Parks Conservation Association, Sierra Club, Utah Physicians for a Healthy Environment, The Coalition to Protect America's National Parks, the Healthy Environment Alliance of Utah, and O2 Utah to Bryce Bird, Director, Utah Division of Air Quality, "Comments on Utah's Proposed Regional Haze State Implementation Plan for the 2nd Implementation Period," (May 31, 2022), https://drive.google.com/drive/folders/1fo9-M-ZEYW-Nf-GciM-UqnSuxUZ61hxW.

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pollution annually that could otherwise be avoided through feasible and cost-effective controls.

We urge EPA to (1) require significant emission-reducing measures for PacifiCorp's Hunter and Huntington coal-fired power plants or set enforceable retirement dates; (2) set an enforceable shut down date of December 31, 2025 for Intermountain Generation Station; (3) require actual, measurable emission reductions from Sunnyside Cogeneration and other sources; (4) require statewide NO_X requirements for flaring, engines, and other oil and gas sector sources; and (5) address the potentially significant environmental justice impacts resulting from any failure to control these sources. These steps are necessary to comply with the reasonable progress requirements of the CAA.

Utah is one of the States that failed to analyze and include controls on emissions from oil and gas sources. NO_X and SO_2 emissions from point and non-point sources from the oil and gas sector total 16,604 tons per year, emissions that should be reduced through requirements as recommended above.

Table 17. Priority Sources in Utah.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
PacifiCorp - Hunter Power Plant*	Fossil Fuel Electric Power Generation	10,514	3,546	2,540
Intermountain Generation*	Fossil Fuel Electric Power Generation	9,050	2,021	1,887
PacifiCorp - Huntington Power Plant*	Fossil Fuel Electric Power Generation	5,206	2,144	1,286
Sunnyside Cogen	Fossil Fuel Electric Power Generation	428	477	25
US Magnesium LLC-Rowley Plant	Nonferrous Metal (except Aluminum) Smelting	1,005	7	53
Ash Grove Cement Company - Leamington Cement Plant	Cement Manufacturing	1,184	19	34
Graymont Western US Incorporated - Cricket Mountain Plant	Crushed and Broken Limestone Mining and Quarry	533	18	17
Holcim (US) Inc. - Devils Slide Plant	Cement Manufacturing	1,406	196	57
Kennecott Utah Copper LLC - Power Plant Lab Tailings	Other Crushed and Broken Stone Mining and Quarry	461	1,036	28

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c. Wyoming

Despite the thousands of tons of controllable pollution from Wyoming's sources including coal-fired power plants, oil and gas operations, cement kilns, and manufacturing plants, among others, and the many opportunities for reasonable progress controls, Wyoming improperly concluded that almost no new reductions in pollution are warranted.[73] The State erroneously relied on inaccurate Four-Factor Analyses, and some sources failed to submit the requested Four-Factor Analyses (*e.g.*, PacifiCorp for several of its sources).

Wyoming's failure to assure reasonable progress is made in the second round was of concern to the National Park Service, which as discussed in our comments to the State, expressed concern that "NPS managed Class I areas in and near Wyoming are affected by haze causing emissions from the state."[74] In particular the NPS explained that "Yellowstone and Grand Teton National Parks in Wyoming and Rocky Mountain National Park, in Colorado, have not made significant progress toward clearer views on most impaired days in recent years."[75] Additionally, "Badlands and Wind Cave National Parks in South Dakota have actually experienced worsening haze on most impaired days in recent years."[76] Wyoming failed to analyze and include controls on emissions from oil and gas sources. NO_X and SO_2 emissions from point and non-point sources from the oil and gas sector total 33,719 tons per year, emissions that should be reduced as part of a compliant haze plan for the state.

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[73] Letter from National Parks Conservation Association, Sierra Club, Powder River Basin Resource Council, and Coalition to Protect America's National Parks, to Nancy Vehr Administrator Air Quality Division Wyoming Department of Environmental Quality, "Conservation Organizations' Comments on Wyoming's Proposed State Implementation Plan Regional Haze Round Two," (March 22, 2022), https://drive.google.com/drive/folders/1ad4ZjzLYDTWvpzht3e0DxLM4t7L2Cg2q, with enclosure, Joe Kordzi, "A Review of the North Dakota Regional Haze State Implementation Plan, (March 2022)," https://drive.google.com/drive/folders/1vzibeDKHPoQTLp2MgxcxI7NEokR6JFac ("Comment Letter to Wyoming").

[74] Comment Letter to Wyoming at 3. (citations omitted).

[75] Comment Letter to Wyoming at 3. (citation omitted).

[76] Comment Letter to Wyoming at 3. (citation omitted).

Table 18. Priority Sources in Wyoming.

Facility Name	Description	NO_x (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Jim Bridger Plant*	Fossil Fuel Electric Power Generation	7,112	8,892	2,389
Dave Johnston*	Fossil Fuel Electric Power Generation	6,316	7,367	1,433
Laramie River Station*	Fossil Fuel Electric Power Generation	7,191	6,132	1,429
Black Thunder Mine	Bituminous Coal and Lignite Surface Mining	10,945	142	1,361
Naughton Plant	Fossil Fuel Electric Power Generation	3,527	2,566	967
Green River Works*	Potash, Soda, and Borate Mineral Mining	1,848	2,953	935
Westvaco Facility*	Potash, Soda, and Borate Mineral Mining	2,090	1,467	681
North Antelope Rochelle Mine	Bituminous Coal and Lignite Surface Mining	3,269	18	554
Laramie Cement Plant*	Cement Manufacturing	2,267	162	265
Antelope Mine	Bituminous Coal and Lignite Surface Mining	1,372	32	173
Elk Basin Gas Plant	Natural Gas Liquid Extraction	993	668	135
Granger Soda Ash Facility*	Potash, Soda, and Borate Mineral Mining	1,310	194	127
Lost Cabin Gas Plant	Crude Petroleum and Natural Gas Extraction	66	1,210	53
Rock Springs Coal Calcining Plant*	All Other Petroleum and Coal Products	376	673	27

Wyoming's failure to assure reasonable progress is made in the second round was of concern to the National Park Service, which as discussed in our comments to the State, expressed concern that "NPS managed Class I areas in and near Wyoming are affected by haze causing emissions from the state."[77] In particular the NPS explained that "Yellowstone and Grand Teton National Parks in Wyoming and Rocky Mountain National Park, in Colorado, have not made significant progress

[77] Comment Letter to Wyoming at 1.

toward clearer views on most impaired days in recent years."[78] Additionally, "Badlands and Wind Cave National Parks in South Dakota have actually experienced worsening haze on most impaired days in recent years."[79]

5. EPA Region 9

In Region 9 we identified two priority states: Arizona and California. In contrast to the other EPA regions, because of the unique issues in these two states, we recommend that EPA address these two states separately, with Arizona being a higher priority.

The Class I areas in the Region 9 priority State of Arizona include the following:

- Chiricahua National Monument Wilderness Area
- Chiricahua Wilderness Area
- Galiuro Wilderness Area
- Grand Canyon National Park
- Mazatzal Wilderness Area
- Mount Baldy Wilderness Area
- Petrified Forest National Park
- Pine Mountain Wilderness Area
- Saguaro Wilderness Area
- Sierra Ancha Wilderness Area
- Superstition Wilderness Area
- Sycamore Canyon Wilderness Area.

The Class I areas in the Region 9 priority State of California include the following:

- Agua Tibia Wilderness Area
- Caribou Wilderness Area
- Cucamonga Wilderness Area
- Desolation Wilderness Area
- Emigrant Wilderness Area
- Hoover Wilderness Area
- John Muir Wilderness Area
- Joshua Tree National Park
- Kaiser Wilderness Area
- Kings Canyon National Park
- Lassen Volcanic National Park
- Lava Beds Wilderness Area

[78] Comment Letter to Wyoming at 3.
[79] Comment Letter to Wyoming at 3.

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- Marble Mountain Wilderness Area
- Minarets Wilderness Area
- Mokelumne Wilderness Area
- Pinnacles Wilderness Area
- Point Reyes Wilderness Area
- Redwood National Park
- San Gabriel Wilderness Area
- San Gorgonio Wilderness Area
- San Jacinto Wilderness Area
- San Rafael Wilderness Area
- Sequoia National Park
- South Warner Wilderness Area
- Thousand Lakes Wilderness Area
- Ventana Wilderness Area
- Yolla Bolly-Middle Eel Wilderness Area
- Yosemite National Park

a. Arizona

Arizona unjustifiably rejected control measures that should have been found to satisfy a Four-Factor Analysis.[80] In addition, Arizona improperly failed to conduct a Four-Factor Analysis for several sources that emit large amounts of visibility-impairing pollution and that currently have inadequate control measures.

[80] Letter from National Parks Conservation Association and Sierra Club to Elias Toon, Arizona Department of Environmental Quality, "National Parks Conservation Association and Sierra Club's Comments on Arizona Department of Environmental Quality's Draft Regional Haze State Implementation Plan for the Second Implementation Period," (July 14, 2022), https://drive.google.com/drive/folders/1KuQi2oJOdIobTdhKljg1sUqmfaaA_qan.

Arizona, should be addressed by EPA in a stand-alone state action as distinct from other states and regions.

Table 19. Priority Sources in Arizona.

Facility Name	Description	NOx (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Asarco LLC - Hayden Smelter*	Nonferrous Metal (except Aluminum) Smelting	46	20,499	3,801
Tucson Electric Power Co – Springerville*	Fossil Fuel Electric Power Generation	5,742	7,229	2,219
Freeport Mcmoran Miami Smelter*	Nonferrous Metal (except Aluminum) Smelting	173	3,930	977
APS - Cholla Power Plant*	Fossil Fuel Electric Power Generation	3,095	1,518	858
Chemical Lime Nelson Plant	Lime Manufacturing	1,367	1,678	481
Calportland-Rillito Cement Plant (APCC)	Cement Manufacturing	2,167	5	477
Freeport - Mcmoran Morenci Inc.	Copper Ore and Nickel Ore Mining	103	1	223
Coronado Generating Plant*	Fossil Fuel Electric Power Generation	1,831	87	218
Irvington*	Electric Power Generation	900	18	97
EPNG - Williams Compressor Station*	Pipeline Transportation of Natural Gas	902	2	76
EPNG - Willcox Compressor Station*	Pipeline Transportation of Natural Gas	283	1	21

EJ Arizona (from follow up letter to EPA Region 9)[81]

Although thousands of Arizonans are negatively impacted by sources of visibility-impairing pollution, including those noted above, the Arizona Department

[81] Letter from National Parks Conservation Association, Sierra Club, and Earthjustice to Martha Guzman Aceves, Regional Administrator, EPA Region 9, regarding environmental justice considerations at a localized level around key sources of haze pollution in Arizona and California,

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of Environmental Quality (ADEQ) entirely ignored the environmental justice and equity impacts of its draft SIP for the second implementation period. Tribal communities live closer than anyone else to Arizona's top two biggest pollution sources – the Hayden Smelter and Tucson Electric Power's Springerville coal plant. ADEQ should have considered both the environmental justice and equity impacts, as well as the benefits to be gained for environmental justice and the Class I areas.

b. California

California impermissibly exempted all but one stationary source from the CAA's Four-Factor Analysis, deferring to future action by local air agencies.[82] EPA's final action for California must ensure that its sources achieve reductions that will assure reasonable progress in the second round at the 29 California Class I areas and those Class I areas affected by the state's emissions. Despite the thousands of tons of controllable pollution from California's stationary sources including oil and gas refineries, cement kilns, and manufacturing plants, among others, and the many opportunities for reasonable progress controls, California improperly concluded that almost no new reductions in pollution are warranted and failed to properly analyze potential controls using the RHR's Four-Factor Analysis.[83] Instead, the State asserted that existing and yet-to-be-adopted regulations were enough.[84] While, California focused only on one pollutant – NO_X – listing four existing and possible future mobile source regulations that would reduce NO_X emissions statewide by 14,600 tons of NO_X per year by 2028,[85] we commend the state for assessing and quantifying mobile source emissions reductions that will benefit visibility. However, that alone does not negate the need to address all other source sector visibility impairing pollution.

EJ California (from follow up letter to EPA Region 9)[86]

California has elevated environmental justice markers statewide based on demographics showing higher-than-national levels of persons of color, as well as

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(Aug. 10, 2022), https://drive.google.com/file/d/18OSiAkRODVz3ulSvN_SrL317IT6NGFA0/view?ts=633b291c.

[82] Letter from National Parks Conservation Association, Sierra Club, and Coalition to Protect America's National Parks to Liane Randolph, Chair, California Air Resources Board, "Conservation Organizations' Comments on California's Proposed State Implementation Plan Regional Haze Round Two," (June 13, 2022), https://drive.google.com/drive/folders/1qy_eRILqmkqyOA9xLBV-O7wqtmjYaJaw.

[83] Comment Letter to California at 4-5.

[84] Comment Letter to California at 5.

[85] Comment Letter to California at 5.

[86] Letter from National Parks Conservation Association, Sierra Club, and Earthjustice to Martha Guzman Aceves, Regional Administrator, EPA Region 9, regarding environmental justice considerations at a localized level around key sources of haze pollution in Arizona and California, (Aug. 10, 2022), https://drive.google.com/file/d/18OSiAkRODVz3ulSvN_SrL317IT6NGFA0/view?ts=633b291c.

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numerous low-income communities located near facilities emitting haze pollution. For example, air pollution poses a significant burden for millions of residents living within the greater Los Angeles and the San Joaquin Valley areas, among others. Communities such as Los Angeles, Long Beach, Bakersfield, and Fresno regularly experience ozone and $PM_{2.5}$ levels that exceed all other areas in the country. The cities in the United States that are most affected by year-round particle pollution are all in California, with Bakersfield topping the list, followed by the Fresno-Madera-Hanford area, Visalia, the San Jose-San Francisco-Oakland area, and Los Angeles.[87] About 20.3 million people live in these areas. Sadly, California failed to adequately consider the environmental justice co-benefits of haze emission reductions from the facilities harming both people and parks from the pollution.

Table 20. Priority Sources in California.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Cemex California Cement LLC*	Cement Manufacturing	5,420	569	1,247
Twenty Palms MCAGCC	National Security	78	2	939
Mitsubishi Cement Corporation*	Cement Manufacturing	1,944	344	481
Shell Martinez Refinery*	Petroleum Refineries	916	1,155	323
Lehigh Southwest Cement Company*	Cement Manufacturing	1,208	1,393	269
California Portland Cement Co.*	Cement Manufacturing	1,531	502	266
Searles Valley Mineral*	Potash, Soda, and Borate Mineral Mining	1,517	146	201
CalPortland Oro Grande	Cement Manufacturing	1,141	8	169
Phillips 66 Carbon Plant*	All Other Petroleum and Coal Products	360	1,464	168
Chevron Products Company	Petroleum Refineries	737	374	167
Torrance Refining Company LLC	Petroleum Refineries	924	242	96

[87] American Lung Association, State of the Air: 2022, https://www.lung.org/research/sota/city-rankings/most-polluted-cities .

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Tesoro Refining & Marketing Co, LLC*	Petroleum Refineries	661	339	95
Chevron Products Co.	Petroleum Refineries	729	282	87
Tesoro Refining and Marketing Co, LLC*	Petroleum Refineries	749	175	81
Valero Refining Company - California	Petroleum Refineries	1,013	95	72
Lehigh Southwest Cement Company*	Cement Manufacturing	603	8	59
Tesoro Refining & Marketing Company, LLC	Petroleum Refineries	360	344	50
US Army National Training Ctr.	National Security	44	0	41
Phillips 66 Company/Los Angeles Refinery*	Petroleum Refineries	391	241	39
Phillips 66 Co/La Refinery Wilmington Pl*	Petroleum Refineries	471	109	38
Wheelabrator Shasta E.C.I.	Hydroelectric Power Generation	536	2	37
Vitro Flat Glass, LLC	Flat Glass Manufacturing	385	59	36
Tesoro Ref & Mktg Co, LLC, Calciner	Office Administrative Services	261	376	32
Guardian Industries Corp	Flat Glass Manufacturing	313	147	29
Collins Pine Co	Sawmills	129	4	28
Tamco	Iron and Steel Mills and Ferroalloy	108	29	20
Cemex - River Plant	Cement Manufacturing	76	5	20
Burney Forest Products	Wood Container and Pallet Manufacturing	190	4	19
Phillips 66 Company - San Francisco Refinery*	Petroleum Refineries	218	368	16
Sierra Pacific Ind. - Burney	Cut Stock, Resawing Lumber, and Planing	157	2	16

Ultramar Inc	Petroleum Refineries	278	125	15

6. EPA Region 10

a. Washington

We identified one state in Region 10 – Washington – where there are unique issues and emissions reductions needed to assure reasonable progress is made in the second round from oil refineries, glass plants and pulp and paper mills.[88] Despite Washington finding reasonable controls for numerous sources, it decided to delay controls to the next planning period. Moreover, the State failed to evaluate cost-effective and achievable emission reductions for all of Washington's largest sources. Finally, Washington failed to first evaluate whether additional emission reductions from sources are necessary via the Four-Factor Analysis reasonable progress determinations to ensure reasonable progress toward the CAA's visibility goal.

[88] Letter from National Parks Conservation Association, Sierra Club, Alpine Lakes Protection Society, North Cascades Conservation Council, Olympic Park Advocates, Puget Soundkeeper Alliance, Stand.earth, Waste Action Project, to Linda Kildahl, Washington Department of Ecology, Air Quality Program, "Conservation Organizations' Comments Submitted on Washington's Proposed Regional Haze State Implementation Plan for 2018 to 2028," (Nov. 23, 2021), https://drive.google.com/file/d/19_6Z8gmTdss8yeUak4CopkEiGuIQOIF_/view?usp=sharing, with enclosure, Victoria Stamper, "Review and Comments on Washington Department of Ecology's Draft Regional Haze Plan for the Second Implementation Period: Long Term Strategy and Four-Factor Analysis of Controls," (Nov. 19, 2021), https://drive.google.com/file/d/1Iqt-K47Nq_F2SRN3AFC_G6ApWW5EwC9T/view?usp=sharing; *see also*, Letter from National Parks Conservation Association, Sierra Club, the Duwamish River Cleanup Coalition, Puget Soundkeeper Alliance, Waste Action Project, to Philip Gent, Air Quality Program, Department of Ecology, "NPCA Comments Submitted for Informal comment period: Regional Haze SIP Revision - 2nd 10-Year Plan," (Feb. 16, 2021, Submitted with correction on Feb. 19, 2021), https://drive.google.com/file/d/1MbrGgMg5M7yPM-m5yo4OH9SIpGvljTnj/view?usp=sharing, including enclosure, Klafka, Steven, P.E. BCEE, Environmental Engineer, Wingra Engineering, S.C., "The Four-Factor Reasonable Progress Analysis for Ardagh Glass," (Jan. 27, 2021), https://drive.google.com/file/d/1xXsx07y4z4K6BIgeJH0rLP7L0Ha_Iuwn/view?usp=sharing; *see also*, Letter submitted on behalf of National Parks Conservation Association, by Laumann Legal, LLC., to Liem Nguyen, Judy Schwieters, Department of Ecology, "NPCA Comments on Draft Air Quality Agreed Orders for Alcoa Wenatchee Agreed Order 18100 (Chelan County), Intalco Agreed Order 18216 (Whatcom County)," (Dec. 3, 2020), https://drive.google.com/file/d/1Jx83tnMmjVnKvzciZ2wo6Qi7a7iZIUx2/view?usp=sharing.

Table 21. Priority Sources in Washington.

Facility Name	Description	NO_X (tons)	SO_2 (tons)	Cumulative Q/d >=5 within 1,000 km
Alcoa Primary Metals Intalco Works	Alumina Refining and Primary Aluminum Product	190	3,987	497
Weyerhaeuser Nr Company	Pulp, Paper, and Paperboard Mills	1,949	390	237
Bp Cherry Point Refinery	Petroleum Refineries	1,918	808	195
Tesoro Northwest Company	Petroleum Refineries	1,971	80	164
Westrock Tacoma Mill	Pulp, Paper, and Paperboard Mills	1,121	190	148
Ash Grove Cement Co, E Marginal*	Cement Manufacturing	1,368	69	136
Boise Paper	Paperboard Mills	637	885	120
DBA Kapstone Kraft	Paperboard Mills	1,041	198	104
Shell Puget Sound Refinery	Petroleum Refineries	1,054	225	102
Ardagh Glass*	Glass Container Manufacturing	153	99	12

Conclusion

Once a decade every state in the country is obligated to consider the visibility impairing pollution in its borders and determine what they will do to curb it to improve air quality at our nation's Class I public lands. States are to come together with their neighbors, with Federal Land Managers, Regional Planning Organizations, EPA, other interested stakeholders and engage in a public process that has one aim: restoring natural visibility conditions. It's no secret that the very pollution that degrades color and clarity in our national parks and wilderness areas is the very pollution that devastates communities long overburdened by the very same sources.

With two-thirds of states having submitted regional haze plans, most of which are laden with disregard for our country's public lands and legal requirements, EPA must step in and act. We would welcome the opportunity to discuss the above prioritization analysis and approach at your earliest convenience.

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Sincerely,

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Exhibit 1

Arizona

Letter from National Parks Conservation Association and Sierra Club to Elias Toon, Arizona Department of Environmental Quality, "National Parks Conservation Association and Sierra Club's Comments on Arizona Department of Environmental Quality's Draft Regional Haze State Implementation Plan for the Second Implementation Period," (July 14, 2022), https://drive.google.com/drive/folders/1KuQi2oJOdIobTdhKljg1sUqmfaaA_qan.

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Washington

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Exhibit 2

January 21, 2022

Joseph M. Goffman
Principal Deputy Assistant Administrator
Office of Air and Radiation
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460
Goffman.Joseph@epa.gov

Dear Principal Deputy Assistant Administrator Goffman:

National Parks Conservation Association, Sierra Club and Earthjustice write regarding several issues in need of EPA's immediate attention and direction to states for the second regional haze planning period. While implementation of the regional haze program has resulted in significant progress to date, our nation's treasured Class I areas from Great Smoky Mountains to Yosemite National Park continue to be marred by air pollution. Indeed, **not a single Class I area has achieved the Clean Air Act's goal of natural visibility conditions**. And the same sources of pollution that harm our public lands are the very sources responsible for tragic health impacts and the climate crisis; therefore, we see timely emissions reductions through state regional haze implementation plans as being of paramount importance.

This letter highlights instances where numerous state air quality agencies have failed to abide by federal requirements to reduce haze causing emissions in their regional haze plans. Consequently, the haze SIPs submitted to EPA to date widely miss the mark of satisfying the obligation to make reasonable progress towards restoring natural conditions. Accountability to cut continued, avoidable emissions from hundreds of fossil fuel-fired power plants, oil refineries, cement kilns, and other sources is on the line. Also at risk are fenceline communities downwind of pollution, along with the vistas and ecosystems of our public lands set aside for posterity. Our organizations demand that EPA prioritize acting on state

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haze plans immediately to deliver on this 45 year-old Congressional mandate without delay.[1]

Collectively, our organizations and others ("Conservation Organizations") have reviewed and commented on nearly every regional haze state implementation plan ("RH SIPs," "SIPs") proposed thus far—covering 38% of the states—including the following:[2]

Colorado[i]	Louisiana[ii]	New York[iii]	Tennessee[iv]
Connecticut[v]	Massachusetts[vi]	North Carolina[vii]	Texas[viii]
Delaware[ix]	Michigan[x]	Ohio[xi]	Washington[xii]
Florida[xiii]	New Hampshire[xiv]	Oregon[xv]	West Virginia[xvi]
Indiana[xvii]	New Jersey[xviii]	South Carolina[xix]	

In addition to commenting in formal public comment periods, Conservation Organizations also provided early analyses to states, identifying sources of visibility impairing pollution, articulating problems with state reliance on regional organizations' work products,[3, xx] requesting states to factor in environmental justice;[4] and putting forth expert analysis regarding control technologies and related developments applicable to many regional haze SIPs.[5] We have identified

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[1] EPA's immediate attention is also required to ensure SIP consistency across states. 40 C.F.R. part 56.

[2] The links provided here and below are to the comment letters sent to each states. In some instances several comment letters have been submitted to a state. For the complete citations for the Conservation Organizations' comment letters and expert reports submitted to the states identified here and below please see the Endnotes starting on page 63.

[3] *See e.g.*, Letter from Stephanie Kodish, NPCA, Leslie Griffith, SELC, and David Rogers, Sierra Club to VISTAS State Air Directors, "Significant Flaws in VISTAS Regional Haze CAMx Modeling and Methods; Recommendations to Develop Compliant State Implementation Plans" (May 12, 2021), https://drive.google.com/file/d/1e0KAljsvNm3Wmj3HRVeyKvafaI-dza0c/view?usp=sharing; *see also* D. Howard Gebhart, "Technical Review of VISTAS Visibility Modeling for the Second Round of Regional Haze State Implementation Plans" (May 2021) ("Gebhart VISTAS Review Report"), including Attachment "Gebhart Resume Final 2020," https://drive.google.com/file/d/1aMKbgtFxJqvrEVxeSOy96CNvoQ0xhUUv/view?usp=sharing; *see also* D. Howard Gebhart, "Technical Review of North Carolina Regional Haze State Implementation Plan Second Round of Regional Haze State Implementation Plans Supplemental Report" (Oct. 2021), https://drive.google.com/file/d/1UYHgQQAx5xKhItnEuQ3fkFpOk4EtMZ_E/view?usp=sharing.

[4] *See infra* Section 5.a.

[5] Vicki Stamper, Megan Williams, " OIL AND GAS SECTOR REASONABLE PROGRESS FOUR-FACTOR ANALYSIS OF CONTROLS FOR FIVE SOURCE CATEGORIES: NATURAL GAS-FIRED ENGINES, NATURAL GAS-FIRED TURBINES, DIESEL-FIRED ENGINES, NATURAL GAS-FIRED HEATERS AND BOILERS, FLARING AND INCINERATION, (March 6, 2020), https://drive.google.com/file/d/1RGWYqXKcfyWzBgxuRXzSiSaCZ9PWDH3y/view?usp=sharing; *see*

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numerous common "approvability" issues based on our reviews and detailed in our comment letters, which for most SIPs were supported by reports prepared by expert engineers and modelers.

The seven states where we provided preliminary comments include:

Arizona[xxi]	New Mexico[xxii]	Utah[xxiii]	Pennsylvania[xxiv]
Nebraska[xxv]	North Dakota[xxvi]	Virginia[xxvii]	

We support a continuation of the Obama Administration's successful efforts to implement the haze program, which has thus far resulted in: emission reductions from over 150 coal plants units, including more than 58 retirements; elimination of more than 132 million metric tons of climate pollution; and a reduction of 303,950 tons reduced NOx and SO_2 combined. In order to continue on this path, EPA must direct states to issue SIPs that are compliant with legal requirements and match the agency's expectations as specified in its "Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period"[6] ("July 2021 Clarification Memo"). EPA must ensure consistency across SIPs. Where states fail to fulfill such obligations, EPA must be at the ready to issue Regional Haze Federal Implementation Plans ("FIPs") for much of the country.

As discussed in this letter, nearly all the SIPs reviewed thus far ignore EPA's July 2021 Clarification Memo while either cherry-picking from off-ramps in "Guidance on Regional Haze State Implementation Plans for the Second

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also Klafka, Steven, P.E. BCEE, Environmental Engineer, Wingra Engineering, S.C., "The Four-Factor Reasonable Progress Analysis for Ardagh Glass," (Jan. 27, 2021), https://drive.google.com/file/d/1xXsx07y4z4K6BIgeJH0rLP7L0Ha_Iuwn/view?usp=sharing; *see also* Klafka, Steve, Wingra Engineering, Holcim – Florence Cement Plant Florence, Colorado Four-Factor Reasonable Progress Analysis (Sept. 30, 2021), https://drive.google.com/file/d/1C0DHVM84YoM-a-xn3LILDB5nK8J4rKDq/view?usp=sharing; *see also* Klafka, Steve, Wingra Engineering, GCC Rio Grande – Pueblo Cement Plant, Four-Factor Reasonable Progress Analysis (Sept. 23, 2021), https://drive.google.com/file/d/1W-EAjYr_zL9Ucj6t2PAtCEuqAVP7flc9/view?usp=sharing.

[6] Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors Regions 1-10, "Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period," (July 9, 2019), https://www.epa.gov/visibility/clarifications-regarding-regional-haze-state-implementation-plans-second-implementation. ("July 2021 Clarification Memo").

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Implementation Period"[7] ("2019 Guidance") or lack a reasoned basis and support for SIP determinations.

The five major areas where issues arise in the RH SIPs are as follows:

Five Major Areas Where Issues Arise in State RH SIPs

1. Source selection precludes significant emissions and sources from consideration in a Four Factor Analysis .
2. Unjustifiable dismissal of emission reduction measures that satisfy the Four-Factor Analyses.
3. Reasonable progress determinations do not comport with the legal requirements.
4. Application of *unique* approaches not provided for under the Act and RHR.
5. Failure to take into consideration the Administration's priorities.

We strongly support the direction articulated in the July 2021 Clarification Memo and are committed to ensuring it results in state plans that deliver meaningful reductions. The following discussion highlights the myriad of issues we've identified in these five major areas – and commented on – in the state RH SIPs reviewed to date.

Note: This letter cites numerous examples from our comment letters where these issues arise. The examples cited are from representative SIPs and are not intended to provide a comprehensive list of the issues raised in all our comment letters. The first time a referenced document is mentioned we provide a link to download the document. Additionally, referenced documents are available to download here: https://drive.google.com/drive/folders/1aE2Yz7-Tl6M1ZNasaYKsBDgsJa22de3S?usp=sharing.

[7] Memorandum from Peter Tsirigotis, Director at EPA Office of Air Quality Planning and Standards, to EPA Air Division Directors Regions 1-10, "Guidance on Regional Haze State Implementation Plans for the Second Implementation Period," EPA-457/B-19-003 (Aug. 2019), https://www.epa.gov/sites/production/files/2019-08/documents/8-20-2019_-_regional_haze_guidance_final_guidance.pdf. ("2019 Guidance").

Table of Contents

1. Source screening excludes significant emissions from sources of visibility impairing pollution. 7

a. Source retirements must be enforceable in the SIP. *7*

b. A prior BART determination (or its equivalent) must not excuse a source from reasonable progress analysis. *9*

c. States must not ignore pollutants by focusing on only the dominant pollutant. *10*

d. States must analyze area and mobile sources, and not solely focus on major sources. *11*

e. Sources with permits are not exempt from the Act's reasonable progress requirements. *13*

f. States must not set thresholds that do not capture sufficient sources and emissions. *13*

2. States must not unjustifiably dismiss emission reduction measures that, if appropriately assessed, would satisfy the Four-Factor Analysis. ... 16

a. States must not assert visibility benefits are too small. *16*

b. States must independently review industry Four-Factor Analysis instead of assuming their correctness and adopting them without question. *18*

c. States must not rely on arguments that a source is "effectively controlled." *22*

d. States must establish cost-effectiveness thresholds that are higher than the first round. *25*

3. Reasonable progress determinations must comport with the legal requirements. 27

a. The Uniform Rate of Progress glidepath is not a safe harbor. *27*

b. States cannot satisfy interstate consultations where they are flawed, incomplete and have no effect. *28*

c. States must not disregard FLM consultations. *32*

ED_014341_00000012-00066

d. States must not delay control requirements and/or determinations to the next planning period. *35*

e. States must not exempt emissions from new and modified sources from the Act's RH RP requirements. *35*

f. States must not assert that that reasonable progress goals determine reasonable progress. *37*

4. States must not use unique approaches that conflict with Act and Regional Haze Rule **38**

a. Oregon. *38*

b. Washington. *38*

c. Texas. *39*

d. Indiana. *40*

e. Use of Plantwide Applicability Limits (PALs). *40*

f. Ohio. *41*

5. States must ensure that SIPs are consistent with the Administration's priorities **41**

a. Consideration of Environmental Justice. *41*

b. For EGUs, transition from coal to natural gas should not be a solution for regional haze. *46*

c. Retired or under-utilized EGUs are now being used to supply energy for onsite bitcoin mining – EPA must address this head on. *46*

d. Requiring States to Incorporate Planned Retirements as Enforceable SIP Provisions, as Required by the Clean Air Act, Would Result In Significant Reductions of Greenhouse Gas Emissions. *46*

Conclusion **47**

List of Documents Referenced **50**

Endnotes **63**

ED_014341_00000012-00067

The Five Major Areas in Need of EPA's Immediate Attention

1. Source screening excludes significant emissions from sources of visibility impairing pollution.

States must identify sources for the Four-Factor Analysis and the screening threshold a state applies must ensure that the threshold is low enough to bring in most sources harming a Class I area; a state must not simply eliminate evaluations of all or most sources for measures to reduce visibility impairing pollution. EPA's July 2021 Clarification Memo emphasizes this requirement explaining that:

> [W]hile states have discretion to reasonably select sources, this analysis should be designed and conducted to ensure that source selection results in a set of pollutants and sources the evaluation of which has the potential to meaningfully reduce their contributions to visibility impairment.[8]

Contrary to the requirement to meaningfully reduce, which requires that states *comprehensively* identify sources of human-caused visibility-impairing emissions across source categories, as discussed below, the proposed SIPs use various methods to circumvent this requirement.

a. *Source retirements must be enforceable in the SIP.*

The Act, the RHR, and EPA guidance and memorandum all make clear that if a state opts to exempt sources from further control analysis based on a planned retirement schedule, the source must "have an enforceable commitment to be retired or replaced by 2028."[9] The Act requires that "[e]ach state implementation plan . . . shall" include "enforceable limitations and other control measures" as

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[8] July 2021 Clarification Memo at 3.

[9] 2019 Guidance at 22; The Clean Air Act does not define the phrase "remaining useful life." However, EPA, in regulations and guidance, has clarified the meaning of the phrase. EPA has consistently stated that the potential retirement of a facility can be used to shorten a source's remaining useful life only if the retirement is federally enforceable. Thus, in order to affect the remaining useful life, a retirement commitment must be included in a pre-existing document that can be enforced in federal court, such as a consent decree entered by a federal court, or a state must incorporate the retirement date into its SIP. If a potential retirement is not federally enforceable, it cannot be relied upon to shorten the remaining useful life of a source; *see e.g.*, 83 Fed. Reg. 62,204, 62,232 (Nov. 30, 2018) ("We are proposing to agree with Arkansas' cost analysis for dry scrubbers and switching to low sulfur coal for Independence Units 1 and 2, and with the state's decision to assume a 30-year capital cost recovery period in the cost analysis. It is appropriate to assume a 30-year capital cost recovery period in the cost analysis since Entergy's plans to cease coal combustion at the Independence facility are not state or federally-enforceable."); *see also* 83 Fed. Reg. 43,586, 43,604 (Aug. 27, 2018) (Considering the retirement of certain units where there was evidence that the units had actually been retired at the time of the rulemaking and that the plant had requested cancellation of its air permit).

ED_014341_00000012-00068

necessary to "meet the applicable requirements" of the Act.[10] The RHR similarly requires each state to include "enforceable emission limitations" as necessary to ensure reasonable progress toward the national visibility goal.[11] Indeed, remaining useful life is only one of the four statutory factors that a state must consider when selecting the sources for which it will determine what control measures are necessary to make reasonable progress.[12] Allowing states to avoid a four-factor analysis based on alleged intent to retire would render the other statutory factors meaningless and violate the requirements of the Regional Haze Rule.[13] Therefore, where the state relies on a source's plans to permanently cease operations or projects that future operating parameters (*e.g.*, limited hours of operation or capacity utilization) will differ from past practice, or if this projection exempts additional pollution controls as unnecessary to ensure reasonable progress, then the state "must" make those parameters or assumptions into enforceable limitations.[14]

Despite these requirements, states exempt electric generating units ("EGUs") and other sources from Four-Factor Analyses based on *any* announcement of retirement. For the EGUs in Indiana, North Carolina and Michigan, the SIPs exempt EGUs and other sources from Four-Factor Analyses based on any announcement of retirement.[15] Additionally, in Tennessee, the State revised its 2028 projected SO2 emissions for Kingston from 1,886 to 424 tons and its 2028 projected NOx emissions from 1,687 to 380 tons based solely on TVA's Strategic Power Supply Plan projections, without including enforceable emission limitations in the SIP.[16] Furthermore, the Centralia power plant, which was required to cease coal-firing for BART and for which no emissions were assumed in the 2028 RPGs,

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[10] 42 U.S.C. § 7410(a)(2)(A).
[11] *See* 40 C.F.R. § 51.308(f)(2) ("The long-term strategy must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv).").
[12] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem."); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) ("A statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission.").
[13] The United States Court of Appeals for the Fifth Circuit found that EPA must consider statutory factors listed in a similar provision of the Clean Water Act when revising best available technology ("BAT") limits. *See Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1026-27 (5th Cir. 2019).
[14] 40 C.F.R. § 51.308(f)(2); *see also* 2019 Guidance at 34.
[15] *See e.g.,* Comment Letter to Indiana at 11, 14-17; Comment Letter to North Carolina at 14-26 (*i.e.*, Duke Energy Carolinas, LLC, Marshall Steam Station; Duke Energy Carolinas, LLC, Belews Creek Steam Station; Duke Energy Progress, Roxboro Steam Electric Plant; Duke Energy Carolinas, LLC, Cliffside Steam Station Facility); Comment Letter to Michigan at 9-10 (EGLE Erroneously Relied on Remaining Useful Life Without Enforceable Retirement Dates for the following facilities: St. Clair; Belle River; Trenton Channel; Erickson; JH Campbell; and Karn Units 3 & 4).
[16] Comment Letter to Tennessee at 21-22.

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recently got a BART order amendment that provides the ability to repower to gas,[17] again without including enforceable emission limitations in the SIP.

EPA must ensure enforceable retirements are locked into the haze SIP for any EGU or other source where a state relies on reductions for reasonable progress or its Long-Term Strategy. Only enforceable retirements may alter the remaining useful life. EPA must require that states subject sources that intend to retire to a Four-Factor Analysis if a state selects the source for analysis of emission control measures.

b. ***A prior BART determination (or its equivalent) must not excuse a source from reasonable progress analysis.***

As EPA's 2019 Guidance explains, the RHR "anticipates the re-assessment of BART-eligible sources under the reasonable progress Rule provisions,"[18] and further instructs state SIP development by explaining that:

> [S]tates may not categorically exclude all BART-eligible sources, or all sources that installed BART controls, as candidates for selection for analysis of control measures.[19]

In SIPs, several states assert that where EGUs (and primary copper smelters in Arizona)[20] are BART sources they need *not* be reviewed for reasonable progress. For example, the following states have exempted BART sources: Indiana; South Carolina; Michigan; West Virginia, Texas.[21] Similarly, sources subject to the Clean Air Interstate Rule (CAIR) and its successor, the Cross-State Air Pollution Rule

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[17] Comment Letter to Washington - November 2021 at 25-26.

[18] 2019 Guidance at 25, citing 40 C.F.R. § 51.308(e)(5) ("After a State has met the requirements for BART or implemented an emissions trading program or other alternative measure that achieves more reasonable progress than ... BART, BART-eligible sources will be subject to the requirements of paragraphs (d) and (f) of this section.").

[19] 2019 Guidance at 25.

[20] Preliminary Comment Letter to Arizona at 6-7 (*i.e.*, ASARCO LLC - Hayden Smelter and the Freeport Mcmoran Miami Smelter).

[21] *See e.g.*, Comment Letter to Indiana 16-19 (R.S. Nelson); *see also* Comment Letter to South Carolina at 30-32 (It appears the State may have exempted a sources from RP that completed BART demonstrations despite the fact that the State did not require any BART controls: Dominion Energy Wateree Generating Station); *see also* Comment Letter to Michigan at 15 (Tilden Mine), 16 (St. Mary's Cement Kiln); *see also* West Virginia Comment Letter at 87, FN 386 (commenting on Proposed SIP at 114).

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(CSAPR) are not exempt from reasonable progress review.[22] EPA must reemphasize that BART does not excuse source from a reasonable progress evaluation. [23]

c. ***States must not ignore pollutants by focusing on only the dominant pollutant.***

EPA's expectation regarding the pollutants considered for source selection and control strategy analysis for the second planning period is that "each state will analyze sulfur dioxide (SO_2) and nitrogen oxide (NOx) in selecting sources and determining control measures."[24] Moreover, "[a] state that chooses not to consider at least these two pollutants in the second planning period should show why such consideration would be unreasonable, especially if the state considered both these pollutants in the first planning period."[25]

Examples of states that are focusing on the dominant pollutant and ignoring the others include VISTAS states (*e.g.*, Tennessee,[26] West Virginia,[27] North Carolina,[28] Florida,[29] South Carolina[30]), which disregarded NOx emissions because they asserted SO_2 is the dominant visibility impairing pollutant. As a consequence, VISTAS states routinely ignored cost-effective opportunities for reducing NOx from EGUs with underperforming SCR and SNCR systems, including from EGUs like Marshall Steam Stations units 1, 2 and 4[31] and pulp and paper plants like Blue

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[22] Comment Letter to Indiana at 39 (Gibson and Indiana Michigan Power); Comment Letter to West Virginia at 34-35 (Participation in CSAPR, MATS, and/or installation of BART is not a shield against reasonable progress or Four-Factor Analyses for the following EGU sources: Harrison, Fort Martin, Mitchell, and Amos.); *id.* at 39 (Grant Town Power Plant); *id.* at 87 FN386 (commenting that reasonable progress requirements apply to all sources, despite the State SIP that allow an unnamed BART-eligible source that received a permit during the first RH planning period, to also avoid an RP analysis).

[23] Although many states addressed the Clean Air Act's BART requirements in their initial regional haze plans, EPA's 2017 revisions to the Regional Haze Rule make clear that BART was not a once-and-done requirement. Indeed, states "will need" to reassess "BART-eligible sources that installed only moderately effective controls (or no controls at all)" for any additional technically-achievable controls in the second planning period. 82 Fed. Reg. at 3,083; *see also id.* at 3,096 ("states must evaluate and reassess all elements required by 40 CFR 51.308(d)").

[24] July 2021 Clarification Memo at 4, citing 2019 Guidance at 12.

[25] July 2021 Clarification Memo at 4-5.

[26] Comment Letter to Tennessee at 19-20, 28 (TDEC Impermissibly Exempts Eastman's NOx Emissions from the Required Four-Factor Analysis), 62 (TDEC Ignores and the SIP Lacks Controls for Nitrate Contributions from Point Sources at Class I Areas).

[27] Comment Letter to West Virginia at 19, 22-23, 25, 29-30, 42, 84-85.

[28] Comment Letter to North Carolina at 38.

[29] Comment Letter to Florida at 31.

[30] Comment Letter to South Carolina at 22, 24, 35-36 (DHEC Must Subject South Carolina EGUs to NOx Four-Factor Analyses), 74-75.

[31] Comment Letter to North Carolina at 14-15.

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Ridge.[32] States also attempt to disregard pollutants, sources and other requirements based on a purported lack of resources.[33]

EPA must ensure that regional haze plans include an analysis of both SO_2 and NOx emissions.

d. ***States must analyze area and mobile sources, and not solely focus on major sources.***

The RHR requires that states consider "major and minor stationary sources or groups of sources, mobile sources, and area sources."[34] Indeed, "regional haze" is defined in the RHR to explicitly include these sources:

> Visibility impairment that is caused by the emission of air pollutants from numerous anthropogenic sources located over a wide geographic area. Such sources include, but are not limited to, major and *minor stationary sources, mobile sources, and area sources.*[35]

Several states consider only major point sources and ignore area and mobile sources. This approach is particularly problematic where the area and mobile source categories make up most if not all the visibility impairment. For example, in many states, emissions from oil and gas development are a significant threat to visibility

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[32] Comment Letter to North Carolina at 24-25.

[33] Comment Letter to South Carolina at 75 (DHEC's apparent assertion that it lacks the time, personnel, and funding resources to develop a complete regional haze SIP does not excuse it from the Act's requirements. The Act and implementing regulations require that states have adequate resources and authority, indeed states are required to certify to EPA in each SIP submission and periodically for infrastructure SIPs that they have such resources and authorities. 42 U.S.C. §§ 7410(a)(2)(J), 7410(a)(2)(D)(i), 7410(a)(2)(D)(ii), 7410(a)(2)(E)(i); 40 C.F.R. part 51, Appendix V; *see also,* EPA's application of Act's requirements when Wyoming asserted it lacked of authority to impose RP requirements, 79 Fed. Reg. 5032 (Jan. 30, 2014). Alternatively, if DHEC finalizes its proposed determination that it lacks the resources necessary to develop a complete [and potentially approvable] SIP, then it must follow in the footsteps of Montana and notify EPA that South Carolina will defer to EPA's development and implementation a regional haze FIP on their behalf. 77 Fed. Reg. 23,988 (Apr. 20, 2012) (EPA's proposed FIP, explained that "[o]n June 19, 2006, Montana submitted a letter to us signifying that the State would be discontinuing its efforts to revise the visibility control plan that would have incorporated provisions of the Regional Haze Rule. The State acknowledged with this letter that EPA would make a finding of failure to submit and thus promulgate additional federal rules to address the requirements of the Regional Haze Rule, including BART. In response to the State's decision EPA made a finding of SIP inadequacy on January 15, 2009 (74 FR 2392), determining that Montana failed to submit a SIP that addressed any of the required regional haze SIP elements of 40 CFR 51.308."); 77 Fed. Reg. 57,864 (Sept. 18, 2012) (EPA's final FIP).); *see also* Comment Letter to Tennessee at 63; *see also* Comment Letter to West Virginia at 86.

[34] 40 C.F.R. § 51.308(f)(2)(i) ("The State should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources.").

[35] 40 C.F.R. § 51.301 (emphasis added).

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and air quality in Class I areas.[36] Such development often occurs on federal lands that are near to or abut Class I areas. For example, oil and gas development contributes to visibility impairment in public lands in Utah and Colorado where the NPS found that oil and gas development and leasing in the two states would "cause visibility impairment" at Dinosaur National Monument.[37] Additionally, NPS recently found impacts from oil and gas emissions at Carlsbad Caverns and San Pedro Parks Wilderness Class I areas, among others, based on 2008 emissions inventories—which do not capture more recent growth—and include only a portion of emissions from the production process.[38] States that have ignored these important source categories include: Texas, which outright ignored oil and gas sources;[39] Utah, which is also ignoring oil and gas sources suggesting it will address emissions later via an ozone SIP;[40] and Florida, which despite high cost-effective green harvesting techniques that could reduce emissions on environmental justice communities and Class I areas, did not evaluate emissions from burning sugar cane fields.[41] On a positive note, California is the one state that is assessing emissions from heavy duty trucks through a Four-Factor Analysis.

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[36] Examples of Class I areas currently or potentially impacted by oil and gas emissions include: Theodore Roosevelt and Lostwoods (Bakken Shale in eastern Montana and North Dakota); Wind Cave and Badlands (Powder River Basin in northeast Wyoming); Bridger and Fitzpatrick Wilderness Areas (Pinedale Anticline and Jonah Fields in western Wyoming); Mesa Verde (North and South San Juan Basin); Carlsbad Caverns and Guadalupe Mountains (Permian Basin in southeastern New Mexico and western Texas); and Canyonlands and Arches (Uintah, Paradox, and Piceance Basins in Utah and Colorado).

[37] *See* e.g., Memorandum from Mark A. Foust, Superintendent, Dinosaur National Monument, National Park Service, to Ester McCullough, Field Office Manager, BLM Vernal Field Office, "NPS Comments on the Environmental Assessment for the December 2017 Oil and Gas Sale (DOI-BLM-UT-GO10-2017-0028-EA)," at 2-3 (Aug. 22, 2017), https://eplanning.blm.gov/public_projects/nepa/80165/119058/145306/Dinosaur_National_Monument_Comment_Letter.pdf (last visited Jan. 21, 2022); Krish Vijayaraghavan *et al.*, Ramboll Environ US Corporation, "Colorado Air Resources Management Modeling Study (CARMMS): 2025 CAMx Modeling Results for the High, Low and Medium Oil and Gas Development Scenarios," 05-35899 (Aug. 2017) (prepared for BLM), https://www.blm.gov/documents/colorado/public-room/data (last visited Jan. 21, 2022).

[38] Thompson *et al.*, Modeling to Evaluate Contribution of Oil and Gas Emissions to Air Pollution, 67 Journal of the Air & Waste Management Association Vol. 4, at 455 (March 10, 2017. 2016), https://doi.org/10.1080/10962247.2016.1251508 (last visited Jan. 21, 2022); *see also id.* Figures and data, https://www.tandfonline.com/doi/suppl/10.1080/10962247.2016.1251508?scroll=top .

[39] Comment Letter to Texas at 24-29 ("Texas Ignores All Area Sources in its Four-Factor Analyses," the emissions from the oil and gas sector not considered by Texas include 17,293 of NOx and 8,322 SO_2.).

[40] NPCA raised its concern regarding the need for Four-Factor Analyses and control of emissions from oil and gas to Utah and EPA on several occasions, nevertheless, Utah Division of Air Quality (DAQ) indicates that it does not plan to address emissions from the oil and gas sector in its Regional Haze SIP, instead deferring to a future ozone SIP. NPCA and Utah DAQ Meetings (February 18, 2020 and May 28, 2020); NPCA and EPA Region 8 Meeting (July 7, 2021).

[41] Comment Letter to Florida at 23, 24, 25.

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In states where area and mobile source sectors contribute to much of the visibility impairing pollutions, we urge EPA to direct that those states ensure emissions from those source sectors are included in the Four-Factor Analyses and that the SIP contain enforceable emission limitations.

e. ***Sources with permits are not exempt from the Act's reasonable progress requirements.***

The reasonable progress requirements apply to all sources and a permit to construct does not exempt a source from the regional haze program. If a source is found subject to the required reasonable progress Four-Factor Analysis as a result of a state's reasonable progress screening process, the state must ensure the Analysis is conducted. Neither the Act nor EPA's rules provide an "off-ramp" for a source in this situation. Several states have exempted sources because of recently issued permits.[42]

f. ***States must not set thresholds that do not capture sufficient sources and emissions.***

The RHR requires each state to submit a long-term strategy that addresses the regional haze visibility impairment resulting from emissions from within that state and for each mandatory Class I Federal area located outside the State that may be affected by emissions from the State.[43] Regarding a state's source selection methodology EPA's Guidance explained:

> Whatever threshold is used, the state must justify why the use of that threshold is a reasonable approach, *i.e.*, why it captures a reasonable set of sources of emissions to assess for determining what measures are necessary to make reasonable progress.[44]

As EPA has further explained:

- [I]t may be difficult to show reasonableness of a threshold set so high that an uncontrolled or lightly controlled source that is one of the largest contributors to anthropogenic light extinction at a Class I area is excluded;[45]

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[42] *See e.g.*, Comment Letter to Washington - November 2021 at 14 (exempting Cardinal FG Winlock Glass Plant from Four-Factor Analysis).
[43] 40 C.F.R. § 51.308(f)(2).
[44] 2019 Guidance at 19, citing 40 C.F.R. § 51.308(f)(2)(i)("The State must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy.").
[45] 2019 Guidance at 19.

- [A] threshold that captures only a small portion of a state's contribution to visibility impairment in Class I areas is more likely to be unreasonable;[46] and
- [A] threshold that excludes a state's largest visibility impairing sources from selection is more likely to be unreasonable.[47]

There are a variety of ways states use high thresholds to screen out sources and emissions. First are the VISTAS states, which used an overly restrictive Area of Influence (AOI) analysis to identify which sources should be Particulate Matter Source Apportionment Technology ("PSAT") tagged, which failed to properly identify all sources contributing to adverse visibility conditions at VISTAS Class I areas.[48] "Most VISTAS states selected an AOI threshold in the range of 2-5% of the overall sulfate and/or nitrate impacts to identify emission sources contributing to visibility impairment. As a result, most states identified six or fewer contributing emission sources through the AOI analysis."[49]

Second, the VISTAS II CAMx modeling relied on a flawed PSAT modeling analysis that applied an outdated 2028 emissions inventory, provided incomplete information on source-specific contributions to visibility impairment, and carried forward known deficiencies in the modeled sulfate projections.[50] VISTAS coupled the flawed PSAT modeling analysis with a recommendation that only those sources which contribute 1% or greater to either the modeled sulfate or nitrate concentrations would be recommended for the Four-Factor Analysis.[51] As a result, VISTAS concluded that only a relatively small group of emission sources would be considered for the Four-Factor Analysis.[52]

Both screening methods used arbitrary, high thresholds that substantially restricted the total number of sources analyzed. NPCA's independent analysis identified 342 sources and NPS identified 256 sources – but VISTAS identified only 33 sources for all 14 states.[53] Many VISTAS states used a 3% AOI threshold for PSAT tagging and a 3% PSAT impact threshold[54] (some like North Carolina used 3% sulfate-only)[55] for the Four-Factor Analyses. These thresholds are arbitrary and unsupported in the SIPs. Lower thresholds would have resulted in many more AOI

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[46] July 2021 Clarification Memo at 3.
[47] July 2021 Clarification Memo at 3.
[48] Gebhart VISTAS Review Report at 2; *see also id.* at 9-14.
[49] Gebhart VISTAS Review Report at 2.
[50] Gebhart VISTAS Review Report at 2; *see also id.* at 9-14.
[51] Gebhart VISTAS Review Report at 2.
[52] Gebhart VISTAS Review Report at 2.
[53] Letter from Stephanie Kodish, NPCA, Leslie Griffith, SELC, and David Rogers, Sierra Club to VISTAS State Air Directors, "Significant Flaws in VISTAS Regional Haze CAMx Modeling and Methods; Recommendations to Develop Compliant State Implementation Plans" (May 12, 2021), at
[54] *See e.g.*, Comment Letter to Tennessee at 8; *see also* Comment Letter to Florida at 12; *see also* Comment Letter to North Carolina at 14; *see also* West Virginia at 23, 25.
[55] Comment Letter to North Carolina at 6.

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sources being PSAT tagged and many more PSAT-tagged sources being selected for Four-Factor Analyses.

Another example is MANE-VU, which used a 3.0 Mm^{-1} (inverse megameters) single source impact threshold for defining sources to evaluate with a Four-Factor Analysis, which results in an extremely high threshold that omits most sources from evaluation. Many states in the region have relied on this threshold.[56] Connecticut's reliance on the MANE-VU threshold resulted in a threshold that excluded every source in the State from the Four-Factor Analysis requirement,[57] demonstrating the need for states to evaluate and adjust the RPO-created thresholds for each Class I area. Similarly, Massachusetts, relying on MANE-VU's threshold, selected only two sources for Four-Factor Analyses, one of which ceased operation in the first planning period, 2017.[58]

EPA must ensure that screening thresholds are set to capture a significant degree of visibility impairing emissions. The 2016 Proposed Guidance set 80% of

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[56] *See e.g.*, Comment Letter to New Hampshire at ; *see also* Comment Letter to Connecticut at 7, 8; *see also* Comment Letter to Massachusetts at 7, 8; *see also* Comment Letter to New Jersey at 10, 11, 12, 13 (MANE-VU identified only one source in New Jersey state that exceeded its recommended 3.0 Mm-1 extinction threshold: the BL England coal and oil-fired power plant and NJDEP did not conduct a four-factor control analysis for the units at BL England because the units have essentially shut down.); *see also* Comment Letter to New York at 11, 12, 13, 14 (MANE-VU identified two sources in New York state that exceeded its recommended 3.0 Mm-1 extinction threshold: LaFarge Building Materials and Finch Paper. However, NYSDEC did not conduct a four-factor analysis of controls for these sources. Instead, NYSDEC seemed to rely on other programs and/or decisions made to reduce emissions and "their potential max extinction to below the 3.0 Mm-1 threshold." NYSDEC provided no details on these programs or whether such requirements were enforceable, did not quantify emissions reductions, and did not provide any new modeling to verify visibility impacts of these two sources with the reduced emissions.)

[57] Comment Letter to Connecticut at 8-9; *see also id.* at 9 (Based on the Q/d values, it's clear that Connecticut needs to conduct a Four-Factor Analysis for four municipal waste combustion sources to inform its reasonable progress determination, specifically: Wheelabrator Bridgeport LP; CRRA/Mid-Connecticut; Covanta Southeastern CT; and Wheelabrator Lisbon LP.

[58] Comment Letter to Massachusetts at 6 (By relying on the emission sources modeled by MANE-VU, MassDEP identified and selected only two point sources (EGUs) affecting Class I sites (Brayton Point unit 4 and Canal Station unit 1) out of which, Brayton Point, already ceased operations in 2017.); *see also id.* at FN28 ("The Federal Land Managers explained during their consultation with the State that this closure was during the first planning period and not the planning period for the SIP proposed for the second planning period – thus emissions cannot be used to offset emission for the second planning period. Email from Don Shepard, NPS, to Mark Wert (Nov. 23, 2020) ("Since Brayton Point was retired in 2017, i [sic] do not think its closure can be used to offset other emissions during this planning period.").

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emissions,[59] and the FLMs rely on this figure,[60] as have some states (*e.g.*, Oregon[61]). Our organizations submit that 80% is an appropriate metric. EPA should apply the 80% threshold, including in future guidance.

2. States must not unjustifiably dismiss emission reduction measures that, if appropriately assessed, would satisfy the Four-Factor Analysis.

a. States must not assert visibility benefits are too small.

While visibility is the goal of the regional haze program,[62] the reasonable progress Four-Factor Analysis evaluation does not itself incorporate visibility.[63] Because visibility is not one of the four statutory factors, a state cannot rely on visibility impacts to exclude emission reducing measures from sources that otherwise satisfy the four statutory factors. The plain language of the Act clearly bounds the information for each of the factors. Therefore, it is inconsistent with the Act's Four-Factor analysis for a state's existing and future RP analyses to consider information outside the bounds of these factors (*e.g.*, air quality impacts, modeling results, and emission inventories).[64] Additionally, where a state includes visibility as additional weight-of-evidence in its decision-making to reject controls, this too is inconsistent with the Act.

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[59] EPA, "Draft Guidance on Progress Tracking Metrics, Long-term Strategies, Reasonable Progress Goals and Other Requirements for Regional Haze State Implementation Plans for the Second Implementation Period," EPA-457/P-16-001 (July 2016), at 72 ("The EPA considers 80 percent to be a reasonably large fraction for this purpose in the second planning period. If an approach does not reach this 80 percent inclusion level, the threshold for major stationary sources, minor stationary sources and/or categories of area stationary sources should be reassessed for reasonableness.[103]"); *see also id.* FN103 ("This recommendation based on 80 percent of the aggregate light extinction impacts may not be fully applicable when Q/d is used as a surrogate for visibility impacts. Mechanically, it is possible to compare the sum of the individual Q/d values for the "above threshold sources" to the sum of the Q/d values for all in-state sources, but this may not give a good indicator of what fraction of in-state light extinction impacts are attributable to the first set of sources. A state planning on relying on Q/d, or another surrogate, for screening purposes should consult with its EPA regional office about the specifics of its planned screening approach."), https://www.epa.gov/sites/default/files/2016-07/documents/draft_regional_haze_guidance_july_2016.pdf.

[60] *See, e.g.*, South Carolina Regional Haze Plan, App'x H-1 at pdf page 7.

[61] *See e.g.*, Oregon Department of Environmental Quality, "Regional Haze: 2018-2028 State Implementation Plan, Public Notice Draft" (Aug. 27, 2021), https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/RHSIP2021plan.pdf (last visited Jan. 21, 2022).

[62] 42 U.S.C. § 7491(a)(1).

[63] The Act provides that "in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." 42 U.S.C. § 7491(g)(1).

[64] The regional haze program takes air quality impacts into consideration in selecting which sources are evaluated for the RP Four-Factor Analysis, and to apply that same metric twice is not consistent with how Congress designed the program.

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Many states assert that visibility benefits are too small as an excuse to avoid controlling sources, including when cost-effective controls are identified via a Four-Factor Analysis. Visibility is not a fifth factor RP consideration under the Act.[65] For example, Texas identified at least 18 facilities for which there were cost-effective controls available, but the State refused to impose control measures at any of those sources because the visibility benefits would purportedly be too small and the annualized, aggregate cost of controls would be too large.[66] Other states that required no controls based on small visibility benefits, despite Four-Factor Analyses with cost-effective controls include: Tennessee;[67] Nebraska;[68] North Carolina;[69] and Washington.[70]

This approach is inconsistent with the Act, and EPA must ensure that states remove consideration of visibility (or the purported lack of perceptible visibility improvements) in selecting emission controls. While visibility is the goal of the regional haze program, *id.* at 7491(a)(1), the four-factor reasonable progress evaluation does not itself incorporate visibility, and states may not give it the same weight as the four statutory factors. Regional haze is "visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area."[71] At any given Class I area, hundreds or even thousands of individual sources may contribute to regional haze. Thus, it is *not* appropriate to reject a control measure for a single emission unit, a single source, or even a group of sources on the basis of the associated visibility benefits being imperceptible to the human eye.

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[65] *See e.g.*, Comment Letter to South Carolina at 68-69 ("Because DHEC has used visibility impacts (or supposedly minimal or insufficient visibility improvements) to reject emission controls at a number of large air pollution sources, the Proposed SIP is at odds with the plain language of the CAA. South Carolina cannot rely on visibility impacts to exclude emission reducing measures from sources that otherwise satisfy the four statutory factors.").

[66] Comment Letter to Texas at 20-22 ("Texas' Approach to Weighing Cost-Effectiveness to Visibility Impact is Flawed"); *see also* Texas Commission on Environmental Quality, 2021 Regional Haze State Implementation Plan at 7-14 to 7-15 (June 20, 2021).

[67] Comment Letter to Tennessee at 57.

[68] Comment Letter to Nebraska at 2.

[69] Comment Letter to North Carolina at 3.

[70] Comment Letter to Washington - November 2021 at 16, 44 (deferring all sources in the pulp and paper mill sector from conducting the required Four-Factor Analyses, despite the McKinley Paper Company having the second highest Q/d value (83.1) of any facility for which Ecology requested four-factor analyses; and the three other pulp and paper mills being in the top ten highest Q/d values as calculated by Ecology – the WestRock Tacoma facility, the Nippon Dynawave Packaging Company in Longview, and the Pt Townshend Paper Corporation); *see also* Comment Letter to Indiana at 13, citing 40 C.F.R. § 51.308(f)(2)(i); *see also id.* (explaining that "the state has an obligation to explain 'the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy'" citing at FN53 *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

[71] 40 C.F.R. § 51.301.

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As a fundamental matter, EPA must affirm the fundamental principle that the degree of visibility improvement may not be used as screening metric to avoid a four-factor control analysis. Nor may states use the lack of visibility improvement as a factor that overrides controls that otherwise satisfy a four factor reasonable progress analysis. In other words, at the control analysis stage, states should consider *only* the four statutory factors to determine whether control measures are necessary to achieve reasonable progress. The Regional Haze Rule and EPA's 2019 Guidance make clear that states cannot weigh the visibility benefit of controls against the four statutory factors to identify appropriate control measures. Rather, for each source or source category that is selected for further analysis during the screening process, states would require whatever control measures are determined upon considering the four statutory factors alone.

b. States must independently review industry Four-Factor Analysis instead of assuming their correctness and adopting them without question.

The duty to ensure reasonable progress requirements are met for purposes of submitting a SIP to EPA rests with the state, not the source. Therefore, if a source is unwilling to prepare the analysis, the state must conduct the analyses to inform its reasonable progress determination. As discussed below in section 2.b, we ask that EPA support states' use of EPA's tools (*e.g.*, Control Cost Manual) to create their own Four-Factor Analyses). Moreover, it is the state's responsibility to independently review, evaluate and verify a draft Four-Factor Analysis submitted by a source and submit a SIP that complies with the Act.[72] A state must not "rubber stamp" a source's analysis. Despite the requirement for states to conduct an independent emission control analyses for any sources many states did not,

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[72] 40 C.F.R. § 51.308(f)(2)(i)(" *The State* must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment. The State should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources. *The State* must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy. In considering the time necessary for compliance, if the State concludes that a control measure cannot reasonably be installed and become operational until after the end of the implementation period, the State may not consider this fact in determining whether the measure is necessary to make reasonable progress." (emphasis added); *see also* 42 U.S.C. § 7491(g)(1); *see also* 40 C.F.R. §§ 51.308(d)(3), (f)(2)(i); *see also* 42 U.S.C. §§ 7410(a)(2)(A); 7491(b)(2) (SIP must include among other things, requiring enforceable emission limitations necessary to ensure reasonable progress).

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including, Indiana,[73] Florida,[74] Louisiana,[75] Ohio,[76] South Carolina,[77] Tennessee,[78] Texas.[79] The lack of independent review by states arose in other areas as well, for example, states: relied on flawed RPO source screening analyses and did not evaluate an adequate number of sources and emissions;[80] neglected to consider and respond to FLM comments;[81] and did not review information provided during interstate consultation.[82] Indeed, as the Regional Haze Rule makes clear, the *state* has a duty to conduct a "robust" analysis of potential reasonable progress controls, and must "document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects."[83] If a source prepares a flawed, incomplete or undocumented Four-Factor Analysis, the state must either require the source to make the necessary corrections or make the corrections itself and ensure that the Four-Factor Analyses is accurately and completely documented *before* the start of the public notice and comment period.[84] This lack of basic documentation not only precludes the state and any independent reviewer from

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[73] Comment Letter to Indiana at 4, 12-15.
[74] Comment Letter to Florida at 14, 15, 16, 18, 19, 20, 21, 22.
[75] Comment Letter to Louisiana at 2, 9-12.
[76] Comment Letter to Ohio at 13 (General James M. Gavin Power Plant, Kyger Creek Power Plant).
[77] Comment Letter to South Carolina at 18.
[78] Comment Letter to Tennessee at 21.
[79] Comment Letter to Texas at 11 ("This lack of documentation for the basic data that prevents an independent reviewer from replicating most of Texas' control cost analyses violates multiple portions of section 51.308..." *citing* 40 C.F.R. §§ 51.308(f), (f)(2)(iii), (f)(3)(ii)(B).).
[80] Similarly, where a Regional Planning Organization's reasonable progress analyses are flawed, the state must conduct must conduct independent analyses to inform its reasonable progress determination. *See e.g.*, Comment Letter to Connecticut at 5-12 (reliance on MANE-VU's assessments); *see also* Comment Letter to Florida at 10-13 (reliance on VISTAS flawed methodology for source selection); *see also* Comment Letter to Massachusetts at 5-12 (reliance on MANE-VU's assessments); *see also* Comment Letter to North Carolina at 11-14, (reliance on VISTAS flawed methodology for source selection); *see also* Comment Letter to South Carolina at 19-23 (reliance on VISTAS flawed methodology for source selection); *see also* Comment Letter to Tennessee at 17-21 (reliance on VISTAS flawed methodology for source selection).
[81] States also do not respond to the FLMs' comments on Four-Factor Analyses prepared by the sources, which indicates a state, fully supports the company's assertions. *See e.g.*, Comment Letter to Ohio at 20.
[82] *See e.g.*, Comment Letter to South Carolina at 52 ("... there is nothing in South Carolina's SIP that demonstrates DHEC conducted an independent evaluation of what it received from Pennsylvania and Ohio.); *see also* Comment Letter to Tennessee at 38 ("For the states TDEC did hear from and what information we found for the states that did not respond, there is nothing in the Draft SIP that demonstrates TDEC conducted an independent evaluation of what it received and found from the other states. Instead, TDEC sums up its state-to-state consultations by saying it "agrees with all of the decisions made by other state agencies concerning the emission sources ..."*citing* Draft SIP at 218.); *see e.g.* Comment Letter to West Virginia at 64-65.
[83] 40 C.F.R. § 51.308(f)(2)(iii).
[84] *See e.g.*, Comment Letter to Indiana at 12-15 (IDEM Failed to Conduct Any Independent Emission Control Analyses for Any Sources).

ED_014341_00000012-00080

verifying the respective utility modeling or control cost analyses, but it is contrary to the Act and the RHR.[85]

In nearly all SIPs reviewed, the states accept source claims regarding costs with little to no documentation (specifically capital costs). Additionally, despite EPA final actions during the first planning period disapproving the use of flawed information, the states continue to use: improper interest rates;[86] equipment life;[87] and disallowed costs such as escalation during construction;[88] Allowance for Funds Used During Construction ("AFUDC");[89] contingency factor;[90] and owners costs.[91, 92] Moreover, states routinely only consider controls if they are in the RACT, BACT, LAER Clearinghouse ("RBLC").[93] While EPA created the RBLC to be used as a data

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[85] 2019 Guidance at 22.

[86] *See e.g.*, Comment Letter to Florida at 21, 22, 34; *see also* Comment Letter to Indiana at 24, 27, 29, 32, 35, 41; *see also* Comment Letter to Louisiana at 15, 16, 26, 27; *see also* Comment Letter to North Carolina at 21; *see also* Comment Letter to Ohio at 12, 14, 20, 39-42, 44; *see also* Comment Letter to South Carolina at 44-48; *see also* Comment Letter to Tennessee at 21, 30-32; *see also* Comment Letter to Texas at 8, 9, 12, 13, 14, 16; *see also* Preliminary Comment Letter to Virginia at 5, 6; *see also* Letter to Washington at 33, 36, 38, 40-42, 45, 46-50.

[87] *See e.g.*, Comment Letter to Florida at 21, 33; *see also* Comment Letter to Indiana at 29, 32, 35, 41; *see also* Comment Letter to Louisiana at 15, 27; *see also* Comment Letter to North Carolina at 21; ; *see also* Comment Letter to Ohio at 12, 15, 20, 39, 41, 42, 47, 48; *see also* Comment Letter to Tennessee at 21, 30, 31, 32; *see also* Comment Letter to Texas at 8, 11 (FN 35), 12-14, 16; *see also* Preliminary Comment Letter to Virginia at 5; *see also* Comment Letter to Washington - November 2021 at 50.

[88] *See e.g.*, Comment Letter to Louisiana at 16; *see also* Comment Letter to Tennessee at 29, 30, 31, 32; *see also* Comment Letter to Washington - November 2021 at 34.

[89] *See e.g.*, Comment Letter to Florida at 22, 35; *see also* Comment Letter to Ohio at 14; Comment Letter to South Carolina at 44, 45; *see also* Comment Letter to Tennessee at 28; *see also* Comment Letter to Texas at 16.

[90] *See e.g.*, Comment Letter to Louisiana at 16; *see also* Kordzi Report for Tennessee at 29-30, 31, 32.

[91] *See e.g.*, Comment Letter to Florida at 35; *see also* Comment Letter to Louisiana at 16.

[92] *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201, 1212 (10th Cir. 2013) (holding EPA has a reasonable basis for rejecting cost estimates where the agency explained the estimates "contain[ed] ... fundamental methodological flaws, such as including escalation and Allowance for Funds Used During Construction (AFUDC)..." and that "[t]he cost of scrubbers would not be substantially higher than those reported for other similar projects if OG & E had used the costing method and basis, i.e., overnight costs in current dollars, prescribed by the Control Cost Manual...") (internal citations omitted).

[93] EPA, RBLC, https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information#:~:text=EPA%20established%20the%20RACT%2FBACT%2FLAER%20Clearinghouse%2C%20or%20RBLC%2C%20to,agencies%20and%20to%20aid%20in%20future%20case-by-case%20determinations (The terms "RACT," "BACT," and "LAER" are acronyms for different program requirements under the NSR program. **RACT, or Reasonably Available Control Technology**, is required on existing sources in areas that are not meeting national ambient air quality standards (*i.e.*, non-attainment areas). **BACT, or Best Available Control Technology**, is required on major new or modified sources in clean areas (*i.e.*, attainment areas). **LAER, or Lowest Achievable Emission Rate**, is required on major new or modified sources in non-attainment areas.")

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base of air pollution technology information it is not a comprehensive compilation.[94] There is also a general lack of documentation for all issues relating to the Four-Factor Analyses, including: capital, operational and maintenance costs;[95] unit-specific emissions;[96] retrofit factors;[97] and the other information necessary for an analysis.[98] In many instances, states use inaccurate information, which inflates the cost-effectiveness calculations. As discussed below, these errors appear despite early and detailed comments from the FLMs pointing out the need for corrections.

Additionally, most of the proposed SIPs do not include any information on unit-specific emissions, making it impossible for the public to review, comment and determine if correct units in a facility are being analyzed, and the historical emissions of the units being analyzed. The public cannot meaningfully comment on the proposed SIPs. Moreover, commenters are forced to submit state freedom of information requests for the unit-specific emission information, which are generally ignored, untimely and/or incomplete. In short, the states' reasonable progress analyses and long-term strategies that lack this information are arbitrary, unlawful, and unapprovable because the agencies fail to consider the relevant statutory and regulatory factors, and fail to articulate a rational connection between the facts in the record and the agencies' final decision.[99]

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[94] *See e.g.*, Comment Letter to Florida at 18, 19; *see also* Kordzi Report on Florida at 14, 15, 25; *see also* Comment Letter to Texas at 17, 18; *see also* Klafka Report on Ardagh Glass at 8 ("There have been additional emission control projects in the U.S. which have not been subject to the PSD regulations so are not documented in the BACT Clearinghouse. These also provide insight into demonstrated emission control methods.").

[95] *See e.g.*, Kordzi Report on Florida at 20, 21, 23, 25, 32, 34; *see also* Comment Letter to Indiana at 21, 26, 32, 33, 36, 37, 38, 40, 41, 53; *see also* Kordzi Report on North Carolina at 45; *see also* Comment Letter to Ohio at 14 FN 42; *see also* Comment Letter to South Carolina at 40, 43, 46; *see also* Comment Letter to Tennessee at 33.

[96] Comment Letter to Michigan at 16-17 ("...EGLE has not presented adequate emissions inventory information, it is not possible for an independent reviewer to validate EGLE's source selection methodology, nevertheless, a number of sources have been identified that were not covered by EGLE in its SIP, including LaFarge Midwest Inc., EES Coke Battery LLC, and U.S. Steel Great Lakes Works –these are sources of visibility impairing pollution identified through NPCA analysis of emissions and distance to Class I areas. EGLE should therefore either discuss why it has not considered the above listed facilities or conduct four-factor analysis on these facilities.").

[97] *See e.g.*, Comment Letter to Florida at 34; Comment Letter to Indiana at 31-32, 41; Kordzi Report on North Carolina at 43-46; Comment Letter to Ohio at 14, 15, 20 (Comment from the FLMs); Comment Letter to South Carolina at 44, 45; Kordzi Report on Tennessee at 34-35; Comment Letter to Washington - November 2021 at 33, 38, 41, 46, 48, 49.

[98] Specific details regarding the states' reliance on the industry-prepared flawed Four-Factor Analyses information is discussed in the expert reports included with the Conservation Organizations' comment letters.

[99] *State Farm*, 463 U.S. at 43; *see also North Dakota v. EPA*, 730 F.3d at 761 (A state's regional haze plan must be "reasonably moored to the Act's provisions" and based on "reasoned analysis" of the facts); *see also Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"); *see also State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious if, among other things, "the agency

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In addition to ensuring that SIPs include complete and documented Four-Factor Analyses, we ask that EPA provide additional support for using its EGU cost calculation spreadsheets for other source types when there is a lack of documentation (*e.g.*, Washington used EPA's spreadsheets when companies submitted costs without documentation, but then said the State needed to conduct further analysis before a finding of cost effectiveness could be made).[100]

EPA must insist that SIPs provide for meaningful public review and comment, and that proposed SIPs be accurate, complete and fully documented *prior* to the start of public comment.

c. *States must not rely on arguments that a source is "effectively controlled."*[101]

States are misinterpreting EPA's 2019 Guidance on "effectively controlled" sources and/or failing to provide analysis to support their determinations.[102] EPA's 2019 Guidance states that it may be reasonable for a state not to select an

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has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *see also North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013) (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485, 490 (2004) (EPA must ensure that the state's regional haze plan is "reasonably moored to the Act's provisions" and based on "reasoned analysis" of the facts)).

[100] Comment Letter to Washington - November 2021 at 30-31, 34, 37, 41; *see also* Kordzi Report on Ohio at 32 (explaining that the "Sargent and Lundy (S&L) wet and dry scrubber cost algorithms commissioned by EPA for use in its IPM modeling" are discussed in the Control Cost Manual and allows their use, but cautions that they must be modified to remove AFUDC and owner's' costs,[50]" FN50 citing Control Cost Manual, Chapter 1 Wet and Dry Scrubbers for Acid Gas Control, April 2021, page 1-49); *id.* (The Kordzi Report further explains that "[t]hese cost algorithms, along with the described adjustments have been made and utilized by EPA in the past, including its Texas BART FIP,[51]" (citation omitted)).

[101] July 2021 Clarification Memo at 5. Our comment letters also present this issue as a state relying on what it asserts are the "best performing controls" without providing a technical justification and analyses.

[102] *See e.g.*, Comment Letter to Florida at 13, 14, 17, 18, 19, 20; *see also* Comment Letter to North Carolina at 24 FN128, 41; *see also* Comment Letter to New Jersey at 16-17; *see also* Comment Letter to New York at 23-24, 26; *see also* Comment Letter to Ohio at 12, 13, 20 FN69; *see also* Comment Letter to South Carolina at 3, 25-26, 34, 44, 52 (regarding Pennsylvania's assertions that Units 1 and 3 at Genon NE Mgmt Co /Keystone Generating Station), 53-54 (regarding Ohio's assertions that Boilers B003 and B004 at the Gavin Power Plant), 58 (NPS consultation comments); *see also* Comment Letter to South Carolina at 29; *see also* Comment Letter to Tennessee at 43 (FLMs consultation comments); *see also* Kordzi Report on Tennessee at 19-20; *see also* Comment Letter to West Virginia at 26, 34, 35, 59, 61 (NPS consultation comment), 67 (regarding Kentucky's assertions for Units 1 and 4 at the Tennessee Valley Authority - Shawnee Fossil Plant), at 67-69 (regarding Ohio's assertions at Cardinal Operating Company - Cardinal Power Plant, Lightstone Generation LLC - General James M. Gavin Power Plant, Ohio Valley Electric Corp. - Kyger Creek Generating Station).

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"effectively controlled source" for controls in its regional haze plan, but EPA was referring to sources which had pollution controls installed recently to meet a Clean Air Act requirement for which there is a low likelihood of technological advancement in controls that could provide further reasonable progress.[103] Even for sources with recent pollution controls installed or that are otherwise effectively controlled, EPA's 2019 Guidance still requires that a state that does not select such a source for evaluation of controls to meet reasonable progress to "explain why the decision is consistent with the requirement to make reasonable progress, i.e., why it is reasonable to assume for the purposes of efficiency and prioritization that a full four-factor analysis would likely result in the conclusion that no further controls are necessary."[104] Moreover, SIPs that rely on the "effectively controlled" argument, must show that a Four-Factor Analysis would likely result in the conclusion that no further controls are necessary.[105]

Indeed, EPA has previously indicated that scrubber and SCR systems should be assessed for upgrades and that these upgrades are likely very cost-effective.[106] EPA's July 2021 Clarification Memo underscores this point making clear that in evaluating reasonable progress for all sources, states should consider the "full range of potentially reasonable options for reducing emissions . . . [and] may be able to achieve greater control efficiencies, and, therefore, lower emission rates, using their

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[103] 2019 Guidance at 22.

[104] 2019 Guidance at 22.

[105] 2019 Guidance at 19; *see also* July 2021 Clarification Memo at 5.

[106] *See, e.g.*, 40 C.F.R. § 51.308(f)(2)(i) (The State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment."); *see also* 82 Fed. Reg. at 3088 ("Consistent with CAA section 169A(g)(1) and our action on the Texas SIP, a state's reasonable progress analysis must consider a meaningful set of sources and controls that impact visibility. If a state's analysis fails to do so, for example, by . . . failing to include cost-effective controls at sources with significant visibility impacts, then the EPA has the authority to disapprove the state's unreasoned analysis and promulgate a FIP.").

Even if a source has a limited remaining useful life, EPA's Guidance contemplates that states consider cost-effective operational upgrades. Regional Haze Rule Guidance § II.B.3(f) ("If a control measure involves only operational changes, there typically will be only small capital costs, if any, and the useful life of the source or control equipment will not materially affect the annualized cost of the measure."); *see also* 70 Fed. Reg. 39,103, 39,171 (July 6, 2005) (where EPA has made it a point in past actions to ensure that existing controls are examined to determine if they can be cost-effectively upgraded. For instance, the 2005 BART revision to the Regional Haze Rule devotes several paragraphs to specific potential scrubber upgrades it recommends be examined.); *see also* 81 Fed. Reg. 295, 305 (Jan. 5, 2016) (EPA also demonstrated that scrubber upgrades to a number of coal-fired power plants utilizing outdated and inefficient scrubber systems were highly cost-effective, and could achieve removal efficiencies of ninety-five percent which is near the ninety-eight to ninety-nine percent removal efficiencies of newly-installed scrubber systems.); *see also* 82 Fed. Reg. 3078, 3088 (Jan. 10, 2017) (EPA noted in its 2017 Regional Haze Rule revision, EPA disapproved Texas' four-factor analysis in part because "it did not include scrubber upgrades that would achieve highly cost-effective emission reductions that would lead to significant visibility improvements.").

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existing measures."[107] Therefore, a state must first subject a source to a Four-Factor Analysis under section 51.308(f)(2)(i) before it is able to determine whether there are no emission reducing options available (including upgrades to existing controls).

Contrary to these requirements, many states suggest that where a (non-regional haze) standard is good enough for another program it's good enough for reasonable progress (*e.g.*, RACT in Washington, MATS and other existing programs/requirements for the VISTAS states[108]). Nearly all states do not consider upgrades/optimizations to existing controls or operating SCRs[109] and requiring controls all year.[110]

Contrary to the state's determinations regarding "effectively controlled"—every state we assessed thus far has EGUs with scrubber and/or SCR systems that are easily determined by our experts to be underperforming (*e.g.*, Indiana,[111]

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[107] July 2021 Clarification Memo at 7.

[108] *See e.g.*, Comment Letter to Florida at 13, 14, 15, 16, 21, 26, 27 FN129; see also Comment Letter to New York at 24 (NPS consultation comment); *see also* Comment Letter to South Carolina at 25-27, 34, 52-53 (Pennsylvania erroneously relied on the MATS rule for its analysis of the Genon NE Mgmt Co / Keystone Generating Station), 58 (NPS consultation comments), 66; *see also* Comment Letter to Michigan at 15-16; *see also* Comment Letter to Tennessee at 51; *see also* Comment Letter to West Virginia at 26-27, 34, 35, 67 (Kentucky's assertions regarding Units 1 and 2 at the Tennessee Valley Authority - Shawnee Fossil Plant), 71-72 (Pennsylvania erroneously relied on the MATS rule for its analysis of the Genon NE Mgmt Co / Keystone Generating Station), 75; additionally states also erroneously excuse sources from a Four-Factor Analyses if they are meeting NAAQS (current and future), NSPS, MACT, NESHAP, BACT, BART, CAIR, CSAPR, have a Title V permit, or LAER requirements).

[109] *See e.g.*, Comment Letter to Florida at 16, 17, 20, 21, 31, 32, 33, 34, 39; *see also* Comment Letter to Indiana at 15, 20, 21, 25, 26, 35, 42, 43, 44; *see also* Comment Letter to Louisiana at 13, 18; *see also* Comment Letter to North Carolina at 3, 8, 15, 23 (North Carolina did not consult with Ohio regarding the Cardinal Power Plant and Kyger Creek Power Plant, where upgrades must be considered), 23-24 (North Carolina did not consult with Pennsylvania regarding upgrades at the Seward Power Plant), 24-25; *see also* Comment Letter New Jersey at 17-19; *see also* Comment Letter to New York at 27, 29; *see also* Comment Letter to Ohio at 21, 22; *see also* Comment Letter to South Carolina at 27, 28, 29, 33, 34, 35, 36, 46, 48, 52-53, 58 (NPS consultation comment), 73, 74; *see also* Comment Letter to Michigan at 16; *see also* Comment Letter to Tennessee at 29, 40, 41, 61, 62; *see also* Comment Letter to Texas at 9, 10, 11, 12, 13, 18 FN51, 37.

[110] *See e.g.*, Comment Letter to Indiana at 24; *see also* Comment Letter to New Jersey at 15, 16, 17; *see also* Comment Letter to New York at 23, 24, 25, 26; *see also* Comment Letter to Ohio at 13, 21; *see also* Comment Letter to Washington - November 2021 at 29; *see also* Comment Letter to South Carolina at 36; *see also* Comment Letter to Tennessee at 44-45.

[111] Kordzi Report on Indiana at 11 (Duke Gibson Unit 1), 14 ("The [AEP] Rockport SCR systems have been underperforming since they came online."), 21 (Petersburg), 24 (Cayuga).

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Ohio,[112] North Carolina,[113] Louisiana,[114] South Carolina,[115]). As explained in several of the Kordzi Reports, the fact that an EGU is equipped with the most effective control *technology* (e.g., scrubbers and/or Selective Catalytic Reduction ("SCRs")) does not mean those controls are operating at their most effective levels.[116] "In Ohio, the State did not consider its EGUs because they have scrubbers installed—notably, the scrubbers were installed in the mid-1990s and have poor emission control rates.[117] Furthermore, emissions from units with SIP enforceable retirements dates five or more years away could still be reduced by using low sulfur coal, upgrading existing controls, or installing cost effective controls such as Dry Sorbent Injection ("DSI"), Selective Non-Catalytic Reduction ("SNCR"), and other controls.

EPA must give effect to its July 2021 Clarification Memo, and not approve SIPs that that erroneously rely on the "effectively controlled" argument to avoid the Four-Factor Analyses.

d. States must establish cost-effectiveness thresholds that are higher than the first round.

Cost-effectiveness thresholds for the second planning period should be higher than the first round, which at a minimum supports requirements that result in controls already required at similar sources. As we've expressed in our comments, we are concerned with some states using the same $5,000 per ton threshold as last round for cost analysis[118] or dismissing any cost of control. For example, Ohio,

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[112] *See generally* Kordzi Report on Ohio at 5-7; *id.* at 10 (Cardinal); *id.* at 13 (Bayshore); *id.* at 14 (Gavin); *id.* at 21 (Kyger Creek only utilizes its SCR systems at their full capabilities during ozone season); *id.* at 23-25 (W H Sammis).

[113] Kordzi Report on North Carolina at 15-18 (Marshall Power Plant); *id.* at 18-21 (Duke Energy Belews Creek Power Plant); *id.* at 21-24 (Duke Energy Roxboro Power Plant); *id.* at 24-26 (Duke Energy Cliffside Power Plant).

[114] Stamper Report on Louisiana at 35 (R.S. Nelson); *id.* at 46 Big Cajun II; *id.* at 58 (Brame Energy Center); *id.* at 66 (Ninemile).

[115] *See generally* Kordzi Report on South Carolina at 16 ("As is demonstrated elsewhere in this report, there are a number of sources with likely cost-effective NOx controls that SC DHEC should have required to be assessed for four-factor analyses. For instance, examples are cited of EGUs that already have installed the best NOx control available—SCR systems. In every case, these EGU SCR systems have demonstrated an ability to control NOx to a much higher level than they are currently achieving. The only apparent reason for this lax performance is that SC DHEC's permits do not require them to perform better. Thus, the "control" that would be evaluated would likely involve little to no capital expense, since the infrastructure is already present. Instead, the costs that would be evaluated may well be confined to additional reagent and perhaps better catalyst management.")

[116] *See e.g.,* Kordzi Report on Ohio at 13.

[117] Comment Letter to Ohio at 12-16.

[118] This is despite First Round SIPs that resulted in a wide range of cost-effectiveness values that states and EPA found acceptable, including values over $5,000/ton. *See, e.g.*, Comment Letter to Texas at 19 ("On page 7-12, and in on page B-14 of Appendix B, Texas discusses its rationale for establishing a cost-effectiveness threshold of $5,000, over which it does not consider any control,

North Carolina and Michigan are examples of states that did not identify a cost-effectiveness control threshold and instead created their own concoction of why they need not consider or require emission reduction measures. In contrast, several states are using a cost-effectiveness threshold of $10,000 per ton (*e.g.*, Oregon[119] and Colorado),[120] which demonstrates the reasonable approach of ratcheting up of costs from one planning period to the next. In its Regional Haze Guidance and consistent with its regulations, EPA advises states to exercise caution in establishing the cost-effectiveness threshold:

> As the Ninth Circuit explained in *NPCA v. EPA*, 788 F.3d at 1142, the Regional Haze Rule does not prevent states from implementing "bright line" rules, such as thresholds, when considering costs and visibility benefits. However, the state must explain the basis for any thresholds or other rules (see 40 CFR 51.308(f)(2)). If a state applies a threshold for any particular metric to remove control measures from further consideration before all other relevant factors are considered, it should explain why its selected threshold is appropriate for that purpose, i.e., why its application is consistent with the requirement to make reasonable progress.[121]

We request that EPA presume a control is cost-effective if it is operating or required at similar sources (including voluntary installations used to avoid PSD or

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regardless of visibility impact. Texas describes how it considered $2,700/ton and $10,000/ton thresholds, but concluded that $5,000 represented a "reasonable mid-point." This choice by Texas is completely arbitrary. No information was presented that would discriminate $5,000/ton from $7,500/ton or some other value.").; *see also*, Comment Letter to Indiana at 17-18 (Texas is using $5,000/ton as a cost effectiveness threshold. *see* /https://www.tceq.texas.gov/assets/public/implementation/air/sip/haze/2021RHSIP_pro.pdf (last visited Jan. 21, 2022); Arizona is using $4,000 to $6,500/ton. *see*, e.g., Arizona Department of Environmental Quality, 2021 Regional Haze Four-Factor Initial Control Determination, Tucson Electric Power Springerville Generating Station, at 15, https://www.azdeq.gov/2021-regional-haze-sip-planning (last visited Jan. 21, 2022); New Mexico is using a floor of $7,000 per ton. *see* NMED and City of Albuquerque, Regional Haze Stakeholder Outreach Webinar #2, at 12, https://www.env.nm.gov/air-quality/wpcontent/uploads/sites/2/2017/01/NMED_EHD-RH2_8_25_2020.pdf.

[119] Oregon is using $10,000/ton or possibly even higher. *See, e.g.*, September 9, 2020 letter from Oregon Department of Environmental Quality to Collins Forest Products, at 1-2, https://www.oregon.gov/deq/aq/Documents/18-0013CollinsDEQletter.pdf (last visited Jan. 21, 2022).

[120] "Prehearing Statement of the Colorado Department of Public Health and Environmental, Air Pollution Control Division," *In the Matter of Proposed Revisions to Regulation No 23* (Oct. 7, 2021) at 7, (further explaining that "[t]his threshold is applied to the individual pollutants in the control strategy analyses, specifically NOx, PM, and SO_2. This threshold value is an increase from Round 1 and reflects the fact that with each successive round of planning, less costly and easier to implement strategies have already been adopted. Colorado has maintained this threshold throughout the planning process despite the fact that each of the Class I areas in Colorado is below the URP for 2028."), https://drive.google.com/file/d/1e0Qy1qFQERRcGcvHUHihLZGOzjRvqUW4/view?usp=sharing (last visited Jan. 21, 2022).

[121] 2019 Guidance at 38.

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other requirements). Generally, controls should be considered cost effective for the source in question unless there are documented unique circumstances. Further, the cost threshold should not be maintained at last round levels, but each round should come with the presumption that cost thresholds must be higher. Moreover, as the Clean Air Act is a technology-forcing statute, it is fitting for states to consider newer applications of control technologies or practices used at an industry or that could be applied across industries to limit emissions to the extent practicable.

3. Reasonable progress determinations must comport with the legal requirements.

Many of the issues discussed above are incorporated into the reasonable progress determination, including costs too high and/or visibility benefits too small to justify controls, and reliance on announced retirements to justify a "no control" decision. Other approvability issues include the following.

a. The Uniform Rate of Progress glidepath is not a safe harbor.

As EPA's 2021 July 2021 Clarification Memo reiterated, SIPs "that conclude that additional controls, including potentially cost-effective and otherwise reasonable controls, are not needed because all of the Class I areas in the state (and those out-of-state areas affected by emissions from the state) are below their uniform rates of progress (URPs)" have not "answer[ed] the question of whether the amount of progress made in any particular implementation period is 'reasonable progress.'"[122] EPA explained that its "2017 RHR preamble and the August 2019 Guidance clearly state that it is not appropriate to use the URP in this way, *i.e.,* as a 'safe harbor.'"[123] In a similar vein, many states assert that control analyses were not necessary considering the significant progress already made towards achieving the national visibility goal.[124] Yet other states asserted that additional controls for

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[122] July 2021 Clarification Memo at 15.

[123] July 2021 Clarification Memo at 15-16; *see also* EPA Guidance at 25; *see also* 82 Fed. Reg. 3078, 3093, 3099-3100 (Jan. 10, 2017); *see also* 81 Fed. Reg. 66,331, 66,631 (Sept. 27, 2016); *see also* 81 Fed. Reg. 296, 326 (Jan. 5, 2016) (determining, as part of the reasonable progress federal implementation plan for Texas, "the uniform rate of progress is not a 'safe harbor' under the Regional Haze Rule."); *see also* EPA, Responses to Comments at 120, Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan: Best Available Retrofit Technology and Interstate Transport Provisions, EPA Docket No. EPA-R06-OAR-2016-6011 (June 2020) ("EPA has repeatedly and consistently taken the position that meeting a specific reasonable progress goal is not, itself, a "safe harbor," and does not relieve the state of the obligation to consider additional measures for reasonable progress. If it is reasonable to make more progress than the URP, a state must do so, as EPA explained in the 1999 regional haze rule) (citing 64 Fed. Reg. at 35732); *see also* 81 Fed. Reg. at 66,370 ("EPA's longstanding interpretation of the regional haze rule is that 'the URP does not establish a 'safe harbor' for the state in setting its progress goals.") (quoting 79 Fed. Reg. 74818, 74834)).

[124] *See e.g.,* Comment Letter to Indiana at 52.

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the EGUs are not necessary to ensure reasonable progress toward natural visibility in Class I areas because visibility *monitoring* indicates that visibility is improving.[125]

North Carolina,[126] Ohio,[127] Tennessee,[128] West Virginia,[129] Indiana,[130] Louisiana,[131] Michigan,[132] South Carolina,[133] Washington,[134] and many other states are making these arguments. We ask that EPA confirm in its communications with all states that the URP is not a safe harbor.

b. States cannot satisfy interstate consultations where they are flawed, incomplete and have no effect.[135]

EPA's regulations require that each applicable implementation plan for a State in which any mandatory Class I Federal area is located contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.[136] The Clean Air Act further requires states to determine the measures necessary to make reasonable progress towards preventing future, and remedying existing, anthropogenic visibility impairment in all Class I areas.[137] Thus, "Congress was clear that both downwind states (*i.e.*, "a State in which any [mandatory Class I Federal] area . . . is located) and upwind states (*i.e.*, "a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area") must revise their SIPs to include measures that will make reasonable progress at all affected Class I areas."[138]

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[125] *See e.g.*, Comment Letter to Indiana at 11.
[126] Comment Letter to North Carolina at 17 ("DAQ attempts to justify deferring any further emission reductions for every major source in the state by pointing out that Class I areas appear to be trending below these area's glide path or URP, which DAQ suggests is sufficient to achieve reasonable progress.).
[127] Comment Letter to Ohio at 18 FN65, 20.
[128] Comment Letter to Tennessee at 58-59.
[129] Comment Letter to West Virginia at 33, 80-84, .
[130] Comment Letter to Indiana at 17-19, 48 ("IDEM Impermissibly Exempts EGUs From a Four-Factor Analysis Based on the State's Purported Compliance with the Uniform Rate of Progress.").
[131] Comment Letter to Louisiana at 10-11 ("...LDEQ attempts to justify 'deferring any further' emission reductions for every major source in the state by pointing out that Louisiana's Breton Wilderness Class I area appears to be trending below these area's glide path or URP, which LDEQ suggests is 'sufficient to achieve reasonable progress.'").
[132] Comment Letter to Michigan at 7-8.
[133] Comment Letter to South Carolina at 39 (argument made by Alumax - Century Aluminum of South Carolina, which the State did not correct.); *id.* at 70 ("DHEC also claims that '[f]or Cape Romain, visibility improvements are ahead of the timeline noted on the URP.'").
[134] Comment Letter to Washington - November 2021 at 58-59.
[135] July 2021 Clarification Memo at 16-17.
[136] 42 U.S.C. § 7491(b)(2).
[137] 42 U.S.C. § 7491(a)(1).
[138] 82 Fed. Reg. at 3,094.

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According to EPA, "[t]his consultation obligation is a key element of the regional haze program. Congress, the states, the courts and the EPA have long recognized that regional haze is a regional problem that requires regional solutions."[139] Congress intended this provision of the Clean Air Act to "equalize the positions of the States with respect to interstate pollution,"[140] and EPA's interpretation of this requirement accomplishes this goal by ensuring that downwind states can seek recourse from EPA if an upwind state is not doing enough to address visibility transport.[141]

In developing a long-term strategy for regional haze, EPA's regulation 40 C.F.R. § 51.308(f)(2) requires that a state take three distinct steps: consultation; demonstration; and consideration. Specifically, the regulation requires:

> (ii) The State must consult with those States that have emissions that are reasonably anticipated to contribute to visibility impairment in the mandatory Class I Federal area to develop coordinated emission management strategies containing the emission reductions necessary to make reasonable progress.
> (A) The State must demonstrate that it has included in its implementation plan all measures agreed to during state-to-state consultations or a regional planning process, or measures that will provide equivalent visibility improvement.
> (B) The State must consider the emission reduction measures identified by other States for their sources as being necessary to make reasonable progress in the mandatory Class I Federal area.[142]

Under the Regional Haze Rule, "[w]here the State has emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area located in another State or States, the State must consult with the other State(s) in order to develop coordinated emission management strategies."[143] Moreover, plan revisions:

> [M]ust provide procedures for continuing consultation between the State ... on the implementation of the visibility protection program required by this subpart, including development and review of implementation plan revisions

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[139] 82 Fed. Reg. at 3,085, citing *Vermont v. Thomas*, 850 F.2d 99, 101 (2d Cir. 1988)).
[140] S. Rep. No. 95-127, at 41 (1977).
[141] S. Rep. No. 95-127, at 41 (1977).
[142] 40 C.F.R. § 51.308(f)(2) (emphasis added); *see also*, 64 Fed. Reg. 35,765, 35,735 (July 1, 1999) (In conducting the Four-Factor Analysis, EPA explained that "...the State must consult with other States which are anticipated to contribute to visibility impairment in the Class I area under consideration ... any such State must consult with other States before submitting its long-term strategy to EPA.").
[143] 40 C.F.R. § 51.308(f)(3)(i).

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and progress reports, and on the implementation of other programs having the potential to contribute to impairment of visibility in mandatory Class I Federal areas.[144]

In its 2017 amendments to the Regional Haze Rule, EPA explained that "states *must* exchange their four-factor analyses and the associated technical information that was developed in the course of devising their long-term strategies. This information includes modeling, monitoring and emissions data and cost and feasibility studies."[145] In the event of a recalcitrant state, "[t]o the extent that one state does not provide another state with these analyses and information, or to the extent that the analyses or information are materially deficient, the latter state should document this fact so that the EPA can assess whether the former state has failed to meaningfully comply with the consultation requirements."[146]

Finally, "[i]f a State contains sources which are reasonably anticipated to contribute to visibility impairment in a mandatory Class I Federal area in another State" that has established reasonable progress goals that are slower than the Uniform Rate of Progress, "the State must demonstrate that there are no additional emission reduction measures for anthropogenic sources or groups of sources in the State."[147] To that end, the "State must provide a robust demonstration, including documenting the criteria used to determine which sources or groups or sources were evaluated and how the four factors required by paragraph (f)(2)(i) were taken into consideration in selecting the measures for inclusion in its long-term strategy."[148] In any event, "[a]ll substantive interstate consultations must be documented."[149]

Nearly all states are ignoring these important and detailed interstate consultation requirements. In general, states don't ask other states to evaluate sources impacting their Class I areas. For example, North Carolina should have asked Ohio to do a four factor analysis for Cardinal and Kyger Creek coal-fired power plants in Ohio,[150] and also asked Pennsylvania to evaluate the Seward coal-fired power plant but did not.[151] Additionally, Louisiana did not ask Alabama for any evaluation of controls even though sources in Mobile, Alabama impact the Breton Wilderness Area;[152] those sources impact the adjacent environmental justice

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[144] 40 C.F.R. § 51.308(f)(4).
[145] 82 Fed. Reg. at 3,088 (emphasis added).
[146] 82 Fed. Reg. at 3,088.
[147] 40 C.F.R. § 51.308(f)(3)(ii)(B).
[148] 40 C.F.R. § 51.308(f)(3)(ii)(B).
[149] 40 C.F.R. § 51.308(f)(2)(ii)(C).
[150] Comment Letter to North Carolina at 23
[151] Comment Letter to North Carolina at 23-24.
[152] Comment Letter to Louisiana at 30-31.

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communities.[153] Despite the request from MANE-VU that several states implement certain emission reduction measures under the RHR as MANE-VU's analysis found that the identified states were contributing to visibility impairment at the Acadia National Park Class I Area,[154] states either ignored or disagreed with the request.[155] Even states within MANE-VU did not respond to the MANE-VU Asks and ignored the requests to prepare the Four-Factor Analyses and SIP emission limitations in their SIPs, in some instances erroneously relying on Title V permits that are not in the SIP.[156] In those limited instances where a state asks another state to conduct Four-Factor Analyses, more often than not, the state asked does not respond.[157] Other states spend months arguing with each other—without elevating the disagreements and resolving their differences.

EPA must insist that states comply with the interstate consultation requirements. Indeed, the myriad of states uniformly ignoring these requirements is likely to result in the necessary step of EPA's issuance of regional FIPs that address the interstate regional haze impacts for the recalcitrant states.

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[153] Comment Letter to Louisiana at 31-37 (*i.e.*, four existing steel mills, more than 30 chemical companies, 15 aerospace companies, eight military bases, and more than 200 business supporting oil and gas development including three refineries and petroleum storage and transport facilities.)
[154] Comment Letter to Florida at 39, citing Letter from Jeffrey F. Koerner, Director, Division of Air Resource Management, FL DEP, to Mr. David Foerter, Executive Director Mid-Atlantic/Northeast Visibility Union/Ozone Transport Commission (Jan. 19. 2018).
[155] *See e.g.*, Comment Letter to Florida at 39; *see also* Comment Letter to Ohio at 21; *see also* Comment Letter to Tennessee at 44-45.
[156] *See e.g.*, Comment Letter to Connecticut at 10-11 (for the Ask that requires that "Electric Generating Units (EGUs) with a nameplate capacity larger than or equal to 25 MW with already installed NOX and/or SO2 controls - ensure the most effective use of control technologies on a year-round basis to consistently minimize emissions of haze precursors, or obtain equivalent alternative emission reductions" ("MANE-VU 25 MW Ask") Connecticut's SIP relied on Title V permits for the 13 sources without putting the permit requirements in the SIP); *id.* at 12 (for the Ask regarding fuel switching, Connecticut's SIP similarly relies on Title V permits); *see also* Comment Letter to Massachusetts at 10-11 (the SIP explains that it includes a list of 53 EGU sources that are subject to the MANE-VU 25 MW Ask, yet the SIP neither includes the list of 53 EGU sources nor does it contain SIP emission limitations, instead it lists one Title V permit); *see also* Comment Letter to New York at 10, 22-26.
[157] *See e.g.*, Comment Letter to Tennessee at 38-40 (neither Indiana nor Georgia responded to TDEC's request for Four-Factor Analyses).

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c. States must not disregard FLM consultations.

The state must consult with the Federal Land Managers ("FLMs") and look to the FLMs' expertise regarding their resources and harms from air pollution to guide the state to ensure SIPs help restore natural skies.[158] The RHR requires that in "developing any implementation plan (or plan revision) or progress report, the State must include a description of how it addressed any comments provided by the Federal Land Managers.[159] These requirements are further clarified by EPA.[160]

While most states have engaged in some type of consultation process with FLMs, nearly all of them have disregarded the FLM consultation/asks where it really matters—in the emission reductions requirements or as manifested by the lack thereof at visibility impairing sources—and proceeded as they initially intended. To the extent that states have addressed FLM input and made changes from the prepublic version of the proposed SIP, it has largely been cosmetic. Several SIPs indicate only that they "considered" the FLM comments despite the detailed and lengthy formal FLM consultation comments. These states fail to engage with the FLM comments and fail to provide any explanation on why they ignore and/or disagree the FLM comments. Instead, the states reiterate what they have already been planning to do in the SIP. A mere indication that a state "considered" comments is not meaningful consideration of comments.[161]

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[158] FLMs have affirmative duties under 42 U.S.C. §§ 7492(a), (d) as well as mandates to protect and manage public lands under the Wilderness Act (16 U.S.C. §§ 1131-1136) and the Organics Act (54 U.S.C. § 100101).
[159] 40 C.F.R. § 51.308(i)(3); 40 C.F.R. § 51.308(f)(4).
[160] July 2021 Clarification Memo at 16-17.
[161] *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 35 (D.C. Cir. 1977).

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Several FLM consultations are incomplete. For example, in Oregon the FLMs provided a critique and input on the state's Four-Factor Analyses in the FLM consult draft,[162] however rather than evaluate and consider FLM analysis, the proposed SIP replaced nearly all of the state's Four-Factor Analyses with industry agreements maintaining the status quo instead of reductions.[163] The FLMs had no opportunity to consult on these agreements and the public there is deprived of knowing whether and how those agreements satisfy regional haze requirements from the FLM perspective. Other FLM consultations are not documented and are therefore not available to the public (*e.g.*, South Carolina,[164] Louisiana,[165] Washington[166] (only partially documented)). West Virginia's so-called consultation with the FLM raises numerous process and transparency issues.[167] The FLMs (National Park Service, USDA Forest Service and U.S. Fish and Wildlife Service) take their consultation obligations seriously and identify sources to be evaluated under Four-Factor Analyses, identify issues with a state's screening methods, recommend measures for achieving or better achieving emission reductions, and identify concerns with an outcome of no or too few emission reduction measures. Unless the FLMs are requesting minor nonsubstantive corrections to Four-Factor Analyses, states have widely disregarded the consultation comments (*e.g.*, Indiana,[168] New Jersey,[169] New York,[170] Ohio,[171] Tennessee,[172] Texas,[173] North Carolina,[174]).

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[162] Letter from Cindy Orlando Acting Regional Director National Park Service, Interior Regions 8, 9, 10, and 12, to Oregon Department of Environmental Quality, Attention: Karen F. Williams, "NPS Review of the proposed Oregon Regional Haze State Implementation Plan (SIP) for the Second Implementation Period (2018-2028)," (Oct. 29, 2021), https://drive.google.com/file/d/10W2f0MFIIvBPeAvjzGk2eCZDhH8p9KlA/view?usp=sharing, with Enclosure 1, "National Park Service (NPS) Regional Haze SIP feedback for the Oregon Department of Environmental Quality," (Nov. 1, 2021), https://drive.google.com/file/d/1gfBlqxS6TWh_BJa6xO7NkaW_oS83rp5W/view?usp=sharing.

[163] Oregon Department of Environmental Quality, "Regional Haze: 2018-2028 State Implementation Plan, Public Notice Draft" (Aug. 27, 2021), https://www.oregon.gov/deq/Regulations/rulemaking/RuleDocuments/RHSIP2021plan.pdf (last visited Jan. 21, 2022).

[164] Comment Letter to South Carolina at 55-60 (South Carolina's SIP failed to include information on whether or how the State addressed the FLM comments).

[165] Comment Letter to Louisiana at 38 ("In its proposal, LDEQ indicates that the agency LDEQ is 'presenting this draft copy [to the FLMs] seeking their input.' In other words, LDEQ failed to consult with the Federal Land Mangers until *after* the state already developed and issued its proposed SIP, making it impossible for the Federal Land Managers' recommendations to "meaningfully inform the State's decisions on the long-term strategy," as required by 40 C.F.R. § 51.308(i)(2). The proposed SIP also fails to include any information on whether or how LDEQ has addressed any FLM comments or concerns to date, as required by 40 C.F.R. § 51.308(i)(2). In essence, the LDEQ SIP transforms the Regional Haze Rule's mandatory and iterative FLM consultation process into pro forma, after-the-fact box-checking exercise." (internal citations omitted)).

[166] Comment Letter to Washington - November 2021 at 67-68 (commenting that many of Ecology's responses were non-responsive and/or inconsistent with the CAA and RHR requirements, including: (i) Perceptibility should not be considered in screening source controls for reasonable progress; (ii) Visibility improvement is not a fifth-factor "off-ramp" for emission controls; (iii) If visibility benefit

EPA must provide firm direction to the states that they must meaningfully consider and address the insight and recommendations of federal agency counterparts, and that states must use the FLM consultation comments to inform or amend the pre-public version of the SIP in response to the FLM comments or provide a reasoned basis for disagreement. Given that FLM comments are based on well-documented facts and legal concerns from the Act, RHR, EPA's guidance and

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analyses are undertaken, they should reference a clean – not dirty – background; (iv) RACT, which Ecology describes as a "C-grade" control or emission limit, clearly is less stringent than emission limits developed from application of the four-factor reasonable progress analysis; (v) Use of an outdated emission inventory is not allowed under the RHR; (vi) The state must document support for its proposed SIP decisions; and (vii) Reliance on the lack of a federal action by Department of Interior in another program that does apply to existing sources is not a legitimate basis to justify no controls at those sources.).

[167] Comment Letter to West Virginia at 53-62.

[168] Comment Letter to Indiana at 27; *id.* at 28 ("...IDEM admitted it would put on a good show in "addressing the FLMs comments as thoroughly as possible" but only to "show that Indiana has seriously evaluated the selected sources in accordance with the RH Rule and section 169A(g)(1) of the CAA which lists four factors that must be taken into consideration in determining reasonable progress" not do actually require any controls," citing Draft SIP, Appendix P at 3; *see also id.* at 50-53.

[169] Comment Letter to New Jersey at 14 ("The FLMs requested that numerous facilities be evaluated for air pollution controls/reductions based on emissions and Q/d analyses and the state has failed to provide an ample analysis or explanation for its failure to assess these sources for additional emission reducing measures.).

[170] Comment Letter to New York at 15.

[171] Comment Letter to Ohio at 19-20 (Notably, OEPA appears to not have considered comments made by the U.S. Forest Service. Additionally, OEPA merely includes the companies' response70 to the several FLM comments, without providing its independent assessment of the information submitted by the companies. In doing so, it appears that OEPA has fully endorsed the companies' submittals critiquing the FLM comments. Comments from the NPS and USFS ignored by the State included:

- The lack of federally enforceable emission limitations in the SIP;
- Improper reliance on a broad weight-of-evidence approach, including visibility, rather than consideration of the four statutory RP factor to determine RP requirements;
- The need to broaden what OEPA considers as effective emission controls;
- Sources should not be excluded from the RP analysis requirement based on "design" efficiency of emission controls;
- Inflated cost analyses (*e.g.*, inaccurate interest rate, equipment life, control efficiency and retrofit factors) prejudicing emission reduction outcome;
- Analysis based on reduced capacity, where there are no enforceable limitations on capacity, are erroneous;
- Perceptibility is not a requirement for reasonable progress;
- If visibility benefit analyses are undertaken, they should reference a clean background;
- Use of PSAT modeled visibility impacts from specific sources should not be used to generically represent other sources;
- Scale PSAT modeled visibility impacts to reflect different emission scenarios from those that were actually modeled; and
- Relieve a source or group of sources from performing a four-factor analysis and installing cost effective controls if the Class I Area impacted is below the glidepath.).

[172] Comment Letter to Tennessee at 42-44.

[173] Comment Letter to Texas at 38-30.

[174] Comment Letter to North Carolina at 18-21.

July 2021 Clarification Memorandum, the states must amend the pre-public version of the SIPs in response to comments from the FLMs.

d. States must not delay control requirements and/or determinations to the next planning period.

EPA's July 2021 Clarification Memo made clear that "[i]f four-factor analyses evaluate a reasonable range of potential control options, we anticipate that in many cases states will find that new (*i.e.*, additional) measures are necessary to make reasonable progress."[175] Indeed, based on Four-Factor Analyses states are indeed determining control options are reasonable. However, despite these determinations, several states are delaying controls until the next planning period, while other states neglect to make a determination on whether controls are reasonable. Such state determinations are contrary to EPA's July 2021 Clarification Memo, which indicated that "[a]ll new measures must be included in the SIP."[176] Washington is one such state because despite finding reasonable controls for numerous sources, Washington is delaying controls for pulp and paper mills and refineries to the next planning period, planning on a subsequent SIP revision.[177] Other states where Four-Factor Analyses demonstrated reasonable controls are available and yet the state failed to make any determination at all include: Indiana. Michigan, and North Carolina.[178]

We ask that where additional measures satisfy a Four-Factor Analysis, EPA ensure SIPs include new measures to limit emissions to make reasonable progress.

e. States must not exempt emissions from new and modified sources from the Act's RH RP requirements.

Several states appear to have permitted new construction without ensuring that the source's emissions are consistent with the RH program requirements and making progress towards meeting the national goal of preventing any future, and remedying any existing, impairment of visibility.[179] This states must not do. The reasonable progress requirements apply to existing and *new* sources.[180] Indeed, the

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[175] July 2021 Clarification Memo at 8.
[176] July 2021 Clarification Memo at 8.
[177] Comment Letter to Washington - November 2021 at 30-41 (oil refineries); *id.* at 42-50 (pulp and paper mills).
[178] *See e.g.*, Comment Letter to Indiana; *see also* Comment Letter to Michigan; *see also* Comment Letter to North Carolina.
[179] *See e.g.*, Comment Letter to South Carolina at 32 (Dominion Energy Cope Generating Station), 72 (Nucor Steel Berkley); *see id.* Comment Letter to Florida at 13, 14, 17.
[180] 42 U.S.C. §§ 7491(g); 40 C.F.R. § 51.300(a); 40 C.F.R. § 51.307(c) ("Review of any major stationary source or major modification under paragraph (b) of this section, shall be conducted in accordance with paragraph (a) of this section, and § 51.166(o), (p)(1) through (2), and (q). *In conducting such reviews the State must ensure that the source's emissions will be consistent with making reasonable progress toward the national visibility goal referred to in § 51.300(a).* The State may take into

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RHR requires that in deciding whether to grant an application for construction or modification at a major source the state must ensure that the new emissions will be consistent *with making reasonable progress toward the national visibility goal.*[181] States need a rational basis for making such a determination, which must be based on a Four-Factor Analysis.[182]

Moreover, when developing a long-term strategy a state must consider "[m]easures to mitigate the impacts of construction activities."[183] As the FLM's pointed out during the first round of RH SIPs, the states often ignored these requirements and thus Round 1 RH SIPs may lack provisions to mitigate the impacts of emissions from new and modified sources.[184] EPA's 2019 Guidance made clear that "[i]f the state does not select construction activities as a source category for an analysis of control measures, the SIP must nevertheless indicate how the state has considered measures to mitigate the impacts of construction activities."[185]

EPA must insist to the states that emissions limitations for new and modified sources—including Four-Factor Analyses and necessary controls—must be considered and included during a state's decision on whether to grant an application

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account the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source." (emphasis added)).

[181] 40 C.F.R. § 51.307(c).

[182] 40 C.F.R. § 51.307(c).

[183] 40 C.F.R. § 51.308(d)(3)(v)(B).

[184] Alabama Regional Haze State Implementation Plan, Appendix P, FLM Comments on Alabama's Draft SIP (Email and Attachment from Catherine Collins, USFWS, to ADEM, "Fish and Wildlife Service Comments regarding the Alabama Regional Haze State Implementation Plan," (Dec. 26, 2007), at pdf 13, EPA-R04-OAR-2009-0782-0026, https://www.regulations.gov/document/EPA-R04-OAR-2009-0782-0026 ("...the State should include a discussion about the relationship between PSD/NSR programs as part of the other programs that will benefit visibility in the LTS section. A new or modified major industrial source can have a serious impact on the State's ability to obtain RH goals. As part of the Long- Term Strategy (LTS), the State will rely in great part on the New Source Review (NSR) and Prevention of Significant Deterioration (PSD) permitting programs to assure that new sources do not unduly impair the expected progress toward natural conditions. Section 7.2.1. of the November 2007 draft SIP speaks to emissions reductions of ongoing programs but does not include a discussion of the interaction between the existing NSR program and progress on the regional haze plan. Given the uncertainty in the new source growth estimates used to develop the 2018 emission inventory, and ultimately the 2018 visibility projections, it would be appropriate for the state to discuss the relationship between the Regional Haze Plan and requirements of the NSR and PSD programs within the SIP. Specifically, how does the State anticipate addressing new sources of air pollution in the PSD process in regards to its reasonable progress goals and long term strategy; and, how will it analyze the affect [*sic*] of new emissions from these new sources on progress toward the interim visibility goals established under this SIP, as well as the ultimate goal of natural background visibility by 2064.")

[185] 2019 Guidance at 22 (which further explains that "If the state has selected construction activities as a source category for an analysis of control measures, it will consider this factor in that analysis. That analysis and the decision about what measures are necessary for reasonable progress are the subjects of Sections II.B.4 and II.B.5 of this document.")

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for a construction permit. The RH SIPs must also include the necessary mitigation and emission limitations from the permit terms and conditions to make them enforceable in the SIP. Additionally, as the rule requires the long-term strategy include measures to *mitigate* the impacts of emissions construction activities, the emissions from new or modified source must be limited, otherwise the new emissions will not be consistent with making reasonable progress. Moreover, when an EGU proposes to switch fuel from coal to natural gas[186] EPA must not allow states to approve construction permits that fail to apply the Act's Four-Factor Analysis requirement and resulting mitigation measures. In the absence of such analysis and associated requirements the construction or modification of a facility may cross the Act's provisions to prevent future visibility impairment, as well as the Act's anti-backsliding provision.[187]

f. States must not assert that that reasonable progress goals determine reasonable progress.

Many states set reasonable progress goals, *before* and *in lieu of* conducting the required Four-Factor Analysis. These states have impermissibly reversed the order of the requirements. The states must first conduct the Four-Factor Analyses, determine measures for reducing visibility impairing emissions based on the Act's Four-Factor Analysis, and then use the results to develop revisions to the reasonable progress goals. The reasonable progress goals are not to be developed before the Four-Factor Analyses but as a result of the Four-Factor Analyses.[188]

One example is Washington State, where they first set the reasonable progress goals, and then conducted the Four-Factor Analyses.[189] The MANE-VU states also apply this approach, calculating reasonable progress goals based on non-enforceable reasonable progress measures.[190] In the VISTAS states, some term the

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[186] *See* discussion *infra* Section 5.b. regarding EGU source modifications switching fuel from coal to natural gas.

[187] *See e.g. Sierra Club v. Env't Prot. Agency*, 985 F.3d 1055 (D.C. Cir.), *superseded*, 21 F.4th 815 (D.C. Cir. 2021).

[188] *See e.g.*, 82 Fed. Reg. at 3090-91.

[189] Comment Letter to Washington - November 2021 at 8, 53.

[190] Comment Letter to New Jersey at 2 ("New Jersey indicates that the long term strategy must include the measures necessary to achieve the reasonable progress goals (RPGs) established by states where the Class I areas are located.1 This is backwards. The state must determine what additional emission reductions measures are needed to make reasonable progress, considering the four statutory reasonable progress factors along with the factors specified in the revised RHR. Reasonable progress goals are determined from measures that are necessary to make reasonable progress, rather than measures being identified as needed to meet RPGs. While MANE-VU may have calculated values that it and its member states refer to as RPGs, these are not RPGs until the state with the Class I area adopts them as such. Regardless of the RPGs and regardless of how current visibility or projected visibility compares to values calculated by MANE-VU, New Jersey must show that it has adopted a long-term strategy that complies with the RHR and that was developed by NJDEP based on its own reasoned decision making. Additionally, for the second implementation period, the revised RHR does not require a state to consider "the uniform rate of

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reasonable progress goals the "rate of progress" goals, and all reviewed thus far merely base goals on the flawed VISTAS modeling results.[191]

EPA must make clear to the states that failure to first conduct the Four-Factor Analyses and then use the results of those Analyses and the emission limitations secured in the SIP to develop revisions to the reasonable progress goals will result in an unapprovable SIP.

4. States must not use unique approaches that conflict with Act and Regional Haze Rule.

a. *Oregon.*

Oregon's Four-Factor Analyses indicated that controls were cost effective. But the State decided to replace those Four-Factor Analyses with industry agreed-upon plans that neither result in emission reductions nor apply the Act's four factors.[192] Oregon's enabling state law is potentially illegal as it considers issues outside of the RHR.

b. Washington.

Washington's SIP found cost-effective controls but claimed they are required to follow a State-RACT process under state law, which will delay controls until at least the third round. The State indicates it lacks authority to control sources under the Act's RP requirements and incorrectly asserts that Washington State RACT "is equivalent to the" Regional Haze Rule's four-factor analysis.[193] Based on the plain language in Washington's statute for RACT—and the detailed analysis in our Comment Letter— the *five*-factor State-RACT is neither equivalent to nor more stringent than the Clean Air Act's RP Four-Factor Analysis.[194] Washington must use one of the other authorities identified in our comments[195] and cannot use its

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improvement" or require a state to consider the measures that would be needed to meet the uniform rate of progress. That requirement of 40 C.F.R. § 51.308(d) does not have a counterpart in 51.308(f).");

[191] Comment Letter to North Carolina at 17; *see also* Comment Letter to South Carolina at 60-61; *see also* Comment Letter to Tennessee at 47; *see also* Comment Letter to West Virginia at 72-73.

[192] Comment Letter to Oregon at 2 ("... after comments on the Division 223 rules were closed, DEQ fundamentally altered its approach without engaging in any kind of public process and without consulting stakeholders other than the regulated entities. Instead of ordering all 17 facilities to implement the reasonable progress controls identified through four-factor analyses, DEQ inexplicably chose to extend offers that allowed all but one of these facilities to exit the program or comply with the program without investing in the highly effective pollution-reducing technology that DEQ could—and should—have required these facilities to install to meet the state's obligations under the regional haze program.); *id.* at 4-19.

[193] Comment Letter to Washington - November 2021 at 17-22.

[194] Comment Letter to Washington - November 2021 at 17-22.

[195] Comment Letter to Washington - November 2021 at 22-25.

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State-RACT process to avoid compliance with the Act's reasonable progress requirements.

c. *Texas.*

Texas' SIP used a combined source evaluation.[196] Texas evaluated the annualized cost of controls across multiple sectors and types of sources against purported visibility benefits of those controls, rather than evaluating the cost-effectiveness of controls at very large individual sources. This is essentially identical to the illegal approach Texas took in evaluating reasonable progress in Round 1.[197] EPA rejected that approach and issued its own federal implementation plan because Texas's analysis overlooked cost-effective, source-specific pollution controls at a number of individual sources, each of which had significant visibility impacts:[198]

> [I]individual sources were not effectively considered by the TCEQ. . . . A primary flaw was that the control set was overinclusive. It included controls on sources that served to increase the total cost with little visibility benefit. As was noted in our proposal, Texas adopted this approach despite evidence in the record of identified source-specific, cost-effective controls that would have resulted in large emission reductions on certain EGUs, and despite source apportionment modeling that identified large impacts from EGU sources in northeast Texas. Our proposal explained that this approach obscured benefits that might be obtained from individual sources and only considered aggregated costs. . . . Therefore, whether the state's analysis is labeled a source category analysis, an analysis of multiple individual sources, or some hybrid, we conclude that it contained serious deficiencies that would materially affect the outcome of the state's SIP process. . . . Ultimately, however, while there is flexibility in available analytical approaches, states cannot adopt an approach to reasonable progress, which by its nature overlooks cost-effective controls that would otherwise be viewed as being beneficial.

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[196] Comment Letter to Texas at 14-15; *see generally* Texas Commission on Environmental Quality, 2021 Regional Haze State Implementation Plan Revision, Chapter 7 (June 30, 2021) ["Texas Round 2 SIP"].

[197] Texas Commission on Environmental Quality, Revisions to The State Implementation Plan Concerning Regional Haz at 10-5 (Feb. 25, 2009).

[198] This response to comment has been summarized from the original, which appears in the Texas-Oklahoma FIP, 81 Fed. Reg. 313 (Jan. 5, 2016).

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Due, in part, to Texas's flawed first round SIP, EPA's 2019 Guidance explicitly advises against using that annualized approach during the second planning period:

> EPA does not believe it is reasonable to solely use a threshold for the capital cost or annualized cost to determine that a measure is not necessary to make reasonable progress. Large capital costs considered in isolation may not provide complete information about the potential reasonableness of a measure; additionally, decisions to exclude control measures from consideration should also take into account relevant information for other factors.[199]

Texas's continued use of a flawed annualized, aggregate control analysis is contrary to the Regional Haze Rule, flouts EPA's explicit guidance on the topic, and must be revised. This flawed approach is especially egregious since, similar to its first round SIP, Texas's contribution to particulate sulfate visibility degradation in nine out-of-state Class one areas is *greater* than the home state's contribution; and its particulate nitrate contribution to six out-of-state Class I areas is likewise greater than the state in which the Class I area is located.[200] This makes it impossible for Texas to satisfy section 51.308(f)(3)(ii)(B)'s requirement that the state demonstrate "that there are no additional emission reduction measures for anthropogenic sources or groups of sources in the State that may reasonably be anticipated to contribute to visibility impairment in [another state's] Class I area that would be reasonable to include in its own long-term strategy."

d. *Indiana.*

Indiana's SIP contains a blanket exemption of EGUs from the Four-Factor Analysis.[201] The EGUs are the largest source sector in Indiana, "even though they generally have the greatest visibility impacts at nearby Class I areas and together account for 11 of the 20 top sources on the Q/d list" contributing 77,777 tons of NOx and 85,329 tons of SO_2 per year.[202]

e. Use of Plantwide Applicability Limits (PALs).

Some states have proposed or are considering plantwide limits—in lieu of the Unit-Specific Four-Factor Analysis requirement—that give the source the flexibility

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[199] 2019 Guidance at 39.
[200] *See* Texas Round 2 SIP at 8-47 to 8-53.
[201] Comment Letter to Indiana at 11-12 (IDEM's explanation "intends to conduct a review of the EGU sector for the January 31, 2025 progress report, pursuant to 40 CFR 51.308 (g). If necessary, IDEM will evaluate EGUs more in depth for the third implementation period of the RH Rule, to be submitted in 2028" "is unsupported by the record, arbitrary and capricious, and inconsistent with the Clean Air Act and the Regional Haze Rule, for numerous reasons.").
[202] Comment Letter to Indiana at 11; *see also* Indiana Regional Haze State Implementation Plan for the Second Implementation Period at 55 (Dec. 2021)

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to decide how to meet emission reductions. Oregon proposed this in its agreements with industry.[203] The PALs are an issue for numerous reasons: (1) they fail to meet the unit-specific technology based emission limit required by the Act; (2) they don't result in a reduction equivalent to reductions from a Four-Factor Analysis; (3) they are subject to abuse because in some instances PAL emissions are based on allowable emissions, don't amount to a reduction in actual emissions (*i.e.*, PacifiCorp), and ultimately don't require installation of pollution controls.

f. Ohio.

Ohio considered affordability of controls for some of its sources.[204] While Ohio noted that there is no provision in the RHR to consider affordability, the State nevertheless considered it.[205] Consideration of costs is outside the bounds of the Act's Four-Factor Analysis.[206] Moreover, as the Kordzi Report on Ohio clearly demonstrated in the "Comments on the Carmeuse Maple Grove SO_2 Analysis,"[207] despite the source's inappropriate costing methodology that highly inflated costs, the Kordzi Report shows that "SO2 controls are available for retrofit to the Carmeuse kilns at cost-effectiveness levels that have previously been found to be cost-effective by many states."[208]

We urge EPA to instruct these states that the unique approaches outlined above are inconsistent with the Act and RHR requirements.

5. <u>States must ensure that SIPs are consistent with the Administration's priorities.</u>

a. Consideration of Environmental Justice.

State and federal authorities require consideration of environmental justice.[209] While some states acknowledge their authority, commitment and need to

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[203] Comment Letter to Oregon at 9-12 (Table comparing emission reductions projected from installation of four factor analysis requirements as compared to requirements of "alternative compliance" agreements, heavily reliant on Plant Site Emission Limits or "PSELs").
[204] Kordzi Report on Ohio at 46, citing Ohio Draft SIP at 39.
[205] Kordzi Report on Ohio at 46.
[206] *See e.g.*, Kordzi Report at 47.
[207] Kordzi Report on Ohio at 42-45.
[208] Kordzi Report on Ohio at 44-45.
[209] *See e.g.*, Comment Letter to Connecticut at 12-17; *see also* Comment Letter to Florida at 22-25 ("FL DEP Must Consider Emissions from and Include Emission Limitations on Preharvest Sugarcane Field Burning"); *see also id.* at 39-43; *see also* Comment Letter to Indiana at 55-58; *see also* Comment Letter to Louisiana at 30-34 (Louisiana did not consult with Alabama regarding sources in Mobile, Alabama that impact the Breton Wilderness Area and the environmental justice communities); *see also id.* at 38-41; *see also* Comment Letter to Massachusetts at 15-18; *see also* Comment Letter to Michigan at 17-19; *see also* Comment Letter to North Carolina at 27-31; *see also*

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consider environmental justice, most if not all SIPs do not contain meaningful consideration, much less emission limitations to protect environmental justice communities. States like Oregon have gone to great lengths to develop environmental justice methods and use environmental screening thresholds, but nothing material came of such considerations.[210] Colorado acknowledged the need to consider environmental justice, but again, nothing appears to have come of it.[211] Yet other states, like North Carolina, misunderstand an environmental justice analysis, and looked at whether the communities near Class I areas were classified as environmental justice communities rather than looking at the communities impacted by sources.[212]

Finally, the Table below contains the sources NPCA identified as sources of concern due to their potential to impair visibility at Class I areas *and* their

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Comment Letter to New Jersey at 21-27; *see also* Comment Letter to New York at 16; *see also id.* 18-22; *see also* Comment Letter to Ohio at 22-25; *see also* Comment Letter to South Carolina at 87-91; *see also* Comment Letter to Tennessee at 63-68; *see also* Comment Letter to Virginia at 7-9 ; *see also* Comment Letter to Washington - November 2021 at 52-56; *see also* Comment Letter to West Virginia at 88-94.

[210] Comment Letter to Oregon at 17-20 ("Despite the claim in the SIP that DEQ incorporated environmental justice into its regional haze decisions, nothing in the SIP suggests that DEQ considered environmental justice in making the choice to extend "alternative compliance" to 16 of the 17 facilities with reasonable progress controls. While DEQ carefully established a protocol and analyzed the environmental justice and vulnerable populations "score" of each facility with cost-effective controls identified in its four-factor analysis, it then seemingly ignored this information when making consequential decisions: in place of actual significant reductions in emissions that would be achieved though the implementation of four factor reasonable progress control analyses the agency instead established alternative compliance to these facilities regardless of the environmental justice impacts and the impacts on vulnerable populations.")

[211] National Parks Conservation Association and Sierra Club's Prehearing Statement Before the Colorado Air Quality Control Commission Regarding Proposed Revisions to the Regional Haze State Implementation Plan (SIP), Regulation 23 at 13-15 ("Rather than substantively incorporate equity and environmental justice principles into this rulemaking, the Division makes only one passing reference to community concerns in the proposed SIP and supporting documents. But notably, that sole reference to community concerns is for the Cemex facility in Lyons, where the Division noted that it rejected a proposed control technology in response to community outcry against the technology. (citation omitted) Tellingly, the Division's proposal makes no mention of any community concerns in the disproportionately impacted communities in North Denver, Pueblo, or Florence, which will be impacted by the Division's actions regarding Suncor, the GCC Rio Grande – Pueblo cement plant, and the Holcim Florence cement plant.")

[212] Comment Letter to North Carolina at 29 ("While we appreciate DAQ's efforts to prepare an environmental justice analysis, it falls short. DAQ's proposed SIP explains that it overlaid the State's Class I areas with maps of potentially underserved block groups, which was then used to inform the specific EJ focused outreach for the RH program. While this is a useful first step, DAQ must do more. DAQ must involve and consider the environmental justice communities impacted by harms from the reasonable progress sources. DAQ's SIP ignores the fact that many of the reasonable progress sources are located in communities of color and many live below the poverty line. For example, PCS Phosphate Company (Aurora) and Domtar Paper Company are located in vulnerable areas where the people of color is higher than 64% and the percentage of poverty rate is higher than 30%." (citation omitted)).

likelihood to impact vulnerable communities. The selection was made using environmental justice markers such as people of color and people living below the poverty line. NPCA used American Community Survey data from the United States Census Bureau at the county and city levels to identify vulnerable communities. Additional information at the community or neighborhood levels was used when available for this selection. The sources identified below lack the best pollution controls or lack of pollution control upgrades to further reduce emissions and lessen the burden of air pollution in these communities. We will continue to make EPA aware of similar sources of concern identified in our future comment letters.

Table 1. Sources Identified by NPCA of Concern Due to Potential Impacts on Visibility at Class I Areas and Their Likelihood to Impact Vulnerable Communities.

State	Facility	County	Description	Cumulative Q/d (>=5)	% of People of Color	% of People Living Below Poverty Line	NOx (tons)	SO2 (tons)
AZ	FREEPORT MCMORAN MIAMI SMELTER	Gila	Primary Copper Smelting/Refining	223	37%	21%	173	3,930
AZ	ASARCO LLC - HAYDEN SMELTER	Gila	Primary Copper Smelting/Refining	3,801	37%	21%	46	20,498
CO	Suncor	Adams	Petroleum Refinery	46	48%	13%	593	196
CT	Wheelabrator Bridgeport	Fairfield	Municipal Waste Combustor	12	36%	9%	1,096	120
FL	SEMINOLE ELECTRIC COOPERATIVE, INC.	Putnam	Electric Power Generation	338	28%	26%	2,203	4,563
FL	Northside	Duval	Electric Power Generation	297	45%	16%	2,864	1,917
FL	Big Bend	Hillsborough	Electric Power Generation	104	49%	16%	2,277	1,156
FL	Deerhaven	Alachua	Electric Power Generation	72	38%	23%	1,388	600
FL	MOSAIC FERTILIZER, LLC	Hillsborough	Phosphatic Fertilizer Manufacturing	44	49%	16%	171	1,487
FL	U.S. SUGAR CORPORATION	Hendry	Cane Sugar Manufacturing	26	66%	25%	1,326	171
FL	SUGAR CANE GROWERS CO-OP	Palm Beach	Cane Sugar Manufacturing	8	43%	14%	486	103
FL	OSCEOLA FARMS	Palm Beach	Cane Sugar Manufacturing	6	43%	14%	379	20
IN	United States Steel Corporation - Gary Works	Lake	Steel Mill Manufacturing	235	45%	17%	3,089	3,030
IN	Indiana Harbor East	Lake	Steel Mill Manufacturing	691	45%	17%	9,001	12,959
IN	Indiana Harbor West	Lake	Steel Mill Manufacturing	101	45%	17%	1,056	1,619
LA	R. S. Nelson	Calcasieu	Electric Power Generation	164	31%	17%	2,427	7,674
LA	Big Cajun II	Pointe Coupee	Electric Power Generation	207	39%	19%	1,989	6,021
MI	EES Coke	Wayne	Iron and Steel Mills and Ferroalloy Man	113	50%	24%	1,351	2,820
MI	US Steel Great Lakes Works	Wayne	Iron and Steel Mills and Ferroalloy Man	23	50%	24%	980	1,502
NC	PCS Phosphate	Beaufort	Fertilizer Plant	267	64%	30%	408	3,140
NC	Domtar Paper	Martin	Pulp and Paper Plant	118	64%	30%	1,806	770
OH	Cleveland-Cliffs (AK Steel)	Butler	Steel Mill	179	17%	13%	1,963	1,963
OR	Owens_Brockway	Multnomah	Glass Plant	23	29%	17%	404	118
TN	TVA Cumberland	Stewart	Electricity Generation via Combusti	536	8%	19%	3,380	6,649
TN	Trelleborg Coated Systems*	Hamblen	All Other Rubber Product Manufacturing	421	18%	21%	2	0
TN	Signal Mountain Cement	Hamilton	Cement Manufacturing	65	28%	14%	1,263	1
TN	O-N Minerals Company	Union	Lime Manufacturing	15	3%	23%	350	56
TN	Packaging Corporation of America	Hardin	Pulp and Paper Plant	62	8%	22%	1,416	616
TN	Tennessee Gas Pipeline, Station 860	Hickman	Compressor Station	29	9%	21%	1,484	0
WA	Ash Grove Cement	King	Cement Manufacturing	136	38%	11%	1,368	69
WA	Ardagh Glass	King	Glass Plant	12	38%	11%	153	99
WV	Harrison Coal Plant	Harrison	Electric Power Generation	1,047	5%	16%	5,575	11,270
WV	FORT MARTIN COAL POWER STATION	Monongalia	Electric Power Generation	815	11%	21%	9,388	4,234
WV	PLEASANTS COAL POWER STATION	Pleasants	Electric Power Generation	552	4%	16%	4,514	7,044
WV	MOUNTAINEER COAL PLANT	Mason	Electric Power Generation	384	3%	18%	3,579	4,600
WV	AMERICAN BITUMINOUS POWER-GRANT TO	Marion	Electric Power Generation	204	7%	16%	1,672	1,964
WV	LONGVIEW COAL POWER PLANT	Monongalia	Electric Power Generation	191	11%	21%	1,532	2,158
WV	WEST VIRGINIA ALLOYS, INC.	Fayette	Iron and Steel Mills and Ferroalloy Man	130	7%	18%	1,066	1,121
WV	MORGANTOWN ENERGY FACILITY	Monongalia	Fossil Fuel Electric Power Generation	70	11%	21%	1,142	703
TX	SAN MIGUEL ELECTRIC PLANT	Atascosa	Electric Power Generation	153	65%	15%	2,267	8,940
TX	TEXARKANA MILL	Cass	Paper (except Newsprint) Mills	40	23%	19%	1,796	76
TX	ODESSA CEMENT PLANT	Ector	Cement Manufacturing	12	64%	12%	938	19
TX	NEWMAN STATION	El Paso	Electric Power Generation	89	87%	22%	1,875	9
TX	WA PARISH ELECTRIC GENERATING STATION	Fort Bend	Electric Power Generation	476	65%	8%	4,589	28,811
TX	CORNUDAS PLANT	Hudspeth	Pipeline Transportation of Natural Gas	8.3	81%	32%	362	5
TX	OXBOW CALCINING	Jefferson	All Other Petroleum and Coal Products M	174	58%	19%	609	11,495
TX	TOLK STATION	Lamb	Electric Power Generation	780	59%	20%	2,488	13,625
TX	LIMESTONE ELECTRIC GENERATION STATION	Limestone	Electric Power Generation	255	40%	21%	7,470	10,240
TX	JONES STATION POWER PLANT	Lubbock	Electric Power Generation	6	45%	19%	1,395	3
TX	SANDY CREEK ENERGY STATION	McLennan	Electric Power Generation	40	43%	19%	1,147	2,961
TX	STREETMAN PLANT	Navarro	Ground or Treated Mineral and Earth M	74	42%	20%	681	3,493
TX	HARRINGTON STATION POWER PLANT	Potter	Electric Power Generation	1,005	54%	21%	2,945	10,476
TX	OAK GROVE STEAM ELECTRIC STATION	Robertson	Electric Power Generation	219	42%	15%	4,535	6,974
TX	WELSH POWER PLANT	Titus	Electric Power Generation	407	53%	20%	4,951	11,178
TX	OKLAUNION POWER STATION	Wilbarger	Electric Power Generation	386	40%	16%	5,215	1,779
TX	KEYSTONE GAS PLANT	Winkler	Natural Gas Liquid Extraction	41	62%	17%	1,130	435

* Source with extremely high PM2.5 and PM10 emissions

The RHR requires that the state should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources.[213] The states ignore emissions from area sources, and some states even ignore area sources that impact both visibility and vulnerable communities. For example, Florida ignored area source emissions from agricultural sugar cane burning. Much of the sugar cane acreage burned is owned or controlled by the sugar cane mills. Therefore, performing Four-Factor Analyses would logistically be a relatively straightforward exercise.[214] Moreover, green harvesting using mechanical harvesters—that does not involve burning—is already implemented in Florida and in other states.[215]

Additionally, oil and gas area sources are a problem for Class I areas and vulnerable communities.[216] Texas is an example of a state that declined to evaluate all areas sources for Four-Factor Analyses,[217] despite areas sources being the largest category contributor of NOx, Volatile Organic Carbon (VOC), ammonia (NH3), and Particulate Matter, with most of NOx, VOC and SO2 emissions from the Oil and Gas sector.[218] Moreover, Texas Emissions Inventory fails to include significant flaring emissions and drastically undercounts the actual levels of SO_2 emissions from oil and gas area sources.[219]

EPA must reinforce the need for states to engage environmental justice communities, select sources—including area sources—with priority for those in/adjacent environmental justice communities, and most importantly direct states to require reductions from environmental justice sources

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[213] 40 C.F.R. §51.308(f)(2)(i).
[214] Comment Letter to Florida at 30.
[215] Comment Letter to Florida at 31-32.
[216] Examples of Class I areas currently or potentially impacted by oil and gas emissions, several of which also impact vulnerable communities, include but are not limited to: Theodore Roosevelt and Lostwood (i.e., Bakken Shale in eastern Montana and North Dakota); Wind Cave and Badlands (i.e., Powder River Basin in northeast Wyoming); Bridger and Fitzpatrick Wilderness Areas (i.e., Pinedale Anticline and Jonah Fields in western Wyoming); Mesa Verde (i.e., North and South San Juan Basin); Carlsbad Caverns and Guadalupe Mountains (i.e., Permian Basin in southeastern New Mexico and western Texas); Canyonlands and Arches (i.e., Uintah, Paradox, and Piceance Basins in Utah and Colorado); and Rocky Mountain (i.e., Denver-Julesburg Basin).
[217] Comment Letter to Texas at 24.
[218] Comment Letter to Texas at 24-25.
[219] Comment Letter to Texas at 25.

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b. For EGUs, transition from coal to natural gas should not be a solution for regional haze.

EPA must ensure that long-term strategies include appropriate measures to prevent *future* impairment of visibility in mandatory class I Federal areas.[220] Reductions achieved with controls for some pollutants will be the same as those obtained with conversion from coal to natural gas. If a switch to natural gas takes place, the state must consider and require controls (*e.g.*, SCR for turbines). Controls should be required upfront reflecting low rates and should be required at a new facility or at a facility that switches fuel. As discussed above in section 2.e, fuel switch conversion should include permit (PSD) reviews and Four-Factor Analyses.

c. Retired or under-utilized EGUs are now being used to supply energy for onsite bitcoin mining – EPA must address this head on.

Some EGUs (*e.g.*, using waste coal, peaking units and other stationary and mobile sources) were previously running at a very low capacity (or not running at all) but are now run at high capacity for bitcoin mining. States do not appear to be considering the impacts from these sources on Class I areas and environmental justice communities in their permitting and oversight/enforcement activities. Indeed, where these sources are already permitted, the state RH SIPs assume—without enforceable limitations—that these sources will continue to operate at a lower capacity. Furthermore, as explained in the above issue, when a state considers whether to permit a new source or modification, it must apply the regional haze reasonable progress Four-Factor Analysis requirements and not conduct new source permitting in a vacuum. The proliferation of these bitcoin mining sources throughout the states undermines progress of the RH program. EPA should develop a strategic policy and initiatives to address this growing problem and ensure it is applied uniformly in regional haze SIP revisions.

d. Requiring States to Incorporate Planned Retirements as Enforceable SIP Provisions, as Required by the Clean Air Act, Would Result In Significant Reductions of Greenhouse Gas Emissions.

As noted, numerous states have declined or refused to impose emission reduction measures that would satisfy a Four Factor Analysis—and in some instances, refused to even evaluate controls—based on projected source retirements or reductions in utilization. The Clean Air Act, however, requires that "[e]ach state implementation plan . . . *shall*" include "enforceable limitations and other control measures" as necessary to "meet the applicable requirements" of the Act. 42 U.S.C. § 7410(a)(2)(A). The Regional Haze Rule similarly requires each state to include "enforceable emission limitations" as necessary to ensure reasonable progress

[220] 42 U.S.C. § 7491(a)(1).

toward the national visibility goal.[221] Thus, EPA must make clear that, where the state relies on a sources' plans to permanently cease operations or reduction in utilization to ensure reasonable progress or to avoid any control analysis, the state "must" make those parameters or assumptions into enforceable emission limitations in the SIP itself. [222] Including planned retirements as enforceable SIP provisions is not only required under the Clean Air Act and the Regional Haze Rule itself, but would result in significant greenhouse gas emission reductions and other pollution co-benefits.

Conclusion

EPA must ensure that second round haze plans comply with all legal requirements and deliver on the Clean Air Act goal of restoring natural visibility conditions to our nation's treasured national parks and wilderness areas. We strongly recommend that EPA issue findings of failure to submit by January 31, 2022, and take final action on all SIPs (or FIPs) a rolling basis, by August 2023. Moreover, EPA should not delay: once it determines a SIP is deficient,[223] the agency should begin developing a FIP. Please feel free to contact us if you need additional information or have any questions regarding the contents of this letter.

Sincerely,

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[221] *See* 40 C.F.R. § 51.308(d)(3) ("The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas.")

[222] 40 C.F.R. §§ 51.308(i); (d)(3) ("The long-term strategy must include enforceable emissions limitations, compliance schedules . . ."); (f)(2) (the long-term strategy must include "enforceable emissions limitations"); *see also* August 2019 Guidance at 22 ("in selecting sources for control measure analysis," the state may choose "not selecting sources that have an enforceable commitment to be retired or replaced by 2028"); *id.* at 34 (To the extent a retirement or reduction in operation "is being relied upon for a reasonable progress determination, the measure would need to be included in the SIP and/or be federally enforceable.") (citing 40 C.F.R. § 51.308(f)(2)); 2019 Guidance at 43 ("[i]f a state determines that an in-place emission control at a source is a measure that is necessary to make reasonable progress and there is not already an enforceable emission limit corresponding to that control in the SIP, the state is required to adopt emission limits based on those controls as part of its long-term strategy in the SIP via the regional haze second planning period plan submission.").

[223] Furthermore, EPA must use its authority and reject incomplete SIPs and send them back to the states for completion. Good government and efficient use of public resources dictate the agency should not use resources in moving forward with an action knowing it is not approvable.

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[xii] Letter submitted on behalf of National Parks Conservation Association, by Laumann Legal, LLC., to Liem Nguyen, Judy Schwieters, Department of Ecology, "NPCA Comments on Draft Air Quality Agreed Orders for Alcoa Wenatchee Agreed Order 18100 (Chelan County), Intalco Agreed Order 18216 (Whatcom County)," (Dec. 3, 2020) ("Comment Letter to Washington – 2020"), https://drive.google.com/file/d/1Jx83tnMmjVnKvzciZ2wo6Qi7a7iZIUx2/view?usp=sharing; *see also* Letter from National Parks Conservation Association, Sierra Club, the Duwamish River Cleanup Coalition, Puget Soundkeeper Alliance, Waste Action Project, to Philip Gent, Air Quality Program, Department of Ecology, "NPCA Comments Submitted for Informal comment period: Regional Haze SIP Revision - 2nd 10-Year Plan," (Feb. 16, 2021, Submitted with correction on Feb. 19, 2021) ("Comment Letter to Washington – February 2021"), https://drive.google.com/file/d/1MbrGgMg5M7vPM-m5yo4OH9SIpGvljTnj/view?usp=sharing, including enclosure, Klafka, Steven, P.E. BCEE, Environmental Engineer, Wingra Engineering, S.C., "The Four-Factor Reasonable Progress Analysis for Ardagh Glass," (Jan. 27, 2021); *see also* Letter from National Parks Conservation Association, Sierra Club, Alpine Lakes Protection Society, North Cascades Conservation Council, Olympic Park Advocates, Puget Soundkeeper Alliance, Stand.earth, Waste Action Project, to Linda Kildahl, Washington Department of Ecology, Air Quality Program, "Conservation Organizations' Comments Submitted on Washington's Proposed Regional Haze State Implementation Plan for 2018 to 2028," (Nov. 23, 2021) ("Comment Letter to Washington – November 2021"), https://drive.google.com/file/d/19_6Z8gmTdss8yeUak4CopkEiGuIQOlF_/view?usp=sharing, with enclosure, Victoria Stamper, "Review and Comments on Washington Department of Ecology's Draft Regional Haze Plan for the Second Implementation Period: Long Term Strategy and Four-Factor Analysis of Controls," (Nov. 19, 2021), https://drive.google.com/file/d/1Iqt-K47Nq_F2SRN3AFC_G6ApWW5EwC9T/view?usp=sharing.

[xiii] Letter from National Parks Conservation Association, Coalition to Protect America's National Parks and Sierra Club, to Ashley Kung, Florida Department of Environmental Protection,

"Conservation Organizations' Comments on Florida's Proposed Revisions Regional Haze State Implementation Plan for the Second Implementation Period," (July 9, 2021) ("Comment Letter to Florida"), https://drive.google.com/file/d/1D_I9oqlbHFLAcGDGNSgfU-QGJ4vbd_N9/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the Florida Regional Haze State Implementation Plan," (July 2021), https://drive.google.com/file/d/1X2onXDgY4WhbO0D4FUT3F5t5Xmtv4dtg/view?usp=sharing.

[xiv] Letter from Sierra Club and the National Parks Conservation Association, to Craig A. Wright, Director, NHDES Air Resources Division, "Comments on New Hampshire's Regional Haze Plan Periodic Comprehensive Revision," (Dec. 30, 2019), https://drive.google.com/file/d/1YIFCM771jSPI5ZtfPW9g84g9hLKGN8Ay/view?usp=sharing.

[xv] Letter from National Parks Conservation Association, Sierra Club, Coalition to Protect America's National Parks, and Ohio Environmental Council, to Holly Kaloz, Ohio Environmental Protection Agency, Conservation Organizations' Comments on Ohio's Proposed Regional Haze State Implementation Plan for the Second Implementation Period (June 28, 2021) ("Comment Letter to Ohio"), https://drive.google.com/file/d/1nXb7mzCVx6RtJiz5VahDLlPvWihmOQok/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the Ohio Regional Haze State Implementation Plan," (June 2021), https://drive.google.com/file/d/1anyw5lJOyNPjqNmG_BbHdwkhMySDOPYR/view?usp=sharing.

[xvi]Letter from National Parks Conservation Association, Sierra Club, Appalachian Mountain Advocates, West Virginia Rivers Coalition, Mid-Ohio Valley Climate Action, Eastern Panhandle Green Coalition, West Virginia Highlands Conservancy, West Virginia Climate Alliance, to Todd Shrewsbury, WV Department of Environmental Protection, Division of Air Quality, Conservation Organizations' Comments on the Proposed Regional Haze State Implementation Plan," (Jan. 10, 2022) ("Comment Letter to West Virginia"), https://drive.google.com/file/d/15Y5tMGFBrFl5kODmH9y0RSpgvKEmbhgF/view?usp=sharing, with enclosure, Joe Kordzi, "A Review of the West Virginia Regional Haze State Implementation Plan" (Dec. 2021), https://drive.google.com/file/d/1N6BPgPyVClNmLhFcS7poLTVVSYhJ9eFW/view?usp=sharing.

[xvii] Letter from Sierra Club, National Parks Conservation Association, The Coalition to Protect America's National Parks, Just Transition Northwest Indiana, Hoosier Environmental Council, Izaak Walton League, and Save the Dunes Comments on Indiana Department of Environmental Management's Proposed Regional Haze State Implementation Plan for Second Implementation Period (Nov. 15, 2021) ("Comment Letter to Indiana"), https://drive.google.com/file/d/1XmXIZ28giuDhkcLlw5dDfX0esZa7pQiO/view?usp=sharing; with enclosure, Joe Kordzi, "A Review of the Indiana Regional Haze State Implementation Plan" (Nov. 2021), https://drive.google.com/file/d/1SUIxM5aRBCit4Wgrw6IURwrO_VD6x1VY/view?usp=sharing.

[xviii] Letter from National Parks Conservation Association and Sierra Club, to Mr. Ratzman, Bureau of Evaluation and Planning, New Jersey Department of Environmental Protection, "Comments on the New Jersey's Proposed Regional Haze SIP 2018-2028," (Oct. 21, 2019) ("Comment Letter to New Jersey"), https://drive.google.com/file/d/1O-w7PofKGZ6FOmCeaXAm7q3exk-WPDve/view?usp=sharing.

[xix] Letter from Sierra Club, National Parks Conservation Association, Coalition to Protect America's National Parks, Coastal Conservation League, South Carolina Environmental Law Project, Southern Environmental Law Center, to Scott Bigleman, Air Regulation and Data Analysis Section, "Conservation Organizations' Comments on South Carolina's Regional Haze State Implementation Plan," (Jan. 5, 2022) ("Comment Letter to South Carolina"), https://drive.google.com/file/d/1JYrFTBefdsIdK-dVRngRNAbqQyB-0fpe/view?usp=sharing; with enclosure, Joe Kordzi, "A Review of the South Carolina Regional Haze State Implementation Plan" (Dec. 2021), https://drive.google.com/file/d/1R4C0iELLi4RcIrSYN5FCmGOOs4ox727p/view?usp=sharing.

[xx] *See e.g.*, Comment Letter to New Jersey at 9 ("The MANE-VU course of action is not a safety net and, assuming New Jersey accurately interpreted and adhered to the MANE-VU Ask, has not resulted in adequate analysis or emission reduction measures to demonstrate compliance with the

Regional Haze Rule or Clean Air Act."); *id.* at 15 ("In addition to adopting enforceable measures necessary to make reasonable progress via a four-factor analysis, NJDEP also must demonstrate that it has included in its implementation plan "all measures agreed to during state-to-state consultations or a regional planning process, or measures that will provide equivalent visibility improvement." 40 C.F.R. § 51.308(f)(2)(ii). The MANE-VU states, including New Jersey, developed a course of action (i.e., the MANE-VU Asks") to assure reasonable progress towards the national visibility goal during the second implementation period. Although NJDEP's proposed SIP revision seems to indicate that New Jersey has already adopted measures to implement the MANE-VU asks, the proposed regional haze SIP revision fails to adequately identify those existing rules and/or permits, explain how those rules/permits meet the MANE-VU ask, or make clear whether the rules implementing the MANE-VU asks have been submitted to EPA as part of the SIP. This is discussed further below." (citations omitted).

[xxi] Letter from National Parks Conservation Association, Sierra Club, Earthjustice to Arizona to Ryan Templeton, Elias Toon, Arizona Department of Environmental Quality "EPA July 2021 Clarification Memo and the Upcoming Arizona Regional Haze SIP Rulemaking," (Aug. 5, 2021) ("Preliminary Comment Letter to Arizona"), https://drive.google.com/file/d/1e72jUXB_ozBFoWkuTdEzEaRrtNgx8D0B/view?usp=sharing.

[xxii] Letter from Diné C.A.R.E., National Parks Conservation Association, San Juan Citizens Alliance, Sierra Club, and Western Environmental Law Center, to Sandra Ely, Director, Environmental Protection Division, NMED, "New Mexico's Regional Haze Plan and San Juan Generating Station," (March 19, 2020) ("Preliminary Comment Letter to New Mexico"), https://drive.google.com/file/d/1sVqnRJX0av5DjACmVoM8bkmoQaw_JMGR/view?usp=sharing; *see also* Letter from Western Environmental Law Center, National Parks Conservation Association, to Mark Jones, Cember Hardison, New Mexico Environment Department, response to request for additional information on electrification and SCR (May 22, 2020), https://drive.google.com/file/d/1gyoM3RpHne233imcPJ0AQ9LOVR4t5tYM/view?usp=sharing, with enclosure: Vicki Stamper, Megan Williams, "Review of Claims Made by New Mexico Oil and Gas Companies Regarding Applicability of Selective Catalytic Reduction (SCR) to Lean Burn Engines," (May 22, 2020); *see also* Letter from National Parks Conservation Association, Western Environmental Law, to Sandra Ely, Michael Baca, Mark Jones, and Kerwin Singleton New Mexico Environment Department, "Comments responding to 4-factor analysis submittals from identified oil & gas operators," (July 10, 2020), https://drive.google.com/file/d/1jsmusMW2M37vRlWdFXYLjtZwSkP9QE6Z/view?usp=sharing, with enclosure: Vicki Stamper, Megan Williams, "Assessment of Cost Effectiveness Analyses for Controls Evaluated Four – Factor Analyses for Oil and Gas Facilities For the New Mexico Environment Department's Regional Haze Plan for the Second Implementation Period," (July 2, 2020); *see also* Victoria R. Stamper, "Comments on the Enchant/Farmington July 9, 2020 Submittal to the New Mexico Environment Department on Air Pollution Controls at San Juan Units 1 and 4 to Make Reasonable Progress Towards the National Visibility Goal," (Sept. 2, 2020), https://drive.google.com/file/d/1Y6z8z0zIPDim0PhXUbWWvNggGE9yl3vT/view?usp=sharing.

[xxiii] Letter from National Parks Conservation Association, HEAL Utah, Sierra Club, Utah Physicians for a Healthy Environment, Western Resource Advocates, to Bryce Bird, Director, Utah Division of Air Quality, "Preliminary comments on second planning period regional haze reasonable progress submissions by industry," (Nov. 11, 2020) ("Preliminary Comment Letter to Utah"), https://drive.google.com/file/d/1uoS1bzQckY7__O85blgBnggM13y3LDsO/view?usp=sharing, with enclosure: Victoria R. Stamper, "Comments on Company Submittals to the Utah Division of Air Quality on Air Pollution Controls to Make Reasonable Progress Towards the National Visibility Goal," (Oct. 28, 2020), https://drive.google.com/file/d/1CSGL2RoD-8gs3TklpBTI_ixCr1KqoXJw/view?usp=sharing.

[xxiv] Letter from National Parks Conservation Association, PennFuture, Group Against Smog and Pollution, Coalition to Protect America's National Parks, Moms Clean Air Force, Clean Air Council, Earthjustice, to Mark Hammond, Director Bureau of Air Quality, Pennsylvania Department of Environmental Protection, "Regional Haze, Second Planning Period," (April 19, 2021), ("Preliminary

Comment Letter to Pennsylvania"), https://drive.google.com/file/d/18BlJzptxrW6XsFbtiop8fEunY14nX98R/view?usp=sharing, with enclosure, Joe Kordzi, "A Preliminary Review and Recommendations for Selected Pennsylvania Regional Haze Sources," (April 2021), https://drive.google.com/file/d/1ea9Nbcg_vllxekNep0c2RzxY-GOjMFXM/view?usp=sharing.

[xxv] Letter from National Parks Conservation Association, Sierra Club, to Director Macy, "Nebraska's Second Planning Period Regional Haze SIP Development," (July 6, 2021) ("Preliminary Comment Letter to Nebraska"), https://drive.google.com/file/d/1bbFb7VSzchOFrh4Seqox1XaNi7YMOjV0/view?usp=sharing, with enclosures: Victoria R. Stamper, "Reasonable Progress Analysis for Sulfur Dioxide and Nitrogen Oxide Pollution Control Upgrades at Gerald Gentleman Station," (July 6, 2021), https://drive.google.com/file/d/1YKE7eLbxhaW7ChXqiB2n7T6h4yxoftNr/view?usp=sharing; Dr. H. Andrew Gray, "Review of Trinity's CAMx Air Dispersion Modeling Report - Visibility Impacts prepared for NPPD Gerald Gentleman Station (December 2020) and their Supplemental Report (February 2021)," (July, 6, 2021), https://drive.google.com/file/d/1JPtBiYD7s0q8evCN_4Pri4TRJUIqK3pV/view?usp=sharing.

[xxvi] Letter from National Parks Conservation Association, Sierra Club, to Jim Semerad, David E. Stroh, North Dakota Department of Environmental Quality, "North Dakota's Second Planning Period Regional Haze SIP — Responses to Source-Specific Four-Factor Analyses," (Nov. 17, 2020) ("Preliminary Comment Letter to North Dakota – Nov. 2020"), https://drive.google.com/file/d/1ugPNlmSbpmY2jeZoFOxfJk7oZM9tK0gQ/view?usp=sharing, with enclosures: Joe Kordzi, "NOx and SO2 Reasonable Progress Analysis for the Otter Tail Coyote Station," (Nov. 2020), https://drive.google.com/file/d/1hOf9nAIClgu8u--KbhJQ9Crnx6ShEVdA/view?usp=sharing; Joe Kordzi, "North Dakota BART and Reasonable Progress Analysis," (Nov. 2020), https://drive.google.com/file/d/1hOf9nAIClgu8u--KbhJQ9Crnx6ShEVdA/view?usp=sharing; Joe Kordzi, Ranajit Sahu, "A Review of the Record Concerning the Technical Feasibility of Selective Catalytic Reduction on North Dakota," (Oct. 2020), https://drive.google.com/file/d/1v5vLfEXkx3eQiWi9AdWLyxwS0Z0rbWRP/view?usp=sharing; *see also* Letter from National Parks Conservation Association, Badlands Conservation Alliance, Clean Up the River Environment, Sierra Club, to Governor Doug Burgum, Mr. Jim Semerad Director, Division of Air Quality North Dakota Department of Environmental Quality, Mr. David E. Stroh Environmental Engineer North Dakota Department of Environmental Quality, "Environmental Liabilities Resulting from the Potential Sale of Coal Creek Station," (April 19, 2021) ("Preliminary Comment Letter to North Dakota – April 2021"), https://drive.google.com/file/d/1f5ZSXQZWt7otMhOQMn-q8UIjF3hEfnzN/view?usp=sharing.

[xxvii] Letter from Appalachian Voices, Capital Region Land Conservancy, Climate Action Alliance of the Valley, Southern Environmental Law Center, Coalition to Protect America's National Parks, University of Virginia School of Law (Cale Jaffe), Moms Clean Air Force, Virginia Clinicians for Climate Action, National Parks Conservation Association, Virginia Conservation Network, Piedmont Environmental Council, Virginia Interfaith Power & Light, SERCAP, Virginia League of Conservation Voters, to The Hon. Ralph Northam, Office of the Governor, "Request for your leadership to benefit Virginians' health and welfare and to promote environmental justice via an effective clean air plan due soon to the U.S. EPA," (June 25, 2021) ("Preliminary Comment Letter to Virginia"), https://drive.google.com/file/d/1NZr44VbtZ49-gKlD1W7l1kxChZzXUnIi/view?usp=sharing.

Message

From: Bodine, Renee R [renee_bodine@fws.gov]
Sent: 10/13/2022 3:25:03 PM
To: katasha.cornwell@dot.state.fl.us; Thomas.Eason@myfwc.com; melissa.tucker@myfwc.com; claire.sunquist@myfwc.com; ricardo.zambrano@myfwc.com; OHanlon, Bradley [bradley.ohanlon@myfwc.com]; kevin.enge@myfwc.com; Jonathan.Mays@MyFWC.com; Moler, Paul [paul.moler@myfwc.com]; FWCconservationplanningservices@MyFWC.com; Mary.J.Duncan@FloridaDEP.gov; Eric.draper@floridadep.gov; Alex.reed@floridadep.gov; roberts-michael@monroecounty-fl.gov; allen-john@monroecounty-fl.gov; Schemper-Emily@monroecounty-fl.gov; maria.bagiotti@islamorada.fl.us; Parks.Small@dep.state.fl.us; Scott.Tedford@dep.state.fl.us; communications@tropicalaudubon.org; fprice@fnai.fsu.edu; djackson@fnai.fsu.edu; friends@1000fof.org; floffice@earthjustice.org; jwraithmell@audubon.org; cpolsky@fau.edu; fde@fladefenders.org; meredithb@fwfonline.org; frank.jackalone@sierraclub.org; temperince.morgan@tnc.org; florida@tnc.org; efleming@defenders.org; southfloridawild@yahoo.com; gann@regionalconservation.org; jlopez@biologicaldiversity.org; mmcrae@keywest.garden; Jennifer Possley [jpossley@fairchildgarden.org]; Parkinson@ucf.edu; Katie.mercier@knights.ucf.edu; edm@mail.usf.edu; earlmccoy@usf.edu; mushinsk@usf.edu; marla_hamilton@nps.gov; Ramos, Pedro [Pedro_Ramos@nps.gov]; brien_culhane@nps.gov; Eric.P.Summa@usace.army.mil; Ann.B.Hodgson@usace.army.mil; Krista.D.Sabin@usace.army.mil; Dale.E.Beter@usace.army.mil; jason.j.spinning@usace.army.mil; angela.e.dunn@usace.army.mil; Andrew.J.Loschiavo@usace.army.mil; Emily.Biondi@dot.gov; William.Straw@dhs.gov; Sarah.Fangman@noaa.gov; Nathan.Fikkert@usda.gov; Michael.Bush@usda.gov; Blackman, Daniel [Blackman.Daniel@epa.gov]; robby.smith@navy.mil; jered.jackson@navy.mil; george.kenny1@navy.mil; edward.barham@navy.mil; matthew.s.martin1@navy.mil; Andrew.L.Bobick@uscg.mil; Keith.W.Wright@uscg.mil; Boyles, Ryan P [rboyles@usgs.gov]; Kalasz, Kevin S [kevin_kalasz@fws.gov]; Phillips, Jereme [jereme_phillips@fws.gov]; Burchett, Kathleen [kathleen_Burchett@fws.gov]; Hunter, Chuck [chuck_hunter@fws.gov]; Eggleston, Christian [christian_eggleston@fws.gov]; Boling, Greg [greg_boling@fws.gov]; Dixon, Jeremy [jeremy_dixon@fws.gov]
Subject: USFWS Proposes Listing and Critical Habitat for Two Snakes

Dear All,

The U.S. Fish and Wildlife Service proposes listing the Key ring-necked snake and the rim rock crowned snake as endangered under the Endangered Species Act (ESA) and designating critical habitat for them. The Service invites public comment on this proposed rule until Dec. 13, 2022. The news release is now posted on our website.

The two small non-venomous snakes make their home in the crevices and pockets of limestone outcrops, pine rocklands and rockland hammocks in the Florida Keys, putting them at risk from rising seas and increasingly severe and frequent storms. Development, fire suppression and saltwater intrusion compound that threat.

The Service is proposing to designate 2,604 acres of land in four units within the Florida Keys of Monroe County, Florida, as critical habitat for the Key ring-necked snake. The proposed critical habitat for the rim rock crowned snake consists of 5,972 acres across 11 units within Miami-Dade and Monroe Counties, Florida. Most of the land proposed for critical habitat designation for the snakes overlap established critical habitat designations with 11 other species.

The proposed rule posts to the Federal Register's reading room today and is available here. It officially publishes in the Federal Register tomorrow, Oct. 14, 2022, available here.

The proposed rule, supporting information, and how to submit comments are available at the Federal eRulemaking Portal. In the Search box, enter FWS-R4-ES-2022-0022, which is the docket number for this rulemaking.

Best regards,

Renee Bodine, Public Affairs Specialist
U.S. Fish and Wildlife Service - External Affairs
Florida Ecological Services
352-451-8126

Appointment

From: Kim, Eunjung [Kim.Eun@epa.gov]
on behalf of Millan, Vanessa [Millan.Vanessa@epa.gov]
Sent: 11/17/2022 1:54:02 PM
To: Non-Career_Regional_Administrators [Non-Career_Regional_Administrators@epa.gov]; Air Division Directors and Deputies [Air_Division_Directors_and_Deputies@epa.gov]

Subject: FW: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
Location: https://usepa.zoomgov.com/j/1601813017

Start: 11/29/2022 4:00:00 PM
End: 11/29/2022 5:30:00 PM
Show Time As: Tentative

-----Original Appointment-----
From: Millan, Vanessa <Millan.Vanessa@epa.gov>
Sent: Tuesday, November 8, 2022 4:22 PM
To: Millan, Vanessa; Nunez, Alejandra; Kim, Eunjung; Macedonia, Jennifer; Benkeser, Anna; Mmitch3@gmu.edu; Cortez Russell, Loni; Carbonell, Tomas; Jakob, Avivah
Cc: mrauch@momscleanairforce.org; Smith, Grace Y.; Danielle.wright@nasrc.org; sam@evergreenaction.com; Janet McGovern; Martin Hayden; dgreenbaum@healtheffects.org; Paul Billings; zachary.fabish@sierraclub.org; llynch@nrdc.org; Mahyar Sorour; smackler@bipartisanpolicy.org; matthew_davis@lcv.org; bdroessler@environmental-initiative.org; cstarr@eia-global.org; laura.bender@lung.org; Enobakhare, Rosemary; jackerly; thiggins@americanprogress.org; Rose Garr; cjenks@law.harvard.edu; patrick.drupp@sierraclub.org; David McCabe; ebechard@momscleanairforce.org; mreis@momscleanairforce.org; aherzog@hcwh.org; CROZAT, Matt; greed@ucsusa.org; Moltzen, Michael; Johnson, Dennis; Henning, Julie; Simon, Karl; Gunning, Paul; Lupinacci Rausch, Jean; Birnbaum, Rona; Newberg, Cindy; Akerman, Nancy; Cappel, Kirsten; Kee, Annie; Clouse, Matt; Camobreco, Vincent; De Figueiredo, Mark; Elger, Nicholas; Lacount, Melanie; Fisher, Brian; Marcy, Cara; Hathaway, Julia; Johnson, Travis; Bowker, George; Moss, Jacob; Conlin, Beth; Alpert, Adina; Lau, Patrick; Graff, Michelle; Gardarsdottir-Middleton, Thora; Kocchi, Suzie; Denny, Andrea; Smith, Alisa; White, Sharon; Enger, Tracy; Brown, Sheila D.; Cappuccilli, Eva; Durkin, Kim; Errico, Mary; Mitchell, Tracey; Hatcher, Caterina; Hamjian, Lynne; Bird, Patrick; Benoit, Eugene; Isenberg, Madeline; Freeman, Caroline; Toney, Anthony; Rinck, Todd; Watson, Marion; Reynolds, Mary; Lesane, Heidi; Rowson, David; Ashley, Jackie; Baumgart-Getz, Adam; Benedict, Kristen; Brachtl, Megan; Brockman, Larry; Damberg, Rich; Etchells, Elizabeth; Hemby, James; Johnson, Steffan; Koplitz, Shannon; Lasley, Benjamin; Naess, Liz (she/her/hers); Torres, Elineth; Wayland, Richard; Whitlow, Jeff; Roberts, Timothy-P; Marusiak, Eleanor; Hyde, Courtney; Dowdell, Edward (Ned); Thompson, Ashley; Shaw, Betsy; Weaver, Susannah; Biton, Leiran; Greene, Cynthia; Shoaff, John; Profeta, Timothy; Grumet, Stephanie; Mulderrig, Conor; Riley, Alison; Acevedo, Frank; Nwia, Jacqueline; Bertram, Emily
Subject: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
When: Tuesday, November 29, 2022 11:00 AM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: https://usepa.zoomgov.com/j/1601813017

Meeting: This is a virtual roundtable conversation with EPA around the Office of Air and Radiation's provisions in the Inflation Reduction Act.
Date/ Time: Tuesday, Nov. 29, 11:00am-12:30pm EST
Zoom Link: https://usepa.zoomgov.com/j/1601813017
Overview: We are excited to hear your perspectives, priorities, and feedback as we embark on this critical priority. A Request for Information (RFI) was published that includes non-regulatory dockets to provide answers to questions OAR has authored for stakeholders to respond to. The list of discussion questions and dockets can be found HERE.

IRA Provisions Covered:

- Clean Heavy-Duty Vehicles [60101]
- Grants to Reduce Air Pollution at Ports [60102]
- Diesel Emissions Reduction [60104]
- Funding to Address Air Pollution – Fenceline Monitoring [60105(a)]
- Funding to Address Air Pollution – Multipollutant Monitoring [60105(b)]
- Funding to Address Air Pollution – Air Quality Sensors [60105(c)]
- Funding to Address Air Pollution – Emissions from Wood Heaters [60105(d)]
- Funding to Address Air Pollution – Methane Monitoring [60105(e)]
- Funding to Address Air Pollution – Clean Air Act Grants [60105(f)]
- Funding to Address Air Pollution – Mobile Source Grants [60105(g)]
- Funding to Address Air Pollution at Schools [60106]
- Low Emissions Electricity Program [60107]
- Funding for Section 211(O) of the Clean Air Act - RFS [60108]
- Funding for Implementation of American Innovation and Manufacturing Act [60109]
- GHG Corporate Reporting [60111]
- Methane Emissions Reduction Program [60113]
- Climate Pollution Reduction Grants [60114]

(THIS LISTENING SESSION WILL NOT INCLUDE A DISCUSSION OF THE GREEN HOUSE GAS REDUCION FUND.)

PM 2.5 Proposal

Rollout Tick Tock – Announcement Friday, 1/6 5:45pm version

Date	Time	Activity	Person Responsible
11/22	1 – 1:30 pm	Heads up briefing for RAs & ADDs with some materials	OAR
1/4 – (2 days before announcement)	3PM	Rollout discussion w/ RAs plus PADs/ADDs	OCIR
1/5	Thursday, 9:30 (prep) 10AM (start)	Embargoed press call	AO/OPA
1/5	11:45am	Signature	AO
1/5 – Day before announcement	12/14 3:30-6	Embargoed briefings with **2:30** – Congressional (leadership, committees) **3:30** - Environmental and public health NGOs **4:00** - (ECOS/NACAA/AAPCA/NGA/NCSL/NCL/USCM/NACo/AAMA) – (Assoc Staff) **4:30** - EJ organizations **4:45** - Labor **5:00** - USDA/Forest Service/WFLC	OAR, OCIR, OPEEE, OEJECR – Joe/Tomás/Erika w/ facilitation from AO offices
1/5	TBD	State heads-up to MI & CO (OCIR); AK (R10) Local heads-up: Atlanta Dallas, Houston Denver Cleveland, Cincinnati Chicago Detroit Las Vegas Milwaukee St. Louis	OCIR / R10

		Charlotte Philadelphia, Pittsburgh Phoenix, Scottsdale	
1/5 Day before announcement	5:15	Individual heads-up calls (NTAA chair (Tribes)	Pat Childers
1/5	COB	Send invites for post-announcement stakeholder calls	OPEEE, OCIR
1/5-1/6 Day before (and/or signature	6pm/10am	Individual heads-up calls to CARB, industry groups – AF&PA, etc. Tomas to notify SBA day of.	OAR – Joe
1/6 – Day of Announcement	8-10AM	Air Division heads up calls to States	Regional Air Divisions
	9:30am	Briefing for congressional letter signers - TP	OAR & OCIR
	9:45AM	Website goes live	OAQPS/OID/ITG and HEID
	10:00am	Embargo Lifts	OPA
	10:00am	Press release issued; rule and accompanying materials posted to web.	OPA/OAR/OAQPS
	~10:00am	Region amplification of PR	
		Local heads-up (OCIR)	OCIR and Regions
	12pm-1:30pm	Follow-up briefings – States and local govts, NGOs, labor, Industry 1. State co-regulators – 12-12:25 (membership of ECOS, NACAA, AAPCA) 2. NGOs - 12:30 – 12:55 3. Industry & Labor – 1:00-1:25	OCIR, OPEEE, OAR
	2pm	All Hill briefing	OCIR, OAR
Next NTAA call		Briefing for NTAA (Tribes)	OAR, OAQPS

Email Lists

3:30PM – 3:45PM NGOs and Public Health

NGOs

Environment America	Lisa Frank	[HYPERLINK "mailto:lfrank@environmentameric
EDF	Michael Panfil	[HYPERLINK "mailto:mpanfil@edf.c
EDF	Peter Zalzal	[HYPERLINK "mailto:pzalzal@edf.or
EDF	Vicki Patton	[HYPERLINK "mailto:vpatton@edf.c
EIP	Eric Schaeffer	[HYPERLINK "mailto:eschaeffer@environmental]
Clean Air Task Force	Ann Weeks	[HYPERLINK "mailto:aweeks@catf.u
Clean Air Task Force	Hayden Hashimoto	[HYPERLINK "mailto:hhashimoto@c
Clean Air Task Force	Conrad Schneider	[HYPERLINK "mailto:cschneider@ca
Climate Action Campaign	Madeline Page	[HYPERLINK "mailto:mpage@cacam
Climate Action Campaign	Rose Garr	[HYPERLINK "mailto:rgarr@cacamp
LCV	Sara Chieffo	[HYPERLINK "mailto:sara_chieffo@
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AGU GeoHealth Planetary Health Alliance	Mark Shimamoto	

4:30PM – 4:45PM Environmental Justice

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The New School	Dr. Ana Baptista	[HYPERLINK "mailto:baptista@newschool.edu"]
Deep South Center for EJ	Dr. Monique Harden	[HYPERLINK "mailto:moniqueh@ds]
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Michigan Welfare Rights Org.	Sylvia Orduno	[HYPERLINK "mailto:smorduno@gmail.com"]
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Los Jardines Institute	Richard Moore	[HYPERLINK "mailto:ljinewmexico@gmail.com"]
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Stoic Energy	Doug Lewin	[HYPERLINK "mailto:Doug@StoicEnergyConsulti]
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Clean Air Now	Atenas Mena	[HYPERLINK "mailto:atenas@cankc

4:45PM – 5:00PM Labor

Labor		
Blue Green Alliance	Jason Walsh	[HYPERLINK "mailto:jwalsh@bluegreenalliance.c
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AFL-CIO	Brad Markell	[HYPERLINK "mailto:bmarkell@aflcio.org"]
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NABTU	Trevor Falk	[HYPERLINK "mailto:trevor@nabtu.]
IBEW	Donnie Colston	[HYPERLINK "mailto:donnie_colston@ibew.org"
IBEW	Gene Trisko	[HYPERLINK "mailto:etrisko@gmail.com"]

Iron Workers	Ross Templeton	[HYPERLINK "mailto:rtempleton@iwintl.org"]
United Mine Workers of America	Adam Banig	[HYPERLINK "mailto:ABanig@umwa.org"]
AFL-CIO	Brad Markell	[HYPERLINK "mailto:bmarkell@aflcio.org"]

SEPARATE CALLS FOR OAR TO MAKE: Industry (Chamber and EEI)

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Message

From: Freeman, Caroline [Freeman.Caroline@epa.gov]
Sent: 2/13/2023 5:38:25 PM
To: Chaffins, Randall [Chaffins.Randall@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Blevins, John (he/him/his) [Blevins.John@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Johnson, Terry [Johnson.Terry@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]
CC: Blackman, Daniel [Blackman.Daniel@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Nicholson, John [Nicholson.John@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Nowell, Valerie [Nowell.Valerie@epa.gov]
Subject: FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Importance: High

FYI – For Situational Awareness

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Monday, February 13, 2023 12:07 PM
To: Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>
Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org
Subject: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html
- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html
- https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/
- https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/
- processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4
- processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4
- original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
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(305) 440-5435
www.earthjustice.org

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Message

From: Mena, Lourdes [Lourdes_Mena@fws.gov]
Sent: 12/21/2022 4:12:28 PM
To: Todd.Knapp@FreshFromFlorida.com; Camposano, Brian [brian.camposano@freshfromflorida.com]; Michael Jenkins [michael.jenkins@fdacs.gov]; Keith.Rowell@FDACS.gov; Hank.Vinson@FDACS.gov; alex.kropp@myfwc.com; Kim.McShane@MyFWC.com; kristen.sommers@MyFWC.com; Claire Sunquist [claire.sunquist@myfwc.com]; melissa.tucker@myfwc.com; richard.mccann@MyFWC.com; shawn.hamilton@floridadep.gov; darinda.mclaughlin@floridadep.gov; Mary.J.Duncan@FloridaDEP.gov; Sirena.Davila@FloridaDEP.gov; nathan.hess@floridadep.gov; brad.richardson@floridadep.gov; mara.gambineri@floridadep.gov; Greg.Kaufmann@dep.state.fl.us; robert.yero@floridadep.gov; Small, Parks [Parks.small@floridadep.gov]; jared.perdue@dot.state.fl.us; brian.mcmanus@dot.state.fl.us; jennifer.marshall@dot.state.fl.us; vicki.sharpe@dot.state.fl.us; Cornwell, Katasha [katasha.cornwell@dot.state.fl.us]; Joel.DeAngelis@swfwmd.state.fl.us; Paul.Elliott@SWFWMD.state.fl.us; mark.fulkerson@swfwmd.state.fl.us; Will.VanGelder@swfwmd.state.fl.us; Margaret.Blommel@swfwmd.state.fl.us; cyndi.gates@swfwmd.state.fl.us; dbartlett@sfwmd.gov; gkamak@sfwmd.gov; mbodle@sfwmd.gov; lois.forster@fema.dhs.gov; William.Straw@dhs.gov; FEMA-IGA@fema.dhs.gov; FEMA-R4-Info@fema.dhs.gov; stephanie.madson@fema.dhs.gov; susan.wilson@fema.dhs.gov; kimberly.bose@ferc.gov; wayne.king@ferc.gov; nathaniel.davis@ferc.gov; Benito.Cunill@dot.gov; juan.hernandez@usda.gov; Crenel.Francis@fl.usda.gov; Frank.Ellis@usda.gov; Jeff.Schmidt@usda.gov; Roney_Guitierrez@fl.usda.gov; rosalind.moore@fl.usda.gov; michael.bush@fl.usda.gov; Scott.Turgeon@fl.usda.gov; powell.duncan@epa.gov; Dominy, Randy [Dominy.Randy@epa.gov]; godfrey.annie@epa.gov; Blackman, Daniel [Blackman.Daniel@epa.gov]; Hamilton, Marla E [Marla_Hamilton@nps.gov]; Ramos, Pedro [Pedro_Ramos@nps.gov]; brien_culhane@nps.gov; Sadle, Jimi [Jimi_Sadle@nps.gov]; O'Shea, Thomas [osheat@usgs.gov]; michael.l.avery@aphis.usda.gov; mark.garner@usda.gov; Krusac, Dennis -FS [dennis.krusac@usda.gov]; samelon@fs.fed.us; dsaugey@fs.fed.us; Carolyn.Sekerak@usda.gov; rmcclanahan@fs.fed.us; bruce.beard@osd.mil; david.glass@us.af.mil; scott.belfit@us.army.mil; dallas.grimes1@us.army.mil; kevin.thames@us.army.mil; julie.jeter@us.army.mil; kimberly.h.fleming@usmc.mil; ryan.orndorff@usmc.mil; mary.hassell@usmc.mil; doug.nemeth@navy.mil; mark.w.gibson@navy.mil; Andrew.L.Bobick@uscg.mil; J.N.Cromer@usace.army.mil; alan.m.dodd@usace.army.mil; david.j.bauman@usace.army.mil; Eric.P.Summa@usace.army.mil; hal.e.balbach@usace.army.mil; Kelly.e.unger@usace.army.mil; Alisa.A.Zarbo@usace.army.mil; Edward.P.Sarfert@usace.army.mil; Jose.Cedeno-Maldonado@usace.army.mil; Ingrid.N.Gilbert@usace.army.mil; cesaj-rd-sa@usace.army.mil; tampareg@usace.army.mil; J57@miamidade.gov; sonya.thompson@miamidade.gov; guerrcy@miamidade.gov; janet.gil@miamidade.gov; DOZIEJ@miamidade.gov; GrossC@miamidade.gov; luis.moreno2@miamidade.gov; james.duncan@miamidade.gov; john.joyner@miamidade.gov; jacko@miamidade.gov; PBS@miamidade.gov; aimee.webb@sumtercountyfl.gov; patricia.burgos@sumtercountyfl.gov; info@abettersouthflorida.org; floffice@earthjustice.org; cpolsky@fau.edu; fde@fladefenders.org; info@fmpa.com; meredithb@fwfonline.org; frank.jackalone@sierraclub.org; temperince.morgan@tnc.org; florida@tnc.org; efleming@defenders.org; Elise Bennett [EBennett@biologicaldiversity.org]; selcga@selcga.org; wigley@clemson.edu; Mmittelholzer@nahb.com; jbullock@resourcemgt.com; david.childs@hgslaw.com; drillstone@broadandcassel.com; erick@evergladesfoundation.org; info@evergladesfoundation.org; i.stout@ucf.edu; Alan@FLForestry.org; peter@usendowment.org; info@forestlandowners.com; bdavis@forestlandowners.com; Frank Price [fprice@fnai.fsu.edu]; aknight@fnai.fsu.edu; Hanna Rosner-Katz [hrosnerkatz@fnai.fsu.edu]; Amy Jenkins [ajenkins@fnai.fsu.edu]; tyndl.rainey@MyFWC.com; alex.aubuchon@myfwc.com; Arielle.Callender@myfwc.com; deena.wells@dep.state.fl.us; rachel.cone@dep.state.fl.us; dee.ann.miller@dep.state.fl.us; jodi.conway@dep.state.fl.us; darryl.boudreau@dep.state.fl.us; ana.gibbs@dep.state.fl.us; cristina.llorens@dep.state.fl.us; lisa.kelley@dep.state.fl.us; terry.cerullo@dep.state.fl.us; Jennifer.Diaz@dep.state.fl.us; sterling.ivey@freshfromflorida.com; dswm@miamidade.gov; administrative.services@sumtercountyfl.gov; patrick@montgomerybotanical.org; chad@montgomerybotanical.org; tracym@montgomerybotanical.org; sboggess@girlscoutsfl.org; lross@girlscoutsfl.org; Jennifer Possley [jpossley@fairchildgarden.org]; riibe.lindsey@gmail.com; gann@regionalconservation.org; Tyler Michels [craigv@miccosukeetribe.com]; kopturs@fiu.edu; valerie.pence@cincinnatizoo.org; bholst@selby.org; gnelson@bio.fsu.edu; gil@gilnelson.com; sdumond@monkeyjungle.com; alan.cressler@gmail.com; smwood@bellsouth.net; steve@pronative.com; colin.hughes@fau.edu; chughe@fau.edu; dfarrar@iastate.edu; joseluis@joseluisperezcalo.com
CC: Hitt, Heather L [heather_hitt@fws.gov]; Colangelo, Nikki [Nikki_Colangelo@fws.gov]
Subject: FWS Designates Critical Habitat for the Endangered Florida Bristle Fern

Dear Conservation Partner,

The U.S. Fish and Wildlife Service (Service) is designating approximately 4,195 acres on 10 parcels as critical habitat for the rare Florida bristle fern under the Endangered Species Act (ESA).

A final rule designating critical habitat for this fern will publish in the Federal Register tomorrow, December 22, 2022. The designation takes effect on January 23, 2023. The Service listed the Florida bristle fern, a plant found only in Miami-Dade and Sumter counties, as endangered in 2015.

Substantive comments from peer reviewers and the public suggested expanding some of the units and adding parcels to the critical habitat designation during the comment period for the proposed rule in February 2020. Five parcels, Matheson Hammock, Snapper Creek, Castellow and Ross Hammocks, Hattie Bauer Hammock, and Fuchs and Meissner Hammocks, were expanded and one south Florida unit, Charles Deering Estate Hammock, was added.

The Florida bristle fern is a tiny bright green mat-forming plant. In Miami-Dade County, south Florida, four populations of the fern are found in rockland hammocks on county-managed conservation lands in Castellow, Hattie Bauer, Fuchs and Meissner hammocks. In Sumter County, central Florida, two populations grow in small hammocks on state-owned land in the Jumper Creek Tract of the Withlacoochee State Forest.

Urban development, agricultural conversion, building canals and draining the land has modified or destroyed much of the plant's habitat. The ESA requires, where possible, the Service to identify areas essential to the conservation of endangered or threatened species, which it terms critical habitat.

The rule is available for public inspection today, December 21 at this link: https://www.federalregister.gov/public-inspection. The rule, comments, economic analysis, and supporting documents will be available on December 22 at http://www.regulations.gov, Docket No. FWS–R4–ES–2019–0068. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877–8339.

Thank you for your support of our endangered and threatened species.

https://www.fws.gov/press-release/2022-12/service-designates-critical-habitat-endangered-florida-bristle-fern

https://www.fws.gov/story/2022-12/florida-bristle-fern

Sincerely,

Lourdes Mena

Division Manager, Florida Classification and Recovery
U.S. Fish and Wildlife Service
Florida Ecological Services Field Office
7915 Baymeadows Way, Suite 200

Jacksonville, FL 32256-7517
Phone: 904-731-3134
Cell phone: 904-460-4970
https://www.fws.gov/office/florida-ecological-services
Work hours 7:00 am - 3:30 pm (sliding hours 6:30 am - 4:30 pm)

There is something infinitely healing in the repeated refrains of nature - the assurance that dawn comes after night, and spring after winter -- Rachel Carson

NOTE: This email correspondence and any attachments to and from this sender is subject to the Freedom of Information Act (FOIA) and may be disclosed to third parties.

Appointment

From: Millan, Vanessa [Millan.Vanessa@epa.gov]
Sent: 11/17/2022 1:54:05 PM
To: Millan, Vanessa [Millan.Vanessa@epa.gov]; Nunez, Alejandra [Nunez.Alejandra@epa.gov]; Kim, Eunjung [Kim.Eun@epa.gov]; Macedonia, Jennifer [Macedonia.Jennifer@epa.gov]; Benkeser, Anna [Benkeser.Anna@epa.gov]; Mmitch3@gmu.edu; Cortez Russell, Loni [Russell.Loni@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Jakob, Avivah [Jakob.Avivah@epa.gov]
CC: mrauch@momscleanairforce.org; Smith, Grace Y. [Smith.Grace.Y@epa.gov]; Danielle.wright@nasrc.org; sam@evergreenaction.com; anowlan@edf.org; JSlaney@edf.org; Celerah Hewes [chewes@momscleanairforce.org]; Ann Weeks [aweeks@catf.us]; Janet McGovern [jmcgovern@healtheffects.org]; Martin Hayden [mhayden@earthjustice.org]; Spiller, Beia [bspiller@rff.org]; dgreenbaum@healtheffects.org; Paul Billings [Paul.Billings@lung.org]; zachary.fabish@sierraclub.org; llynch@nrdc.org; Mahyar Sorour [mahyar.sorour@sierraclub.org]; smackler@bipartisanpolicy.org; matthew_davis@lcv.org; bdroessler@environmental-initiative.org; cstarr@eia-global.org; laura.bender@lung.org; Enobakhare, Rosemary [Enobakhare.Rosemary@epa.gov]; jackerly [jackerly@forgreenheat.org]; thiggins@americanprogress.org; Rose Garr [rgarr@cacampaign.org]; cjenks@law.harvard.edu; patrick.drupp@sierraclub.org; David McCabe [dmccabe@catf.us]; ebechard@momscleanairforce.org; mreis@momscleanairforce.org; aherzog@hcwh.org; CROZAT, Matt [mpc@nei.org]; greed@ucsusa.org; Moltzen, Michael [Moltzen.Michael@epa.gov]; Johnson, Dennis [Johnson.Dennis@epa.gov]; Henning, Julie [henning.julie@epa.gov]; Simon, Karl [Simon.Karl@epa.gov]; Gunning, Paul [Gunning.Paul@epa.gov]; Lupinacci, Jean [Lupinacci.Jean@epa.gov]; Birnbaum, Rona [Birnbaum.Rona@epa.gov]; Newberg, Cindy [Newberg.Cindy@epa.gov]; Akerman, Nancy [Akerman.Nancy@epa.gov]; Cappel, Kirsten [Cappel.Kirsten@epa.gov]; Kee, Annie [Kee.Annie@epa.gov]; Clouse, Matt [Clouse.Matt@epa.gov]; Camobreco, Vincent [Camobreco.Vincent@epa.gov]; De Figueiredo, Mark [DeFigueiredo.Mark@epa.gov]; Elger, Nicholas [Elger.Nicholas@epa.gov]; Lacount, Melanie [lacount.melanie@epa.gov]; Fisher, Brian [Fisher.Brian@epa.gov]; Marcy, Cara [marcy.cara@epa.gov]; Hathaway, Julia [Hathaway.Julia@epa.gov]; Johnson, Travis [Johnson.Travis@epa.gov]; Bowker, George [Bowker.George@epa.gov]; Moss, Jacob [Moss.Jacob@epa.gov]; Conlin, Beth [Conlin.Beth@epa.gov]; Alpert, Adina [Alpert.Adina@epa.gov]; Lau, Patrick [Lau.Patrick@epa.gov]; Graff, Michelle [graff.michelle@epa.gov]; Gardarsdottir-Middleton, Thora [GardarsdottirMiddleton.Thora@epa.gov]; Kocchi, Suzie [Kocchi.Suzanne@epa.gov]; Denny, Andrea [Denny.Andrea@epa.gov]; Smith, Alisa [Smith.Alisa@epa.gov]; White, Sharon [White.Sharon@epa.gov]; Enger, Tracy [Enger.Tracy@epa.gov]; Brown, Sheila D. [Brown.Sheila@epa.gov]; Cappuccilli, Eva [cappuccilli.eva@epa.gov]; Durkin, Kim [Durkin.Kim@epa.gov]; Errico, Mary [Errico.Mary@epa.gov]; Mitchell, Tracey [Mitchell.Tracey@epa.gov]; Hatcher, Caterina [Hatcher.Caterina@epa.gov]; Hamjian, Lynne [Hamjian.Lynne@epa.gov]; Bird, Patrick [Bird.Patrick@epa.gov]; Benoit, Eugene [benoit.eugene@epa.gov]; Isenberg, Madeline [Isenberg.Madeline@epa.gov]; Freeman, Caroline [Freeman.Caroline@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Rinck, Todd [Rinck.Todd@epa.gov]; Watson, Marion [Watson.Marion@epa.gov]; Reynolds, Mary [Reynolds.Mary@epa.gov]; Lesane, Heidi [Lesane.Heidi@epa.gov]; Rowson, David [Rowson.David@epa.gov]; Ashley, Jackie [Ashley.Jackie@epa.gov]; Baumgart-Getz, Adam [Baumgart-Getz.Adam@epa.gov]; Benedict, Kristen [Benedict.Kristen@epa.gov]; Brachtl, Megan [Brachtl.Megan@epa.gov]; Brockman, Larry [Brockman.Larry@epa.gov]; Damberg, Rich [Damberg.Rich@epa.gov]; Etchells, Elizabeth [Etchells.Elizabeth@epa.gov]; Hemby, James [Hemby.James@epa.gov]; Johnson, Steffan [johnson.steffan@epa.gov]; Koplitz, Shannon [koplitz.shannon@epa.gov]; Lasley, Benjamin [Lasley.Benjamin@epa.gov]; Naess, Liz (she/her/hers) [Naess.Liz@epa.gov]; Torres, Elineth [Torres.Elineth@epa.gov]; Wayland, Richard [Wayland.Richard@epa.gov]; Whitlow, Jeff [Whitlow.Jeff@epa.gov]; Roberts, Timothy-P [Roberts.Timothy-P@epa.gov]; Marusiak, Eleanor [Marusiak.Eleanor@epa.gov]; Hyde, Courtney [Hyde.Courtney@epa.gov]; Dowdell, Edward (Ned) [Dowdell.Ned@epa.gov]; Thompson, Ashley [Thompson.Ashley.M@epa.gov]; Shaw, Betsy [Shaw.Betsy@epa.gov]; Weaver, Susannah [Weaver.Susannah@epa.gov]; Biton, Leiran [biton.leiran@epa.gov]; Greene, Cynthia [Greene.Cynthia@epa.gov]; Shoaff, John [Shoaff.John@epa.gov]; Profeta, Timothy [Profeta.Timothy@epa.gov]; Grumet, Stephanie [Grumet.Stephanie@epa.gov]; Mulderrig, Conor [Mulderrig.Conor@epa.gov]; Riley, Alison [riley.alison@epa.gov]; Acevedo, Frank [acevedo.francisco@epa.gov]; Nwia, Jacqueline [nwia.jacqueline@epa.gov]; Bertram, Emily [Bertram.Emily@epa.gov]; Non-Career_Regional_Administrators [Non-Career_Regional_Administrators@epa.gov]; Air Division Directors and Deputies [Air_Division_Directors_and_Deputies@epa.gov]; Schreiner, Molly [Schreiner.Molly@epa.gov]; Becker, KC [Becker.KC@epa.gov]; Smith, Mark A. [Smith.Marka@epa.gov]; Lucey, John [Lucey.John.D@epa.gov]; Ortiz, Adam [Ortiz.Adam@epa.gov]; Dunkins, Robin [Dunkins.Robin@epa.gov]; Helen Walter-Terrinoni [HWalter-Terrinoni@ahrinet.org]; Viswanathan, Krishna [Viswanathan.Krishna@epa.gov]; Trevor Higgins; Kaufman, Amanda [Kaufman.Amanda@epa.gov]; Petuya, Lauren [Petuya.Lauren@epa.gov]; Nance, Earthea [Nance.Earthea@epa.gov];

jtauber@earthjustice.org; Shyamala.rajan@lung.org; Athena Motavvef [amotavvef@earthjustice.org]; Compton, Kathleen [compton.kathleen@epa.gov]

Subject: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
Location: https://usepa.zoomgov.com/j/1601813017

Start: 11/29/2022 4:00:00 PM
End: 11/29/2022 5:30:00 PM
Show Time As: Tentative

Required Attendees: Millan, Vanessa; Nunez, Alejandra; Kim, Eunjung; Macedonia, Jennifer; Benkeser, Anna; Mmitch3@gmu.edu; Cortez Russell, Loni; Carbonell, Tomas; Jakob, Avivah
Optional Attendees: mrauch@momscleanairforce.org; Smith, Grace Y.; Danielle.wright@nasrc.org; sam@evergreenaction.com; anowlan@edf.org; JSlaney@edf.org; Celerah Hewes; Ann Weeks; Janet McGovern; Martin Hayden; Spiller, Beia; dgreenbaum@healtheffects.org; Paul Billings; zachary.fabish@sierraclub.org; llynch@nrdc.org; Mahyar Sorour; smackler@bipartisanpolicy.org; matthew_davis@lcv.org; bdroessler@environmental-initiative.org; cstarr@eia-global.org; laura.bender@lung.org; Enobakhare, Rosemary; jackerly; thiggins@americanprogress.org; Rose Garr; cjenks@law.harvard.edu; patrick.drupp@sierraclub.org; David McCabe; ebechard@momscleanairforce.org; mreis@momscleanairforce.org; aherzog@hcwh.org; CROZAT, Matt; greed@ucsusa.org; Moltzen, Michael; Johnson, Dennis; Henning, Julie; Simon, Karl; Gunning, Paul; Lupinacci, Jean; Birnbaum, Rona; Newberg, Cindy; Akerman, Nancy; Cappel, Kirsten; Kee, Annie; Clouse, Matt; Camobreco, Vincent; De Figueiredo, Mark; Elger, Nicholas; Lacount, Melanie; Fisher, Brian; Marcy, Cara; Hathaway, Julia; Johnson, Travis; Bowker, George; Moss, Jacob; Conlin, Beth; Alpert, Adina; Lau, Patrick; Graff, Michelle; Gardarsdottir-Middleton, Thora; Kocchi, Suzie; Denny, Andrea; Smith, Alisa; White, Sharon; Enger, Tracy; Brown, Sheila D.; Cappuccilli, Eva; Durkin, Kim; Errico, Mary; Mitchell, Tracey; Hatcher, Caterina; Hamjian, Lynne; Bird, Patrick; Benoit, Eugene; Isenberg, Madeline; Freeman, Caroline; Toney, Anthony; Rinck, Todd; Watson, Marion; Reynolds, Mary; Lesane, Heidi; Rowson, David; Ashley, Jackie; Baumgart-Getz, Adam; Benedict, Kristen; Brachtl, Megan; Brockman, Larry; Damberg, Rich; Etchells, Elizabeth; Hemby, James; Johnson, Steffan; Koplitz, Shannon; Lasley, Benjamin; Naess, Liz (she/her/hers); Torres, Elineth; Wayland, Richard; Whitlow, Jeff; Roberts, Timothy-P; Marusiak, Eleanor; Hyde, Courtney; Dowdell, Edward (Ned); Thompson, Ashley; Shaw, Betsy; Weaver, Susannah; Biton, Leiran; Greene, Cynthia; Shoaff, John; Profeta, Timothy; Grumet, Stephanie; Mulderrig, Conor; Riley, Alison; Acevedo, Frank; Nwia, Jacqueline; Bertram, Emily; Non-Career_Regional_Administrators; Air Division Directors and Deputies; Schreiner, Molly; Becker, KC; Smith, Mark A.; Lucey, John; Ortiz, Adam; Dunkins, Robin; Helen Walter-Terrinoni; Viswanathan, Krishna; Trevor Higgins; Kaufman, Amanda; Petuya, Lauren; Nance, Earthea; jtauber@earthjustice.org; Shyamala.rajan@lung.org; Athena Motavvef; Compton, Kathleen

-----Original Appointment-----
From: Millan, Vanessa <Millan.Vanessa@epa.gov>
Sent: Tuesday, November 8, 2022 4:22 PM
To: Millan, Vanessa; Nunez, Alejandra; Kim, Eunjung; Macedonia, Jennifer; Benkeser, Anna; Mmitch3@gmu.edu; Cortez Russell, Loni; Carbonell, Tomas; Jakob, Avivah
Cc: mrauch@momscleanairforce.org; Smith, Grace Y.; Danielle.wright@nasrc.org; sam@evergreenaction.com; Janet McGovern; Martin Hayden; dgreenbaum@healtheffects.org; Paul Billings; zachary.fabish@sierraclub.org; llynch@nrdc.org; Mahyar Sorour; smackler@bipartisanpolicy.org; matthew_davis@lcv.org; bdroessler@environmental-initiative.org; cstarr@eia-global.org; laura.bender@lung.org; Enobakhare, Rosemary; jackerly; thiggins@americanprogress.org; Rose Garr; cjenks@law.harvard.edu; patrick.drupp@sierraclub.org; David McCabe; ebechard@momscleanairforce.org; mreis@momscleanairforce.org; aherzog@hcwh.org; CROZAT, Matt; greed@ucsusa.org; Moltzen, Michael; Johnson, Dennis; Henning, Julie; Simon, Karl; Gunning, Paul; Lupinacci Rausch, Jean; Birnbaum, Rona; Newberg, Cindy; Akerman, Nancy; Cappel, Kirsten; Kee, Annie; Clouse, Matt; Camobreco, Vincent; De Figueiredo, Mark; Elger, Nicholas; Lacount, Melanie; Fisher, Brian; Marcy, Cara; Hathaway, Julia; Johnson, Travis; Bowker, George; Moss, Jacob; Conlin, Beth; Alpert, Adina; Lau, Patrick; Graff, Michelle; Gardarsdottir-Middleton, Thora; Kocchi, Suzie; Denny, Andrea; Smith, Alisa; White, Sharon; Enger, Tracy; Brown, Sheila D.; Cappuccilli, Eva; Durkin, Kim;

Errico, Mary; Mitchell, Tracey; Hatcher, Caterina; Hamjian, Lynne; Bird, Patrick; Benoit, Eugene; Isenberg, Madeline; Freeman, Caroline; Toney, Anthony; Rinck, Todd; Watson, Marion; Reynolds, Mary; Lesane, Heidi; Rowson, David; Ashley, Jackie; Baumgart-Getz, Adam; Benedict, Kristen; Brachtl, Megan; Brockman, Larry; Damberg, Rich; Etchells, Elizabeth; Hemby, James; Johnson, Steffan; Koplitz, Shannon; Lasley, Benjamin; Naess, Liz (she/her/hers); Torres, Elineth; Wayland, Richard; Whitlow, Jeff; Roberts, Timothy-P; Marusiak, Eleanor; Hyde, Courtney; Dowdell, Edward (Ned); Thompson, Ashley; Shaw, Betsy; Weaver, Susannah; Biton, Leiran; Greene, Cynthia; Shoaff, John; Profeta, Timothy; Grumet, Stephanie; Mulderrig, Conor; Riley, Alison; Acevedo, Frank; Nwia, Jacqueline; Bertram, Emily
Subject: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
When: Tuesday, November 29, 2022 11:00 AM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: https://usepa.zoomgov.com/j/1601813017

Meeting: This is a virtual roundtable conversation with EPA around the Office of Air and Radiation's provisions in the Inflation Reduction Act.
Date/ Time: Tuesday, Nov. 29, 11:00am-12:30pm EST
Zoom Link: https://usepa.zoomgov.com/j/1601813017
Overview: We are excited to hear your perspectives, priorities, and feedback as we embark on this critical priority. A Request for Information (RFI) was published that includes non-regulatory dockets to provide answers to questions OAR has authored for stakeholders to respond to. The list of discussion questions and dockets can be found HERE.

IRA Provisions Covered:

- Clean Heavy-Duty Vehicles [60101]
- Grants to Reduce Air Pollution at Ports [60102]
- Diesel Emissions Reduction [60104]
- Funding to Address Air Pollution – Fenceline Monitoring [60105(a)]
- Funding to Address Air Pollution – Multipollutant Monitoring [60105(b)]
- Funding to Address Air Pollution – Air Quality Sensors [60105(c)]
- Funding to Address Air Pollution – Emissions from Wood Heaters [60105(d)]
- Funding to Address Air Pollution – Methane Monitoring [60105(e)]
- Funding to Address Air Pollution – Clean Air Act Grants [60105(f)]
- Funding to Address Air Pollution – Mobile Source Grants [60105(g)]
- Funding to Address Air Pollution at Schools [60106]
- Low Emissions Electricity Program [60107]
- Funding for Section 211(O) of the Clean Air Act - RFS [60108]
- Funding for Implementation of American Innovation and Manufacturing Act [60109]
- GHG Corporate Reporting [60111]
- Methane Emissions Reduction Program [60113]
- Climate Pollution Reduction Grants [60114]

(THIS LISTENING SESSION WILL NOT INCLUDE A DISCUSSION OF THE GREEN HOUSE GAS REDUCION FUND.)

Message

From: Gettle, Jeaneanne [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8E72AA7E1894FAEA44006FD9F22B637-GETTLE, JEANEANNE]
Sent: 9/8/2022 8:41:22 PM
To: Kupchan, Simma [Kupchan.Simma@epa.gov]
Subject: RE: Request to provide meeting notes

Simma,

To the best of my knowledge I do not have notes on any of these meetings.

Thanks
Jeaneanne

From: Kupchan, Simma <Kupchan.Simma@epa.gov>
Sent: Thursday, September 8, 2022 4:34 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
Subject: Request to provide meeting notes

All,

As part of Florida's request, they asked for any meeting notes that agency staff might have from the following meetings. **If you have notes from any of these meetings, could you please send them to me by COB Monday**? Feel free to delete information that is deliberative, or else I'll just review and remove deliberative material. (We are separately searching the documents of employees no longer at EPA.) Thanks very much for your help, and enjoy your trips down memory lane.

1. 8/17/2018: Briefing for Dave Ross on Florida and 404 Assumption.
   - Attendees still at EPA appeared to include Carrie Wehling, Brian Frazer, and Kathy Hurld.
   - Other attendees included Dave, David F., and Lee F.

2. 9/28/2018: Meeting with Florida Stakeholders
   - Attendees still at EPA included Steve N., Carrie W., and Alexis W.
   - Other attendees included Dave, David F., and Matt L.

4. 12/10/2019: Meeting with CEQ
   - Attendees still at EPA may have included Simma Kupchan, Steve N., Carrie W., Alexis Wade, and Brian Frazer.
   - Other attendees may have included Dave, David F., and Lee F.
   - *FYI: I have the notes that I circulated after that meeting; no need to resend those.*

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Kupchan, Simma
Sent: Tuesday, September 6, 2022 4:30 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Sable, Kacy <Sable.Kacy@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Diaz, Denisse <Diaz.Denisse@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Bragan, Mary Jo <Bragan.Maryjo@epa.gov>; Dromgoole, Ahmad <Dromgoole.Ahmad@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
Subject: FYI: FL 404 Administrative Record request
Importance: High

All,

A heads up that on Thursday evening, 9/1, plaintiffs and Florida sent requests asking EPA to supplement the administrative record. The list of 38 documents plaintiffs requested is attached and the full set of documents is available at the link in the email below. Florida asked for just a handful of additional documents.

We will be working with ORC and DOJ this week to consider how best to respond. We will likely view some of the documents as admissible, but some may be deliberative or not part of EPA's decisionmaking process. A letter response to plaintiffs is due next Friday, 9/16.

We can discuss at our biweekly meeting next Monday, 9/12. We are hoping we can resolve plaintiffs' and Florida's requests without litigation.

Please let me know if you have any questions in the meantime.

Thanks for your attention,

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Tania Galloni <tgalloni@earthjustice.org>
Sent: Thursday, September 1, 2022 6:45 PM
To: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>; Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Cc: jeff.wood@bakerbotts.com; lily.chinn@bakerbotts.com; bmalloy@earthjustice.org
Subject: [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link: https://app.box.com/s/28syutyf37veccgji887zjb0wlq6tmpi. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

***

Tania Galloni
Managing Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5434
www.earthjustice.org

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September 1, 2021

Via E-Mail

Aaron Watkins
Director of the Central District
Florida Department of Environmental Protection
3319 Maguire Boulevard
Orlando, FL 32803
aaron.watkins@floridadep.gov

John Palmer
Chief, Cocoa Section
U.S. Army Corps of Engineers
400 High Point Drive
Cocoa, FL 32926
john.palmer@usace.army.mil

RE: Notice of Clean Water Act Section 404 Violation for Unpermitted Dredge and Fill Activity in Waters of the United States

Dear Director Watkins and Chief Palmer:

On behalf of Save the Wekiva River and Headwaters, we write to notify the Florida Department of Environmental Protection ("FDEP") and the U.S. Army Corps of Engineers ("Corps") of unpermitted dredge and fill activities in waters of the United States by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of Clean Water Act Section 404, 33 U.S.C. § 1344. On information and belief, the 63.1 acre Princeton Oaks project has and will destroy wetlands that are waters of the United States under the state's 404 assumption authority. FDEP must investigate and put an end to any ongoing violations, require that the company obtain a Section 404 permit before continuing to dredge and fill wetlands, and pursue enforcement action, as applicable.

This project is one of many ongoing, planned, or completed industrial and commercial development projects in Florida that are destroying the wetlands surrounding a predominantly Black neighborhood and subjecting the community to pollution and environmental degradation. These projects are exacerbating environmental injustices at a time where the state should be devoting resources to preventing and remedying the disproportionate environmental harms experienced by Black and Brown communities in Florida. That the Princeton Oaks industrial development appears to be moving forward in violation of the Clean Water Act is particularly troubling.

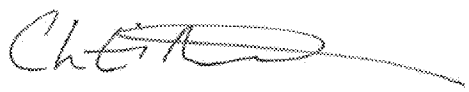
Before Florida assumed administration of Section 404 in Florida, Princeton Oaks sought a Section 404 permit from the Corps because the project would destroy waters of the United States, including a mix of forested wetlands and a stream/waterway. Public Notice, Permit Application # SAJ-2017-02936 (SP-JSC), U.S. Army Corps of Eng'rs, July 8, 2019 (Attachment 1). After the Navigable Waters Protection Rule ("NWPR") became effective in April 2020, the company asked the Corps to revisit its jurisdictional determination. Letter from John Palmer, Corps, to Moses Salcido, Princeton Oaks, Aug. 28, 2020 (Attachment 2). And in August 2020, the Corps acquiesced to this request and determined the waters were no longer jurisdictional.

However, a federal court has now vacated the NWPR. Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al., No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). As a direct result, the Corps' August 2020 jurisdictional determination is no longer valid, rendering Princeton Oaks' unpermitted dredge and fill activities subject to the Clean Water Act.

It is our understanding that Princeton Oaks has begun unpermitted dredge and fill activities in the waters of the United States present on the project site. As such, the Corps and FDEP must revisit and revoke the August 2020 jurisdictional determination and immediately require Princeton Oaks to cease and desist development of the wetlands on the project site unless and until the company obtains a Section 404 permit. Any further destruction of waters of the United States constitutes unpermitted activities in violation of the Clean Water Act. The state and federal governments have a duty to ensure against any such violations and take any and all appropriate enforcement action.

If you have any questions, or would like to discuss this matter, please do not hesitate to contact me at creichert@earthjustice.org.

Sincerely,



Christina I. Reichert
Attorney
Earthjustice

CC:

Shawn Hamilton, Interim Secretary, FDEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, FDEP, justin.g.wolfe@dep.state.fl.us
Joshua Holmes, Deputy District Counsel, Jacksonville District, Corps
Joshua.R.Holmes@usace.army.mil
Radhika Fox, Director, Office of Water, EPA, fox.radhika@epa.gov
John Goodin, Director, Office of Wetlands, Oceans and Watersheds, EPA, goodin.john@epa.gov
Lawrence Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance, EPA, starfield.lawrence@epa.gov

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Macara Lousberg, Director, Water Policy Staff, EPA, lousberg.macara@epa.gov
Tami Thomas-Burton, Regional Environmental Justice Coordinator, Region 4, EPA, thomas-burton.tami@epa.gov
Paul Ellis, Chief Executive Officer, Foundry Commercial, paul.ellis@foundrycommercial.com
Moses Salcido, Principal, Foundry Commercial's Princeton Oaks Industrial Investors II, LLC, moses.salcido@foundrycommercial.com

January 19, 2022

Via E-Mail

Colonel James Booth
District Commander
Jacksonville District
U.S. Army Corps of Engineers
701 San Marco Blvd.
Jacksonville, FL 32207
James.l.booth@usace.army.mil

Lawrence Starfield
Acting Assistant Administrator
Office of Enforcement and Compliance
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2201A
Washington, DC 20460
starfield.lawrence@epa.gov

RE: Second Notice of Unpermitted Discharges in Waters of the United States; Meeting Request.

Dear Colonel Booth and Mr. Starfield:

We are writing to follow up on our September 1, 2021, letter notifying the U.S. Army Corps of Engineers ("Corps") and the Florida Department of Environmental Protection ("DEP") of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1), and to request a meeting with you to discuss the issues raised in this and our prior letter. Letter from Christina I. Reichert, Earthjustice, to Aaron Watkins, Fla. Dep't Env't Prot., and John Palmer, U.S. Army Corps of Eng'rs, Sept. 1, 2021 (Attachment 1).

We have received no response from DEP or the Corps even though the 63.1-acre Princeton Oaks project has discharged and will discharge fill materials into waters of the United States without a permit. As explained in our prior letter, it appears that Princeton Oaks has been filling wetlands relying on an illegal jurisdictional determination from the Corps that applied the unlawful Trump Navigable Waters Protection Rule ("NWPR").

As a result of these Clean Water Act violations, the Corps should (1) rescind the illegal jurisdictional determination; (2) notify Princeton Oaks that it cannot rely on the illegal jurisdictional determination; and (3) notify Princeton Oaks that it must obtain a Clean Water Act Section 404 permit for dredge and fill activities in waters of the United States and mitigate the harm it has already caused. And the EPA should take enforcement action against Princeton Oaks for its prior unpermitted dredge and fill activities.

As we explained in our September 2021 letter, Princeton Oaks sought a Section 404 permit from the Corps in 2019 because the project would destroy waters of the United States, including a mix of forested wetlands and a stream/waterway. Public Notice, Permit Application # SAJ-2017-02936 (SP-JSC), U.S. Army Corps of Eng'rs, July 8, 2019 (Attachment 2). After the NWPR became effective in April 2020, Princeton Oaks asked the Corps to revisit its jurisdictional determination as part of this permitting process. Letter from John Palmer, Corps, to Moses Salcido, Princeton Oaks, Aug. 28, 2020 (Attachment 3). In August 2020, the Corps acquiesced to this request. In December 2020, the U.S. Environmental Protection Agency ("EPA") transferred authority over Section 404 in Florida from the Corps to DEP.

On August 30, 2021, a federal court vacated the NWPR. Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al., No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). Accord Navajo Nation v. Regan, No. 2:20-CV-00602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). As a result, the Corps and EPA halted implementation of the NWPR nationwide and returned to the pre-2015 regulatory regime to define waters of the United States. Current Implementation of Waters of the United States, U.S. Env't Prot. Agency, https://www.epa.gov/wotus/current-implementation-waters-united-states (Dec. 20, 2021) (Attachment 4).

As our September 1, 2021, letter, explained, it is our understanding that since August 30, 2021, Princeton Oaks has been discharging dredge and fill materials into waters of the United States present on the project site without a Section 404 permit. As such, Princeton Oaks has violated the Act and is subject to citizen suits as well as state and federal enforcement.

In a separate September 1, 2021, letter, we notified DEP of the Pasqua Yaqui Tribe decision so that DEP could immediately act to ensure that all waterways covered by the Clean Water Act in Florida would be protected. Letter from Tania Galloni, Earthjustice, to Shawn Hamilton, Fla. Dep't Envtl. Prot., Sept. 1, 2021 (Attachment 5). However, DEP has continued to apply the NWPR and has taken no action on the Princeton Oaks project.

Despite DEP's position, the pre-2015 regulatory regime applies to the state of Florida's Section 404 program, something EPA explained to DEP in its own letter on December 9, 2021. Letter from Daniel Blackman, U.S. Env't Prot. Agency, to Emile D. Hamilton, Fla. Dep't of Env't Prot., Dec. 9, 2021 (Attachment 6). Accordingly, in Florida, "**any discharges of pollutants into waters protected under the pre-2015 Rule regulatory regime**, including discharges into waters outside the scope of the vacated NWPR, **which do not have a permit or are not otherwise exempted from permitting requirements under that regime** … , **violate the Act and are subject to citizen suits as well as state and federal enforcement**." Id. This includes the Princeton Oaks project.

More recently, on January 5, 2022, the Corps issued a notice that it would automatically revisit jurisdictional determinations that rely on the NWPR when making permitting decisions. Navigable Waters Protection Rule Vacatur, U.S. Army Corps of Eng'rs, Jan. 5, 2022, https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur (Attachment 7). The Corps did not similarly say it would automatically revisit illegal "stand-alone" jurisdictional determinations that rely on the NWPR.

Id. But the Corps did explain that Regulatory Guidance Letter No. 05-02 § 1(a) still applies to those stand-alone jurisdictional determinations. Id. (citing U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-02, § 1(a), at p. 1 (June 2005)). That guidance says jurisdictional determinations should remain valid for five years "unless new information warrants revision of the determination before the expiration date." Regulatory Guidance Letter No. 05-02, § 1(a).

First, as explained above, the Princeton Oaks jurisdictional determination was obtained in connection with a Section 404 permitting process before the Corps. Princeton Oaks had initially sought a Section 404 permit and in that process, asked the Corps to revisit the company's jurisdictional determination using the NWPR. This means the jurisdictional determination does not qualify as a "stand-alone" decision and must be revisited and rescinded immediately to ensure compliance with federal law.

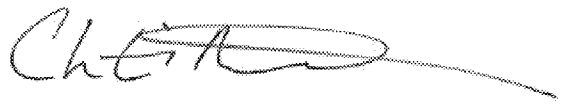
Second, even if the Princeton Oaks jurisdictional determination could be considered a "stand-alone" decision, new information certainly warrants rescission of Princeton Oaks' jurisdictional determination. Id. A federal court has ruled that the NWPR—the definition of "waters of the United States" which serves as the framework for the jurisdictional determination—is illegal, and the NWPR has been vacated. Pasqua Yaqui Tribe, 2021 WL 3855977. Accord Navajo Nation, 2021 WL 4430466. This decision constitutes "new information" that warrants the Corps' revision of the prior jurisdictional determination because it changes the legal framework applied by the Corps to delineate waters of the United States and affects whether the waters of the United States on the Princeton Oaks site will be protected as required by law. Moreover, these decisions mean that the NWPR was never lawfully in place and that no jurisdictional determination can stand that is based on the rule.

Moreover, since the Corps issued its jurisdictional determination, the Biden Administration has dedicated itself to securing environmental justice and ordered agencies to make achieving environmental justice part of their missions. Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021). The Princeton Oaks project is a prime opportunity to for the Corps and EPA to meet this obligation. This project is one of many ongoing, planned, and completed industrial and commercial developments in the Evergreen Stuart Park and Mercy Drive neighborhoods. Public Comments from Dr. Wanda Jones to Nat'l Env't Justice Advisory Council, U.S. Env't Prot. Agency, Aug. 31, 2021 (Attachment 8). These neighborhoods are comprised of primarily Black senior residents. Id. With this and other industrial and commercial developments intruding into their neighborhoods, these communities are facing increased heat, flooding, vulnerability to storms, air pollution, and danger from semi-truck traffic. Id.

Considering the foregoing, the Corps must immediately rescind the illegal August 2020 jurisdictional determination for Princeton Oaks to ensure compliance with federal law. The Corps should also notify Princeton Oaks that it must obtain a Clean Water Act Section 404 permit for dredge and fill activities in waters of the United States and mitigate the harm it has already caused. And EPA should initiate federal enforcement action against Princeton Oaks for any unpermitted discharges.

We would like to meet with you to discuss the violations described in this letter as well as the corrective actions the Corps and EPA must take to remedy them. Thank you for your prompt attention to this matter. We look forward to a meeting with you and members of the community harmed by the Princeton Oaks project to discuss these matters.

Sincerely,



Christina I. Reichert
Attorney
Earthjustice

CC:

Todd Polk, Deputy District Commander, South Florida, Corps, todd.polk@usace.army.mil
Joshua Holmes, Deputy District Counsel, Jacksonville District, Corps
Joshua.R.Holmes@usace.army.mil
Radhika Fox, Director, Office of Water, EPA, fox.radhika@epa.gov
John Goodin, Director, Office of Wetlands, Oceans and Watersheds, EPA, goodin.john@epa.gov
Macara Lousberg, Director, Water Policy Staff, EPA, lousberg.macara@epa.gov
Tami Thomas-Burton, Regional Environmental Justice Coordinator, Region 4, EPA, thomas-burton.tami@epa.gov
Shawn Hamilton, Secretary, DEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, DEP, justin.g.wolfe@dep.state.fl.us
Aaron Watkins, Staff Director for the Central District, DEP, aaron.watkins@floridadep.gov

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Tania Galloni

From: Christina Reichert
Sent: Thursday, February 24, 2022 11:34 AM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy; Tania Galloni; Bradley Marshall; Briana Kleiner; Ana Correa
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

I am writing to follow up on our September 1, 2022, and January 19, 2022, letters notifying the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1).

Our January 19 letter included a request to meet with you to discuss the violations alleged in the letter as well as corrective actions that the Corps and EPA can take to address them. Please propose potential times when you would be available to speak with us.

Sincerely, Christina

From: Christina Reichert
Sent: Wednesday, January 19, 2022 2:35 PM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
Subject: Second Notice of CWA Section 404 Violation & Meeting Request

We are writing to follow up on our September 1, 2021, letter notifying the U.S. Army Corps of Engineers and the Florida Department of Environmental Protection of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1), and to request a meeting with you to discuss the issues raised in this and our prior letter. Please see attached.

Sincerely,
Christina

Christina I. Reichert
she/her/hers
Senior Associate Attorney
Florida Regional Office
Earthjustice
4500 Biscayne Boulevard, Suite 201
Miami, FL 31337
Phone: 305-440-5432*
Fax: 305-681-0020

ED_014341_00000035-00008

* We are currently working remotely, so email is the best way to reach me.

Because the earth needs a good lawyer

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Tania Galloni

From: Wainwright, Katherine T CIV USARMY CESAJ (USA) <katherine.t.wainwright@usace.army.mil>
Sent: Thursday, March 3, 2022 6:57 AM
To: Christina Reichert
Cc: james.l.booth@usace.army.mil; starfield.lawrence@epa.gov; john.palmer@usace.army.mil; saj-rd-enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov; shawn.h.zinszer@usace.army.mil; Bonnie Malloy; Tania Galloni; Bradley Marshall; Briana Kleiner; Ana Correa; john.palmer@usace.army.mil; Bonnie Malloy; Tania Galloni; Bradley Marshall; Briana Kleiner; Ana Correa
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

- Similar name as someone you've contacted.
- This is their first email to you.

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Dear Ms. Reichert:

The U.S. Army Corps of Engineers received your February 24, 2022 e-mail regarding discharges of dredged or fill material by Princeton Oaks Industrial Investors II, LLC. As you know, on December 22, 2020, the Florida Department of Environmental Protection assumed administration of the Clean Water Act Section 404 program in Florida. The discharges associated with the Princeton Oaks project occurred in waters assumed by the State of Florida. As the Corps conveyed to you in an October 2021 meeting, under Section VII of the Memorandum of Agreement between the Corps and the Florida Department of Environmental Protection on assumption, the Corps is not responsible for enforcing against unauthorized discharges of dredged or fill material in violation of the Clean Water Act in assumed waters. Nevertheless, if the U.S. Environmental Protection Agency and Earthjustice decide to hold another meeting regarding this matter, the Corps would be happy to participate. If you have any questions or would like to discuss this matter, please do not hesitate to contact me at (904) 496-6988.

Best regards,

Katherine T. Wainwright
Principal Assistant District Counsel for Regulatory
Jacksonville District
U.S. Army Corps of Engineers
(904) 496-6988
Katherine.t.wainwright@usace.army.mil

From: Christina Reichert <creichert@earthjustice.org>
Sent: Thursday, February 24, 2022 11:34 AM
To: Booth, James L (Jamie) COL USARMY CESAJ (USA) <James.L.Booth@usace.army.mil>; starfield.lawrence@epa.gov; Palmer, John C CIV USARMY CESAJ (USA) <John.Palmer@usace.army.mil>; SAJ-RD-Enforcement <saj-rd-enforcement@usace.army.mil>; todd.polk@usace.army.mil; Holmes, Joshua R CIV USARMY CESAJ (USA) <Joshua.R.Holmes@usace.army.mil>; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: bmalloy@earthjustice.org; tgalloni@earthjustice.org; bmarshall@earthjustice.org; bkleiner@earthjustice.org;

acorrea@earthjustice.org
Subject: [Non-DoD Source] RE: Second Notice of CWA Section 404 Violation & Meeting Request

I am writing to follow up on our September 1, 2022, and January 19, 2022, letters notifying the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1).

Our January 19 letter included a request to meet with you to discuss the violations alleged in the letter as well as corrective actions that the Corps and EPA can take to address them. Please propose potential times when you would be available to speak with us.

Sincerely, Christina

From: Christina Reichert
Sent: Wednesday, January 19, 2022 2:35 PM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
Subject: Second Notice of CWA Section 404 Violation & Meeting Request

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Sincerely,
Christina

Christina I. Reichert
she/her/hers
Senior Associate Attorney
Florida Regional Office
Earthjustice
4500 Biscayne Boulevard, Suite 201
Miami, FL 31337
Phone: 305-440-5432*
Fax: 305-681-0020

* We are currently working remotely, so email is the best way to reach me.

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Tania Galloni

From: Gettle, Jeaneanne <gettle.jeaneanne@epa.gov>
Sent: Friday, April 15, 2022 2:58 PM
To: Bradley Marshall
Cc: kemker.carol@epa.gov; mcgill.thomas@epa.gov
Subject: Second Notice of CWA Section 404 Violation & Meeting Request

Follow Up Flag: Follow up
Flag Status: Completed

This message originated outside of Earthjustice. Please use caution before opening attachments or links.

Good afternoon Mr. Marshall,

Thank you for the information you provided regarding the alleged unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in Orange County, Florida.

As communicated by EPA to the Florida Department of Environmental Protection (FDEP) in a December 9, 2021 letter, the Clean Water Act (CWA) and its implementing regulations require Florida to implement its program consistent with the current definition of "waters of the United States." EPA and the U.S. Army Corps of Engineers (Corps) interpret the current definition of "waters of the United States" subject to the Section 404 program to be the regulatory interpretation in place prior to promulgation of the 2015 Clean Water Rule. Florida's Section 404 permitting program must therefore regulate discharges of dredged or fill material into "waters of the United States" consistent with the pre-2015 Rule regulatory regime. Accordingly, any discharges of pollutants into waters protected under the pre-2015 regulatory regime, including discharges into waters outside the scope of the vacated Navigable Waters Protection Rule, which do not have a permit or are not otherwise exempted from permitting requirements under that regime (e.g., under CWA section 404(f)), violate the CWA and are subject to citizen suits as well as state and federal enforcement.

Because Florida operates the 404 permitting program for assumed waters in Florida and is generally the first line of enforcement for violations within those waters, we recommend that Earthjustice continue to reach out to FDEP on this issue. As you may be aware, EPA also retains enforcement authority in states that have assumed the 404 program. EPA will continue to evaluate the situation and take action, as appropriate.

Jeaneanne M. Gettle
Director, Water Division
USEPA, Region 4

From: Bradley Marshall <bmarshall@earthjustice.org>
Sent: Friday, April 15, 2022 9:22 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Fox, Radhika <Fox.Radhika@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Lousberg, Macara <Lousberg.Macara@epa.gov>; Thomas-Burton, Tami <Thomas-Burton.Tami@epa.gov>
Cc: bmalloy@earthjustice.org; tgalloni@earthjustice.org; bkleiner@earthjustice.org; acorrea@earthjustice.org; creichert@earthjustice.org
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

Good morning,

I am writing to follow-up on the e-mails and letters below regarding the alleged unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1). As we have noted below, we would appreciate the opportunity to meet with EPA to discuss the violations alleged in the letter we sent. Please let us know when you would be available to meet with us, and please let me know if you have any questions. Thank you.

Best,
Bradley

Bradley Marshall
Senior Attorney
Earthjustice Florida Office
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
T: 850.681.0031
T: 850.681.0237 (direct)
F: 850.681.0020
earthjustice.org

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From: Christina Reichert <creichert@earthjustice.org>
Sent: Thursday, February 24, 2022 11:34 AM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
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Our January 19 letter included a request to meet with you to discuss the violations alleged in the letter as well as corrective actions that the Corps and EPA can take to address them. Please propose potential times when you would be available to speak with us.

Sincerely, Christina

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To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
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Christina I. Reichert
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4500 Biscayne Boulevard, Suite 201
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Phone: 305-440-5432*
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Tania Galloni

From: Bradley Marshall
Sent: Wednesday, April 20, 2022 4:58 PM
To: aaron.watkins@floridadep.gov
Cc: shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; timothy.rach@dep.state.fl.us; john.truitt@floridadep.gov; gettle.jeananne@epa.gov; kemker.carol@epa.gov; mcgill.thomas@epa.gov
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request
Attachments: 2022 04 20 Follow-up Notice of CWA Section 404 Violation.pdf; 2021 09 01 Notice of CWA Section 404 Violation.pdf; 2022 01 19 Second Notice of Unpermitted Discharges in Waters of the United States; Meeting Request.pdf

Good afternoon,

As directed by EPA (see below), we are following-up with you, the Florida Department of Environmental Protection, seeking proper regulatory oversight and enforcement regarding unpermitted discharges into waters of the United States by Princeton Oaks Industrial Investors II, LLC in Orange County. Please see the attached letter, and please also find attached prior correspondence that we have sent you on this matter. Please let us know when you can meet with us to discuss the alleged violations in the attached letters and the corrective actions that can be taken to remedy them. Thank you.

Best,
Bradley

Bradley Marshall
Senior Attorney
Earthjustice Florida Office
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
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T: 850.681.0237 (direct)
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Jeaneanne M. Gettle
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Cc: bmalloy@earthjustice.org; tgalloni@earthjustice.org; bkleiner@earthjustice.org; acorrea@earthjustice.org; creichert@earthjustice.org
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Bradley

Bradley Marshall
Senior Attorney
Earthjustice Florida Office
111 S. Martin Luther King Jr. Blvd.

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Christina

Christina I. Reichert
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Senior Associate Attorney
Florida Regional Office
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4500 Biscayne Boulevard, Suite 201
Miami, FL 31337
Phone: 305-440-5432*
Fax: 305-681-0020

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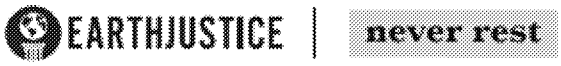

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April 20, 2022

Via E-Mail

Aaron Watkins
Director of the Central District
Florida Department of Environmental Protection
3319 Maguire Boulevard
Orlando, FL 32803
aaron.watkins@floridadep.gov

RE: Notice of Clean Water Act Section 404 Violation for Unpermitted Dredge and Fill Activity in Waters of the United States

Dear Director Watkins:

On behalf of Save the Wekiva River and Headwaters, we write to follow-up our September 1, 2021, notice to the Florida Department of Environmental Protection ("FDEP") of unpermitted dredge and fill activities in waters of the United States by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of Clean Water Act Section 404, 33 U.S.C. § 1344. In our September 1, 2021, letter, we informed you that, on information and belief, the 63.1 acre Princeton Oaks project has and will destroy wetlands that are waters of the United States under the state's 404 assumption authority. As we said then, FDEP must investigate and put an end to any ongoing violations, require that the company obtain a Section 404 permit before continuing to dredge and fill wetlands, and pursue enforcement action, as applicable.

That letter, laying out the history of the project, is enclosed. In it, we laid out the timeline of the jurisdictional determinations of the project, and showed that the August, 2020 jurisdictional determination from the U.S. Army Corps of Engineers relied on the now-vacated Navigable Waters Protection Rule ("NWPR"). Prior to the NWPR rule, Princeton Oaks had sought a 404 permit from the Corps given the clear existence of waters of the United States that would be destroyed as the project moved forward. Given that the NWPR rule has been vacated, the 2020 jurisdictional determination from the Corps, finding no waters of the United States present under NWPR, is not valid, rendering Princeton Oaks' unpermitted dredge and fill activities subject to the Clean Water Act.

Since we alerted FDEP to these facts at the beginning of September, as far as we can discern, FDEP has taken no action to remedy these violations and protect these wetlands. In fact, the St. Johns River Water Management District approved a modified Environmental Resource Permit for the site on October 11, 2021, without addressing any of these issues.

You were CC'd on our January 19, 2022, letter (attached), reiterating the above-points. Yet, we still did not hear from you. On February 24, 2022, we e-mailed EPA, CC'ing you, regarding these points and requesting corrective actions. On April 15, 2022, we again e-mailed EPA, reiterating our request for a meeting and for corrective action to EPA. On April 15, 2022, EPA responded, directing us to again reach out to you as the first line of enforcement for violations within those waters, given the FDEP assumption of the 404 program. It has now been over seven and a half months since we first brought this issue to your attention. We are reaching out again, asking you to exercise your proper regulatory oversight and enforce the Clean Water Act Section 404. We also request that within 14 days you inform us what action, if any, you are planning to take to carry out your duties under the 404 program in this matter, or at the least, meet with us to discuss this matter.

If you have any questions, please do not hesitate to contact me at bmarshall@earthjustice.org.

Sincerely,

Bradley Marshall
Attorney
Earthjustice

CC:

Shawn Hamilton, Secretary, FDEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, FDEP, justin.g.wolfe@dep.state.fl.us
Tim Rach, FDEP, timothy.rach@dep.state.fl.us
John Truitt, FDEP, john.truitt@floridadep.gov
Jeaneanne M. Gettle, EPA, gettle.jeaneanne@epa.gov
Carol Kemker, EPA, kemker.carol@epa.gov
Thomas McGill, EPA, mcgill.thomas@epa.gov

ED_014341_00000035-00021

Message

From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 9/8/2022 8:47:18 PM
To: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]
Subject: RE: Request to provide meeting notes

Thank you!

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>
Sent: Thursday, September 8, 2022 4:41 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>
Subject: RE: Request to provide meeting notes

Simma,

To the best of my knowledge I do not have notes on any of these meetings.

Thanks
Jeaneanne

From: Kupchan, Simma <Kupchan.Simma@epa.gov>
Sent: Thursday, September 8, 2022 4:34 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
Subject: Request to provide meeting notes

All,

As part of Florida's request, they asked for any meeting notes that agency staff might have from the following meetings. **If you have notes from any of these meetings, could you please send them to me by COB Monday**? Feel free to delete information that is deliberative, or else I'll just review and remove deliberative material. (We are separately searching the documents of employees no longer at EPA.) Thanks very much for your help, and enjoy your trips down memory lane.

1. 8/17/2018: Briefing for Dave Ross on Florida and 404 Assumption.
    - Attendees still at EPA appeared to include Carrie Wehling, Brian Frazer, and Kathy Hurld.
    - Other attendees included Dave, David F., and Lee F.

2. 9/28/2018: Meeting with Florida Stakeholders
    - Attendees still at EPA included Steve N., Carrie W., and Alexis W.
    - Other attendees included Dave, David F., and Matt L.

4. 12/10/2019: Meeting with CEQ

- Attendees still at EPA may have included Simma Kupchan, Steve N., Carrie W., Alexis Wade, and Brian Frazer.
- Other attendees may have included Dave, David F., and Lee F.
- *FYI: I have the notes that I circulated after that meeting; no need to resend those.*

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Kupchan, Simma
Sent: Tuesday, September 6, 2022 4:30 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Sable, Kacy <Sable.Kacy@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Diaz, Denisse <Diaz.Denisse@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Bragan, Mary Jo <Bragan.Maryjo@epa.gov>; Dromgoole, Ahmad <Dromgoole.Ahmad@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
Subject: FYI: FL 404 Administrative Record request
Importance: High

All,

A heads up that on Thursday evening, 9/1, plaintiffs and Florida sent requests asking EPA to supplement the administrative record. The list of 38 documents plaintiffs requested is attached and the full set of documents is available at the link in the email below. Florida asked for just a handful of additional documents.

We will be working with ORC and DOJ this week to consider how best to respond. We will likely view some of the documents as admissible, but some may be deliberative or not part of EPA's decisionmaking process. A letter response to plaintiffs is due next Friday, 9/16.

We can discuss at our biweekly meeting next Monday, 9/12. We are hoping we can resolve plaintiffs' and Florida's requests without litigation.

Please let me know if you have any questions in the meantime.

Thanks for your attention,

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Tania Galloni <tgalloni@earthjustice.org>
Sent: Thursday, September 1, 2022 6:45 PM
To: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>; Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>

Cc: jeff.wood@bakerbotts.com; lily.chinn@bakerbotts.com; bmalloy@earthjustice.org
Subject: [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link: https://app.box.com/s/28syutyf37veccgji887zjb0wlq6tmpi. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

***

Tania Galloni
Managing Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5434
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From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 9/8/2022 8:33:31 PM
To: Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Armor, Suzanne [Armor.Suzanne@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]
Subject: Request to provide meeting notes

All,

As part of Florida's request, they asked for any meeting notes that agency staff might have from the following meetings. **If you have notes from any of these meetings, could you please send them to me by COB Monday**? Feel free to delete information that is deliberative, or else I'll just review and remove deliberative material. (We are separately searching the documents of employees no longer at EPA.) Thanks very much for your help, and enjoy your trips down memory lane.

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   - Attendees still at EPA appeared to include Carrie Wehling, Brian Frazer, and Kathy Hurld.
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Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Kupchan, Simma
Sent: Tuesday, September 6, 2022 4:30 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Sable, Kacy <Sable.Kacy@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Diaz, Denisse <Diaz.Denisse@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Bragan, Mary Jo <Bragan.Maryjo@epa.gov>; Dromgoole, Ahmad <Dromgoole.Ahmad@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>

Subject: FYI: FL 404 Administrative Record request
Importance: High

All,

A heads up that on Thursday evening, 9/1, plaintiffs and Florida sent requests asking EPA to supplement the administrative record. The list of 38 documents plaintiffs requested is attached and the full set of documents is available at the link in the email below. Florida asked for just a handful of additional documents.

We will be working with ORC and DOJ this week to consider how best to respond. We will likely view some of the documents as admissible, but some may be deliberative or not part of EPA's decisionmaking process. A letter response to plaintiffs is due next Friday, 9/16.

We can discuss at our biweekly meeting next Monday, 9/12. We are hoping we can resolve plaintiffs' and Florida's requests without litigation.

Please let me know if you have any questions in the meantime.

Thanks for your attention,

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Tania Galloni <tgalloni@earthjustice.org>
Sent: Thursday, September 1, 2022 6:45 PM
To: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>; Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Cc: jeff.wood@bakerbotts.com; lily.chinn@bakerbotts.com; bmalloy@earthjustice.org
Subject: [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link: https://app.box.com/s/28syutvf37veccgji887zjb0wlq6tmpi. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

***

Tania Galloni
Managing Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5434
www.earthjustice.org

EARTHJUSTICE

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Message

From: Jenkins, Brandi [Jenkins.Brandi@epa.gov]
Sent: 5/10/2022 4:43:24 PM
To: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Allenbach, Becky [Allenbach.Becky@epa.gov]; Bermudez, Navis [Bermudez.Navis@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]
CC: Wise, Allison [Wise.Allison@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
Subject: Fwd: Lawsuit: EPA Must Protect Manatees From Water Pollution

FYII

Brandi Jenkins, Public Affairs Director
U.S. EPA - Region 4
(678) 575-2148 (mobile)
(404) 562-9124 (office)

Sent from my iPhone

Begin forwarded message:

> **From:** Amy Green <agreen@wmfe.org>
> **Date:** May 10, 2022 at 12:35:58 PM EDT
> **To:** "Jenkins, Brandi" <Jenkins.Brandi@epa.gov>
> **Subject: FW: Lawsuit: EPA Must Protect Manatees From Water Pollution**
>
> Hi Brandi,
>
> Does the EPA have any comment? Thanks!
>
> Amy
>
> ---
>
> **From:** Ragan Whitlock <rwhitlock@biologicaldiversity.org>
> **Sent:** Tuesday, May 10, 2022 10:44 AM
> **To:** Amy Green <agreen@wmfe.org>
> **Subject:** Lawsuit: EPA Must Protect Manatees From Water Pollution

<!--[if !vml]--><![endif]-->

For Immediate Release, May 10, 2022

Contact: Elizabeth Forsyth, Earthjustice, (206) 531-0841, eforsyth@earthjustice.org
Ragan Whitlock, Center for Biological Diversity, (727) 426-3653, rwhitlock@biologicaldiversity.org
Patrick Rose, Save the Manatee Club, (850) 570-1373, prose@savethemanatee.org
Jake Bleich, Defenders of Wildlife, (202) 772-3208, jbleich@defenders.org

Lawsuit: EPA Must Protect Manatees From Water Pollution

Hundreds Starved to Death in 2021 Because Unchecked Pollution is Killing Seagrass

ORLANDO, *Fla.*— Three conservation groups sued the U.S. Environmental Protection Agency today for failing to protect manatees and sea turtles from water pollution in Florida.

Over half of the more than 1,000 manatee deaths in Florida in 2021 were attributable to starvation. The mass die-off is being caused by pollution-fueled algal blooms that have killed thousands of acres of seagrass in the Indian River Lagoon, highlighting the inadequacy of the state's federally approved water-quality standards.

Earthjustice is representing the Center for Biological Diversity, Save the Manatee Club and Defenders of Wildlife. Today's lawsuit, filed in federal court in the Middle District of Florida, pushes the court to require the EPA to reinitiate consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service under the Endangered Species Act to reassess its approval of Florida's water-quality standards for the Indian River Lagoon.

The Florida manatee is currently experiencing an officially declared unusual mortality event along Florida's east coast, which includes important manatee warm-water habitat like the Indian River Lagoon. The lagoon supports more species of plants and animals than any other estuary in North America.

"Manatees need clean water to live in — it's that simple," said Earthjustice attorney Elizabeth Forsyth. "The pollution in the Indian River Lagoon is preventable. We're asking EPA to step in and ensure the protection of the Indian River Lagoon and the species that depend on it."

Unchecked pollution in the Indian River Lagoon — stemming from wastewater-treatment discharges, leaking septic systems, fertilizer runoff and other sources — fuels algal blooms that kill seagrass and prevent it from growing back. Nearly a decade ago, the EPA approved the state's water-quality criteria for nitrogen and phosphorous, concluding the standards would not "adversely affect" manatees. New information, including the mass die-off of manatees in the lagoon, calls this conclusion into question.

"Hundreds of manatees are dying in the Indian River Lagoon as the water quality plummets, and the EPA must confront the massive nutrient pollution behind this disaster," said Ragan Whitlock, an attorney at the Center for Biological Diversity. "The existing water-quality standards just aren't strong enough to preserve this important ecosystem and save these amazing animals."

Florida's 2021 manatee deaths were more than double the average annual death rate over the previous five years. The number of deaths represents 19% of the Atlantic population of Florida manatees and 12.5% of all manatees in Florida.

"Florida's beloved manatees will continue to suffer and die as long as EPA maintains inadequate water quality standards," said Jane Davenport, senior attorney at Defenders of Wildlife. "There simply is no more time for EPA to waste in reinitiating consultation."

State and federal agency staff continued to witness high levels of malnourished and starving manatees throughout the winter of 2021-22, implementing a first-of-its-kind supplemental feeding program. In recent weeks the surrounding water has warmed, causing the manatees to disperse, and the program has been suspended. Unfortunately many manatees continue to suffer the long-term health consequences of starvation.

"Although nothing we do will bring back those nearly 1,000 manatees that suffered and died from years of neglect despite repeated warnings, we insist that the EPA join forces with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that improved water quality standards are expeditiously set and met to bring an end to this travesty." said Patrick Rose, an aquatic biologist and executive director of Save the Manatee Club, who has worked for over 45 years to help bring the species back from near extinction since it was first listed as endangered in 1967.

The U.S. Fish and Wildlife Service downlisted the manatee from endangered to threatened in 2017. Since then the species has suffered significant setbacks from habitat degradation, red tide, cold winters and now unprecedented mass starvation from the catastrophic seagrass die-off.

Florida manatee (Trichechus manatus latirostrus). Credit: Jim Reid, USFWS. Image is available for media use.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places.

Earthjustice, the nation's premier nonprofit environmental law organization, wields the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change. Because the earth needs a good lawyer.

Save the Manatee Club is an international nonprofit based in Florida with its mission to protect manatees and their aquatic habitat for future generations. The Club was founded in 1981 by former Florida Governor and U.S. Senator Bob Graham and singer-songwriter Jimmy Buffett to protect and advocate on behalf of the species. Today, Save the Manatee Club is the world's leading manatee conservation organization. To learn more about the world's leading voice for manatees, visit savethemanatee.org

Defenders of Wildlife is celebrating 75 years of protecting all native animals and plants in their natural communities. With a nationwide network of nearly 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. For more information, visit defenders.org/newsroom and follow us on Twitter @Defenders.

If you would rather not receive future communications from Center for Biological Diversity, let us know by clicking here.
Center for Biological Diversity, P.O. Box 710, Tucson, AZ 85702 United States

Message

From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 9/14/2022 8:44:34 PM
To: Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Armor, Suzanne [Armor.Suzanne@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]
Subject: Reminder: Request to provide meeting notes

Thanks to those of you who have responded to me! One last reminder to check to see if you have any meeting notes by tomorrow, if possible. (If you don't have any, no need to respond.)

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Kupchan, Simma
Sent: Thursday, September 8, 2022 4:34 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
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To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Sable, Kacy <Sable.Kacy@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Diaz, Denisse <Diaz.Denisse@epa.gov>; Armor, Suzanne <Armor.Suzanne@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Speir, Jeffrey <speir.jeffrey@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Bragan, Mary Jo <Bragan.Maryjo@epa.gov>; Dromgoole, Ahmad <Dromgoole.Ahmad@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
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Importance: High

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EPA Office of General Counsel
202-564-3105

From: Tania Galloni <tgalloni@earthjustice.org>
Sent: Thursday, September 1, 2022 6:45 PM
To: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>; Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Cc: jeff.wood@bakerbotts.com; lily.chinn@bakerbotts.com; bmalloy@earthjustice.org
Subject: [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link: https://app.box.com/s/28syutyf37veccgji887zjb0wlq6tmpi. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

***

Tania Galloni
Managing Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5434
www.earthjustice.org

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Message

From: Hicks, Matt [Hicks.Matthew@epa.gov]
Sent: 6/10/2022 6:34:55 PM
To: Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Hansen, Susan [Hansen.Susan@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]
Subject: FW: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Supplemental Memorandum
Attachments: DN 82 EPA Suppl. Br. on Remedy.pdf

Here's EPA's brief on the issue of what relief (if any) the EPA might be able to provide to Plaintiffs should the Court find in their favor on the merits of Count Eight (failure to provide 30-day effective date required for rulemaking). This was filed on May 26th so apologies for not sending this sooner. Plaintiffs' reply is due on June 23rd.

From: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>
Sent: Thursday, May 26, 2022 6:40 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Wainwright, Katherine T CIV USARMY CESAJ (USA) <Katherine.T.Wainwright@usace.army.mil>; Holmes, Joshua R CIV USARMY CENWS (USA) <Joshua.R.Holmes@usace.army.mil>; Zilioli, Erica M CIV USARMY CEHQ (USA) <Erica.M.Zilioli@usace.army.mil>
Cc: Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Subject: FW: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Supplemental Memorandum

Hi all,
Attached for your records is our supplemental brief on remedy, filed this evening.

Thanks,

Andy

From: DCD_ECFNotice@dcd.uscourts.gov <DCD_ECFNotice@dcd.uscourts.gov>
Sent: Thursday, May 26, 2022 6:35 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Supplemental Memorandum

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Coghlan, Andrew on 5/26/2022 at 6:34 PM and filed on 5/26/2022

Case Name: CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al

Case Number: 1:21-cv-00119-RDM

Filer: JOHN BLEVINS
JAMES BOOTH
RADHIKA FOX
LEOPOLDO MIRANDA-CASTRO
JEFFREY PRIETO
MICHAEL S. REGAN
SCOTT SPELLMON
LAWRENCE STARFIELD
UNITED STATES ARMY CORPS OF ENGINEERS
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
UNITED STATES FISH AND WILDLIFE SERVICE
MARTHA WILLIAMS

Document Number: 82

Docket Text:
SUPPLEMENTAL MEMORANDUM to re [34] Cross MOTION for Summary Judgment *(Partial)* filed by JOHN BLEVINS, JAMES BOOTH, RADHIKA FOX, LEOPOLDO MIRANDA-CASTRO, JEFFREY PRIETO, MICHAEL S. REGAN, SCOTT SPELLMON, LAWRENCE STARFIELD, UNITED STATES ARMY CORPS OF ENGINEERS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES FISH AND WILDLIFE SERVICE, MARTHA WILLIAMS. (Coghlan, Andrew)

1:21-cv-00119-RDM Notice has been electronically mailed to:

Aaron M. Streett aaron.streett@bakerbotts.com, jacqueline.curtis@bakerbotts.com

Alison C. Finnegan alison.c.finnegan@usdoj.gov, efile_wmrs.enrd@usdoj.gov

Andrew S. Coghlan andrew.coghlan@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV

Anna Marie Sewell asewell@earthjustice.org, acorrea@earthjustice.org, flcaseupdates@earthjustice.org, rwinz@earthjustice.org, selbakri@earthjustice.org, vhuggett@earthjustice.org

Bonnie Malloy bmalloy@earthjustice.org

Christina Reichert creichert@earthjustice.org, flcaseupdates@earthjustice.org

Edward M. Wenger emwenger@holtzmanvogel.com

Gary V. Perko gperko@holtzmanvogel.com

Harrison Reback harrison.reback@bakerbotts.com

Jeffrey Heath Wood jeff.wood@bakerbotts.com

Lily N. Chinn lily.chinn@bakerbotts.com, ECFNotices@bakerbotts.com, hazel.ebalo-gillespie@bakerbotts.com, melissa.westbrook@bakerbotts.com

Mohammad Omar Jazil mjazil@holtzmanvogel.com, mfischer@holtzmanvogel.com

Tania Galloni tgalloni@earthjustice.org, acorrea@earthjustice.org, bkleiner@earthjustice.org, flcaseupdates@earthjustice.org

1:21-cv-00119-RDM Notice will be delivered by other means to::

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:suppressed
Electronic document Stamp:
[STAMP dcecfStamp_ID=973800458 [Date=5/26/2022] [FileNumber=7745697-0] [85b2e66ae3a2d8342c6c3a451232ba9a5c8891345322fee310d567bfcd3bfe922e25 b87a57cc8d6dd0c35d9d8655050ed28a70c0e6f8545adf5124a7938e5fdb]]

Message

From: Lusky, Katy [Lusky.Kathleen@epa.gov]
Sent: 2/23/2023 1:49:09 PM
To: Freeman, Caroline [Freeman.Caroline@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Champagne, David [Champagne.David@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Webster, James [Webster.James@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Torres, Ramon [Torres.Ramon@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
CC: Nicholson, John [Nicholson.John@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Rinck, Todd (he/him/his) [Rinck.Todd@epa.gov]; Garver, Daniel [Garver.Daniel@epa.gov]
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks Caroline.

Is someone answering the question about where EPA stores its monitoring data? I assume they really meant FDEP data but we can always direct them to AQS or AirNow. Let me know if you need anything from us on that front.

thanks,
Katy

From: Freeman, Caroline <Freeman.Caroline@epa.gov>
Sent: Thursday, February 23, 2023 6:35 AM
To: Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Champagne, David <Champagne.David@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Webster, James <Webster.James@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Torres, Ramon <Torres.Ramon@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>
Cc: Nicholson, John <Nicholson.John@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Rinck, Todd (he/him/his) <Rinck.Todd@epa.gov>; Lusky, Katy <Lusky.Kathleen@epa.gov>
Subject: FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI – For Situational Awareness.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Thursday, February 23, 2023 3:33 AM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>; Dorka, Lilian <Dorka.Lilian@epa.gov>; Hudson, Monique <Hudson.Monique@epa.gov>; Johnson, Johahna (she/her/hers) <Johnson.Johahna@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Hello Ms. Burkhardt,

Thank you for the updates concerning the Doral fire. I just wanted to let you know that we are working with EPA's Region 4 to address the questions/issues you raised in your previous email and hope to get you some answers soon. Thank you for your patience.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov
Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Thursday, February 16, 2023 8:39 AM
To: Vong, Suong <Vong.Suong@epa.gov>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon Ms. Vong:

We are writing to update you and EPA that the facility is still on fire. We heard that EPA had been conducting air monitoring alongside Miami-Dade County; however, government officials including the mayor are consistently reporting that the air is coming back "clear," contradicting the clouds of smoke that have been pouring into the community for days now, and the extreme spikes in air monitoring readings for particulate matter, up to 500-700 $\mu g/m^3$, that we have been seeing on both a private monitor and DEP's official air network monitor. We then noticed DEP's official air monitoring data disappeared and was marked "missing" on their website (see example here), prompting the attached letter and records request. DEP acknowledged our records request but failed to explain the missing air monitoring data.

We would like to know if you could please provide answers or updates on the following:

1. **Will EPA be initiating an investigation into the cause of the fire, independent of the facility owner (the county) and operator (Covanta)?**

2. **Where is EPA storing its air monitoring data? How can the public access it?**

3. **Will ECRCO now take action on Florida Rising's pending civil rights complaint that alerted EPA to the issues with this facility?** Our complaint addresses ongoing discriminatory policies and practices by DEP's air division and the permitting of air polluting facilities in Black and brown communities statewide. That this is ongoing is demonstrated by the attached notice of intent, published just this week, pertaining to another air polluting facility 3 miles from this incinerator: the Titan Florida Pennsuco cement complex, which is the largest cement plant in Florida and fifth largest limestone operation in the United States.

Thank you for your attention to these urgent matters.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
www.earthjustice.org

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From: Dominique Burkhardt
Sent: Tuesday, February 14, 2023 2:59 PM
To: Vong, Suong <Vong.Suong@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thank you, Ms. Vong.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Tuesday, February 14, 2023 2:15 PM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

This message originated outside of Earthjustice. Please use caution before opening attachments or links.

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov
Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Monday, February 13, 2023 12:07 PM
To: Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>
Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org
Subject: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html
- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html
- https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/
- https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/
- processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4
- processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4
- original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
www.earthjustice.org

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Message

From: Bradley Marshall [bmarshall@earthjustice.org]
Sent: 4/20/2022 9:02:15 PM
To: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]
Subject: FW: Second Notice of CWA Section 404 Violation & Meeting Request
Attachments: 2022 04 20 Follow-up Notice of CWA Section 404 Violation.pdf; 2021 09 01 Notice of CWA Section 404 Violation.pdf; 2022 01 19 Second Notice of Unpermitted Discharges in Waters of the United States; Meeting Request.pdf

I apologize Ms. Gettle,
I meant to CC you on the e-mail below but mis-typed your e-mail. Thank you.
Best,
Bradley

From: Bradley Marshall
Sent: Wednesday, April 20, 2022 4:58 PM
To: aaron.watkins@floridadep.gov
Cc: shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; timothy.rach@dep.state.fl.us; john.truitt@floridadep.gov; gettle.jeananne@epa.gov; kemker.carol@epa.gov; mcgill.thomas@epa.gov
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

Good afternoon,

As directed by EPA (see below), we are following-up with you, the Florida Department of Environmental Protection, seeking proper regulatory oversight and enforcement regarding unpermitted discharges into waters of the United States by Princeton Oaks Industrial Investors II, LLC in Orange County. Please see the attached letter, and please also find attached prior correspondence that we have sent you on this matter. Please let us know when you can meet with us to discuss the alleged violations in the attached letters and the corrective actions that can be taken to remedy them. Thank you.

Best,
Bradley

Bradley Marshall
Senior Attorney
Earthjustice Florida Office
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
T: 850.681.0031
T: 850.681.0237 (direct)
F: 850.681.0020
earthjustice.org

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From: Gettle, Jeaneanne <gettle.jeaneanne@epa.gov>
Sent: Friday, April 15, 2022 2:58 PM
To: Bradley Marshall <bmarshall@earthjustice.org>
Cc: kemker.carol@epa.gov; mcgill.thomas@epa.gov
Subject: Second Notice of CWA Section 404 Violation & Meeting Request

---

Good afternoon Mr. Marshall,

Thank you for the information you provided regarding the alleged unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in Orange County, Florida.

As communicated by EPA to the Florida Department of Environmental Protection (FDEP) in a December 9, 2021 letter, the Clean Water Act (CWA) and its implementing regulations require Florida to implement its program consistent with the current definition of "waters of the United States." EPA and the U.S. Army Corps of Engineers (Corps) interpret the current definition of "waters of the United States" subject to the Section 404 program to be the regulatory interpretation in place prior to promulgation of the 2015 Clean Water Rule. Florida's Section 404 permitting program must therefore regulate discharges of dredged or fill material into "waters of the United States" consistent with the pre-2015 Rule regulatory regime. Accordingly, any discharges of pollutants into waters protected under the pre-2015 regulatory regime, including discharges into waters outside the scope of the vacated Navigable Waters Protection Rule, which do not have a permit or are not otherwise exempted from permitting requirements under that regime (e.g., under CWA section 404(f)), violate the CWA and are subject to citizen suits as well as state and federal enforcement.

Because Florida operates the 404 permitting program for assumed waters in Florida and is generally the first line of enforcement for violations within those waters, we recommend that Earthjustice continue to reach out to FDEP on this issue. As you may be aware, EPA also retains enforcement authority in states that have assumed the 404 program. EPA will continue to evaluate the situation and take action, as appropriate.

Jeaneanne M. Gettle
Director, Water Division
USEPA, Region 4

From: Bradley Marshall <bmarshall@earthjustice.org>
Sent: Friday, April 15, 2022 9:22 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Fox, Radhika <Fox.Radhika@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Lousberg, Macara <Lousberg.Macara@epa.gov>; Thomas-Burton, Tami <Thomas-Burton.Tami@epa.gov>
Cc: bmalloy@earthjustice.org; tgalloni@earthjustice.org; bkleiner@earthjustice.org; acorrea@earthjustice.org; creichert@earthjustice.org
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

Good morning,

I am writing to follow-up on the e-mails and letters below regarding the alleged unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1). As we have noted below, we would appreciate the opportunity to meet with EPA to discuss the violations alleged in the letter we sent. Please let us know when you would be available to meet with us, and please let me know if you have any questions. Thank you.

Best,
Bradley

Bradley Marshall
Senior Attorney
Earthjustice Florida Office
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
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T: 850.681.0237 (direct)
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From: Christina Reichert <creichert@earthjustice.org>
Sent: Thursday, February 24, 2022 11:34 AM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
Subject: RE: Second Notice of CWA Section 404 Violation & Meeting Request

I am writing to follow up on our September 1, 2022, and January 19, 2022, letters notifying the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1).

Our January 19 letter included a request to meet with you to discuss the violations alleged in the letter as well as corrective actions that the Corps and EPA can take to address them. Please propose potential times when you would be available to speak with us.

Sincerely, Christina

From: Christina Reichert
Sent: Wednesday, January 19, 2022 2:35 PM
To: James.l.booth@usace.army.mil; starfield.lawrence@epa.gov; John.Palmer@usace.army.mil; SAJ-RD-Enforcement@usace.army.mil; todd.polk@usace.army.mil; joshua.r.holmes@usace.army.mil; fox.radhika@epa.gov; goodin.john@epa.gov; lousberg.macara@epa.gov; thomas-burton.tami@epa.gov; shawn.hamilton@floridadep.gov; justin.g.wolfe@dep.state.fl.us; aaron.watkins@floridadep.gov
Cc: Bonnie Malloy <bmalloy@earthjustice.org>; Tania Galloni <tgalloni@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; Briana Kleiner <bkleiner@earthjustice.org>; Ana Correa <acorrea@earthjustice.org>
Subject: Second Notice of CWA Section 404 Violation & Meeting Request

We are writing to follow up on our September 1, 2021, letter notifying the U.S. Army Corps of Engineers and the Florida Department of Environmental Protection of unpermitted dredge and fill activities and discharges by Princeton Oaks

Industrial Investors II, LLC, in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1), and to request a meeting with you to discuss the issues raised in this and our prior letter. Please see attached.

Sincerely,
Christina

Christina I. Reichert
she/her/hers
Senior Associate Attorney
Florida Regional Office
Earthjustice
4500 Biscayne Boulevard, Suite 201
Miami, FL 31337
Phone: 305-440-5432*
Fax: 305-681-0020

* We are currently working remotely, so email is the best way to reach me.

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April 20, 2022

Via E-Mail

Aaron Watkins
Director of the Central District
Florida Department of Environmental Protection
3319 Maguire Boulevard
Orlando, FL 32803
aaron.watkins@floridadep.gov

RE: Notice of Clean Water Act Section 404 Violation for Unpermitted Dredge and Fill Activity in Waters of the United States

Dear Director Watkins:

On behalf of Save the Wekiva River and Headwaters, we write to follow-up our September 1, 2021, notice to the Florida Department of Environmental Protection ("FDEP") of unpermitted dredge and fill activities in waters of the United States by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of Clean Water Act Section 404, 33 U.S.C. § 1344. In our September 1, 2021, letter, we informed you that, on information and belief, the 63.1 acre Princeton Oaks project has and will destroy wetlands that are waters of the United States under the state's 404 assumption authority. As we said then, FDEP must investigate and put an end to any ongoing violations, require that the company obtain a Section 404 permit before continuing to dredge and fill wetlands, and pursue enforcement action, as applicable.

That letter, laying out the history of the project, is enclosed. In it, we laid out the timeline of the jurisdictional determinations of the project, and showed that the August, 2020 jurisdictional determination from the U.S. Army Corps of Engineers relied on the now-vacated Navigable Waters Protection Rule ("NWPR"). Prior to the NWPR rule, Princeton Oaks had sought a 404 permit from the Corps given the clear existence of waters of the United States that would be destroyed as the project moved forward. Given that the NWPR rule has been vacated, the 2020 jurisdictional determination from the Corps, finding no waters of the United States present under NWPR, is not valid, rendering Princeton Oaks' unpermitted dredge and fill activities subject to the Clean Water Act.

Since we alerted FDEP to these facts at the beginning of September, as far as we can discern, FDEP has taken no action to remedy these violations and protect these wetlands. In fact, the St. Johns River Water Management District approved a modified Environmental Resource Permit for the site on October 11, 2021, without addressing any of these issues.

You were CC'd on our January 19, 2022, letter (attached), reiterating the above-points. Yet, we still did not hear from you. On February 24, 2022, we e-mailed EPA, CC'ing you, regarding these points and requesting corrective actions. On April 15, 2022, we again e-mailed EPA, reiterating our request for a meeting and for corrective action to EPA. On April 15, 2022, EPA responded, directing us to again reach out to you as the first line of enforcement for violations within those waters, given the FDEP assumption of the 404 program. It has now been over seven and a half months since we first brought this issue to your attention. We are reaching out again, asking you to exercise your proper regulatory oversight and enforce the Clean Water Act Section 404. We also request that within 14 days you inform us what action, if any, you are planning to take to carry out your duties under the 404 program in this matter, or at the least, meet with us to discuss this matter.

If you have any questions, please do not hesitate to contact me at bmarshall@earthjustice.org.

Sincerely,

Bradley Marshall
Attorney
Earthjustice

CC:

Shawn Hamilton, Secretary, FDEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, FDEP, justin.g.wolfe@dep.state.fl.us
Tim Rach, FDEP, timothy.rach@dep.state.fl.us
John Truitt, FDEP, john.truitt@floridadep.gov
Jeaneanne M. Gettle, EPA, gettle.jeaneanne@epa.gov
Carol Kemker, EPA, kemker.carol@epa.gov
Thomas McGill, EPA, mcgill.thomas@epa.gov

ED_014341_00000049-00002

September 1, 2021

Via E-Mail

Aaron Watkins
Director of the Central District
Florida Department of Environmental Protection
3319 Maguire Boulevard
Orlando, FL 32803
aaron.watkins@floridadep.gov

John Palmer
Chief, Cocoa Section
U.S. Army Corps of Engineers
400 High Point Drive
Cocoa, FL 32926
john.palmer@usace.army.mil

RE: Notice of Clean Water Act Section 404 Violation for Unpermitted Dredge and Fill Activity in Waters of the United States

Dear Director Watkins and Chief Palmer:

On behalf of Save the Wekiva River and Headwaters, we write to notify the Florida Department of Environmental Protection ("FDEP") and the U.S. Army Corps of Engineers ("Corps") of unpermitted dredge and fill activities in waters of the United States by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of Clean Water Act Section 404, 33 U.S.C. § 1344. On information and belief, the 63.1 acre Princeton Oaks project has and will destroy wetlands that are waters of the United States under the state's 404 assumption authority. FDEP must investigate and put an end to any ongoing violations, require that the company obtain a Section 404 permit before continuing to dredge and fill wetlands, and pursue enforcement action, as applicable.

This project is one of many ongoing, planned, or completed industrial and commercial development projects in Florida that are destroying the wetlands surrounding a predominantly Black neighborhood and subjecting the community to pollution and environmental degradation. These projects are exacerbating environmental injustices at a time where the state should be devoting resources to preventing and remedying the disproportionate environmental harms experienced by Black and Brown communities in Florida. That the Princeton Oaks industrial development appears to be moving forward in violation of the Clean Water Act is particularly troubling.

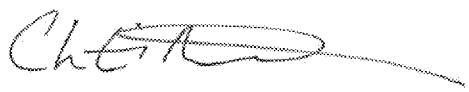
Before Florida assumed administration of Section 404 in Florida, Princeton Oaks sought a Section 404 permit from the Corps because the project would destroy waters of the United States, including a mix of forested wetlands and a stream/waterway. Public Notice, Permit Application # SAJ-2017-02936 (SP-JSC), U.S. Army Corps of Eng'rs, July 8, 2019 (Attachment 1). After the Navigable Waters Protection Rule ("NWPR") became effective in April 2020, the company asked the Corps to revisit its jurisdictional determination. Letter from John Palmer, Corps, to Moses Salcido, Princeton Oaks, Aug. 28, 2020 (Attachment 2). And in August 2020, the Corps acquiesced to this request and determined the waters were no longer jurisdictional.

However, a federal court has now vacated the NWPR. Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al., No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). As a direct result, the Corps' August 2020 jurisdictional determination is no longer valid, rendering Princeton Oaks' unpermitted dredge and fill activities subject to the Clean Water Act.

It is our understanding that Princeton Oaks has begun unpermitted dredge and fill activities in the waters of the United States present on the project site. As such, the Corps and FDEP must revisit and revoke the August 2020 jurisdictional determination and immediately require Princeton Oaks to cease and desist development of the wetlands on the project site unless and until the company obtains a Section 404 permit. Any further destruction of waters of the United States constitutes unpermitted activities in violation of the Clean Water Act. The state and federal governments have a duty to ensure against any such violations and take any and all appropriate enforcement action.

If you have any questions, or would like to discuss this matter, please do not hesitate to contact me at creichert@earthjustice.org.

Sincerely,



Christina I. Reichert
Attorney
Earthjustice

CC:

Shawn Hamilton, Interim Secretary, FDEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, FDEP, justin.g.wolfe@dep.state.fl.us
Joshua Holmes, Deputy District Counsel, Jacksonville District, Corps
Joshua.R.Holmes@usace.army.mil
Radhika Fox, Director, Office of Water, EPA, fox.radhika@epa.gov
John Goodin, Director, Office of Wetlands, Oceans and Watersheds, EPA, goodin.john@epa.gov
Lawrence Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance, EPA, starfield.lawrence@epa.gov

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Macara Lousberg, Director, Water Policy Staff, EPA, lousberg.macara@epa.gov
Tami Thomas-Burton, Regional Environmental Justice Coordinator, Region 4, EPA, thomas-burton.tami@epa.gov
Paul Ellis, Chief Executive Officer, Foundry Commercial, paul.ellis@foundrycommercial.com
Moses Salcido, Principal, Foundry Commercial's Princeton Oaks Industrial Investors II, LLC, moses.salcido@foundrycommercial.com

January 19, 2022

Via E-Mail

Colonel James Booth
District Commander
Jacksonville District
U.S. Army Corps of Engineers
701 San Marco Blvd.
Jacksonville, FL 32207
James.l.booth@usace.army.mil

Lawrence Starfield
Acting Assistant Administrator
Office of Enforcement and Compliance
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2201A
Washington, DC 20460
starfield.lawrence@epa.gov

RE: Second Notice of Unpermitted Discharges in Waters of the United States; Meeting Request.

Dear Colonel Booth and Mr. Starfield:

We are writing to follow up on our September 1, 2021, letter notifying the U.S. Army Corps of Engineers ("Corps") and the Florida Department of Environmental Protection ("DEP") of unpermitted dredge and fill activities and discharges by Princeton Oaks Industrial Investors II, LLC ("Princeton Oaks"), in violation of the Clean Water Act, 33 U.S.C. § 1344, 1365(a)(1), and to request a meeting with you to discuss the issues raised in this and our prior letter. Letter from Christina I. Reichert, Earthjustice, to Aaron Watkins, Fla. Dep't Env't Prot., and John Palmer, U.S. Army Corps of Eng'rs, Sept. 1, 2021 (Attachment 1).

We have received no response from DEP or the Corps even though the 63.1-acre Princeton Oaks project has discharged and will discharge fill materials into waters of the United States without a permit. As explained in our prior letter, it appears that Princeton Oaks has been filling wetlands relying on an illegal jurisdictional determination from the Corps that applied the unlawful Trump Navigable Waters Protection Rule ("NWPR").

As a result of these Clean Water Act violations, the Corps should (1) rescind the illegal jurisdictional determination; (2) notify Princeton Oaks that it cannot rely on the illegal jurisdictional determination; and (3) notify Princeton Oaks that it must obtain a Clean Water Act Section 404 permit for dredge and fill activities in waters of the United States and mitigate the harm it has already caused. And the EPA should take enforcement action against Princeton Oaks for its prior unpermitted dredge and fill activities.

As we explained in our September 2021 letter, Princeton Oaks sought a Section 404 permit from the Corps in 2019 because the project would destroy waters of the United States, including a mix of forested wetlands and a stream/waterway. Public Notice, Permit Application # SAJ-2017-02936 (SP-JSC), U.S. Army Corps of Eng'rs, July 8, 2019 (Attachment 2). After the NWPR became effective in April 2020, Princeton Oaks asked the Corps to revisit its jurisdictional determination as part of this permitting process. Letter from John Palmer, Corps, to Moses Salcido, Princeton Oaks, Aug. 28, 2020 (Attachment 3). In August 2020, the Corps acquiesced to this request. In December 2020, the U.S. Environmental Protection Agency ("EPA") transferred authority over Section 404 in Florida from the Corps to DEP.

On August 30, 2021, a federal court vacated the NWPR. Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al., No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). Accord Navajo Nation v. Regan, No. 2:20-CV-00602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). As a result, the Corps and EPA halted implementation of the NWPR nationwide and returned to the pre-2015 regulatory regime to define waters of the United States. Current Implementation of Waters of the United States, U.S. Env't Prot. Agency, https://www.epa.gov/wotus/current-implementation-waters-united-states (Dec. 20, 2021) (Attachment 4).

As our September 1, 2021, letter, explained, it is our understanding that since August 30, 2021, Princeton Oaks has been discharging dredge and fill materials into waters of the United States present on the project site without a Section 404 permit. As such, Princeton Oaks has violated the Act and is subject to citizen suits as well as state and federal enforcement.

In a separate September 1, 2021, letter, we notified DEP of the Pasqua Yaqui Tribe decision so that DEP could immediately act to ensure that all waterways covered by the Clean Water Act in Florida would be protected. Letter from Tania Galloni, Earthjustice, to Shawn Hamilton, Fla. Dep't Envtl. Prot., Sept. 1, 2021 (Attachment 5). However, DEP has continued to apply the NWPR and has taken no action on the Princeton Oaks project.

Despite DEP's position, the pre-2015 regulatory regime applies to the state of Florida's Section 404 program, something EPA explained to DEP in its own letter on December 9, 2021. Letter from Daniel Blackman, U.S. Env't Prot. Agency, to Emile D. Hamilton, Fla. Dep't of Env't Prot., Dec. 9, 2021 (Attachment 6). Accordingly, in Florida, "**any discharges of pollutants into waters protected under the pre-2015 Rule regulatory regime**, including discharges into waters outside the scope of the vacated NWPR, **which do not have a permit or are not otherwise exempted from permitting requirements under that regime** … , **violate the Act and are subject to citizen suits as well as state and federal enforcement**." Id. This includes the Princeton Oaks project.

More recently, on January 5, 2022, the Corps issued a notice that it would automatically revisit jurisdictional determinations that rely on the NWPR when making permitting decisions. Navigable Waters Protection Rule Vacatur, U.S. Army Corps of Eng'rs, Jan. 5, 2022, https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur (Attachment 7). The Corps did not similarly say it would automatically revisit illegal "stand-alone" jurisdictional determinations that rely on the NWPR.

Id. But the Corps did explain that Regulatory Guidance Letter No. 05-02 § 1(a) still applies to those stand-alone jurisdictional determinations. Id. (citing U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-02, § 1(a), at p. 1 (June 2005)). That guidance says jurisdictional determinations should remain valid for five years "unless new information warrants revision of the determination before the expiration date." Regulatory Guidance Letter No. 05-02, § 1(a).

First, as explained above, the Princeton Oaks jurisdictional determination was obtained in connection with a Section 404 permitting process before the Corps. Princeton Oaks had initially sought a Section 404 permit and in that process, asked the Corps to revisit the company's jurisdictional determination using the NWPR. This means the jurisdictional determination does not qualify as a "stand-alone" decision and must be revisited and rescinded immediately to ensure compliance with federal law.

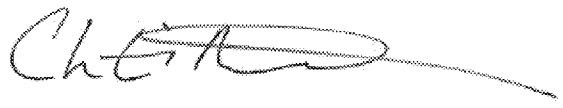
Second, even if the Princeton Oaks jurisdictional determination could be considered a "stand-alone" decision, new information certainly warrants rescission of Princeton Oaks' jurisdictional determination. Id. A federal court has ruled that the NWPR—the definition of "waters of the United States" which serves as the framework for the jurisdictional determination—is illegal, and the NWPR has been vacated. Pasqua Yaqui Tribe, 2021 WL 3855977. Accord Navajo Nation, 2021 WL 4430466. This decision constitutes "new information" that warrants the Corps' revision of the prior jurisdictional determination because it changes the legal framework applied by the Corps to delineate waters of the United States and affects whether the waters of the United States on the Princeton Oaks site will be protected as required by law. Moreover, these decisions mean that the NWPR was never lawfully in place and that no jurisdictional determination can stand that is based on the rule.

Moreover, since the Corps issued its jurisdictional determination, the Biden Administration has dedicated itself to securing environmental justice and ordered agencies to make achieving environmental justice part of their missions. Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021). The Princeton Oaks project is a prime opportunity to for the Corps and EPA to meet this obligation. This project is one of many ongoing, planned, and completed industrial and commercial developments in the Evergreen Stuart Park and Mercy Drive neighborhoods. Public Comments from Dr. Wanda Jones to Nat'l Env't Justice Advisory Council, U.S. Env't Prot. Agency, Aug. 31, 2021 (Attachment 8). These neighborhoods are comprised of primarily Black senior residents. Id. With this and other industrial and commercial developments intruding into their neighborhoods, these communities are facing increased heat, flooding, vulnerability to storms, air pollution, and danger from semi-truck traffic. Id.

Considering the foregoing, the Corps must immediately rescind the illegal August 2020 jurisdictional determination for Princeton Oaks to ensure compliance with federal law. The Corps should also notify Princeton Oaks that it must obtain a Clean Water Act Section 404 permit for dredge and fill activities in waters of the United States and mitigate the harm it has already caused. And EPA should initiate federal enforcement action against Princeton Oaks for any unpermitted discharges.

We would like to meet with you to discuss the violations described in this letter as well as the corrective actions the Corps and EPA must take to remedy them. Thank you for your prompt attention to this matter. We look forward to a meeting with you and members of the community harmed by the Princeton Oaks project to discuss these matters.

Sincerely,



Christina I. Reichert
Attorney
Earthjustice

CC:

Todd Polk, Deputy District Commander, South Florida, Corps, todd.polk@usace.army.mil
Joshua Holmes, Deputy District Counsel, Jacksonville District, Corps
Joshua.R.Holmes@usace.army.mil
Radhika Fox, Director, Office of Water, EPA, fox.radhika@epa.gov
John Goodin, Director, Office of Wetlands, Oceans and Watersheds, EPA, goodin.john@epa.gov
Macara Lousberg, Director, Water Policy Staff, EPA, lousberg.macara@epa.gov
Tami Thomas-Burton, Regional Environmental Justice Coordinator, Region 4, EPA, thomas-burton.tami@epa.gov
Shawn Hamilton, Secretary, DEP, shawn.hamilton@floridadep.gov
Justin George Wolfe, General Counsel, DEP, justin.g.wolfe@dep.state.fl.us
Aaron Watkins, Staff Director for the Central District, DEP, aaron.watkins@floridadep.gov

ED_014341_00000051-00004

Message

From: Nagrani, Kavita [Nagrani.Kavita@epa.gov]
Sent: 7/8/2022 6:54:23 PM
To: Snyder, Katherine [Snyder.Katherine@epa.gov]; Hansel, Joel [Hansel.Joel@epa.gov]; Sampath, Sam [Sampath.Sam@epa.gov]; Hudda, Laila [Hudda.Laila@epa.gov]; Sturdivant, Donnette [Sturdivant.Donnette@epa.gov]; Bouma, Stacey [Bouma.Stacey@epa.gov]; Allenbach, Becky [Allenbach.Becky@epa.gov]; Diaz, Denisse [Diaz.Denisse@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Hansen, Susan [Hansen.Susan@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
Subject: FW: Activity in Case 6:22-cv-00868-CEM-LHP Save the Manatee Club et al v. United States Environmental Protection Agency Answer to Complaint
Attachments: Indian River - DN14 - Federal Defendant's Answer.pdf

Hello – just an FYI that DOJ has filed our answer in the manatee/IRL litigation. I hope you all have a lovely weekend ☺

Kavita

From: Grosko, Brett (ENRD) <Brett.Grosko@usdoj.gov>
Sent: Friday, July 8, 2022 2:45 PM
To: Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Garretson, Eleanor <Garretson.Eleanor@epa.gov>
Cc: Norway, Robert M. (ENRD) <Robert.M.Norway@usdoj.gov>
Subject: FW: Activity in Case 6:22-cv-00868-CEM-LHP Save the Manatee Club et al v. United States Environmental Protection Agency Answer to Complaint

All,

I'm attaching the stamped, as filed answer.

Brett

From: cmecf_flmd_notification@flmd.uscourts.gov <cmecf_flmd_notification@flmd.uscourts.gov>
Sent: Friday, July 8, 2022 1:40 PM
To: cmecf_flmd_notices@flmd.uscourts.gov
Subject: Activity in Case 6:22-cv-00868-CEM-LHP Save the Manatee Club et al v. United States Environmental Protection Agency Answer to Complaint

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U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered by Norway, Robert on 7/8/2022 at 1:39 PM EDT and filed on 7/8/2022

Case Name: Save the Manatee Club et al v. United States Environmental Protection Agency
Case Number: 6:22-cv-00868-CEM-LHP
Filer: United States Environmental Protection Agency
Document Number: 14

Docket Text:
ANSWER and affirmative defenses to [1] Complaint, by United States Environmental Protection Agency.(Norway, Robert)

6:22-cv-00868-CEM-LHP Notice has been electronically mailed to:

Alisa Coe acoe@earthjustice.org, acorrea@earthjustice.org, eforsyth@earthjustice.org, flcaseupdates@earthjustice.org, jhann@earthjustice.org

Elizabeth Britta Forsyth eforsyth@earthjustice.org, jhann@earthjustice.org

John Brett Grosko brett.grosko@usdoj.gov, EFILE_WMRS.ENRD@usdoj.gov

Robert M. Norway Robert.M.Norway@usdoj.gov, efile_wmrs.enrd@usdoj.gov, Joy.Benavides@usdoj.gov

6:22-cv-00868-CEM-LHP Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=7/8/2022] [FileNumber=22208546-0
] [40092a502673f1c6124059dde65403ced9913e11d66ff5b2b48b5d8a73528b53512
24db99278bd31fd1ef9fb22e22aa8c20506dce2bc71b59d5c9c337ff08d7b]]

Message

From: Hoang, Anhthu [Hoang.Anhthu@epa.gov]
Sent: 3/14/2023 1:12:36 AM
To: micah.west@splcenter.org; cflowers [cflowers@creej.org]; mgraham@creej.org; acolangelo@nrdc.org; stallman@nrdc.org; rhammer@nrdc.org; kleefatt@nrdc.org; alyssabrown@nrdc.org
CC: Dorka, Lilian [Dorka.Lilian@epa.gov]; Goerke, Ariadne (she/her/hers) [Goerke.Ariadne@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Harrison, Brenda [Harrison.Brenda@epa.gov]; Stein, Jonathan [Stein.Jonathan@epa.gov]; Vong, Suong [Vong.Suong@epa.gov]
Subject: re: EPA Complaint No. 03R-23-R4
Attachments: 2023.03.06 03R-23-R4 CP Ack.pdf

Dear Messrs. West, Colangelo, Graham and Mss. Flowers, Tallman, Hammer, Leefatt, and Brown:

The attached letter is to notify you that the U.S. Environmental Protection Agency (EPA), Office of Environmental Justice & External Civil Rights Compliance, Office of External Civil Rights Compliance (OECRC), received a complaint on March 6, 2023, involving the Alabama Department of Environmental Management alleging discrimination based on race in violation of Title VI of the Civil Rights Act of 1964.

If you have any questions about the status of this correspondence, please contact me by telephone at (202) 809-3297 or by email at hoang.anhthu@epa.gov.

Anhthu Hoang
Acting Director
Office of External Civil Compliance
Office of Environmental Justice and External Civil Rights

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D C. 20460

Office of Environmental Justice and External Civil Rights
Office of External Civil Rights Compliance

March 13, 2023

In Reply Refer to:
EPA Complaint No. 03R-23-R4

Mr. Micah West
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36130
micah.west@splcenter.org

Catherine Flowers
Michael Graham
Center for Rural Enterprise and Environmental Justice
cflowers@creej.org
mgraham@creej.org

Aaron Colangelo
Sarah Tallman
Rebecca Hammer
Kimberly Leefatt
Alyssa Brown
Natural Resources Defense Council
acolangelo@nrdc.org
stallman@nrdc.org
rhammer@nrdc.org
kleefatt@nrdc.org
alyssabrown@nrdc.org

Re: Acknowledgement of Administrative Complaint

Dear Messrs. West, Colangelo, Graham and Mss. Flowers, Tallman, Hammer, Leefatt, and Brown:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA), Office of Environmental Justice & External Civil Rights Compliance, Office of External Civil Rights Compliance (OECRC)[1] received your correspondence on March 6, 2023, involving the Alabama Department of Environmental Management alleging discrimination based on race in violation of Title VI of the Civil Rights Act of 1964.

OECRC is responsible for processing and resolving complaints alleging discrimination by

[1] On September 24, 2022, EPA announced the establishment of the Office of Environmental Justice and External Civil Rights (OEJECR). The new Office includes the External Civil Rights Compliance Office, which was renamed the Office of External Civil Rights Compliance (OECRC). OECRC continues to enforce and ensure compliance with federal civil rights laws, which prohibit discrimination by applicants for and recipients of EPA financial assistance. OECRC accomplishes in accordance with the procedure described in the Case Resolution Manual.

Micah West (Southern Poverty Law Center)
Catherine Flowers, Michael Graham (Center for Rural Enterprise and Environmental Justice)
Aaron Colangelo, Sarah Tallman, Rebecca Hammer, Kimberly Leefatt, Alyssa Brown (Natural Resources Defense Council)

programs or activities that receive financial assistance from the EPA. OECRC will review the correspondence in light of EPA's nondiscrimination regulation to determine whether it is a complaint that falls within OECRC's jurisdiction. Once this jurisdictional review is completed, OECRC will notify you as to whether it will accept the complaint for investigation, or reject, or refer the complaint to another Federal agency.

Please be advised that, if your complaint is accepted for investigation, a copy of the complaint will be shared with the Recipient, consistent with 40 C.F.R. § 7.120(e). OECRC will release the complaint with appropriate redactions consistent with the Freedom of Information Act (FOIA) and the Privacy Act) and will only release identifying information to the extent necessary to comply with 40 C.F.R. Parts 5 and 7.[2]

In the interim, if you have any questions about the status of this correspondence, please contact me by telephone at (202) 809-3297 or by email at hoang.anhthu@epa.gov.

Sincerely,

ANHTHU HOANG

Digitally signed by ANHTHU HOANG
Date: 2023.03.13 18:51:11 -04'00'

Anhthu Hoang
Acting Director
Office of Environmental Justice and
External Civil Rights Compliance

cc: Ariadne Goerke
Deputy Associate General Counsel
Civil Rights & Finance Law Office

Jeaneanne Gettle
Deputy Regional Administrator
Deputy Civil Rights Official
US EPA Region 4

Leif Palmer
Regional Counsel

[2] Freedom of Information Act, 5 U.S.C. § 552(b)(6) and (7)(c) and the Privacy Act of 1974, 5 U.S.C. § 552a.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY
378 N. Main Avenue
Tucson, AZ 85701;

DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, DC 20036;

SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612;

CONSERVANCY OF SOUTHWEST FLORIDA
1495 Smith Preserve Way
Naples, Florida 34102;

FLORIDA WILDLIFE FEDERATION
2545 Blairstone Pines Drive
Tallahassee, FL 32301;

MIAMI WATERKEEPER
2103 Coral Way
Miami, FL 33145; and

ST. JOHNS RIVERKEEPER
2800 University Blvd N
Jacksonville, FL 32211,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460;

MICHAEL S. REGAN, in his official capacity as Administrator for the U.S. Environmental Protection Agency,
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460;

CIVIL NO. 21-cv-119

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

ED_014341_00000057-00001

RADHIKA FOX, in her official capacity as Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency,
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460;

JEFFREY PRIETO, in his official capacity as General Counsel for the U.S. Environmental Protection Agency,
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460;

LAWRENCE STARFIELD, in his official capacity as Acting Assistant Administrator for the Office of Enforcement and Compliance Assurance for the U.S. Environmental Protection Agency,
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460;

JOHN BLEVINS, in his official capacity as Acting Administrator for Region 4 of the U.S. Environmental Protection Agency,
61 Forsyth Street SW
Atlanta, GA 30303;

U.S. FISH AND WILDLIFE SERVICE
1849 C Street, NW
Washington, DC 20240;

MARTHA WILLIAMS, in her official capacity as Principal Deputy Director for the U.S. Fish and Wildlife Service,
1849 C Street, NW
Washington, DC 20240;

LEOPOLDO MIRANDA-CASTRO, in his official capacity as Regional Director for the U.S. Fish and Wildlife Service,
1875 Century Boulevard, Suite 400
Atlanta, GA 30345;

U.S. ARMY CORPS OF ENGINEERS
441 G Street, NW
Washington, DC 20314;

LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers,

ED_014341_00000057-00002

441 G Street, NW
Washington, DC 20314; and

COLONEL JAMES BOOTH, in his official capacity as District Commander of the Jacksonville District for the U.S. Army Corps of Engineers,
701 San Marco Boulevard
Jacksonville, FL 32207,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action arises from the U.S. Environmental Protection Agency's ("EPA") unlawful approval of a state application to assume jurisdiction over the Clean Water Act's Section 404 permitting program, which regulates the dredging and filling of waters of the United States, including wetlands essential to water quality, storm and climate resiliency, threatened and endangered species, and the economy. EPA's approval is unlawful because the state's program is not as stringent as federal law and rests on unprecedented arrangements that violate federal law. At a December 17, 2020, press conference in Washington, D.C., EPA Administrator Andrew Wheeler announced the agency's approval of the state of Florida's novel program to assume jurisdiction over Section 404, described the program as a roadmap, and encouraged other states to follow suit. On December 22, 2020, the EPA published its decision in the Federal Register, purporting to give it immediate effect, in violation of the Administrative Procedure Act ("APA"), and without codifying the program, also in violation of federal law. The EPA's actions failed to effectuate a lawful transfer of authority. Yet the EPA has advised the state that it may proceed. The EPA's action will allow the state to violate federal law to the detriment of waters of the United States and the endangered and threatened species that rely on them, while depriving those adversely affected of federal rights and remedies.

2. Underlying the EPA's decision are unlawful actions by the U.S. Fish and Wildlife Service ("USFWS"), which has failed to ensure no jeopardy to listed species and creates an unlawful scheme for take liability coverage at the permit level, in contravention of the Endangered Species Act ("ESA"). Also, the U.S. Army Corps of Engineers' ("Corps") list of waters over which it will retain jurisdiction is arbitrarily and capriciously truncated in violation of the Rivers and Harbors Act ("RHA") and the APA.

3. Defendants' actions threaten to open the floodgates for other states to seek assumption without requiring that those programs meet federal standards, further imperiling waters of the United States and the ESA-listed species that rely on them. As Administrator Wheeler stated at the December 17th press conference, states have already been reaching out to the EPA to follow in Florida's footsteps. Defendants' actions are unlawful and must be set aside.

INTRODUCTION

4. Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The impetus for enacting the Clean Water Act was states' failure to control water pollution as evidenced by disasters like the Cuyahoga River catching on fire and the Hudson River filling with raw sewage and toxic waste.

5. The Clean Water Act Section 404 wetlands permitting program ("404 program") regulates the discharge of dredged or fill materials into waters of the United States, including wetlands, 33 U.S.C. § 1344, and is a vital tool to meet the Clean Water Act's goals, recognizing that the degradation and destruction of wetlands is "among the most severe environmental impacts." See 33 U.S.C. § 1251; 40 C.F.R. § 230.1(a).

6. Under the federal 404 program, it is the Corps that reviews and, where appropriate, approves permits.

7. Congress enacted the Endangered Species Act of 1973 ("ESA") to, among other things, "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(2)(b).

8. Pursuant to Section 7(a)(2) of the ESA, the Corps must engage in formal consultation with USFWS and National Marine Fisheries Service ("NFMS") (collectively, "the Services") whenever it appears that a Section 404 permit applicant's proposed activity may adversely affect listed species. Through this process, permittees may obtain protection from ESA liability for any incidental harm (called "incidental take") to listed species on a project by project basis.

9. The Clean Water Act creates a path for states to administer their own dredge and fill permit program, if the state's program is at least as stringent as the federal program. 33 U.S.C. § 1344(h)(1). The state must submit a "full and complete" application showing that it meets this high bar. Id. § 1344(g); 40 C.F.R. §§ 233.10, 233.15(a). In a state 404 program, it is a state agency, rather than the Corps, that reviews 404 permit applications and issues 404 permits.

10. Before a state may assume the 404 program, the EPA must determine that the state has demonstrated authority to issue permits that assure compliance with the Clean Water Act Section 404(b)(1) Guidelines, which, among other things, prohibit the issuance of 404 permits that would jeopardize the existence of ESA-listed species, or result in the likelihood of

destroying or adversely modifying critical habitat identified under the ESA. 33 U.S.C. § 1344(h)(1)(A)(i); 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c), 233.23.

11. ESA Section 7(a) consultation between the Services and federal agencies, including the associated incidental take protection, does not extend to projects regulated under state-operated 404 programs. 16 U.S.C. § 1536(a).

12. Permittees, however, must still comply with the ESA's take prohibition, and must therefore pursue ESA Section 10 consultation with the Services to try to obtain protection from incidental take liability if a project may harm listed species. 16 U.S.C. § 1539.

13. When the EPA approves a state's 404 program, the Administrator must notify the state and the Corps, and, upon notification from the state that it is administering the program, the Corps must suspend its issuance of permits covered by the state program. 33 U.S.C. § 1344(h)(2)(A).

14. Transfer of 404 permitting authority to a state is not effective until after notice is published in the Federal Register. 40 C.F.R. § 233.15(h). As of the effective date of an approved state program, the Corps must suspend all issuance of Section 404 permits in state-regulated waters. Id.

15. The APA provides that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date" subject to certain exceptions not applicable here. 5 U.S.C. § 553(d).

16. In the many years that Section 404 state assumption has been authorized under the Clean Water Act for programs that meet stringent federal standards, the EPA has approved only two. In 1984, the EPA approved Michigan's program, and in 1994, the EPA approved New Jersey's program. See 40 C.F.R. § 233.70 (Michigan), 40 C.F.R. § 233.71 (New Jersey).

17. In 2005 and in 2012, Florida considered pursuing assumption but abandoned the effort considering conflicts between state and federal law, the high costs associated with administering the program, and permittees' concerns regarding protection against ESA liability.

18. Many other states, including most recently Arizona, have reached similar conclusions.

19. On August 20, 2020, Florida applied to the EPA proposing to take over the 404 program without adopting all federal requirements, without demonstrating "no jeopardy" to ESA-listed species, and without adequately identifying the waters over which it would assert jurisdiction. The state also claimed it would require no funding to administer and enforce the program, even amidst major budget cuts resulting from a pandemic which the state did not address or even acknowledge in the application.

20. On August 28, 2020, the EPA nonetheless determined that the application was "complete" as of the submission date.

21. The EPA's "completeness" determination triggered a 120-day deadline to approve or deny the application by December 18, 2020, unless the EPA and Florida agreed to extend the timeline. See 33 U.S.C. § 1344(h)(1); 40 C.F.R. § 233.15(a).

22. On August 28, 2020, and at Florida's request, the EPA reversed its long-standing position that agency review of an assumption application was a non-discretionary act, thereby triggering a duty to engage in ESA consultation with the Services. The EPA agreed with the state that this duty required only a one-time programmatic consultation for purposes of considering the application.

23. Defendants and the state developed this novel position to facilitate programmatic incidental take coverage to the state and state permittees—an unprecedented, and ultimately unlawful, workaround to the requirements of federal law.

24. On September 2, 2020, the EPA submitted an "ESA Biological Evaluation for Clean Water Act Section 404 Assumption by the State of Florida" to USFWS to initiate formal consultation on Florida's application. It was dated August 2020.

25. Also, on September 2, 2020, the EPA sent a letter to NMFS summarily concluding that approval of the state program would have "no effect" on NMFS' jurisdictional marine and anadromous species. The EPA's conclusion was solely based on an April 15, 2020, letter by NMFS to Florida, stating that no species in NMFS' exclusive jurisdiction would be present "in assumable waters." NMFS then concurred with the EPA's determination.

26. The EPA's biological evaluation was largely a cut and paste of a biological assessment drafted by the state and was not independently assessed by the EPA.

27. On September 16, 2020, the EPA initiated a 45-day public comment period that concluded on November 2, 2020. See 40 C.F.R. § 233.15(e) and 5 U.S.C. § 553. The EPA indicated that if approved, the state program would be codified at 40 C.F.R. § 233 subpart H. This was consistent with the agency's codification of the only other two approved state 404 programs. See 40 C.F.R. § 233.70 (New Jersey); id. § 233.71 (Michigan).

28. At the October 21, 2020, EPA public hearing on Florida's submission, Plaintiffs' counsel urged the EPA to reverse its completeness determination considering critical omissions in Florida's application. In an October 23, 2020 letter, Plaintiffs' counsel requested suspension of the public comment period until the deficiencies were cured. See id. § 233.15(a) (statutory review period shall not begin if the EPA finds that state's submission is incomplete).

29. The EPA did not respond to Plaintiffs' requests and closed the public comment period on November 2, 2020.

30. On November 2, 2020, Plaintiffs and many other members of the public submitted comments challenging the legality of the EPA's approval of the state's proposal, the absence of required components prejudicing the opportunity for public comment, and the proposal's failure to meet the requirements for a state-assumed program, particularly as it relates to the protection of threatened and endangered species. 33 U.S.C. § 1344(g)–(h).

31. On November 19, 2020, USFWS transmitted to the EPA a programmatic biological opinion dated November 17, 2020, regarding Florida's application. USFWS' biological opinion, in conjunction with a memorandum of understanding between USFWS and the state, purports to authorize a "technical assistance" role outside the parameters of the ESA that would nevertheless grant "[i]ncidental take exemption" to the EPA for its approval and oversight of the state program, and would further grant protection from liability for any take of listed species incidental to state-permitted activities so long as the permittee complied with the conditions of a state-issued permit.

32. Neither NMFS' April 2020 determination nor USFWS' November 2020 biological opinion was made part of Florida's application or otherwise presented to the public for an opportunity to comment before the EPA acted on the state's application.

33. On December 17, 2020, EPA Administrator Andrew Wheeler announced the approval of Florida's assumption application at a press conference in Washington, D.C.

34. On December 22, 2020, the EPA's approval of the state program was published in the Federal Register, with an immediate "applicable" date as of publication. The notice did not codify the approved program.

35. On the same day, counsel for Plaintiffs notified the EPA that its failure to codify and failure to comply with the APA rendered the transfer ineffective and that authority to administer the 404 program remained with the Corps.

36. On December 28, 2020, EPA General Counsel David Fotouhi sent a letter claiming that the transfer was effective upon publication, that the decision was an adjudication rather than a rulemaking, and that the agency intended to codify the program but only for "transparency."

JURISDICTION AND VENUE

37. This action arises under the Clean Water Act, 33 U.S.C. §§ 1251–1387, ESA, §§ 1531–44, and the APA, 5 U.S.C. §§ 553, 701–06.

38. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and may issue a declaratory judgment and further relief under 28 U.S.C. §§ 2201, 2202.

39. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(e) as the Defendants include agencies of the United States and officers and employees of the United States acting under their official capacities who reside in this district, and Plaintiff Defenders of Wildlife maintains its principal place of business, and therefore resides, in this judicial district. Id. §§ 1391(c)(2), (e)(1)(C).

PARTIES

Plaintiffs

40. CENTER FOR BIOLOGICAL DIVERSITY ("Center") is a nonprofit organization that works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center is incorporated in

California, headquartered in Tucson, Arizona, and maintains an office in the District of Columbia, with field offices throughout the United States and Mexico.

41. The Center has 81,843 members across the country. The Center and its members are concerned with, and have concrete interests in, the conservation of imperiled species and the habitats they rely on for survival, including the ones at issue in this suit. The Center's members and staff have researched, studied, observed, litigated over, and sought protection for federally listed threatened and endangered species in the United States, including listed turtles in Florida. These activities support the Center's mission to save life on earth. The Center brings this action on behalf of itself and its adversely affected members.

42. DEFENDERS OF WILDLIFE ("Defenders") is a nonprofit membership organization that is one of the nation's leading advocates for threatened and endangered species and wildlife conservation. Founded in 1947, Defenders is headquartered in Washington, D.C., and maintains local field offices throughout the country. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities and the preservation of the habitats upon which they depend, including in wetlands and other aquatic environments. Defenders works toward the recovery of threatened and endangered species by means such as monitoring and engaging in public notices and comments, litigation, research, education, and federal, state, and local advocacy.

43. Defenders is a science-based conservation organization with more than 1.8 million members and supporters nationwide and around the world. Defenders and its members aim to protect and restore imperiled species throughout North America by transforming policies and institutions, promoting innovative solutions, and litigating over protections for threatened and endangered species in the United States. These activities support Defenders' mission to

protect native plants and animals. Defenders brings this action on behalf of itself and its adversely affected members.

44. SIERRA CLUB ("Sierra Club") is a national non-profit organization dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

45. Headquartered in Oakland, California, the Sierra Club has 67 chapters and more than 808,000 members across the nation. Sierra Club's concerns include the protection of wetlands and federally listed threatened and endangered species. The Sierra Club brings this action on behalf of itself and its adversely affected members.

46. CONSERVANCY OF SOUTHWEST FLORIDA ("Conservancy") is a nonprofit organization that is dedicated to the protection of Southwest Florida's land, water, wildlife, and future through advocacy, science, education, and wildlife rehabilitation. The Conservancy was founded in 1964 in response to plans to build a road through Rookery Bay and carries on its mission to preserve wetlands and downstream areas important to the health of the ecosystem, economy, and quality of life.

47. The Conservancy has approximately 3,600 dues-paying members and over 2,000 additional donors and supporters. The Conservancy's members and staff have researched, studied, observed, and sought protection, including through litigation, for federally listed threatened and endangered species and their habitat in southwest Florida. These activities support the Conservancy's mission to protect southwest Florida's water, land, and wildlife. The Conservancy brings this action on behalf of itself and its adversely affected members.

48. FLORIDA WILDLIFE FEDERATION ("FWF") is a nonprofit corporation established in 1936. FWF has approximately 9,000 members and 60,000 supporters. FWF has long supported environmental sustainability and conservation in Florida through education, advocacy, and litigation.

49. FWF's members and staff have researched, studied, observed, and sought protection, including filing lawsuits, for federally listed threatened and endangered species and their habitat. These activities support FWF's mission to ensure that wildlife and fragile environment have a voice. Among other things, FWF is dedicated to protecting the state's waterways, as wildlife cannot thrive where wetlands are drained, waters polluted, and habitats degraded or destroyed. FWF brings this action on behalf of itself and its adversely affected members.

50. MIAMI WATERKEEPER ("MWK") is a nonprofit organization whose mission is to defend, protect, and preserve South Florida's watershed through citizen engagement, education and outreach, scientific research, advocacy, and when necessary, legal action.

51. MWK has 165 members. MWK's members and staff have researched, studied, observed, patrolled, and sought protection, including filing lawsuits, for South Florida's watershed and the federally listed threatened and endangered species that depend on its freshwater and marine habitats, including listed corals. These activities support MWK's mission to ensure swimmable, drinkable, fishable water for all. MWK brings this action on behalf of itself and its adversely affected members.

52. ST. JOHNS RIVERKEEPER ("St. Johns RK") is a nonprofit organization that provides an independent voice to defend, advocate, and activate others to protect and restore the St. Johns River, Florida's longest and most significant river for commercial and recreational use.

53. St. Johns RK has 1,400 members. St. Johns RK's members and staff have researched, studied, observed, patrolled, and sought protection, including through litigation, for the St. Johns River watershed and the federally listed threatened and endangered species that depend on it. These activities support St. Johns RK's mission to ensure a thriving watershed that sustains healthy ecosystems for future generations. St. Johns RK brings this action on behalf of itself and its adversely affected members.

54. Plaintiffs and their members participated throughout the EPA's rulemaking process on the state's application to assume the 404 program in an attempt to ensure that the EPA abided the requirements of the Clean Water Act, ESA and APA, and to advocate for the protection of endangered species, wetlands and other waterways, as well as the communities that rely on them. Plaintiffs and their members have monitored, investigated, educated the public, litigated, and provided science-based policy recommendations on development projects and their associated Clean Water Act 404 permits in order to protect the environment and wildlife and intend to continue to do so in the near future.

55. The above-described conservation, informational, and scientific interests of Plaintiffs and their respective members have been, are being, and—unless the relief prayed for herein is granted—will continue to be adversely affected and irreparably injured by the Defendants' failure to comply with the Clean Water Act, ESA, and APA as described below. Plaintiffs have no adequate remedy at law.

56. Plaintiffs' interests fall within the zone of interests protected by the laws sought to be enforced in this action.

Defendants

57. U.S. ENVIRONMENTAL PROTECTION AGENCY ("EPA") is an independent executive agency of the United States federal government with responsibility for administering and implementing the Clean Water Act. The EPA approved Florida's request to assume authority over the Clean Water Act 404 program.

58. MICHAEL S. REGAN is the Administrator of the EPA and the highest-ranking official responsible for actions taken by the EPA, including decisions to approve state administration of Clean Water Act Section 404. Defendant Regan is sued in his official capacity.

59. RADHIKA FOX is the Assistant Administrator for EPA Office of Water and is an official responsible for actions taken by the EPA, including the delegated authority to approve state Clean Water Act programs. Defendant Fox is sued in her official capacity.

60. JEFFREY PRIETO is the General Counsel for the EPA and is an official responsible for actions taken by the EPA, including the delegated authority to approve state Clean Water Act programs. Defendant Prieto is sued in her official capacity.

61. LAWENCE STARFIELD is the Acting Assistant Administrator for the Office of Enforcement and Compliance Assurance for the EPA and is an official responsible for actions taken by the EPA, including the delegated authority to approve state Clean Water Act programs. Defendant Starfield is sued in his official capacity.

62. JOHN BLEVINS is the Acting Regional Administrator for EPA Region 4 and is an official responsible for actions taken by the EPA, including the delegated authority to approve state Clean Water Act programs. Defendant Blevins is sued in his official capacity.

63. Defendants Regan, Fox, Prieto, Starfield, Blevins and the EPA will collectively be referred to as "EPA."

64. U.S. FISH AND WILDLIFE SERVICE ("USFWS") is an agency within the U.S. Department of the Interior and has joint delegated responsibilities of administering and implementing the ESA along with NMFS. USFWS issued the programmatic biological opinion and incidental take statement that are challenged here and underlie the EPA's challenged action.

65. MARTHA WILLIAMS is the Principal Deputy Director of USFWS and highest-ranking official responsible for actions taken by USFWS, including compliance with and implementation of the ESA. Defendant Williams is sued in her official capacity.

66. LEOPOLDO MIRANDA-CASTRO is Regional Director of USFWS and is an official responsible for actions taken by USFWS, including the biological opinion and incidental take statement in this case. Defendant Miranda-Castro is sued in his official capacity.

67. Defendants Williams, Miranda-Castro and USFWS will collectively be referred to as "USFWS."

68. U.S. ARMY CORPS OF ENGINEERS ("Corps") is a federal agency organized under the U.S. Department of Defense. The Corps is charged with administering permits under section 404 of the Clean Water Act for the discharge of dredged or fill material into the waters of the United States and ensuring that the requirements of NEPA, the RHA and the ESA are fulfilled in connection with all evaluation and decision-making concerning such permits. The Corps issued the "retained waters list" that is challenged here and underlies the EPA's challenged action.

69. LIEUTENANT GENERAL SCOTT A. SPELLMON is the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers and has delegated responsibilities of administering and implementing the Clean Water Act 404 program. Defendant Spellmon is sued in his official capacity.

70. COLONEL JAMES BOOTH, is District Commander for the Jacksonville District of the U.S. Army Corps of Engineers and is an official responsible for actions taken by the Corps, including the determination of the waters to be retained under the Corps' jurisdiction after state assumption. Defendant Booth is sued in his official capacity.

71. Defendants Spellmon, Booth, and the Corps will collectively be referred to as "the Corps."

LEGAL FRAMEWORK

Administrative Procedure Act

72. Pursuant to the Administrative Procedure Act ("APA"), a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be" (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (2) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; (3) "without observance of procedure required by law"; or (4) "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (C)–(E).

73. The APA grants a right of judicial review of final agency actions to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." Id. § 702.

74. The EPA's approval of Florida's 404 assumption application is unlawful and must be set aside for: failing to provide an opportunity for notice and comment on a complete program submission; approving a state program that is inconsistent with and violates federal law; relying on unlawful, related actions by USFWS (biological opinion and incidental take statement); NMFS (jurisdictional determination); the Corps (retained waters list); and making its decision effective immediately upon publication in the Federal Register and without codification.

75. The actions by USFWS and the Corps on which the EPA relied are similarly subject to judicial review under the APA and must be set aside.

The Clean Water Act

76. Before the EPA may consider a state 404 assumption application, the state must submit a "full and complete" application including a description of the program it proposes to establish and administer as well as a statement from the attorney general that the laws of the state provide adequate authority to carry out the described program. 33 U.S.C. § 1344(g); 40 C.F.R. § 233.10.

77. A complete program description must include a description of (1) the scope and structure of the state's program, including the extent of the state's jurisdiction and permit review criteria; (2) the state's permitting, administrative, judicial review, and other applicable procedures; (3) the basic organization and structure of the state agencies which will administer the program, specifically addressing the responsibilities of each agency; (4) the funding and staffing available for program administration; (5) estimated anticipated workload; (6) permit application forms, permit forms, and reporting forms; (7) the state's compliance evaluation and enforcement programs, including how the state will coordinate with the EPA and the Corps; (8) the waters of the United States within a state over which the state assumes jurisdiction under the approved program; the waters of the United States within a State over which the Corps retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands; and (9) the specific best management practices proposed to satisfy Section 404 exemptions for construction and maintenance of certain roads. 40 C.F.R. § 233.11.

78. A complete attorney general's statement must demonstrate that the laws and regulations of the state provide adequate authority to carry out the program and meet the

applicable requirements of the federal Section 404 program. Id. § 233.12(a). The statement must cite authorities which are "lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and, where appropriate, judicial decisions which demonstrate adequate authority." Id. Where more than one agency has responsibility for administering the state program, the statement must certify that each agency has full authority to administer the program within its category of jurisdiction. Id. § 233.12(d).

79. The submission of a state assumption application sets in motion a timeline for EPA review. 33 U.S.C. § 1344(g)–(h). The statutory review period shall not begin until a complete application is received by the EPA. 40 C.F.R. § 233.15(a).

80. The EPA must determine if an application is complete within 30 days, 40 C.F.R. § 233.15(a), and publish notice of the application and provide for a comment period of not less than 45 days including a public hearing within the state, id. § 233.15(e)(1)–(2). The EPA must determine whether to approve or deny the state's application within 120 days after the date of the receipt of a complete program application. 33 U.S.C. § 1344(h); 40 C.F.R. § 233.15(g). The EPA must issue a summary of significant comments received and its response to these comments. 40 C.F.R. § 233.15(g).

81. To approve a state application, the EPA must determine whether the state has "authority with respect to the issuance of permits pursuant to such program" to, among other things: (1) issue permits "which apply, and assure compliance with" all Section 404 requirements, including Section 404(b)(1) Guidelines; (2) assure that the public "receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;" and (3) "abate violations of the permit or the permit program,

including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1344(h)(1)(A)(i), (1)(C), (1)(G).

82. The Section 404(b)(1) Guidelines prohibit, among other things, the issuance of 404 permits that would jeopardize the existence of ESA-listed species or result in the likelihood of destroying or adversely modifying critical habitat identified under the ESA. 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c), 233.23.

The Endangered Species Act

83. Congress enacted the Endangered Species Act of 1973 ("ESA") because human activities had caused the extinction of many species and other species "[had] been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(1)–(2). All species listed as endangered or threatened by the Secretary of Interior are protected by the ESA, which the Supreme Court has called "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

84. Recognizing the need to protect these species and to conserve their habitat, Congress mandated that all federal departments and agencies seek to conserve endangered and threatened species. 16 U.S.C. § 1531(c)(1).

85. Section 7 of the ESA establishes a federal interagency consultation process to assist agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. Under this process, a federal agency proposing an action that "may affect" a listed species must prepare and provide to the appropriate expert agency a description of the proposed action, its effects, and the relevant scientific evidence. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

86. Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .

16 U.S.C. § 1536(a)(2).

87. "Action" is defined broadly to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02. An agency's Section 7 obligations extend to ongoing actions over which the agency retains authority or discretionary control.

88. For actions that may adversely affect a listed species or critical habitat, a formal consultation with the Services is required. Id. § 402.14. At the conclusion of a formal consultation, the Services issue a biological opinion assessing the effects of the action on the species and its critical habitat, determining whether the action is likely to jeopardize the continued existence of the species or adversely modify its critical habitat and, if so, offering a reasonable and prudent alternative that will avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)–(h).

89. Federal agencies must ensure that such actions will not "result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). Since critical habitat must be designated outside of a species' current inhabited range under certain circumstances, the "adverse modification" analysis provides habitat protection even in situations where the "jeopardy" analysis does not apply. See Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 131 (D.D.C. 2004); accord Sierra Club v. U.S. Fish and

Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001).

90. Section 9 of the ESA prohibits "take" of endangered species by any person, which includes private entities, along with state and federal agencies. 16 U.S.C. § 1538(a)(1). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." Id. § 1532(19). The Services have defined "harm" to include "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.

91. If a federal action undergoing consultation will take a listed species, the biological opinion must include an "incidental take statement" that specifies the amount and extent of incidental take of listed species that may occur without causing jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take statement provides a safe harbor, insulating from take liability activities undertaken in compliance with the incidental take statement's terms and conditions. 16 U.S.C. § 1536(o)(2). See Id. § 1536(b)(4)(C). An incidental take statement also serves as a check on the biological opinion's assumptions and conclusions and provides for monitoring. 50 C.F.R. § 402.14(i)(3). It must set out a "trigger" that identifies an unacceptable level of take that invalidates the safe harbor and requires the agencies to immediately reinitiate consultation. Id. § 402.14(i)(4).

92. The ESA implementing regulations provide:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and
>
> (a) If the amount or extent of taking specified in the incidental take statement is exceeded; [or]

> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered . . . .

50 C.F.R. § 402.16 & (a)–(b). If either of these triggers occurs, both the action agency and the expert fish and wildlife agency have a duty to request reinitiation of consultation. Id.

93. The Services' regulations reiterate that even when undertaking a programmatic consultation, the action agency is not relieved "of the requirements for considering the effects of the action or actions as a whole." 50 C.F.R. § 402.14(c)(4).

94. The "action area" to be examined by the Services encompasses "all areas to be *affected directly or indirectly* by the federal action and not merely the immediate area involved in the action." Id. § 402.02 (emphasis added).

The Rivers and Harbors Act

95. A state 404 program cannot assert jurisdiction over navigable waters of the United States. 33 U.S.C. § 1344(g)(1).

96. Navigable waters of the United States remain under the Corps' exclusive control pursuant to Section 10 of the Rivers and Harbors Act. 33 U.S.C. § 403. They include those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4.

97. The Corps' exclusive jurisdiction also "extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark." Id. § 329.11(a).

98. Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. Id. § 329.3.

99. The Corps' determination of navigable waters is made by the division engineer in a report of findings based on criteria set out in the Corps' regulations. Id. § 329.14(b). These reports must be reviewed by district counsel before the division engineer issues a final determination. Id.

100. Each report must include findings on (1) the name of the waterbody, (2) the river it feeds; (3) its physical characteristics (including the water type, length, approximate discharge volume, fall per mile, extent of tidal influence, range between high and ordinary low water, and improvements to navigation), (4) the nature and location of significant obstructions to navigation or its capability to be used in interstate commerce, (5) authorized projects (including a list of known survey documents or reports describing the waterbody), (6) past or present interstate commerce, (7) the potential use for interstate commerce, (8) the nature of jurisdiction that has been exercised by federal agencies, (9) state or federal court decisions relating to navigability of the waterbody, and (10) the Corps' finding regarding navigability. Id. § 329.14(c).

101. Each district of the Corps is required to maintain a tabulated list of final determinations of navigability, and to update these lists "as necessitated by court decisions, jurisdictional inquiries, or other changed conditions." Id. § 329.16(a).

102. Since the district's list "represent[s] only those waterbodies for which determinations have been made[,] absence from that list should not be taken as an indication that the waterbody is not navigable." Id. § 329.16(b).

103. "Deletions from the list are not authorized" and "changes are not considered final until a determination has been made by the division engineer" following updated findings. Id. § 329.16(c).

FIRST CLAIM FOR RELIEF

EPA'S INTERLOCUTORY COMPLETENESS DETERMINATION VIOLATES THE CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT

104. Plaintiffs adopt and incorporate by reference paragraphs 1–103 of this Complaint.

105. The APA's rulemaking procedures and Clean Water Act regulations require that the public be given notice and an opportunity to comment on a state 404 assumption application. 5 U.S.C. § 553; 40 C.F.R. § 233.15(e)(1)–(2).

106. Pursuant to the APA, "rule" means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). A "rule making" is the "agency process for formulating, amending, or repealing a rule." Id. § 551(5).

107. The EPA's decision to approve the transfer of section 404 jurisdiction from the Corps to a state is a rulemaking that must comply with the rulemaking procedures defined by Section 553 of the APA.

108. The state application was not complete when received by the EPA because it relied on a USFWS programmatic biological opinion that was not in existence at the time of submission and which would later result from the EPA's formal consultation with USFWS—a process that had not even begun when the application was submitted—to demonstrate that its program would ensure no jeopardy to listed species.

109. USFWS' programmatic biological opinion and incidental take statement were submitted to the EPA on November 19, 2020, more than two weeks after the close of the public comment period. Neither was made available to the public for review and comment.

110. The state application was also not complete because it failed to adequately identify the waters that would be assumed under its proposed program as required by the EPA regulations dictating the contents of an assumption application. 40 C.F.R. § 233.11(h) (requiring assumption applications to include "[a] description" of the waters of the United States to be assumed by the state and to be retained by the Corps).

111. Rather than provide this information, the state application included an unauthorized, truncated list of retained waters prepared by the Corps.

112. Without complete information, members of the public were unable to fully evaluate and comment on the impact the EPA's approval would have on waters that are of ecological, historical, cultural, and economic benefit to the public.

113. Finally, the state application failed to identify any funding for the implementation, operation, and enforcement of a state-level 404 program, as it claimed that no additional resources would be required and it did not identify legislative authorization for the re-purposing of funds. See 40 C.F.R. § 233.11(d) (program description must include "[a] description of the funding *and* manpower which will be available for program administration" (emphasis added)).

114. The EPA's determination that Florida's application was complete as of its submission on August 20, 2020, was arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence and otherwise in violation of the Clean Water Act and APA. 5 U.S.C. § 706(2); 33 U.S.C. § 1344; 40 C.F.R. § 233.15.

115. The EPA's closure of the comment period before elements of the state's application were completed was arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the Clean Water Act and APA. 5 U.S.C. § 706(2); 33 U.S.C. § 1344(g); 40 C.F.R. § 233.10, 233.15(e)(1)–(2).

116. The EPA's unlawful completeness determination precluded meaningful testing, denied fairness to affected parties, and precluded the opportunity to develop evidence in the record necessary for judicial review. See Small Refiner Lead Phase-Down Task Force v. U.S. Envtl. Prot. Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (stating public notice requirements under the APA are intended to provide these opportunities).

117. The EPA's actions and omissions have harmed the Plaintiffs and leave them without any adequate remedy at law.

SECOND CLAIM FOR RELIEF

EPA'S APPROVAL OF FLORIDA'S ASSUMPTION PROGRAM VIOLATES THE CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT

118. Plaintiffs adopt and incorporate by reference paragraphs 1–117 of this Complaint.

119. The Clean Water Act requires the EPA to determine whether a state seeking to administer the 404 program has demonstrated that it has authority to, among other things: issue permits that apply, and assure compliance with, the requirements of Section 404, including the 404(b)(1) Guidelines; assure that the public will have notice and an opportunity for hearing on every application; and abate violations of any permit and the permit program via civil and criminal enforcement. 33 U.S.C. § 1344(h)(1); see also 33 U.S.C. § 1344(g)(1); 40 C.F.R. § 233.12. The EPA may only approve a state program if it meets these criteria. 33 U.S.C. § 1344(h)(2)(A).

120. The EPA acted unlawfully in approving the state's application as its program did not meet the criteria in many regards, including, but not limited to, those identified below.

121. As to general permits, Section 404 authorizes the Corps to issue general permits for a duration of five years after the permitting entity determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. The analysis underlying the issuance of general permits must be re-evaluated before a general permit can be renewed.

122. The state program violates federal law by purporting to issue scores of general permits without the state permitting authority having made the requisite determinations regarding environmental impact, 40 C.F.R. § 233.21(b), id. § 233.2 (defining director as state agency), relying instead on the Corps' prior determinations.

123. The state program violates federal law by authorizing these general permits for a duration of five years from the date of EPA approval of the program, unlawfully extending the general permits issued initially by the Corps beyond their statutorily limited five-year duration. 33 U.S.C. § 1344(e)(2).

124. As to emergency permits, the state program unlawfully expands the circumstances under which emergency permits—those that do not follow the ordinary requirements of Section 404—may issue, in contravention of 40 C.F.R. § 233.22(a).

125. As to permit conditions, the state program omits important requirements, including the requirement to "minimize" discharges in violation of a permit, Id. § 233.23(c)(4), certain monitoring and reporting requirements, id. § 233.23(c)(7), the requirement that discharges minimize adverse impacts through restoration, in addition to mitigation, id.

§ 233.23(c)(9), and the requirement of specifically identifying and completely describing the authorized activity, id. § 233.23(c)(1).

126. As to the permit application process, the state does not require the same level of detailed information as is required under federal law, id. § 233.30(d), and uses different terms that change the information that must be provided, contrary to id. § 233.30(b)(3).

127. The federal rules require that permits "shall be coordinated with federal and federal-state water related planning and review processes." Id. § 233.3. The state program, however, does not include this requirement and conceded that it "did not add this [requirement] to the rule."

128. As to public notice, the state program does not require that the state provide public notice on receipt of a 404 permit application, in contravention of federal law, which does. Id. § 233.32(a)(1).

129. As to definitions, the state program does not adopt all definitions in the 404(b)(1) Guidelines, omits definitions of several terms defined under federal law, and adopts more restrictive definitions for certain, critical terms (including "pollution"). Compare id. § 230.3(k) with Fla. Stat. § 403.031(7).

130. Federal regulations require that a state "shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions." 40 C.F.R. § 233.40(a). The state's application failed to demonstrate that it has, much less maintains, any such a program.

131. As to general procedures for determining the applicability of permit conditions relating to the contamination of dredge and fill material, the state restricted the broad federal duty to "determine the possibility of chemical contamination or physical incompatibility of the

material to be discharged," id. § 230.5, to only situations where that contamination may violate state water quality standards or toxic effluent standards or prohibitions.

132. As to general permits, id. § 230.7, the state failed to include the 404(b)(1) Guidelines' requirement that a general permit may only be issued if "[t]he activities in such category are similar in nature and similar in their impact upon water quality and in the aquatic environment." The state also failed to incorporate the 404(b)(1) Guidelines' requirements governing the process for issuing general permits.

133. As to restrictions on discharge, id. § 230.10, the state program creates a wholesale exception for temporary violations of state water quality standards that is not present under federal law.

134. As to impacts, the state program fails to incorporate the requirement that a determination of whether a discharge would cause or contribute to significant degradation of wetlands or other surface waters be based on factual determinations, evaluations, and tests required by the 404(b)(1) Guidelines "subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts." Id. § 230.10(c).

135. As to factual determinations, id. § 230.11, the 404(b)(1) Guidelines lay out specific, factual determinations that permitting authorities must use to determine the individual, cumulative, and secondary effects of a proposed discharge of dredged or fill material on physical substrate; water circulation, fluctuation, and salinity; suspended particulate/turbidity; contaminants; aquatic ecosystem and organism; and the proposed disposal site. The state program does not incorporate or apply the guideline's defined set of factual determinations, and it does not require these factual determinations when considering whether to issue a 404 permit.

136. As to findings of compliance or noncompliance with the restrictions on discharge, id. § 230.12, the 404(b)(1) Guidelines require that the permitting authority, after deciding whether to issue or deny a permit, must make findings that "include the factual determinations required by § 230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration." Id. § 230.12(b).

137. The state regulations do not require the agency to make the factual determinations laid out in id. § 230.11, and therefore do not require that the agency include those factual determinations in any final permit decisions.

138. The state application also failed to demonstrate adequate criminal enforcement authority. 33 U.S.C. § 1344(g)(1)(G). State law requires a greater degree of intent or knowledge to establish a criminal violation of Section 404 and provides a shorter statute of limitations as compared to federal law for holding criminal violators accountable. 33 U.S.C. §§ 1319(c)(1)(A), (B), 1365(a), (g); 18 U.S.C. § 3282; 28 U.S.C. § 2462; 40 C.F.R. § 233.41(a)(3)(ii). See United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012); United States v. Pruett, 681 F.3d 232, 243 (5th Cir. 2012); United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005); United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999).

139. The state program failed to adopt or incorporate the wide range of impacts that must be considered under the 404(b)(1) Guidelines when reviewing a permit, other than for aesthetics. 40 C.F.R. §§ 230.20–25 (Subpart C); id. §§ 230.30–32 (Subpart D); id. §§ 230.40–45 (Subpart E); id. §§ 230.50–54 (Subpart F). But see id. § 230.53 (aesthetics).

140. The state program failed to adopt or incorporate the 404(b)(1) Guidelines pertaining to compensatory mitigation for loss of wetlands.

141. The state program failed to define a whole host of terms used in the federal program, id. § 230.92, and uses definitions of comparable terms that conflict with or undermine the substance of the federal definition (for example the state definition of wetlands "creation" does not require "a gain in aquatic resource area and functions," whereas the federal definition of wetlands "establishment" does).

142. As to general compensatory mitigation requirements, id. § 230.93, the state alters or omits vital portions of this Guideline, thereby creating less stringent requirements for its mitigation program. For example, the state program weakens the "watershed approach" described in the 404(b)(1) Guidelines, which is necessary to ensuring that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by dredge and fill permits. Id. § 230.93(c)(4). The state program ignores the federal requirements pertaining to site selection for mitigation, id. § 230.93(d)(vi), which are essential to ensuring the mitigation is appropriate and effective.

143. The state program does not include federal requirements that permit writers document certain findings pertaining to mitigation, id. § 230.93(e)(2)–(3), and omits the requirement that the permit writer "require a mitigation ratio greater than one-to-one where necessary." Id. § 230.93(f)(2).

144. As to the decision-making process for a permit application, federal rules require that a permit be reviewed for compliance with the 404(b)(1) Guidelines. Id. § 233.34.

145. The state program has not adopted or incorporated these guidelines.

146. As to compliance evaluation programs, federal rules require a state to "maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions." Id. § 233.40(a).

147. The state does not maintain a program to identify violations of its current wetlands programs and has not shown it is capable to do so for an assumed 404 program.

148. State law also does not provide comparable access to the courts for purposes of enforcement and redress as available under federal law. This deprives affected parties of the ability to vindicate rights and ensure citizen enforcement of Section 404.

149. Whereas federal law authorizes any aggrieved party to litigate Section 404 claims, Florida allows only citizens of the state to compel government enforcement of environmental laws, to bring suit against a person or non-governmental entity to enforce environmental laws, to initiate administrative proceedings in federally delegated programs, and to intervene in enforcement proceedings.

150. State law also severely limits the ability to establish associational standing. Whereas federal law authorizes associational standing based on a single member's injury in fact, Am. Clinical Lab. Ass'n v. Azar, 931 F.3d 1195, 1203 (D.C. Cir. 2019), Florida law requires organizations to demonstrate that a "substantial number" of their members "are substantially affected" by the challenged conduct.

151. For purposes of enforcement and redress, state law further conflicts with federal law by creating a mandatory fee-shifting provision that has no analog under the Clean Water Act and discourages or precludes under-resourced individuals and organizations from seeking to vindicate their rights.

152. State 404 permitting programs must ensure that the state agency will not issue any permit that fails to comply with the requirements of the Clean Water Act and its implementing regulations, including the 404(b)(1) Guidelines. See 40 C.F.R. § 233.20.

153. The state program fails to adopt or incorporate by reference all 404(b)(1) Guidelines.

154. Specifically, the state program fails to satisfy the 404(b)(1) Guidelines requirement to ensure there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the Clean Water Act Guidelines. Id. §§ 233.15(g), 230.10(b)(3).

155. The state did not demonstrate that its Department of Environmental Protection has the authority to regulate species under state law that it now claims it would exercise in a state-assumed program.

156. The state's application failed to provide the necessary statement regarding the State's takings law. Id. § 233.12(c). Instead, the state relied on the limited and universally applicable chance that a takings case may be reviewed by the Supreme Court of the United States.

157. The state's application summarily asserted that it could rely on existing resources to administer and enforce a 404 program while failing to disclose, among other things: (1) the state agency's failure to meet existing regulatory obligations; (2) the significant budget cuts brought on by the global pandemic; and (3) the resource status and needs of other state agencies which the state intends to rely on to fulfill obligations under the Clean Water Act. Id. §§ 233.1(a), 233.11.

158. The state also did not demonstrate that it had the legal authority to re-purpose current funding for a new federal program.

159. The state program did not fully address or disclose all costs that will necessarily be associated with administering a state-level 404 program, including: (1) initial resources

needed to process all pending (160) applications at the time of assumption; (2) resource needs and costs required for compliance and enforcement of the pending applications that are approved; (3) sufficient staffing; (4) an adequate audit process; (5) costs associated with reissuing general permits; (6) the large area of permits where the claimed "85%" overlap of work with the state wetlands program will not be achieved; and (7) several costs associated with implementation.

160. For these, and other reasons, the EPA's approval of the state's application was arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the Clean Water Act, 33 U.S.C. § 1344, and APA, 5 U.S.C. § 706(2).

161. The EPA's actions and omissions have harmed and will harm the Plaintiffs and leave them without any adequate remedy at law.

THIRD CLAIM FOR RELIEF

USFWS' BIOLOGICAL OPINION AND "NO JEOPARDY" DETERMINATION VIOLATE THE ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT

162. Plaintiffs adopt and incorporate by reference paragraphs 1–161 of this Complaint.

163. Section 7 of the ESA requires that a biological opinion "detail[] how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A).

164. In this case, the "agency action" for Section 7 of the ESA was EPA's consideration of the state 404 program. The ESA therefore required USFWS to make the relevant determinations regarding the impact of the EPA's approval of the program. The ESA's implementing regulations specify that a biological opinion must include: "[a] detailed discussion of the environmental baseline of the listed species and critical habitat [and] [a] detailed

discussion of the effects of the action on listed species or critical habitat." 50 C.F.R. § 402.14(h)(1)(ii), (iii).

165. These requirements apply to the issuance of programmatic biological opinions. 50 C.F.R. § 402.14(c)(4). USFWS' biological opinion concluded that approval of the state program would result in "no jeopardy."

166. USFWS stated that its jeopardy analysis relied on: (1) the status of the species; (2) the environmental baseline, which analyzes the condition of the listed species in the action area, without the consequences to the listed species caused by the proposed action; (3) the effects of the action, which includes all consequences to listed species that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action; and (4) the cumulative effects, which evaluates the effects of future, non-Federal activities in the action area on the species. 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(g).

167. In the biological opinion, however, USFWS relied on the biological evaluation submitted by the EPA, which was virtually identical to the biological assessment provided by the state to the EPA in support of its application.

168. In the biological evaluation, the EPA found the proposed assumption is "likely to adversely affect" 1643 species under USFWS's jurisdiction, is "not likely to adversely affect" 9 species, and would have "no effect" on 60 species.

169. The EPA's conclusions were inconsistent and incomplete. For example, the EPA found the action would have "no effect" on shortnose sturgeon, Gulf sturgeon, or Atlantic sturgeon, despite also stating that "the action could result in a [likely to adversely affect] determination" for shortnose sturgeon and that critical habitat for Gulf sturgeon is designated in several Florida rivers.

170. USFWS' biological opinion also failed to provide a detailed discussion of the environmental baseline and failed to provide a detailed discussion of the effects of the action.

171. Rather than provide the requisite detailed discussion of the environmental baseline, USFWS' biological opinion incorporated by reference the EPA's biological evaluation.

172. The biological evaluation in turn does not provide a detailed discussion of the environmental baseline as affects listed species and critical habitats, 50 C.F.R. § 402.02. Instead, the biological opinion merely includes a chart listing previous 404 permits that involved ESA consultations.

173. Instead of a detailed discussion of effects on each of the listed species and critical habitats that may result from the EPA's approval of the state program, USFWS' biological opinion—again incorporating the EPA's biological evaluation, which mimics the state's biological assessment—provides only a cursory overview of the harms to species and habitat from general environmental degradation.

174. The biological evaluation noted that critical habitat is designated for nearly 40 potentially affected species but did not map where critical habitat may exist within the action area or make any effects determinations for critical habitats.

175. USFWS' biological opinion did not lawfully conduct a jeopardy analysis as to any species or critical habitat. 16 U.S.C. § 1536(a)(2), (b).

176. USFWS' reliance on this insufficient biological evaluation to make determinations required under the ESA was arbitrary and capricious and otherwise not in accordance with the law.

177. USFWS further improperly relied on its memorandum of understanding with the state in making its no jeopardy determination. The memorandum of understanding establishes a

process regarding individual permit decisions, not an assessment of whether the federal action for consultation purposes—the EPA's approval of the state's 404 assumption—may jeopardize listed species or adversely modify critical habitat, which requires assessment of the proposed program as a whole.

178. Likewise, USFWS' consideration of the likelihood of jeopardy or adverse modification from the issuance of individual permits does not assess the likelihood of jeopardy or adverse modification from the entire action under consultation—assumed authority for all dredge and fill permits.

179. USFWS' failures to analyze the status of the species, environmental baseline, effects of the action and cumulative effects violate the ESA, 16 U.S.C. § 1536, and APA, 5 U.S.C. § 706(2)(A), and render its "no jeopardy" determination unlawful.

FOURTH CLAIM FOR RELIEF

USFWS' BIOLOGICAL OPINION AND "INCIDENTAL TAKE STATEMENT" VIOLATE THE ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT

180. Plaintiffs adopt and incorporate by reference paragraphs 1–179 of this Complaint.

181. The ESA prohibits any person from "taking" an endangered species. 16 U.S.C. § 1538(a)(1)(B). Under Section 4(d), 16 U.S.C. § 1533(d), USFWS has the authority to issue regulations extending the take prohibition to threatened species.

182. The take prohibition applies to "any person." 16 U.S.C. § 1538(a)(1). The ESA defines "any person" to include "any officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. § 1532(13). The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including federal agencies. Id. § 1540(g)(1).

183. The EPA, the director of a state-assumed program, and permittees are persons subject to the ESA take prohibition and to ESA citizen suits.

184. The ESA defines "take" to include "harm." Id. § 1532(19).

185. If a federal action undergoing consultation will take a listed species, the biological opinion must include an "incidental take statement" that specifies the amount and extent of incidental take of the listed species that may occur without causing jeopardy or adverse modification, includes "terms and conditions," and provides for monitoring of take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)–(3). Incidental take must be incidental and not the purpose of the action. The incidental take statement insulates from take liability activities undertaken in compliance with its terms and conditions. 16 U.S.C. § 1536(o)(2). See 16 U.S.C. § 1536(b)(4)(C).

186. An incidental take statement serves as a check on the biological opinion's assumptions and conclusions. It must set out a "trigger" that specifies an unacceptable level of take that invalidates the safe harbor and requires the agencies to immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

187. USFWS' biological opinion fails to specify the amount or extent of incidental take, fails to impose a limit on incidental take, and fails to specify a take-based trigger for reinitiating consultation, all in violation of the ESA.

188. USFWS' failures precluded the agency from lawful authority to issue an incidental take statement purporting to extend incidental take coverage to the EPA, the state, and state permittees.

189. USFWS' incidental take statement purports to provide permittees conditional take coverage so long as they comply with all permit conditions imposed by the state agency, as

recommended by USFWS. The nature and adequacy of such conditions is not known because there are no standards or sideboards governing them. Accordingly, USFWS lacks a reasoned basis for determining the permits and permittee actions in compliance with them will not result in an unacceptable amount of take.

190. The biological opinion's incidental take statement does not impose a measurable limit on allowable take. See 50 C.F.R. 402.14(i)(1)(i). It indicates that USFWS does not know which species will be taken, the locations of take, or the number of individual members of listed species that will be harmed, killed, or otherwise taken as a result of state permits authorizing the discharge of dredged and fill material in waters of the United States.

191. The Services can use a surrogate to establish a take limit, provided the surrogate is an accurate and credible measure of harm to the listed species.

192. The biological opinion provides no surrogate measure for the number of individual listed species that can be taken under the delegation without upending the biological opinion's assumptions and no-jeopardy determinations. It therefore fails to provide a limit on take as required by the ESA and the ESA regulations and no measurable trigger for reinitiation of consultation or elimination of the safe harbor.

193. The incidental take statement incorporates into its take limit compliance with the process set out in the memorandum of understanding. In other words, the take limit is the same as implementation of the action undergoing consultation. It is the proposed action, rather than a separate limit and check on the biological opinion's no-jeopardy conclusions.

194. USFWS acted arbitrarily, capriciously, and contrary to the ESA, in violation of the APA, 5 U.S.C. § 706(2), in setting the take limit at the level that coincides with full implementation of the action undergoing consultation.

195. The incidental take statement relies on a future process to minimize take, but that process lacks sideboards to ensure that the take that will not cause jeopardy or be at odds with the biological opinion's assumptions and conclusions. It provides the EPA take coverage once the delegation is approved without requiring the EPA to implement USFWS' take minimization measures. As to the EPA, it thereby establishes no limit on the allowable amount of take that the delegation will cause.

196. The terms and conditions of the incidental take statement require the state to implement all USFWS recommendations to avoid and minimize impacts to listed species and to deny a permit if USFWS makes a jeopardy call. Neither the biological opinion nor the memorandum of understanding imposes any sideboards to ensure USFWS will make the necessary recommendations to avoid and minimize those impacts. It was therefore arbitrary and capricious for the agency to claim that those documents are enough to avoid take.

197. To the extent that the biological opinion and incidental take statement rely on future jeopardy determinations that USFWS may make in its review of individual permits, the biological opinion is abdicating its responsibility to determine whether the delegation is likely to cause jeopardy and punting to future jeopardy determinations on different proposed actions – individual permits versus the delegation of authority over all future permits throughout the entire state and for the indefinite future. In addition, this abdication of responsibility is replacing the required Section 7 consultation at the programmatic level for an unauthorized and less protective "technical assistance" review laid out in the biological opinion at the permit-level.

198. The incidental take statement fails to include any method for recording or monitoring incidental take or to consider the cumulative impact of individual permit decisions.

199. The incidental take statement relies on an unlawful scheme for purportedly conducting ESA review at the permit level for purposes of take liability coverage for the state and permittees. The ESA creates two paths for extending take liability coverage, Section 7 (consultation for federal actions) and Section 10 (incidental take permits). 16 U.S.C. §§ 1536(a)(2), 1539(a)(1)(B). Neither authorizes the scheme that USFWS created and relies upon in the incidental take statement.

200. USFWS' actions and omissions are arbitrary, capricious, an abuse of discretion, and not in accordance with the law, in violation of the ESA, 16 U.S.C. § 1536, and APA, 5 U.S.C. § 706(2)(A).

201. USFWS' actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

FIFTH CLAIM FOR RELIEF

EPA'S "NO EFFECT" DETERMINATION VIOLATES THE CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT

202. Plaintiffs adopt and incorporate by reference paragraphs 1–201 of this Complaint.

203. On April 15, 2020, NMFS unlawfully concluded that there were no species under its exclusive jurisdiction in assumable waters. On its face, NMFS' determination failed to consider, much less analyze, all areas that would be affected by Florida's program directly or indirectly, as required under federal law. See 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.02.

204. On August 28, 2020, the EPA determined that consideration of a state 404 program was a discretionary action subject to compliance with the ESA, thereby triggering a duty to consult with USFWS and NMFS.

205. On September 2, 2020, the EPA initiated formal consultation with USFWS, and transmitted its "ESA Biological Evaluation for Clean Water Act Section 404 Assumption by the State of Florida" (dated August 2020) to USFWS.

206. In the biological evaluation, the EPA concluded that Florida's application would have "no effect" on NFMS jurisdictional species, based solely on the rationale in NMFS' April 15, 2020 letter.

207. On September 2, 2020, EPA also sent a letter to NMFS confirming there were no changes to the previous species list reviewed by NMFS in April and, relying on NMFS April 15 jurisdictional determination, concluded the state's assumption would have no effect on NMFS's jurisdictional species.

208. On September 3, 2020, NMFS sent a letter to EPA stating that they concurred with the "no effect" determination in EPA's September 2, 2020 letter.

209. On October 30, 2020, NMFS in an email to EPA again concurred with EPA's "no effect" determination.

210. These determinations were all based on NMFS' conclusion that jurisdictional species would not be within assumed waters.

211. The EPA's actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the Clean Water Act and APA. 5 U.S.C. § 706(2); 33 U.S.C. § 1344(h)(1)(A)(i); 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c), 233.23(a).

212. The EPA's actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

SIXTH CLAIM OF RELIEF

USFWS' UNLAWFUL SCHEME VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

213. Plaintiffs adopt and incorporate by reference paragraphs 1–212 of this Complaint.

214. USFWS' incidental take statement, biological opinion, and memorandum of understanding create an ESA scheme that is not authorized by law.

215. No provision of the ESA authorizes the scheme created by USFWS in the biological opinion, incidental take statement, and memorandum of understanding to give the state a workaround regarding the mechanisms that Congress provided for establishing take limits, extending liability coverage, and determining jeopardy to species.

216. Section 7 authorizes federal agencies to consult with USFWS. 16 U.S.C. § 1536. Pursuant to that process, USFWS can issue a biological opinion, establish take limits, and provide an incidental take statement that extends protection from ESA liability. Id. § 1536(b)(c).

217. USFWS' scheme in this case attempts to replicate that process with a state agency. However, that is not authorized by the statute or regulations.

218. Section 10 of the ESA creates a process for non-federal entities, like the state, to obtain permits that would relieve liability for the taking of listed species done incidental to an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). Pursuant to that process, the applicant completes a conservation plan and submits it to USFWS. Id. § 1539(a)(2)(A). After review of the habitat conservation plan and public comments of the plan, USFWS may issue a permit including such terms and conditions as necessary or appropriate to carry out the purposes of the ESA. Id. § 1539(a)(2)(B).

219. USFWS did not act pursuant to Section 10 when establishing its scheme.

220. USFWS' actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, in excess of statutory jurisdiction and authority, short of statutory right, and otherwise in violation of the APA, 5 U.S.C. § 706(2).

221. USFWS' actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

SEVENTH CLAIM FOR RELIEF

CORPS' RETAINED WATERS DETERMINATION VIOLATES THE RIVERS AND HARBORS ACT AND THE ADMINISTRATIVE PROCEDURE ACT

222. Plaintiffs adopt and incorporate by reference paragraphs 1–221 of this Complaint.

223. The Corps cannot delete identified navigable waters from its retained waters list until a determination has been made by the division engineer following the procedures and relying on the findings identified by the Corps' regulations. 33 C.F.R. § 329.14, 16.

224. In conjunction with the state application, the Corps drastically reduced its retained waters list from 17 to 4 pages long.

225. The Corps has not provided the public with a justification for its decision to substantially reduce the list of retained waters.

226. The Corps' actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the APA, 5 U.S.C. § 706(2).

227. The Corps' actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

EIGHTH CLAIM FOR RELIEF

EPA'S IMMEDIATE EFFECTIVE DATE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

228. Plaintiffs adopt and incorporate by reference paragraphs 1–227 of this Complaint.

229. Pursuant to the APA, "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d). The only exceptions to this rule occur when a rule is: (1) a substantive rule that "grants or recognizes an exemption or relieves a restriction"; (2) an interpretive rule or statement of policy; or (3) "the agency otherwise provides for good cause found and published with the rule." 5 U.S.C. § 553(d)(1)–(3).

230. The EPA's approval of a state program constitutes a substantive rule that is subject to the requirements of APA Section 553. 5 U.S.C. §§ 551(4)–(5), 553.

231. The EPA acted pursuant to delegated authority under the Clean Water Act to approve the state's assumption of jurisdiction over the federal 404 program. 33 U.S.C. § 1344.

232. As required for a rule of general applicability and legal effect, the EPA indicated that approval of the Florida 404 program would be codified at 40 C.F.R. 233 subpart H. 85 Fed. Reg. 57,853, 57,855 (Sept. 16, 2020). The agency unlawfully failed to codify the program.

233. The EPA's decision has a substantive legal effect by (1) requiring public citizens to follow a new legal process under a new set of laws, regulations, and guidance, (2) delegates decision-making authority from the federal government to a state; (3) requires compliance with a different set of laws; (4) transfers enforcement authority from the federal government to a state operating under a different set of laws in state courts rather than federal courts; (5) requires permit applicants to fill out and submit different permit application forms to be submitted to a different permit-issuing entity; (6) strips the Corps of jurisdiction over the federal 404 program;

(7) removes citizens' NEPA rights; (8) restricts citizens' access to the courts; and (9) deprives Tribes' of their right to consult with the federal government—which bears trust obligations to the Tribes—when 404 permits would affect their natural, cultural, and historical resources.

234. The rule does not grant or recognize an exception or relieve a restriction.

235. Nor does the rule constitute an interpretation or statement of policy.

236. The EPA provided no justification in the Federal Register Notice that would support application of the good cause exception. Nor do the good cause exceptions apply.

237. The EPA violated the APA by making its approval effective immediately upon publication in the Federal Register, rather than no less than 30 days thereafter.

238. The EPA's actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the APA, 5 U.S.C. § 706(2).

239. The EPA's immediate effective date for Florida's 404 program must be held unlawful and set aside.

NINTH CLAIM FOR RELIEF

EPA'S FAILURE TO CODIFY FLORIDA'S PROGRAM VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

240. Plaintiffs adopt and incorporate by reference paragraphs 1–239 of this Complaint.

241. Codification in the Code of Federal Regulations is required for all documents of an agency "having general applicability and legal effect . . . and . . . relied upon by the agency as authority." 44 U.S.C. § 1510(a).

242. EPA's decision was intended to be a rule of general applicability that would have the legal effect of transferring authority from the Corps to the state and authorizing the state 404 program.

243. Whenever a rule is subject to codification, the agency must draft its notice as an amendment to the Code of Federal Regulations before submitting it to the Office of the Federal Register. 1 C.F.R. § 21.1(a). The agency must include in its publication "words of issuance" and "amendatory language that precisely describes the relationship of the new provision to the Code." Id. § 21.1(b).

244. The EPA's December 22, 2020, publication of its decision in the Federal Register failed to include "words of issuance" or "amendatory language" codifying the state program into the Code of Federal Regulations. 85 Fed. Reg. 83,553 (Dec. 22, 2020).

245. The EPA indicated that approval of the Florida 404 program would be codified at 40 C.F.R. 233 subpart H. 85 Fed. Reg. at 57,855.

246. The EPA has codified in the Code of Federal Regulations its approval of prior states that have assumed 404 jurisdiction. See 40 C.F.R. § 233.70 (incorporating by reference Michigan's assumption program); 49 Fed. Reg 38,947-01 (approving and codifying Michigan's program into 40 C.F.R. § 233.70); 40 C.F.R. § 233.71 (incorporating by reference New Jersey's assumption program); 59 Fed. Reg. 9,933-01 (approving and codifying New Jersey's assumption program).

247. The EPA's actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the APA, 5 U.S.C. § 706(2).

248. The EPA's failure to codify the state program rendered the transfer of authority a nullity. The subsequent transfer of authority must be held unlawful and set aside.

TENTH CLAIM FOR RELIEF

EPA'S UNLAWFUL RELIANCE ON THE PROGRAMMATIC BIOLOGICAL OPINION VIOLATES ENDANGERED SPECIES ACT

249. Plaintiffs adopt and incorporate by reference paragraphs 1–248 of this Complaint.

250. Section 7 of the ESA requires that a biological opinion "detail[] how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A).

251. Here, the "agency action" for Section 7 of the ESA was EPA's decision to approve the state 404 program and transfer 404 authority to the state.

252. Accordingly, before approving a state's assumption of the CWA's Section 404 permitting program, Section 7(a)(2) of the ESA required EPA to ensure that the state's assumption, and thus implementation of the program, would not jeopardize the continued existence and recovery of listed species and critical habitat.

253. The ESA's implementing regulations specify that a biological opinion must include: "[a] detailed discussion of the environmental baseline of the listed species and critical habitat [and] [a] detailed discussion of the effects of the action on listed species or critical habitat." 50 C.F.R. § 402.14(h)(1)(ii), (iii).

254. These requirements apply to the issuance of programmatic biological opinions. 50 C.F.R. § 402.14(c)(4). USFWS' biological opinion concluded that approval of the state program would result in "no jeopardy."

255. USFWS' biological opinion stated that its jeopardy analysis relied on: (1) the status of the species; (2) the environmental baseline, which analyzes the condition of the listed species in the action area, without the consequences to the listed species caused by the proposed action; (3) the effects of the action, which includes all consequences to listed species that are caused by the proposed action, including the consequences of other activities that are caused by

the proposed action; and (4) the cumulative effects, which evaluates the effects of future, non-Federal activities in the action area on the species. 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(g).

256. On July 24, 2020, the state sent EPA its final biological assessment containing the state's conclusions regarding the effects of the state's to-be proposed 404 program if approved by EPA. 50 C.F.R § 402.12.

257. On September 2, 2020, EPA submitted a biological evaluation to USFWS to initiate formal consultation on the state's application. The biological evaluation was largely a cut and paste of the biological assessment drafted by the state.

258. On November 19, 2020, USFWS transmitted to EPA a programmatic biological opinion and incidental take statement regarding EPA's approval of the state's application. The biological opinion relied heavily on and incorporated large portions of the biological evaluation submitted by EPA.

259. In the biological evaluation, EPA found the proposed assumption is "likely to adversely affect" 164 species under USFWS' jurisdiction, is "not likely to adversely affect" nine species, and would have "no effect" on sixty species.

260. EPA's conclusions were inconsistent and contradictory. For example, EPA found the action would have "no effect" on shortnose sturgeon, Gulf sturgeon, or Atlantic sturgeon, despite also stating that "the action could result in a [likely to adversely affect] determination" for shortnose sturgeon and that critical habitat for Gulf sturgeon is designated in several Florida rivers, which may be affected by state 404 permits.

261. USFWS' biological opinion also failed to provide a detailed discussion of the environmental baseline and failed to provide a detailed discussion of the effects of the action.

262. Rather than provide the requisite detailed discussion of the environmental baseline, USFWS' biological opinion incorporated by reference a portion of EPA's biological evaluation which merely consists of a chart listing previous 404 permits in Florida that involved ESA consultations.

263. Instead of a detailed discussion of effects on each of the listed species and critical habitats that may result from EPA's approval of the state program, USFWS' biological opinion—again incorporating EPA's biological evaluation, which mimics the state's biological assessment—provided only a cursory overview of the harms to species and habitat from general environmental degradation.

264. USFWS' biological opinion did not conduct a legally sufficient jeopardy analysis as to any species or an analysis of the potential destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2), (b).

265. USFWS' biological opinion's reliance on EPA's insufficient biological evaluation to make determinations required under the ESA was arbitrary and capricious and otherwise not in accordance with the law.

266. USFWS' biological opinion further improperly relied on USFWS' memorandum of understanding with the state in making its no jeopardy determination. The memorandum of understanding establishes a process regarding individual permit decisions, not an assessment of whether the federal action for consultation purposes—EPA's approval of the state's 404 assumption—may jeopardize listed species or adversely modify critical habitat, which requires assessment of the proposed program as a whole.

267. Likewise, USFWS' consideration of the likelihood of jeopardy or adverse modification from the issuance of individual permits does not assess the likelihood of jeopardy

or adverse modification from the action under consultation—assumed authority for all dredge and fill permits.

268. USFWS' biological opinion impermissibly failed to analyze the status of the species, environmental baseline, effects of the action and cumulative effects in violation of the ESA, 16 U.S.C. § 1536, and APA, 5 U.S.C. § 706(2)(A), rendering unlawful its "no jeopardy" determination and determination that the action is not likely to destroy or adversely modify designated critical habitat.

269. An "incidental take statement" must specify the amount and extent of incidental take of the listed species that may occur without causing jeopardy or adverse modification, include "terms and conditions," and provide for monitoring of take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)–(3).

270. USFWS' biological opinion incidental take statement fails to specify the amount or extent of incidental take, fails to impose a limit on incidental take, and fails to specify a take-based trigger for reinitiating consultation, all in violation of the ESA.

271. The incidental take statement also fails to include any method for recording or monitoring incidental take or to consider the cumulative impact of individual permit decisions.

272. EPA's reliance on USFWS' inadequate biological opinion and accompanying incidental take statement to approve Florida's assumption of the CWA Section 404 permitting program violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).

273. EPA's actions and omissions have harmed the Plaintiffs and—unless enjoined—leave them without any adequate remedy at law.

ELEVENTH CLAIM FOR RELIEF

EPA'S FAILURE TO CONSULT WITH NMFS VIOLATE THE ENDANGERED SPECIES ACT

274. Plaintiffs adopt and incorporate by reference paragraphs 1–273 of this Complaint.

275. Whenever an agency action "may affect" a listed species in the "action area," the agency must consult with either NMFS and/or USFWS. 16 U.S.C. § 1536; 50 C.F.R. § 402.13–14.

276. "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). The "threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to 'insure' under Section 7(a)(2)." Id. Only where the action agency determines its actions will have no effect on listed species or critical habitat may it forego consultation. 50 C.F.R. § 402.14(a).

277. The "action area" includes "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. "Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." Id.

278. On April 15, 2020, NMFS concluded that there were no species under its exclusive jurisdiction in assumable waters, and therefore unlawfully concluded that assumption would have no effect on listed species. On its face, NMFS' determination failed to consider, much less analyze, all areas that would be affected by Florida's program directly or indirectly, as required under federal law. See 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.02.

279. On August 28, 2020, EPA determined that consideration of a state 404 program was a discretionary action subject to compliance with the ESA, thereby triggering a duty to consult with USFWS and NMFS.

280. On September 2, 2020, EPA initiated formal consultation with USFWS, and transmitted its "ESA Biological Evaluation for Clean Water Act Section 404 Assumption by the State of Florida" (BE) (dated August 2020) to USFWS. In the biological evaluation, EPA concluded that Florida's application would have "no effect" on NFMS jurisdictional species, based solely on the rationale in NMFS' April 15, 2020, letter.

281. On September 2, 2020, EPA also sent a letter to NMFS confirming there were no changes to the previous species list reviewed by NMFS in April and, relying on NMFS' April 15, 2020, jurisdictional determination, concluded the state's assumption would have no effect on NMFS' jurisdictional species.

282. On September 3, 2020, NMFS sent a letter to EPA stating that they concurred with the "no effect" determination in EPA's September 2, 2020, letter.

283. On October 30, 2020, NMFS in an email to EPA again concurred with EPA's "no effect" determination.

284. These determinations were all based on NMFS' categorical conclusion that because jurisdictional species would not be within assumed waters themselves, state assumption would have no effect on species under their jurisdiction.

285. However, EPA's approval of the state assumption application may directly and indirectly affect species that are under NMFS' jurisdiction.

286. EPA's actions and omissions were arbitrary, capricious, an abuse of discretion, not in accordance with the law, unsupported by substantial evidence, and otherwise in violation of the ESA and APA, 5 U.S.C. § 706(2).

287. The EPA's actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

TWELFTH CLAIM FOR RELIEF

EPA'S FAILURE TO CONSULT ON CERTAIN SPECIES AND CRITICAL HABITATS UNDER USFWS JURISDICTION VIOLATES THE ENDANGERED SPECIES ACT

288. Plaintiffs adopt and incorporate by reference paragraphs 1–287 of this Complaint.

289. EPA is required by ESA section 7(a)(2) to initiate and *complete* consultation with USFWS to ensure the state's assumption would not jeopardize the continued existence of ESA-listed species. 16 U.S.C. § 1536(a)(2).

290. Dredge and fill activities in assumed waters may affect nesting sea turtles and adversely modify or destroy designated critical habitat for these species.

291. EPA therefore was required to consult with USFWS on those effects. 16 U.S.C. § 1536(a)(2).

292. EPA did not consider or make effects determinations for ESA-listed sea turtles that nest on Florida's beaches or their designated critical habitats. USFWS did not consult with EPA regarding these ESA-listed sea turtles or their critical habitats.

293. EPA's failure to complete consultation on these USFWS jurisdictional species and habitats violates EPA's procedural and substantive obligations under ESA Section 7.

294. EPA's actions and omissions have harmed the Plaintiffs and—unless enjoined—leave them without any adequate remedy at law.

THIRTEENTH CLAIM FOR RELIEF

USFWS' CREATION OF THE TECHNICAL ASSISTANCE PROCESS IS AN UNLAWFUL ULTRA VIRES ACTION

295. Plaintiffs adopt and incorporate by reference paragraphs 1–296 of this Complaint.

296. Plaintiffs have a cause of action to enjoin and declare unlawful official agency actions that are *ultra vires* and exceed USFWS' statutory authority.

297. USFWS' incidental take statement, biological opinion, and memorandum of understanding create an ESA scheme that is not authorized by law.

298. No provision of law authorizes the "technical assistance process" scheme created by USFWS in the programmatic biological opinion, incidental take statement, and memorandum of understanding to give the state and state permittees a workaround to avoid the requirements that Congress provided for establishing take limits, extending liability coverage, and determining jeopardy to species.

299. Because USFWS' scheme is not authorized under any provision of law, it is *ultra vires* and unlawful.

300. USFWS' actions and omissions have harmed and—unless enjoined—will harm the Plaintiffs and leave them without any adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Issue a declaratory judgment declaring that the EPA violated the Clean Water Act and APA by taking a final agency action and making findings and conclusions that are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with law, when making the decision that the state's application was complete;

(b) Issue a declaratory judgment declaring that the EPA violated the Clean Water Act and APA by taking a final agency action and making findings and conclusions that are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with law, when the agency approved the state's application to assume jurisdiction over the Clean Water Act 404 program;

(c) Issue a declaratory judgment declaring that USFWS' biological opinion, "no jeopardy" determination, incidental take statement, and technical assistance process are ultra vires and violated the ESA and APA;

(d) Issue a declaratory judgment declaring that EPA's reliance on USFWS' unlawful biological opinion violated the ESA;

(e) Issue a declaratory judgment declaring that EPA violated the ESA by failing to consult with NMFS;

(f) Issue a declaratory judgment declaring that EPA violated the ESA by failing to consult with USFWS regarding nesting sea turtles;

(g) Issue a declaratory judgment declaring that USFWS' scheme for permit-level ESA "analysis" is not authorized by the law;

(h) Issue a declaratory judgment declaring that the Corps violated the RHA and APA when producing its retained waters list;

(i) Issue a declaratory judgment declaring that the EPA violated the APA by providing an immediate-on-publication effective date for its approval of Florida's program;

(j) Issue a declaratory judgment declaring that the EPA violated the APA by transferring authority without codifying a lawful state program in the Code of Federal Regulations;

(k) Vacate and set aside the EPA's decision that the state's application is complete;

(l) Vacate and set aside the EPA's decision to approve the state's application to assume jurisdiction over the Clean Water Act 404 program and remand with instructions for reopening and completing EPA's consideration of Florida's assumption application;

(m) Vacate and set aside USFWS' programmatic biological opinion and incidental take statement for the challenged EPA decision and remand with instructions for reopening and reinitiating consultation;

(n) Vacate and set aside the Corps' retained waters list submitted in conjunction with the state's application;

(o) Hold unlawful and set aside the EPA's December 22, 2020, immediate effective date for the Florida 404 program;

(p) Enjoin the EPA's approval and transfer of authority to the state;

(q) Issue any other appropriate injunctive relief;

(r) Allow the Plaintiffs to recover the reasonable fees, costs, and disbursements of this action, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

(s) Grant such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 4th day of January 2022,

/s/ Tania Galloni
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Counsel for Plaintiffs

** Admitted Pro Hac Vice*

Message

From: Freeman, Caroline [Freeman.Caroline@epa.gov]
Sent: 2/23/2023 9:46:03 PM
To: Lusky, Katy [Lusky.Kathleen@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Champagne, David [Champagne.David@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Webster, James [Webster.James@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Torres, Ramon [Torres.Ramon@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
CC: Nicholson, John [Nicholson.John@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Rinck, Todd (he/him/his) [Rinck.Todd@epa.gov]; Garver, Daniel [Garver.Daniel@epa.gov]
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Hey Katy,

The requestor was referring to EPA Air Monitoring Data according to Monique. It is on the Miami-Dade Website for the Doral Fire.

https://www.miamidade.gov/global/solidwaste/wastefire/home.page

Caroline

From: Lusky, Katy <Lusky.Kathleen@epa.gov>
Sent: Thursday, February 23, 2023 8:49 AM
To: Freeman, Caroline <Freeman.Caroline@epa.gov>; Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Champagne, David <Champagne.David@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Webster, James <Webster.James@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Torres, Ramon <Torres.Ramon@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>
Cc: Nicholson, John <Nicholson.John@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Rinck, Todd (he/him/his) <Rinck.Todd@epa.gov>; Garver, Daniel <Garver.Daniel@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thanks Caroline.

Is someone answering the question about where EPA stores its monitoring data? I assume they really meant FDEP data but we can always direct them to AQS or AirNow. Let me know if you need anything from us on that front.

thanks,
Katy

From: Freeman, Caroline <Freeman.Caroline@epa.gov>
Sent: Thursday, February 23, 2023 6:35 AM
To: Jenkins, Brandi <Jenkins.Brandi@epa.gov>; Champagne, David <Champagne.David@epa.gov>; Keefer, David <Keefer.David@epa.gov>; Webster, James <Webster.James@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Newman, Keriema <Newman.Keriema@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Torres, Ramon <Torres.Ramon@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>
Cc: Nicholson, John <Nicholson.John@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Toney, Anthony <Toney.Anthony@epa.gov>; Rinck, Todd (he/him/his) <Rinck.Todd@epa.gov>; Lusky, Katy <Lusky.Kathleen@epa.gov>
Subject: FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

FYI – For Situational Awareness.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Thursday, February 23, 2023 3:33 AM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>; Dorka, Lilian <Dorka.Lilian@epa.gov>; Hudson, Monique <Hudson.Monique@epa.gov>; Johnson, Johahna (she/her/hers) <Johnson.Johahna@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Hello Ms. Burkhardt,

Thank you for the updates concerning the Doral fire. I just wanted to let you know that we are working with EPA's Region 4 to address the questions/issues you raised in your previous email and hope to get you some answers soon. Thank you for your patience.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov
Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Thursday, February 16, 2023 8:39 AM
To: Vong, Suong <Vong.Suong@epa.gov>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon Ms. Vong:

We are writing to update you and EPA that the facility is still on fire. We heard that EPA had been conducting air monitoring alongside Miami-Dade County; however, government officials including the mayor are consistently reporting that the air is coming back "clear," contradicting the clouds of smoke that have been pouring into the community for days now, and the extreme spikes in air monitoring readings for particulate matter, up to 500-700 $\mu g/m^3$, that we have been seeing on both a private monitor and DEP's official air network monitor. We then noticed DEP's official air monitoring data disappeared and was marked "missing" on their website (see example here), prompting the attached letter and records request. DEP acknowledged our records request but failed to explain the missing air monitoring data.

We would like to know if you could please provide answers or updates on the following:

1. **Will EPA be initiating an investigation into the cause of the fire, independent of the facility owner (the county) and operator (Covanta)?**

2. **Where is EPA storing its air monitoring data? How can the public access it?**

3. **Will ECRCO now take action on Florida Rising's pending civil rights complaint that alerted EPA to the issues with this facility?** Our complaint addresses ongoing discriminatory policies and practices by DEP's air division and the permitting of air polluting facilities in Black and brown communities statewide. That this is ongoing is demonstrated by the attached notice of intent, published just this week, pertaining to another air polluting facility 3 miles from this incinerator: the Titan Florida Pennsuco cement complex, which is the largest cement plant in Florida and fifth largest limestone operation in the United States.

Thank you for your attention to these urgent matters.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
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(305) 440-5435
www.earthjustice.org

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From: Dominique Burkhardt
Sent: Tuesday, February 14, 2023 2:59 PM
To: Vong, Suong <Vong.Suong@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thank you, Ms. Vong.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Tuesday, February 14, 2023 2:15 PM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

This message originated outside of Earthjustice. Please use caution before opening attachments or links.

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov

Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Monday, February 13, 2023 12:07 PM
To: Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>
Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org
Subject: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html
- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html
- https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/
- https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/
- processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4
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- original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and

3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
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www.earthjustice.org

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September 1, 2022

Andrew Coghlan
Alison Finnegan
United States Department of Justice
Environmental and Natural Resources Division
Washington, DC 20002

Via Email:
andrew.coghlan@usdoj.gov
alison.c.finnegan@usdoj.gov

Re: Center for Biological Diversity, et al. v. U.S. EPA, et al.,
Case No. 21-cv-119 (D.D.C.) – Administrative Records

Dear Counsel:

On behalf of the Plaintiffs, we submit this correspondence in accordance with the Court's July 27, 2022, minute order requiring Plaintiffs to notify the Federal Defendants by today of any issues with the administrative records in this case. By email dated August 19, 2022, we notified the parties of our concerns regarding the Corps' administrative record, and additional records we believe belong in that administrative record.

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We also object to the Federal Defendants' failure to provide documents and other information shared and considered via Microsoft Teams, a platform that appears to have been used by all agencies in the consideration of the matters at issue in this case. We ask that the Defendants review those materials for pertinent records that may belong in the administrative record so that we may discuss supplementation.

Through a review of the records provided in this litigation, as well as partial agency responses to longstanding FOIA requests by Plaintiffs' counsel for information regarding Florida's 404 assumption, we have identified a number of documents we believe belong in the administrative records for EPA and USFWS.

Enclosed please find a spreadsheet as to each of those agencies that identifies the date and name of each document. We are also making the documents available to the parties through box.com.

We have identified a number of other documents that have not been produced to us through this litigation or FOIA but that are relevant and referenced either in the administrative record or a FOIA production. We separately identify those documents on the appropriate spreadsheet and request that they be produced and added to the corresponding record as well.

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Lastly, we request that the Defendants provide and include in the appropriate administrative record:

(1) Any notes of the meeting discussed in the 08/20/2018 EPA internal email FOIA ID ED_005978_00019245;

(2) Any notes of the meeting referenced in the 09/27/2018 EPA internal email FOIA ID ED_005978_00019429;

(3) Any notes of the meeting referenced in the 10/18/2019 EPA internal email FOIA ID ED_005978_00053479 Formal RWR;

(4) Any notes of the 12/10/2019 CEQ meeting referenced in EPA internal emails FOIA ID's ED_005978_00013956_Formal RWR and ED_005978_00027585;

(5) Any notes of the "high level call" scheduled for 12/23/2019 that was referenced in 12/20/2019 email exchange between Robert Tawes and Jerry Ziewitz;

(6) Any notes of 01/29/2020 call between USFWS and FDEP that was referenced in 01/31/2020 email between Robert Tawes and Leo Miranda;

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(8) Any notes of meetings/calls or correspondence related to NMFS' communications with USFWS on using the 316(b) approach for Florida's 404 assumption in 2019-2020.

Please let us know if you have any questions or trouble with the attachments or access to the documents we have provided. Many thanks.

Sincerely,

Tania Galloni
Managing Attorney

Bonnie Malloy
Senior Attorney

Enc.

cc w/enc: Jeffrey Wood
Lily Chinn

Message

From: Freeman, Caroline [Freeman.Caroline@epa.gov]
Sent: 2/23/2023 11:35:24 AM
To: Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Champagne, David [Champagne.David@epa.gov]; Keefer, David [Keefer.David@epa.gov]; Webster, James [Webster.James@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Newman, Keriema [Newman.Keriema@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Torres, Ramon [Torres.Ramon@epa.gov]; Zapata, Cesar [Zapata.Cesar@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
CC: Nicholson, John [Nicholson.John@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Toney, Anthony [Toney.Anthony@epa.gov]; Rinck, Todd (he/him/his) [Rinck.Todd@epa.gov]; Lusky, Katy [Lusky.Kathleen@epa.gov]
Subject: FW: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Attachments: Public Notices _ Florida Press Association.pdf; PRR to DEP_02 15 23.pdf

FYI – For Situational Awareness.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Thursday, February 23, 2023 3:33 AM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>; Dorka, Lilian <Dorka.Lilian@epa.gov>; Hudson, Monique <Hudson.Monique@epa.gov>; Johnson, Johahna (she/her/hers) <Johnson.Johahna@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Hello Ms. Burkhardt,

Thank you for the updates concerning the Doral fire. I just wanted to let you know that we are working with EPA's Region 4 to address the questions/issues you raised in your previous email and hope to get you some answers soon. Thank you for your patience.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov
Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Thursday, February 16, 2023 8:39 AM
To: Vong, Suong <Vong.Suong@epa.gov>
Cc: Sara Laumann <sara@laumannlegal.com>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Bradley Marshall <bmarshall@earthjustice.org>; Nestor Perez <nperez@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon Ms. Vong:

We are writing to update you and EPA that the facility is still on fire. We heard that EPA had been conducting air monitoring alongside Miami-Dade County; however, government officials including the mayor are consistently reporting that the air is coming back "clear," contradicting the clouds of smoke that have been pouring into the community for

days now, and the extreme spikes in air monitoring readings for particulate matter, up to 500-700 μg/m^3, that we have been seeing on both a private monitor and DEP's official air network monitor. We then noticed DEP's official air monitoring data disappeared and was marked "missing" on their website (see example here), prompting the attached letter and records request. DEP acknowledged our records request but failed to explain the missing air monitoring data.

We would like to know if you could please provide answers or updates on the following:

1. **Will EPA be initiating an investigation into the cause of the fire, independent of the facility owner (the county) and operator (Covanta)?**

2. **Where is EPA storing its air monitoring data? How can the public access it?**

3. **Will ECRCO now take action on Florida Rising's pending civil rights complaint that alerted EPA to the issues with this facility?** Our complaint addresses ongoing discriminatory policies and practices by DEP's air division and the permitting of air polluting facilities in Black and brown communities statewide. That this is ongoing is demonstrated by the attached notice of intent, published just this week, pertaining to another air polluting facility 3 miles from this incinerator: the Titan Florida Pennsuco cement complex, which is the largest cement plant in Florida and fifth largest limestone operation in the United States.

Thank you for your attention to these urgent matters.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
www.earthjustice.org

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From: Dominique Burkhardt
Sent: Tuesday, February 14, 2023 2:59 PM
To: Vong, Suong <Vong.Suong@epa.gov>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

Thank you, Ms. Vong.

From: Vong, Suong <Vong.Suong@epa.gov>
Sent: Tuesday, February 14, 2023 2:15 PM
To: Dominique Burkhardt <dburkhardt@earthjustice.org>
Subject: RE: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator

This message originated outside of Earthjustice. Please use caution before opening attachments or links.

Thank you, Dominique, for bringing this matter to our attention. We are evaluating our options on this issue.

Suong Vong
Team Lead, Office of External Civil Rights Compliance

Office of Environmental Justice and External Civil Rights
U.S. Environmental Protection Agency
Email: vong.suong@epa.gov
Phone: (202) 564-0392

From: Dominique Burkhardt <dburkhardt@earthjustice.org>
Sent: Monday, February 13, 2023 12:07 PM
To: Geis, Stacey <Geis.Stacey@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Oquendo, Ana (she/her/hers) <Oquendo.Ana@epa.gov>; Freeman, Caroline <Freeman.Caroline@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Hoang, Anhthu <Hoang.Anhthu@epa.gov>; Vong, Suong <Vong.Suong@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>
Cc: gina@floridarising.org; Kelli Thomas <kelli@floridarising.org>; MacKenzie Marcelin <mackenzie@floridarising.org>; sebastian@floridarising.org; Nestor Perez <nperez@earthjustice.org>; Bradley Marshall <bmarshall@earthjustice.org>; jjsmith@earthjustice.org
Subject: Urgent Response Needed Re. Fire at EPA-Regulated Incinerator
Importance: High

Good Afternoon,

We are writing to bring to your attention a massive fire that broke out yesterday at a municipal waste incinerator in a residential community in Doral, FL: the Miami-Dade County Resources Recovery Facility (address: 6990 NW 97th Avenue, Doral, FL 33178).

EPA maintains oversight of this facility under the Clean Air Act. The fire began around 2 p.m. yesterday, and though it has been contained somewhat, **it is ongoing, and it is expected that it will take days for firefighters to out the fire**. The apparent cause is that waste on a conveyor belt caught on fire.

Here is news coverage of the incident.

- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272447693.html
- https://www.miamiherald.com/news/local/community/miami-dade/doral/article272457138.html
- https://wsvn.com/news/local/miami-dade/crews-battling-4-alarm-fire-at-renewable-energy-plant-in-doral-nearby-residents-asked-to-stay-indoors/
- https://www.nbcmiami.com/news/local/in-photos-shocking-images-show-crews-battle-massive-fire-at-doral-waste-to-energy-plant/2972370/
- processed-D60F0087-4BC2-4E15-A0D1-24D2D07B7475-2D268CE9-FED1-493B-BAB3-CBF8C4B5946E.mp4
- processed-42BA0664-973D-4441-B0AE-40FED9102D0A-5C6F238B-04AB-4016-8420-864BFC8EA09A.mp4
- original-888974A1-A8DA-4450-BE20-C0483296E51A.mp4

As you may be aware, Florida Rising has been opposed to this polluting waste incinerator in a residential community, calling for denial of the Title V air permit renewal via written comments and filing a civil rights complaint to EPA's Office of Civil Rights.

Now, community members in this environmental justice community face even more toxic exposure to air pollution from the billowing smoke from this fire, as they are forced to remain indoors and essentially protect themselves from this hazard. As part of its waste burning, this incinerator normally burns plastic and tires, and it is not prohibited from burning medical waste; as a result, the community is naturally fearful of what toxins they are now being exposed to from this fire.

We are calling on EPA to act under its enforcement authority and its mandate to protect human health from these types of toxic exposures to:

1) **Assist with immediately safeguarding the health of residents near this fire**, including evacuations and the shutting down of schools;
2) **Conduct a prompt, full, and independent investigation** into the cause of this fire, making the investigation results available to the public; and
3) **Order the facility operator, Covanta Energy, to cease operations at this source** indefinitely, and at least until the conclusion of an independent investigation and the determination by EPA that it is safe to resume operations at this facility.

Waste incinerators emit a host of toxic pollution that is harmful to people's health, and in Doral, in Florida, and in the United States, these facilities are predominantly in Black and brown communities. We are calling on EPA to act now, while also facilitating the shutdown of these harmful facilities in favor of safer, and more sustainable waste management alternatives, such as the ones outlined in your agency's Zero Waste Toolkit.

Thank you for your prompt attention to this matter.

Sincerely,

Dominique Burkhardt
Senior Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5435
www.earthjustice.org

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EARTHJUSTICE

February 15, 2023

Via Electronic Mail

Sandra Veazey
Program Administrator
Office of Air Monitoring
Florida Department of Environmental Protection
3900 Commonwealth Blvd.
Tallahassee, FL 32399
Sandra.Veazey@FloridaDEP.gov

Dear Ms. Veazey:

Air Quality Monitor L086-0034, located in Kendall, Miami-Dade County, Miami, FL 33186 displayed numerous air quality readings of PM 2.5 throughout the day of February 15, 2023[1] in excess of 100 $\mu g/m^3$, including readings above 700 $\mu g/m^3$. However, shortly after the readings have been posted, they have been deleted and replaced with an "M" to indicate that they are a "Missing Hourly Value." Given the ongoing fire from the incinerator in Doral, FL, we are requesting an explanation as to why the readings are being systematically taken down and replaced with an "M."

Pursuant to Chapter 119, Florida Statutes, Earthjustice also requests the numerical data that has since been replaced with an "M." Furthermore, Earthjustice requests that the following documents be produced by February 17, 2023.

INSTRUCTIONS

1. The term "documents" is as defined in Rule 1.350(a), Florida Rules of Civil Procedure, and includes all documents in the possession, custody, or control of the Florida Department of Environmental Protection ("FDEP"), including, without limitation, documents within the possession, custody or control of your attorneys, agents, or contractors that you have a legal right to obtain, copy, or have access to, wherever located.

2. The entity to whom this request is directed, FDEP, includes all FDEP offices, programs, and departments and all employees, agents, attorneys, contractors, and representatives of said entity.

[1] The readings were available at https://fldep.dep.state.fl.us/air/flaqs/DailyReport.asp?SiteId=120860034&DataDate=2/15/2023.

RECORDS REQUEST

1. All data, whether preliminary in nature or not, for air monitor AQS L086-0034, located in Kendall, Miami-Dade County, Miami, FL 33186, specifically including all communications regarding this air monitor, including electronic mail. This request specifically includes, but is not limited to, any data that was posted on DEP's daily readings website for this monitoring station that was subsequently replaced with an "M." These websites would include, but are not limited to: https://fldep.dep.state.fl.us/air/flaqs/DailyReport.asp?SiteId=120860034&DataDate=2/15/2023 and https://fldep.dep.state.fl.us/air/flaqs/DailyReport.asp?SiteId=120860034&DataDate=2/14/2023. This request is limited to data, documents, and communications from February 12, 2023 through the present.

2. All data, whether preliminary in nature or not, for air monitor AQS L086-1016, located at Miami Fire Station, Miami-Dade County, Miami, FL 33142. This request is limited to data, documents, and communications from February 12, 2023 through the present.

Thank you for your prompt attention to this request. If the estimated cost of proceeding with this request is in excess of $50.00, please contact me before proceeding. If you have any questions, please email me at bmarshall@earthjustice.org.

Sincerely,

Bradley Marshall
Senior Attorney
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
bmarshall@earthjustice.org

cc:
Jeff.Koerner@FloridaDEP.gov
Cadedra.Hodge@FloridaDEP.gov
Joshua.Slappey@FloridaDEP.gov
James.Goodwin@FloridaDEP.gov

ED_014341_00000069-00002

Message

From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 9/6/2022 8:29:31 PM
To: Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Sable, Kacy [Sable.Kacy@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Diaz, Denisse [Diaz.Denisse@epa.gov]; Armor, Suzanne [Armor.Suzanne@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Speir, Jeffrey [speir.jeffrey@epa.gov]; Morgan, James [Morgan.James@epa.gov]; Bragan, Mary Jo [Bragan.Maryjo@epa.gov]; Dromgoole, Ahmad [Dromgoole.Ahmad@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]
Subject: FYI: FL 404 Administrative Record request
Attachments: f.Florida 404 Assumption - EPA AR - Plaintiffs Records to Add.pdf; 2022 09 01 CBD v EPA 21-cv-119 Plaintiffs Letter re AR_FINAL.pdf

Importance: High

All,

A heads up that on Thursday evening, 9/1, plaintiffs and Florida sent requests asking EPA to supplement the administrative record. The list of 38 documents plaintiffs requested is attached and the full set of documents is available at the link in the email below. Florida asked for just a handful of additional documents.

We will be working with ORC and DOJ this week to consider how best to respond. We will likely view some of the documents as admissible, but some may be deliberative or not part of EPA's decisionmaking process. A letter response to plaintiffs is due next Friday, 9/16.

We can discuss at our biweekly meeting next Monday, 9/12. We are hoping we can resolve plaintiffs' and Florida's requests without litigation.

Please let me know if you have any questions in the meantime.

Thanks for your attention,

Simma Kupchan
Water Law Office
EPA Office of General Counsel
202-564-3105

From: Tania Galloni <tgalloni@earthjustice.org>
Sent: Thursday, September 1, 2022 6:45 PM
To: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>; Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Cc: jeff.wood@bakerbotts.com; lily.chinn@bakerbotts.com; bmalloy@earthjustice.org
Subject: [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link:

https://app.box.com/s/28syutyf37veccgji887zjb0wlq6tmpi. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

***

Tania Galloni
Managing Attorney
Florida Regional Office
4500 Biscayne Blvd., Ste 201
Miami, FL 33137
(305) 440-5434
www.earthjustice.org

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September 1, 2022

Andrew Coghlan
Alison Finnegan
United States Department of Justice
Environmental and Natural Resources Division
Washington, DC 20002

Via Email:
andrew.coghlan@usdoj.gov
alison.c.finnegan@usdoj.gov

Re: Center for Biological Diversity, et al. v. U.S. EPA, et al.,
Case No. 21-cv-119 (D.D.C.) – Administrative Records

Dear Counsel:

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We have identified a number of other documents that have not been produced to us through this litigation or FOIA but that are relevant and referenced either in the administrative record or a FOIA production. We separately identify those documents on the appropriate spreadsheet and request that they be produced and added to the corresponding record as well.

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Lastly, we request that the Defendants provide and include in the appropriate administrative record:

(1) Any notes of the meeting discussed in the 08/20/2018 EPA internal email FOIA ID ED_005978_00019245;

(2) Any notes of the meeting referenced in the 09/27/2018 EPA internal email FOIA ID ED_005978_00019429;

(3) Any notes of the meeting referenced in the 10/18/2019 EPA internal email FOIA ID ED_005978_00053479 Formal RWR;

(4) Any notes of the 12/10/2019 CEQ meeting referenced in EPA internal emails FOIA ID's ED_005978_00013956_Formal RWR and ED_005978_00027585;

(5) Any notes of the "high level call" scheduled for 12/23/2019 that was referenced in 12/20/2019 email exchange between Robert Tawes and Jerry Ziewitz;

(6) Any notes of 01/29/2020 call between USFWS and FDEP that was referenced in 01/31/2020 email between Robert Tawes and Leo Miranda;

(7) Any notes of in-person meeting with USFWS, FWC, FDEP, EPA, and FDEP's consultants – GHD on 02/18/2020 that was referenced in 02/19/2020 email exchange between Heath Rauschenberger and Robert Tawes; and

(8) Any notes of meetings/calls or correspondence related to NMFS' communications with USFWS on using the 316(b) approach for Florida's 404 assumption in 2019-2020.

Please let us know if you have any questions or trouble with the attachments or access to the documents we have provided. Many thanks.

Sincerely,

Tania Galloni
Managing Attorney

Bonnie Malloy
Senior Attorney

Enc.

cc w/enc: Jeffrey Wood
Lily Chinn

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SAVE THE MANATEE CLUB, CENTER FOR BIOLOGICAL DIVERSITY, and DEFENDERS OF WILDLIFE, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the failure of the U.S. Environmental Protection Agency ("EPA") to reinitiate Endangered Species Act ("ESA") section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (together, the "Services") on water quality standards for Florida's Indian River Lagoon, where poor water quality has caused catastrophic mortality of Florida manatees.

2. The Indian River Lagoon (the "Lagoon") is one of the most biologically diverse estuaries in North America. Its seagrass ecosystem is home to thousands of plant and animal species. Sometimes called the "cradle of the ocean," the Lagoon features brackish waters that some predators avoid, leading young sea turtles, fish, crab, and shrimp to spend their juvenile stages there before they mature and move into the Atlantic Ocean. The iconic Florida manatee inhabits the Lagoon, alongside green sea turtles, loggerhead sea turtles, and smalltooth sawfish. The manatee and sea turtles are protected as "threatened" species under the ESA. The smalltooth sawfish is protected as an "endangered" species under the ESA.

3. The Indian River Lagoon is currently suffering ecologic collapse. More than a thousand manatees died in Florida in 2021, more than any other year on record, with more than half of the deaths occurring in the Lagoon. Manatee deaths in the Lagoon have continued into 2022 at a record pace.

4. The root of the problem is deteriorating water quality. Excess nitrogen and phosphorus pollution from human activities fuels harmful algal outbreaks that block sunlight from reaching seagrass, the manatee's main food source. As a result, tens of thousands of acres of seagrass have died, and hundreds of manatees have starved to death. Other ESA-listed species in the Lagoon are also harmed by the same pollution. Sea turtles develop deadly tumors in the dirty water, and smalltooth sawfish lose their mangrove habitat.

5. Congress passed the Clean Water Act ("CWA") and the ESA to prevent such harms.

6. The CWA charges the Florida Department of Environmental Protection ("FDEP") and EPA with the protection of Florida's waterbodies, including the beleaguered Indian River Lagoon. Pursuant to its CWA duty, FDEP has set pollution budgets known as "total maximum daily loads" ("TMDLs") for each pollutant impairing a waterbody. FDEP set TMDLs for nitrogen and phosphorus in the Indian River Lagoon in 2009 with a goal of preserving the natural balance of flora and fauna in the Lagoon, including maintaining seagrass. EPA approved FDEP's 2009 TMDLs as water quality standards for the Lagoon in 2013.

7. At the time EPA approved these TMDLs as water quality standards, it consulted with FWS and NMFS under section 7 of the ESA. The ESA consultation

process exists to ensure that EPA's actions—including its approval of a state's water quality standards—are not likely to jeopardize the survival and recovery of listed species or destroy or adversely modify designated critical habitat. Following consultation, FWS concurred in EPA's determination that the water quality standards would not likely adversely affect manatees. NMFS determined that the water quality standards would not jeopardize green sea turtles, loggerhead sea turtles, or smalltooth sawfish.

8. The ESA also requires that consultation be reinitiated in certain circumstances when new information reveals effects of an action on listed species or critical habitat that were not previously considered.

9. On August 10, 2021, FWS asked EPA to reinitiate consultation based on new information that harmful algal outbreaks have killed tens of thousands of acres of seagrass, leading manatees to starve to death in record numbers.

10. EPA refused to reinitiate consultation in response to FWS's request.

11. Plaintiffs Save the Manatee Club, Center for Biological Diversity, and Defenders of Wildlife notified the EPA, FWS, and NMFS of their intent to sue over EPA's failure to reinitiate consultation in violation of ESA section 7. Like FWS, Plaintiffs explained that new information shows that the mass die-off of manatees and harm to other protected species in the Indian River Lagoon is caused by nitrogen and phosphorus pollution subject to the 2009 TMDLs. Plaintiffs also

explained that new information shows that the TMDLs are not adequately followed or enforced, nor are there reasonable assurances that the state will meet the TMDLs in the absence of additional enforcement measures. Finally, Plaintiffs explained that new information demonstrates that the TMDLs fail to account for contributions from historic pollution sources, underestimate contributions from septic systems, and do not account for the impacts of climate change.

12. EPA did not reinitiate consultation in response to Plaintiffs' notice.

13. Manatees and other ESA-protected species in the Indian River Lagoon are suffering and will continue to suffer until water quality in the Lagoon improves. Plaintiffs therefore ask this Court to compel EPA to reinitiate consultation with the Services to protect ESA-listed species that depend on the Lagoon's fragile habitat, as the Endangered Species Act requires.

JURISDICTION AND VENUE

14. Plaintiffs bring this action pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), which waives EPA's sovereign immunity. Pursuant to this provision, Plaintiffs sent EPA and the Services two 60-day notice letters of their intent to sue for all ESA violations listed herein. *See id.* § 1540(g)(2)(A)(i). Plaintiffs sent the first notice letter—regarding consultation with FWS on impacts to manatees—on December 20, 2021, and the second letter—regarding consultation with NMFS on impacts to green sea turtles, loggerhead sea turtles,

and smalltooth sawfish—on February 7, 2022. [Attached as Exhibits 1 and 2]. EPA has not remedied the legal violations Plaintiffs identified in the 60-day notice letters and now allege in this Complaint.

15. This Court has jurisdiction over Plaintiffs' claims under 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201–02.

16. Venue lies in the Middle District of Florida pursuant to 28 U.S.C. § 1391(e)(1)(B) & (C), because a substantial part of the Indian River Lagoon and the species at issue occur in this District, and because Plaintiff Save the Manatee Club's office is in Maitland, Orange County, in this District. For these reasons, venue is further appropriate in the Orlando Division of the Middle District of Florida as this action is most directly connected with, and most conveniently advanced, in the Orlando Division. *See* Middle District of Florida Local Rule 1.04(a)–(b).

PARTIES

17. Plaintiff Save the Manatee Club is a nonprofit 501(c)(3) membership organization dedicated to the conservation of manatees. The organization was founded in 1981 by singer and songwriter Jimmy Buffett and Governor of Florida Bob Graham. Save the Manatee Club is located in Maitland, Florida. The organization currently has about 40,000 active members.

18. Save the Manatee Club brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee in its natural habitat. Save the Manatee Club members regularly engage in these activities in the Indian River Lagoon and will continue to do so in the future.

19. For example, one of Save the Manatee Club's members and volunteers lives, works, and recreates on or around the Indian River Lagoon. She has lived in Indian River County since 2011 and has been an active volunteer with Save the Manatee Club since 2012. This member has authored a book about manatee evolution, physiology, mythology, and conservation based on her observations and enjoyment of the animals in their Lagoon habitat. In addition to her volunteer work with Save the Manatee Club, this member gives educational talks on manatees to various environmental organizations and boating and garden clubs. One of her favorite activities is leading guided walks and kayak tours at Round Island, a well-known manatee observation area. During these tours, she shares her knowledge about and experiences with manatees, and discusses the animals' interesting lifestyle and biological quirks with members of the public.

20. Plaintiff Center for Biological Diversity (the "Center") is a nonprofit 501(c)(3) organization incorporated in the State of California with offices across the country, including in Washington, D.C., Arizona, California, Florida, New

York, North Carlina, Oregon, and Washington, and in Baja California Sur, Mexico. The Center works through science and environmental law to advocate for the protection of endangered, threatened, and rare species and their habitats both in the United States and abroad. The Center has over 81,800 active members, including members who reside in and travel to areas where manatees feed, breed, and migrate.

21. The Center brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee and other species in their natural habitat in the Indian River Lagoon. The Center's members regularly engage in these activities in the Indian River Lagoon from land and water and will continue to do so in the future.

22. For example, one of the Center's members moved near the Indian River Lagoon in 1978 and became involved in manatee protection shortly thereafter. She has been advocating for manatees since high school and interned at the Marine Mammal Pathobiology Laboratory in Saint Petersburg, Florida, while pursuing her undergraduate degree. She also has a graduate degree in Coastal Resource Management and has provided data that informed the Florida Fish and Wildlife Conservation Commission's manatee protection plans. This member drives within sight distance of the Lagoon every week and kayaks on the Lagoon several times a year. She also stops at the manatee observation deck at Haulover

Canal every month and has concrete plans to do so again in May and June 2022. She considers manatees a wonderful cultural resource for the state of Florida that residents have the right to enjoy.

23. Plaintiff Defenders of Wildlife ("Defenders") is a nonprofit 501(c)(3) membership organization dedicated to the protection and restoration of all native wild animals and plants in their natural communities and the preservation of the habitats on which these species depend. Headquartered in Washington, D.C., Defenders has regional and field offices in Alaska, Arizona, California, Colorado, Florida, Montana, New Mexico, North Carolina, Ohio, Oregon, Texas, Washington, and Wyoming. Defenders has nearly 2.2 million members and activists across the United States, including more than 124,000 members living in Florida where manatees live, feed, breed, and migrate.

24. Defenders brings this action on behalf of itself and its members, many of whom enjoy observing, photographing, and appreciating the Florida manatee and other species in their natural habitats. Defenders' members regularly engage in these activities in various locations within Florida, including the Indian River Lagoon, from land and water and will continue to do so in the future.

25. For example, one of Defenders' members enjoys viewing Florida manatees as often as she can. A key factor in her decision to live in Winter Park, Orange County, Florida, was that the city is near areas where she can regularly

view and enjoy manatees. She frequently enjoys visiting a manatee aggregation site in Blue Springs State Park in Orange City, Volusia County, Florida. This member also regularly visits the beach at Indialantic, a town between the Indian River Lagoon and the Atlantic Ocean, from which she can easily travel to the Indian River Lagoon to attempt to view manatees. This member has concrete plans to travel to the Indian River Lagoon to attempt to view manatees in May or June 2022. This member has also served as the Advocacy Committee Co-Chair of the Free the Ocklawaha River Coalition for Everyone, participated in the twice-yearly Manatee Forum meeting hosted by the Florida Fish and Wildlife Conservation Commission, and produced policy and outreach materials, comment letters, blog posts, and social media posts about manatees and the conservation challenges they face. Moreover, this member has engaged and will continue to engage in pro bono work to support manatee conservation.

26. Plaintiffs and their members are harmed by EPA's failure to reinitiate consultation with FWS and NMFS. This failure harms manatees, green sea turtles, loggerhead sea turtles, smalltooth sawfish, and other ESA-listed species that depend on the health of the ecosystem of the Indian River Lagoon, thereby decreasing Plaintiffs' members' opportunities to observe and enjoy them in their natural habitats.

27. An order from this Court declaring that EPA is in violation of the ESA and its implementing regulations, and directing EPA to reinitiate consultation with the Services, will remedy Plaintiffs' injuries. The ESA consultation process will help EPA protect and recover manatees, green sea turtles, smalltooth sawfish, and other ESA-protected species in the Indian River Lagoon where Plaintiffs' members observe and enjoy these species.

28. Defendant EPA is the federal agency charged with administering the Clean Water Act and ensuring that its actions under that statute do not jeopardize the survival and recovery of any ESA-listed species or destroy or adversely modify their critical habitat.

FACTUAL BACKGROUND

29. The Indian River Lagoon is an estuary on Florida's Atlantic Coast that includes the Mosquito Lagoon, the Banana River Lagoon, and the Indian River. The ecology of the Lagoon is defined by seagrass, a grass-like flowering aquatic plant that provides habitat and forage for many commercially, recreationally, and ecologically important species. The Lagoon sustains species protected under the Endangered Species Act, including the Florida manatee (*Trichechus manatus latirostris*), green sea turtle (*Chelonia mydas*), loggerhead sea turtle (*Caretta caretta*), and smalltooth sawfish (*Pristis pectinate*).

30. As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff and leachate of fertilizer and manure, among other sources. These nutrients, in turn, feed harmful algal outbreaks, which block light from getting to the seagrass, causing it to die.

31. As a result of the seagrass die-off, manatees in the Lagoon, which depend on the seagrass as their primary source of food, have been starving to death. More than 1,100 manatees died in 2021 in Florida—in total, 2021 saw a nearly 19% loss of the Atlantic coast population. Manatees are continuing to die at a record pace this year and continue to be particularly impacted by the seagrass loss in the Lagoon.

32. Other protected species in the Indian River Lagoon are also suffering from the impacts of water pollution. Water pollution in the Indian River Lagoon has been recently linked to the development of fibropapillomatosis in sea turtles, a chronic and often lethal tumor-causing disease. Water pollution also harms red mangroves, which provide nursery habitat for smalltooth sawfish.

33. The Lagoon is now at its ecological tipping point. If pollution is not curbed, the Lagoon will no longer be defined by its seagrass habitat, but by toxic or harmful algal outbreaks. Manatees, sea turtles, smalltooth sawfish, and other ESA-

protected species that depend on clean water in the Indian River Lagoon will continue to suffer and die.

LEGAL BACKGROUND

I. The Clean Water Act

34. Congress passed the CWA fifty years ago to prevent the type of ecological collapse currently occurring in the Indian River Lagoon. The aim of this statute is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment. *Id.* § 1313(c).

35. Water quality standards consist of two elements. The first is a waterbody's designated use—meaning the goals for the use of a particular waterbody. *See* 40 C.F.R. § 131.3(f), (i). For example, the highest surface water classification in Florida is Class I, for "potable water supplies," while the lowest classification is Class V, for "navigation, utility and industrial use." Fla. Admin. Code Ann. r. 62-302.400.

36. The second element of a water quality standard is the criteria, or qualities of a waterbody that, if met, will support a waterbody's designated use. *See* 40 C.F.R. § 131.3(b), (i). Criteria can be expressed in numeric or narrative form. *Id.* § 131.3(b). For example, Class I waterbodies in Florida cannot exceed a

total arsenic concentration of 10 μg/L, while Class V waterbodies cannot exceed a total arsenic concentration of 50 μg/L (numeric standard). *See* Fla. Admin. Code Ann. r. 62-302.530(5)(a). By contrast, the standard for undissolved "oils and greases" for all classes of Florida waterbodies is narrative: none "shall be present so as to cause taste or odor, or otherwise interfere with the beneficial use of waters." *Id.* § 62-302.530(50)(b).

37. Under the CWA, states also set pollution budgets, known as "total maximum daily loads" or "TMDLs," for particularly polluted waterbodies. 33 U.S.C. § 1313(d)(1)(A), (d)(1)(C). States must establish TMDLs for each pollutant impairing a waterbody. *Id.* § 1313(d)(1)(C). TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can receive and still comply with applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C).

38. With the numeric target as a starting point, states then allocate that total pollutant load among the various sources that contribute the pollutant to the waterbody. There are two categories of contributors to the total pollutant load: (1) "point source" contributors—single identifiable sources, such as a discharge pipe from a sewage treatment plant, *see* 33 U.S.C. § 1362(14); and (2) "nonpoint source" contributors—pollution sources that do not originate from a single identifiable source, such as fertilizer runoff from farms. 40 C.F.R. § 130.2(g)–(i).

39. EPA oversees states' development of water quality standards and TMDLs. 33 U.S.C. § 1313(c)(3), (d)(2). Among other things, this means EPA may not approve or continue to authorize a TMDL or water quality standard that is inadequate. EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including [the] location of the source(s) and the quantity of the loading" to enable EPA to adequately review the load and wasteload allocations. *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). The TMDL must also include a "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C). EPA is expected to closely scrutinize a TMDL and its component parts, including ensuring that the TMDL has a sufficiently protective margin of safety and that it provides "reasonable assurances" that point and nonpoint source control measures will achieve the expected load reductions. *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002).

40. EPA has authority to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA]." 33 U.S.C § 1313(c)(4)(B). EPA also has the authority to establish TMDLs itself, rather than waiting on the

state to do so, in the event EPA deems a state-submitted TMDL inadequate. 33 U.S.C § 1313(d)(2). If a TMDL fails to attain water quality standards, "a TMDL revision is required." EPA, Guidance for Water Quality-based Decisions: The TMDL Process 2 (April 1991).

II. The Endangered Species Act

41. In 1973, recognizing that certain species "ha[d] been so depleted in numbers that they are in danger of or threatened with extinction," Congress enacted the ESA, 16 U.S.C. §§ 1531–44, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." *Id.* § 1531(a)(2), (b). Congress declared that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." *Id.* § 1531(c)(1).

42. The ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." *Id.* § 1532(3). The ESA's goal is not simply to prevent endangered and threatened species from becoming extinct, but to recover these species to the point where they no longer require the statute's protections.

43. Considered "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," the ESA embodies the "plain intent" of Congress to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978); *see also id.* at 185 (ESA section 7's legislative history "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies").

44. Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state's water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202 (Feb. 22, 2001) ("EPA & Services MOU"). Such "action agencies" must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee; NMFS in the case of green sea turtles, loggerhead sea turtles, and

smalltooth sawfish. *See id.*; 50 C.F.R. § 402.01(b); *id.* §§ 17.11(h), 223.102(e), 224.101(h).

45. The action agency's ESA obligations do not end after completing an initial consultation. The ESA also requires that consultation be reinitiated in certain circumstances where "discretionary Federal involvement or control over the action has been retained or is authorized by law." 50 C.F.R. § 402.16(a).

46. With regards to state water quality standards and TMDLs, EPA has continuing discretionary authority under 33 U.S.C. § 1313(c)(4)(B), which requires it to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act]," and 33 U.S.C § 1313(d)(2) & (e)(2), which provides EPA with continuing discretionary authority over TMDLs. *See also* EPA & Services MOU at 11,206 ("EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA.").

47. Where the action agency retains discretionary involvement or control over its action, it must reinitiate consultation:

(1) If the amount or extent of taking specified in the incidental take statement is exceeded;
(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

PROCEDURAL HISTORY

48. For decades, Florida's water quality standard for nutrients, including nitrogen and phosphorus, was a "narrative" criterion: "In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." Fla. Admin. Code Ann. r. 62-302.530(48)(b).

49. In 2008, environmental groups sued EPA, explaining that this vague narrative criterion was insufficient to protect Florida waters, and that "numeric" nutrient criteria were needed to control nitrogen and phosphorus pollution. The groups analogized the problem to highway speed limits. A numeric speed limit sign would read "Speed Limit 50 MPH" while a narrative speed limit sign would read "Don't Drive Too Fast." Nitrogen and phosphorus pollution in Florida could not be adequately controlled without specific numeric pollution limits in place.

50. Through a consent decree, EPA agreed to set revised standards. In 2010, EPA proposed and finalized rules establishing numeric nutrient criteria.

51. On June 13, 2012, Florida submitted its own revised water quality standards for EPA's approval under 33 U.S.C. § 1313(c) to supersede those adopted by EPA. Florida's revisions included a rule adopting a framework for developing numeric interpretations of the existing statewide narrative nutrient criterion.

52. The framework explains that where a site-specific TMDL has been adopted "that interpret[s] the narrative water quality criterion for nutrients," the TMDL shall be the numeric interpretation of the narrative nutrient criterion. Fla. Admin. Code Ann. r. 62-302.531.

53. For the Indian River Lagoon and its constituent Banana River Lagoon, FDEP set TMDLs for nitrogen and phosphorus in 2009 and submitted them for EPA's approval as numeric nutrient criteria. EPA approved these TMDLs as water quality standards in 2013. They are codified as "Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion" under Fla. Admin. Code r. 62-302.532(aa) (referencing Fla. Admin. Code r. 62-304.520). In other words, while typically a TMDL is set in order to meet a water quality standard, here the water quality standards *are* the TMDLs for the Indian River Lagoon and the TMDLs *are* the water quality standards.

54. Under ESA section 7(a)(2), EPA consulted with FWS and NMFS on its approval of the Indian River Lagoon water quality standards/TMDLs in 2013.

55. In its informal consultation with the FWS, EPA concluded that its approval would not adversely affect Florida manatees. FWS concurred in that determination. In the biological opinion that NMFS issued to EPA following formal consultation on green sea turtles, loggerhead sea turtles, and smalltooth sawfish, NMFS concluded that EPA's approval would not likely jeopardize the continued existence of these species or destroy or adversely modify designated critical habitat for the smalltooth sawfish.

56. In March 2021, after more than 500 manatees had died since the beginning of the year, the Secretary of Commerce, in consultation with the Secretary of the Interior and with the guidance of the Working Group on Marine Mammal Unusual Mortality Events, officially declared an "Unusual Mortality Event" for the Atlantic Florida manatee under the Marine Mammal Protection Act, 16 U.S.C. § 1421c(a)(2)(B).

57. On August 10, 2021, FWS requested that EPA reinitiate ESA consultation. The letter explained that FWS "would like to make [EPA] aware of new information regarding an ongoing Unusual Mortality Event (UME) for manatees in the Indian River Lagoon (IRL) in Florida and recommend that EPA reinitiate consultation on the numeric nutrient criteria for water quality standards in

estuaries." FWS's letter alerted EPA that the Indian River Lagoon has reached an "ecological tipping point" and that the loss of "tens of thousands of acres of seagrass" due to excess nutrient pollution was causing the ongoing die-off of manatees.

58. On November 23, 2021, EPA responded by letter to FWS, declining to reinitiate consultation.

59. As required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), on December 20, 2021, Plaintiffs sent EPA and FWS a 60-day notice letter explaining that the agency is in violation of the Endangered Species Act for failing to reinitiate consultation with FWS. Plaintiffs sent EPA and NMFS a second 60-day notice letter on February 7, 2022, notifying EPA that it is in violation of the ESA for failing to reinitiate consultation with NMFS.

60. Plaintiffs' letters pointed out new information that requires EPA to reinitiate consultation with the Services under 50 C.F.R. § 402.16(a)(2) on the water quality standards/TMDLs for the Indian River Lagoon.

61. First, like FWS's request for reinitiation of consultation, Plaintiffs alerted EPA that the unprecedented die-off of manatees due to deteriorating water quality in the Lagoon requires reinitiation of consultation with FWS. Plaintiffs further explained to EPA how the same pollution adversely affecting manatees is also adversely affecting green sea turtles, loggerhead sea turtles, and smalltooth

sawfish, thus requiring reinitiation of consultation with NMFS. Plaintiffs explained that this new information, showing that continued deterioration of water quality is harming these species, calls into question the overall adequacy of the water quality standards/TMDLs.

62. Second, Plaintiffs explained that new information demonstrating lax enforcement and compliance for reductions of both point and nonpoint sources shows that the water quality standards/TMDLs lack reasonable assurances that point and nonpoint source reductions will achieve expected load reductions. Among other deficiencies, (1) the state of Florida has been routinely allowing harmful sewage spills as "wet weather discharges"; (2) the state is failing to inspect wastewater treatment facilities and fine them when they illegally pollute; and (3) the state is failing to ensure enrollment and oversight of a program aimed at curbing pollution from agricultural runoff.

63. Finally, Plaintiffs explained that new scientific information demonstrates that the water quality standards/TMDLs are insufficient at preventing seagrass loss because the models that underlie the TMDLs do not adequately account for all sources of pollution. In particular, (1) the models do not accurately account for ongoing inputs of nitrogen and phosphorus released from accumulated historic pollution in the Lagoon; (2) they underestimate nutrient loading from

septic tanks; and (3) they do not accurately account for the confounding role of climate change in driving nutrient loading.

64. To date, EPA has not reinitiated consultation with either FWS or NMFS.

FIRST CLAIM FOR RELIEF
(Failure to Reinitiate Consultation with FWS)

65. Plaintiffs hereby reallege, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 64.

66. EPA is required to reinitiate consultation with FWS on a given action when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2).

67. New information reveals that EPA's approval of FDEP's water quality standards/TMDLs for the Indian River Lagoon has resulted in a manatee die-off without parallel in the ecosystem's recorded history. New information also demonstrates that the water quality standards/TMDLs are inadequate because they lack reasonable assurances that reduced discharges from point and nonpoint sources will achieve expected reductions in the total pollutant load, and because they fail to account for historic pollution sources, contributions from septic systems, and the impacts of climate change. Collectively, these deficiencies have

allowed excess nitrogen and phosphorus pollution to enter the Lagoon, creating harmful algal outbreaks that kill the seagrass manatees need to survive.

68. By refusing to reinitiate consultation with FWS on the impacts of the water quality standards/TMDLs on Florida manatees, EPA is in violation of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a)(2).

SECOND CLAIM FOR RELIEF
(Failure to Reinitiate Consultation with NMFS)

69. Plaintiffs hereby reallege, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 64.

70. EPA is required to reinitiate consultation with NMFS on a given action when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2).

71. New information reveals that EPA's approval of water quality standards/TMDLs for the Indian River Lagoon has had significant adverse effects on green and loggerhead sea turtles and smalltooth sawfish. These species and/or their habitats are harmed by the same excess nutrient pollution that threatens manatees, caused by the above-named deficiencies in the water quality standards/TMDLs for the Indian River Lagoon that EPA approved.

72. By failing to reinitiate consultation with NMFS on the impacts of the water quality standards/TMDLs on green and loggerhead sea turtles and smalltooth sawfish, EPA is in violation of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a)(2).

REQUEST FOR RELIEF

Therefore, Plaintiffs respectfully request that this Court:

73. Declare that EPA is in violation of the ESA for failing to reinitiate consultation with FWS on the effects of the water quality standards/TMDLs for the Indian River Lagoon on the Florida manatee and with NMFS on the effects of the water quality standards/TMDLs for the Indian River Lagoon on green and loggerhead sea turtles and smalltooth sawfish;

74. Order EPA to reinitiate ESA consultation with the Services on EPA's approval of the water quality standards/TMDLs for the Indian River Lagoon;

75. Award Plaintiffs their reasonable costs, fees, and expenses, including attorney's fees, associated with this litigation; and

76. Grant Plaintiffs such further relief as the Court may deem just and proper.

Respectfully submitted this 10th day of May, 2022.

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EXHIBIT 1

December 20, 2021

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VIA ELECTRONIC AND CERTIFIED MAIL

Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency ("EPA") is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) ("manatees") in the Indian River Lagoon. Specifically, the EPA has unlawfully failed to reinitiate section 7 consultation with U.S. Fish and Wildlife Service ("FWS") in light of significant new information undermining EPA and FWS's conclusions that the Clean Water Act ("CWA") estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the manatee and its habitat.

More than 1,000 manatees have died so far this year in Florida, as part of a catastrophic "Unusual Mortality Event." This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year. More than half of those deaths occurred in the northern Indian River Lagoon due to starvation and malnutrition caused by seagrass die-offs attributable to nutrient pollution and associated harmful algal outbreaks.

Congress enacted the ESA and CWA to prevent such harms. These statutes require that EPA-approved water quality standards ensure the protection of water quality and threatened species such as the manatee. However, the current estuary-specific numeric nutrient criteria fail to fulfill these mandates. New information shows that the current criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to take into account the impact of legacy pollution. As a result, approximately 12% of the estimated Florida manatee population statewide has died, with the Atlantic subpopulation having lost approximately 19% of its population. In short, both the Indian River Lagoon and the manatee are presently in the midst of ecological collapse. Further, it appears likely that the 2021 Unusual Mortality Event will not be a one-time event, but rather portends a grim future of continued manatee deaths unless more effective actions are taken to address the key environmental factor driving them—nutrient pollution of key estuary habitats that is destroying habitat, including food for manatees and many other species. Together, the ESA and the CWA require such actions. This letter provides notice that your agency is violating the law by failing to take them.

I. LEGAL BACKGROUND

A. EPA's Obligations in Approving Water Quality Standards under the Clean Water Act

The Clean Water Act was enacted almost 50 years ago to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the "Clean Water Act"). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as "total maximum daily loads" ("TMDLs") for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. §130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida's development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA's CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide "reasonable assurances" that point and nonpoint source control measures will achieve the expected load reductions.[1]

B. EPA's Consultation Obligations under the ESA

Congress enacted the Endangered Species Act in 1973 to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16

[1] *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021).

U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species "the highest of priorities," so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state's water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) ("EPA & FWS MOU"). Such "action agencies" must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with FWS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of FWS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where "discretionary Federal involvement or control over the action has been retained or is authorized by law." 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act]." *See also* EPA & FWS MOU at 11206 ("EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA."); *Wild Fish Conservancy v. United States Env't Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

> (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
> (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA's approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida's Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida's Department of Environmental Protection ("FDEP") set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as nutrient criteria on July 29, 2013, and they are codified as the "Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion" under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with FWS—as well as with the National Marine Fisheries Service ("NMFS")[2]—multiple times under 50 C.F.R. § 402.13 on its approval of Florida's water quality standards. This included (1) consulting with FWS on EPA's approval of Florida's revisions in 2012;[3] (2) consulting with FWS on EPA's approval of amendments to these revisions in 2013—which among other things, approved the specific TMDLs for the Indian River Lagoon;[4] and (3) consulting with FWS on EPA's approval to changes made to Florida's statewide estuary-specific numeric nutrient criteria in 2017 (which did not alter the previously approved TMDLs for Indian River Lagoon).[5]

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[2] *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

[3] Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012).

[4] Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013).

[5] Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017).

In each of its informal consultations with FWS, EPA concluded that its approval would not adversely affect the manatee,[6] and FWS agreed.[7]

III. NEW INFORMATION REQUIRES REINITATION OF CONSULTATION

FWS has already recognized that reinitiation of consultation is required here, asking EPA on August 10, 2021, to reinitiate consultation. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). However, upon information and belief, no such consultation has been reinitiated.

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[6] *See* Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012) (transmitting Biological Evaluation concluding that "[t]he EPA has determined that its approval of the addition of numeric criteria for springs, lakes, streams, and estuaries, which are primarily outlined within Rule 62-302, as well as the procedure for developing alternative criteria will not likely adversely affect or will beneficially affect listed species, critical habitat and food sources"); Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013) (transmitting Biological Evaluation concluding that "[o]verall, the EPA has determined that the chemical, physical, and biological data and the scientifically sound approaches used to develop the [numeric nutrient criteria ("NNC")] resulted in NNC that will provide for the protection of a healthy, well-balanced biological community and will ensure the protection of water quality and aquatic life. For all of these reasons, the EPA has determined that the NNC adopted by the State of Florida . . . are not likely to adversely affect listed species and that implementation of the NNC will avoid excessive concentrations of nutrients that can lead to the imbalance of flora and fauna"); Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017) (noting that "EPA continues to arrive at a finding of [No Effect and Not Likely to Adversely Affect] for the unchanged list of FWS's species of concern[.]")

[7] *See* Letter from Larry Williams, FWS Florida State Supervisor, to Annie Godfrey, Chief of EPA Water Quality Standards Section 7 (July 31, 2013) ("the Service concurs with EPA's determination that the revised nutrient standards are not likely to adversely affect the West Indian manatee or its critical habitat"); Letter from Larry Williams, FWS Field Supervisor South Florida Ecological Services Office, to Joanne Benante, EPA Water Quality Planning Branch (Nov. 15, 2013) ("The adopted TMDLs in the Indian River Lagoon contain [Total Nitrogen ("TN")] and [Total Phosphorus ("TP")] loading targets that were established to support the restoration of seagrass beds. Historical seagrass coverage was evaluated in conjunction with historic estimates of point and nonpoint nutrient inputs to establish TMDLs suitable for seagrass proliferation. Implementation of the TMDLs would result in significant reductions in TN (51 percent) and TP (47 percent) loading in the central Indian River Lagoon, which includes the segments within the [FWS South Florida Ecological Services Office] area of responsibility (TMDL 2009b)"); Letter from Jay B. Herrington, FWS Field Supervisor, to Joanne Benante, EPA Water Quality Planning Branch (May 3, 2017) ("the Service concurs with EPA's determination that the changes made to the Florida's statewide estuary-specific numeric nutrient criteria under review is not likely to adversely affect any federally listed species or their critical habitats").

Three significant pieces of new information underscore the requirement for EPA to reinitiate consultation with FWS under 50 C.F.R. § 402.16 on Florida's estuary-specific numeric nutrient criteria. First, new information suggests mass die-offs of manatees in the Indian River Lagoon are due to deterioration in water quality as a result of continuing nitrogen and phosphorus pollution, calling into question the overall adequacy of the current TMDLs. As FWS has already recognized, this unprecedented die-off alone requires reinitiation of consultation. Second, new information suggests there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, and finally, new information indicates that the current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety.

A. New Information Suggests Mass Die-Offs of Manatees are Due to Continuing Deterioration in Water Quality

More than 1,000 manatees have died so far this year in Florida, with the majority on the Atlantic coast as part of an unprecedented die-off that has been officially declared an "Unusual Mortality Event" by the Working Group on Marine Mammal Unusual Mortality Events and FWS.[8] This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year.[9] The Florida Fish and Wildlife Conservation Commission estimates the total number of Florida manatees to have been 8,800 as of 2015–16, with roughly 4,000 on the Atlantic coast.[10] In other words, Florida has lost roughly 12% of its manatee population this year alone, and nearly 19% of the Atlantic population.[11]

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[8] *See* Florida Fish and Wildlife Conservation Commission, Marine Mammal Pathobiology Laboratory, 2021 Preliminary Manatee Mortality Table with 5-Year Summary From 01/01/2021 to 12/03/2021, *available at* https://myfwc.com/media/25428/preliminary.pdf (last visited Dec. 16, 2021) (stating that a total of 1038 manatees have died in Florida from 01/01/2021 to 12/03/2021); Florida Fish and Wildlife Conservation Commission, Manatee Mortality Event Along The East Coast 2020-2021, *available at* https://myfwc.com/research/manatee/rescue-mortality-response/ume/ (last visited Dec. 15, 2021).

[9] *Id.*; *see also* Allen, As Seagrass Habitats Decline, Florida Manatees Are Dying Of Starvation, NPR (June 21, 2021), *available at* https://www.npr.org/2021/06/21/1006332218/as-seagrass-habitats-decline-florida-manatees-are-dying-of-starvation (last visited Dec. 1, 2021).

[10] Hostetler, et al., Updated Statewide Abundance Estimates for the Florida Manatee (2018), *available at* https://f50006a.eos-intl.net/ELIBSQL12_F50006A_Documents/TR23-18Hostetler-USAEF.pdf (last visited Dec. 1, 2021).

[11] *Id.*; *see also* Florida Fish and Wildlife Conservation Commission, Manatee Mortalities on the Florida Atlantic Coast, Staff Report (Aug. 4, 2021), *available at* https://www.wfla.com/wp-content/uploads/sites/71/2021/08/FWC-Manatee-Mortalities-Report.pdf (last visited Dec. 16, 2021).

The majority of these deaths have occurred in the Indian River Lagoon, where a die-off of seagrass has left the manatees to starve to death.[12] The Indian River Lagoon is an estuary that includes Mosquito Lagoon, Banana River Lagoon, and the Indian River. It has more species of plants and animals than any other estuary in North America. The lagoon's seagrass includes Johnson's seagrass, a rare seagrass found only in lagoons on the east coast of Florida that was the first marine plant species to be listed under the ESA.[13] The seagrass in the lagoon formerly provided habitat and forage for many commercially, recreationally, and ecologically important species, including manatees, sea turtles, spotted sea trout, redfish (red drum), snook, tarpon, mullet, sheepshead, pompano, seahorses, blue crabs, hermit crabs, pink shrimp, scallops, clams, marine worms, marine snails, and other crustaceans.[14] Seagrass health is therefore not only critical to the survival of the manatee, but to the persistence of other threatened and endangered species of plants and wildlife, the health of commercially and recreationally important species, and the functioning of the ecosystem overall.

The die-off of seagrass is directly related to deteriorating water quality in the Indian River Lagoon.[15] As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff carrying nitrogen fertilizer, among other sources. These nutrients, in turn, feed algae super outbreaks, which block light from getting to the seagrass, causing it to die.[16]

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[12] *See* Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) ("This unusual mortality event has been attributed to the effects of starvation tied to lack of suitable forage availability associated with winter aggregation at warm water sites."); Lefebvre et al., Characterizing Manatee habitat use and seagrass grazing in Florida and Puerto Rico: implications for conservation and management, Pacific Conservation Biology Vol 5: 289–98 (2000) (explaining the importance of seagrass to manatee diets).

[13] National Marine Fisheries Service, Final Recovery Plan for Johnson's Seagrass (Sept. 2002).

[14] *See* U.S. Fish and Wildlife Service, Indian River Lagoon, *available at* https://www.fws.gov/refuge/pelican_island/wildlife_and_habitat/indian_river_lagoon.html (last visited Oct. 12, 2021); St. Johns River Water Management District, Indian River Lagoon: An Introduction to a National Treasure (2007).

[15] *See* Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) ("Seagrass losses in the Indian River Lagoon have been significant due to continuing water quality issues.").

[16] *See, e.g.,* Lapointe, et al., Nutrient Over-Enrichment and Light Limitation of Seagrass Communities in the Indian River Lagoon, an Urbanized Subtropical Estuary, Science of the Total Environment 699 (2020). This deteriorating water quality has also led to other effects on protected species. For instance, a 2021 article found a strong correlation between water pollution in the Indian River Lagoon and the prevalence of tumors in endangered green sea turtles. *See* Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded Versus a Nondegraded Habitat, J. Wildlife Diseases 57(4):761-772 (2021).

As FWS has already recognized, the continued deterioration in water quality—leading to algae outbreaks "that have increased in frequency and duration" and have caused the recent unusual manatee mortality event—require reinitiation of consultation under 50 C.F.R. § 402.16(a)(2) on EPA's approval of the numeric nutrient criteria for water quality standards in estuaries. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). Despite FWS's call for reinitiation, however, available information indicates that to date neither agency has formally reinitiated ESA consultation. *See id.* (asking EPA to reinitiate consultation, without itself formally reinitiating consultation). Given the continued water quality deterioration and increasing die-off of manatees, EPA must immediately reinitiate consultation to address the Unusual Mortality Event and to reconsider whether the current TMDLs are adequate to protect the manatee. As discussed below, significant new information indicates they are not.

B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions

In addition to the recent unprecedented die-off of manatees, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.[17] Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a "Blue-green Algae Task Force," appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that "[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management

[17] *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with "the assumptions and requirements of any available wasteload allocation" in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, "the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable").

practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards." Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended "the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts." *Id.* It further recommended "that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically." *Id.*

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, Marine Pollution Bulletin 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of "emergency wet weather" surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.[18]

Finally, a 2020 Florida Public Employees for Environmental Responsibility ("Florida PEER") report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* https://www.peer.org/2020-florida-enforcement-report/ (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, the "the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach." *Id.* at 35. As Florida PEER Director Jerry Phillips explained, "[r]ather than seeking major reductions in our pollution load, DEP's reliance on small fines makes pollution an acceptable cost of doing business." *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* https://www.peer.org/florida-pollution-enforcement-fell-

[18] *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida's Indian River Lagoon, 43 Harmful Algae 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

into-covid-coma/ (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.[19]

EPA must thus reinitiate consultation with FWS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

2. The TMDL Lacks Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) ("CIRL BMAP"). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans ("BMAPs"), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon ("NIRL BMAP"); and (3) the Banana River Lagoon ("BRL BMAP"). These BMAPs include agricultural best management practices ("BMPs") that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner's responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services ("FDACS") is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the

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[19] *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, Florida Today (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, Florida Today (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, Florida Today (May 7, 2021).

rules, none have faced penalties.[20] As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, "[u]nfortunately we have not seen a hammer come down from FDEP. . . . There's a carrot and there's a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick's not working."[21]

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.,* CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinitiate consultation with FWS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass and manatee die-offs, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which "fluxes" nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.[22] Brevard County recently posited that "[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters." Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to

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[20] *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/ (last visited Dec. 1, 2021).

[21] *Id. See also* MacLaughlin, Will Basin Management Action Plans Restore Florida's Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs "need more regulatory teeth if they are to succeed"); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) ("[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation").

[22] Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan (last visited on Dec. 1, 2021).

nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases light availability to seagrass and further contributes to seagrass loss.[23] It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.[24]

EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading" in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety "to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality." EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the "Spatial Watershed Iterative Loading or 'SWIL' Model"—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.,* NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.[25] EPA must therefore reinitiate consultation with FWS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinitiate formal consultation with FWS concerning EPA's approval of Florida's estuary-specific numeric nutrient criteria in light of recent manatee mortality and new information suggesting that the current numeric nutrient standards are insufficient to protect against the current manatee die-off as well as protect against future mortality events. If EPA is unwilling to take action within sixty days to reinitiate consultation, we plan to seek redress through litigation.

Sincerely,

Elizabeth Forsyth
Earthjustice Biodiversity Defense Program

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[23] Phlips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, Estuarine, Coastal and Shelf Science (Sep. 2002).
[24] Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, Florida Today (Nov. 24, 2013).
[25] *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, Water (2021) (explaining that in Lake Okeechobee, "[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake").

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EARTHJUSTICE

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VIA ELECTRONIC AND CERTIFIED MAIL

Re: Supplement to Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide a supplement to our December 20, 2021 notice that the U.S. Environmental Protection Agency is in violation of the Endangered Species Act ("ESA") for failing to reinitiate consultation with the U.S. Fish and Wildlife Service under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) ("manatees") in the Indian River Lagoon. This supplement includes an expert report by Dr. Peter Barile detailing additional ways the current EPA-approved estuary-specific numeric nutrient criteria are inadequate to prevent seagrass die-off, harmful algal outbreaks, and further manatee mortality events in the Indian River Lagoon. Specifically, Dr. Barile's report explains that new information demonstrates that nutrient loads from septic tanks were underestimated in the approved numeric nutrient criteria and that the criteria do not account for the confounding role of climate change in driving nutrient loading.

The report concludes that based on this new information, the current estuary-specific numeric nutrient criteria are currently "an order of magnitude" above maximum concentrations that would support seagrass and should be revised accordingly to prevent eutrophication, loss of seagrass, and harm to the manatee.

Sincerely,

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Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria

Peter Barile, Ph.D. Senior Scientist
Marine Research & Consulting, Inc., Melbourne FL

This is an expert report by Peter Barile, Ph.D., Senior Scientist, Marine Research & Consulting, Inc. Melbourne, Florida, on the scientific description of the health of the Indian River Lagoon as it relates to the 2013 EPA-approved Numerical Nutrient Criteria for the Indian River Lagoon system, excess nutrient loading and concentrations, harmful algal blooms and subsequently to seagrasses die-off and loss of over 400 manatees in Brevard County in 2021.

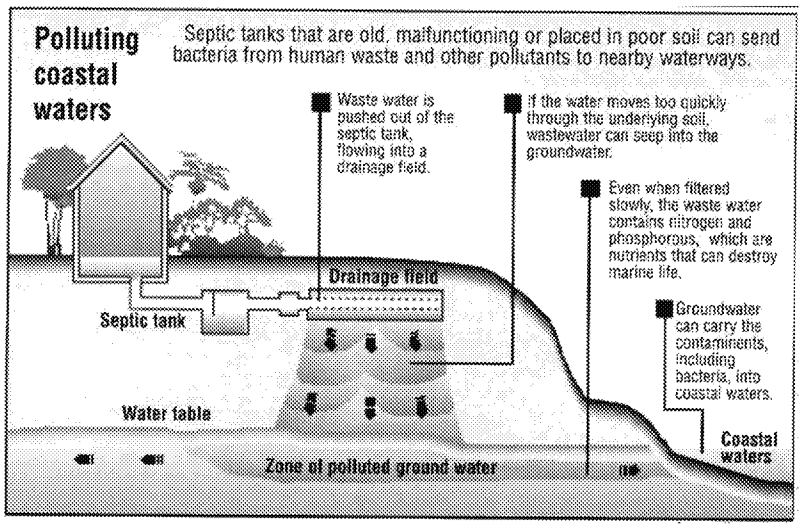
Dr. Barile has a Ph.D. in Environmental Sciences, a Master of Science degree in Marine Biology and a Bachelor's degree in Biological Sciences, all from Florida Tech in Melbourne, FL. Dr. Barile is a former Link Foundation Post Doctoral Fellow in the Division of Marine Science at Harbor Branch Oceanographic Institution in Ft. Pierce, FL. and a former NOAA Sea Grant- Knauss Marine Policy Fellow with residence in the US federal government's executive branch on ocean policy development at the National Science Foundation in Washington, D.C. Dr. Barile has 30 years of experience as a scientist and has authored over 20 peer-reviewed scientific articles, book chapters and public policy documents largely on Florida aquatic ecosystems, including the Indian River Lagoon. He has been relied upon to give expert consultation and testimony to the Florida legislature on the role of land-based sources of pollution to Florida's aquatic ecosystems and served on the Florida Senate's Consumer Fertilizer Task Force.

This report addresses new scientific information that may be used to compel the US Environmental Protection Agency (EPA) under the Clean Water Act to require the Florida Department of Environmental Protection (FDEP) to reassess its Numerical Nutrient Criteria (NNC) for Impaired Waters of the Indian River Lagoon. This analysis includes new scientific evidence, since adoption of the 2013 EPA-approved NNC, revising the understanding of nutrient loading sources to the IRL system and processes that now confound the models used to create the IRL NNC. Since the EPA's adoption of the 2013 NNC, the FDEP's TMDL nutrient reduction

regulatory program has resulted in 1) annual nutrient load and nutrient concentration exceedances that have resulted in 2) unprecedented high density phytoplankton blooms, 3) a 95% loss of historic seagrass coverage in the northern Indian River Lagoon (NIRL), and 4) subsequent die-off of nearly 400 manatees in the NIRL BMAP/TMDL area during 2021.

1) Florida DEP underestimated the contribution of nutrient loads from septic tanks

Recent modeling work in Florida indicates that nutrient loading from septic tanks (OSDS) is the second largest nutrient loading source to Florida's aquatic ecosystems (Badruzzaman et al. 2012). The University of Florida's Institute of Food & Agricultural Sciences estimates that there are 2.6 million septic tanks in the state that discharge nearly 426 million gallons of wastewater per day into Florida's ground and surface waters (UF-IFAS 2022). Nearly 300,000 OSDS are in the counties along the IRL system. The widespread pollution of OSDS effluent into the IRL is supported by the hydrogeological properties of the surficial aquifer along the Lagoon that mobilizes effluent downgradient to the IRL's surface waters.



From: Barile and Lapointe (1999)

The EPA's NNC are based upon a NIRL BMAP nutrient load estimate that there are 16,171 residences within this watershed basin that utilize Onsite Sewage Disposal Systems (OSDS) or septic tanks for human waste water treatment (FDEP 2021).

This value may be an underestimate, as Brevard County alone has nearly 90,000 residences on septic tanks, where the SJRWMD (1993) estimated that nearly 70% may be "problem tanks" where changing environmental conditions may directly mobilize effluent to nearby surface or groundwaters beyond those available in the TMDL estimates for the central (CIRL) and northern (NIRL) Indian River Lagoon BMAP areas.

Barile (2018) estimated that 43% of the residences and a total of 91,630 residences utilize septic tanks for human sewage disposal in Brevard County. With flooding conditions associated with heavy wet weather and tropical storm activity, steady state models of septic tank effluent loading to adjacent surface waters, such as the SWIL model used in the FDEP's NIRL BMAP nutrient loading estimates, are recognized to be conservative and an underestimate of this significant nutrient loading source.

In fact, a 2016 State of Florida South Florida Water Management District resolution (Resolution of the Governing Board #2016-0712, July 14, 2016) indicated that ***"human wastewater including septic tanks is the major source of excess nitrogen in the Indian River Lagoon and is underestimated in past nutrient loading models."***

Figure 2 to the right is the 2021 FDEP BMAP of the residential septic systems (OSDS) in the NIRL watershed.

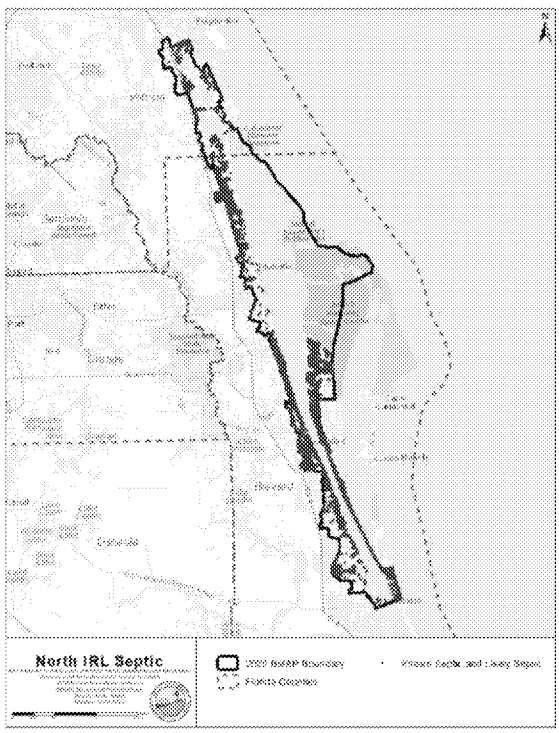


Figure 2. Location of septic systems in the NIRL.

The process of mobilization of septic tank (OSDS) effluent, as a previously underestimated and significant nutrient loading source to the Indian River Lagoon, has been documented recently in several published peer-reviewed academic journal contributions.

In the counties along the ~150 mile long lagoon, nearly 50% of the residences utilize OSDS for wastewater treatment (Barile, 2018), which is significantly higher than the Florida or US national average.

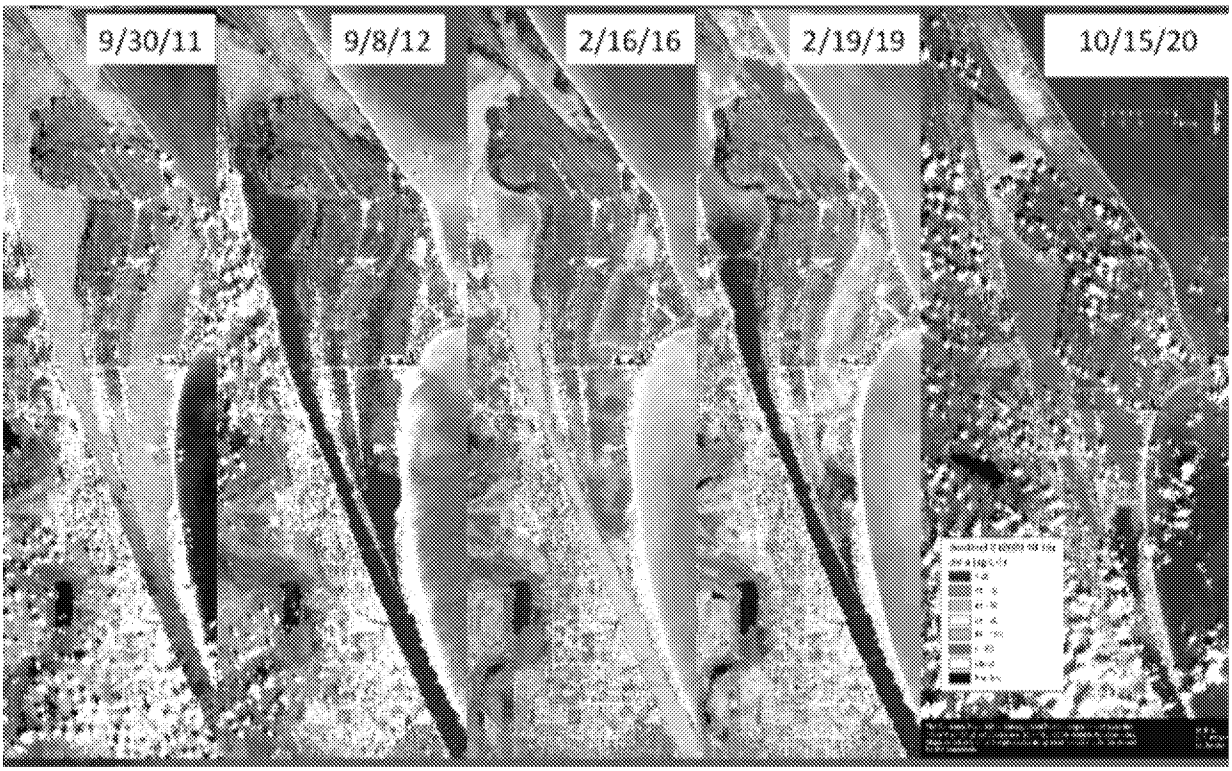
Lapointe et al. (2017) reported significantly high concentrations of septic tank (OSDS) inorganic nitrogen and phosphorus in groundwater monitor wells downgradient and adjacent to residential communities utilizing OSDS in the St. Lucie River, FL the primary tributary to the southern IRL. In adjacent surface waters evidence of significantly elevated wastewater nutrients were detected along with the conservative synthetic wastewater tracer, sucralose. Macroalgae and phytoplankton HAB blooms in both the St. Lucie River and southern Indian River Lagoon were enriched with OSDS wastewater nitrogen as a primary source, including the "green guacamole" *Microcystis* blooms that caused a public health crisis and international media attention in the summer of 2016.

Herren et al. (2021) reported the movement of septic tank (OSDS) effluent with high concentrations of reactive nitrogen and phosphorus into adjacent groundwaters and then into adjacent surface waters of the Sebastian River and Vero Beach lateral canal tributaries and into the CIRL. They traced OSDS as the dominant nitrogen source into macroalgae HABs in the downstream estuary. The study further used a conservative wastewater tracer, sucralose, as an additional line of evidence to trace OSDS loading from OSDS drainfields into adjacent ground and surface waters. There was significantly higher movement of OSDS nitrogen and phosphorus into adjacent ground and surface waters in the rainy "wet" season compared to the dry season.

Lapointe et al. (2015) reported wastewater nitrogen from OSDS as the primary loading source supporting macroalgae HABs at sites along the ~150 mi. IRL system. Sewage nitrogen from OSDS was also reported as a primary source of nitrogen supporting "super bloom" and "brown tide" phytoplankton blooms in the Indian River Lagoon. Total dissolved nitrogen and phosphorus concentrations were also measured above EPA's NNC nutrient thresholds despite high concentration phytoplankton blooms and macroalgae blooms that should deplete water column nutrient concentrations.

Kang et al. (2015) reported for the 2012-2013 "brown tide" *Aureoumba lagunensis* bloom event in the NIRL and Mosquito Lagoon that this HAB species was supported by a sewage nitrogen source from OSDS in the adjacent watersheds. This brown tide in 2012-2013 was a driver in the loss of ~95% of the seagrasses in the NIRL where the 2021 manatee UME occurred.

Barile (2018) documented widespread incorporation of wastewater nitrogen into macroalgal biomass at > 70 sites within tributaries and among the IRL system from Volusia to Palm Beach County. The study indicates that macroalgae HAB species incorporate elevated nitrogen and phosphorus from wastewater into their biomass more significantly during the rainy "wet season" when both elevated mobilization of nearby OSDS effluent sources and where dilapidate wastewater infrastructure either leaks or spills occur. Higher macroalgae tissue nitrogen contents in the rainy season also suggest that nitrogen loads are "externally" derived, and not supplied by "internal" cycling from the sediments or muck deposits.



SJRWMD (2021) Composite image of 2011-2020 HAB chlorophyll levels in the NIRL, all color shades lighter than blue (green, yellow, orange and red) are indicative of excessive HAB chlorophyll levels with higher concentrations from green to red. For reference, any shade darker than "purple" is an NNC exceedance. The HABs in "red" are >20x over the NNC concentration threshold for chlorophyll.

2) The 2013 EPA NNC for the IRL may not be adequate to mitigate harmful algal blooms

The northern and central IRL, Banana River and Mosquito River Lagoons, all "Impaired Waters" portions of the Indian River Lagoon system subject to Clean Water Act and subsequent EPA NNC regulatory action, experienced historically unprecedented and significant "Super blooms" of phytoplankton in 2011-2012 as the FDEP's NNC & TMDL's were going through review and adoption by the EPA. Since the adoption of the 2013 EPA-approved NNCs, nearly every rainy season since has caused excessive external nutrient loads (still ~50% above 2021 NIRL BMAP threshold nitrogen and phosphorus loading estimates) that have resulted in unprecedented phytoplankton and macroalgal HABs.

Whitehouse and Lapointe 2015 reported that widespread macroalgae HABs, *Chaetomorpha* sp. and *Ulva* sp., in the NIRL that overgrow and shade out seagrasses as they have high uptake affinities for low levels of inorganic nitrogen and phosphorus. These macroalgae HAB species, through this physiological ecology study, are demonstrated to reach maximum photosynthetic rates (e.g. *Ulva* sp. doubling biomass every 2 days) at very low level nutrient concentrations, well below the 2013 EPA-approved NNC's for nitrogen and phosphorus. This peer-reviewed scientific study concludes that the current NNC's are not sufficient to limit HABs in the northern IRL where >95% seagrass die-off has occurred and >400 manatees died in 2021.

3) The 2013 EPA-approved NNC for the IRL may not be adequate to mitigate seagrass die-off

The process of seagrass loss in estuaries is directly related to water quality declines. Specifically, these processes have been well documented for the northern Indian River Lagoon. Lapointe et al. (2015) reported the relationship between human sewage nitrogen, blooms of phytoplankton and macroalgae cover and their relation to seagrass loss in the NIRL. The 2021 FDEP BMAP TMDL report for the NIRL has acknowledged the relationships between poor water quality and seagrass demise, and that water quality has been "non-compliant" to support seagrass growth since 2007, per the statement below.

"The mean depth limits of seagrass coverage in the IRL decreased over the years because of changes in water quality resulting from anthropogenic influences. As polluted runoff reaches the Lagoon, it contributes to conditions that prevent the seagrass from growing in deeper water."

Since the 2013 BMAP, further evaluations of the seagrass depth limits in the NIRL have been conducted to reassess whether the NIRL project zones have continued to be compliant. **Table 23** and **Table 24** list the results of both steps of these evaluations since 2013, including the number of years that passed Step 2 of the evaluation. In 2020, the evaluation was conducted using the 2013, 2015, 2017, and 2019 seagrass mapping data, which were the latest datasets available at that time. **Figure 15** and **Figure 16** show the results of both steps of the 2020 evaluation for Project Zones A and B, respectively. Neither of the project zones was compliant. As indicated in the 2013 BMAP, DEP assigns detailed allocations in project zones where compliance is not maintained.

Table 23. Summary of seagrass compliance results, Step 1

Step 1	North A	North B
2007 – 2013	Fail	Fail
2009 – 2015	Fail	Fail
2011 – 2017	Fail	Fail
2013 – 2019	Fail	Fail

Table 24. Summary of seagrass compliance results, Step 2

Note: Parentheses indicate number of years passing of those assessed for the compliance period of record.

Step 2	North A	North B
2007 – 2013	Fail (0 of 4)	Fail (0 of 4)
2009 – 2015	Fail (0 of 4)	Fail (0 of 4)
2011 – 2017	Fail (0 of 4)	Fail (0 of 4)
2013 – 2019	Fail (0 of 4)	Fail (0 of 4)

Lapointe et al. 2020 reported that excessive nutrient loads during the rainy "wet season," which coincides with the period of peak seagrass growth, causes phytoplankton HABs that reduced downwelling light levels (Kd) below scientifically recognized thresholds known to support seagrass growth or seagrass ecosystem restoration. This study detailed the relationships of excess nitrogen loading from sewage, high water column ammonium concentrations, high levels of downwelling light attenuation (Kd) to seagrasses, and biochemical evidence of light limitation to remaining seagrass tissue, indicating stress from low light availability that results in seagrass loss. Carbon isotope analysis, coupled with other

biochemical and environmental data indicate severe light limitation of seagrass growth, even in seagrasses that have survived mortality events during "super bloom" HABs or low dissolved oxygen events resulting from macroalgae and phytoplankton HABs. Furthermore, the current 2013 EPA-approved NNC for nitrogen concentrations found in the NIRL are an order of magnitude above maximum concentrations, reported in Lapointe et al. 2020, for sustaining growth of some seagrass species found in the Indian River Lagoon system. Excess nutrient concentrations reported for the IRL can be directly toxic or indirectly lethal to seagrasses in the IRL system. NNC for the IRL should be revised to address these effects on seagrasses.

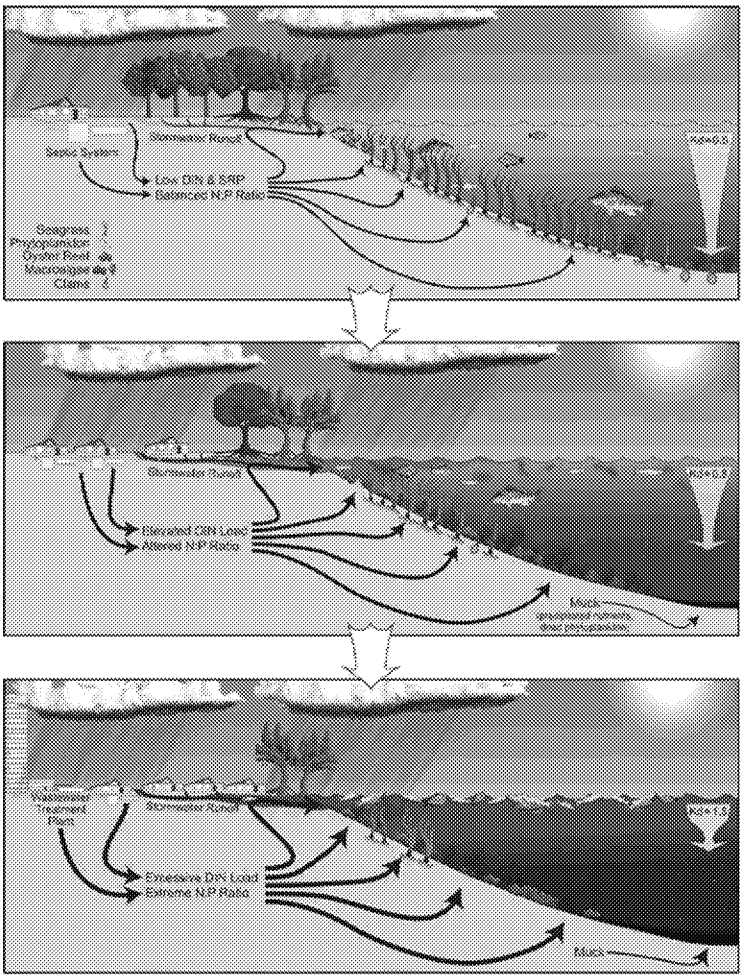


Figure from: Lapointe et al. (2020)

Escalating IRL eutrophication, resulting from low to elevated to excessive nutrient loads and the ecological consequences, including phytoplankton and macroalgae algal blooms, lower downwelling light, seagrass loss, fish kills and muck accumulations. Under elevated nutrient enrichment, the bottom of large portions of the IRL become a "dead zone" devoid of oxygen or light.

4) The 2013 EPA-approved NNC for the IRL does not account for the confounding role of climate change driven nutrient loading and responses of IRL HABs and seagrass communities.

In an invited presentation to then Gubernatorial candidate Congressman Ron DeSantis in August 2018, I provided the case study, based upon the peer-reviewed and published Barile (2018) article, on how human-induced climate change significantly increased nutrient loading into the Indian River Lagoon which resulted in a historically significant "brown tide" event in 2017-2018 and continued seagrass loss. Specifically, I described to the soon to be elected Governor how an intense Category 4 hurricane in September 2017 named Irma, strengthened by anthropogenically induced warming of the Caribbean Sea, resulted in storm conditions that caused the dumping of 30 million gallons or untreated sewage into an already beleaguered Indian River Lagoon. The direct nutrient loading from this event resulted in several tons on "new" nitrogen not accounted for in the EPA-NNC of FDEP TMDL.

In fact, climate change impacts are causing serious impacts to the sustainability of coastal estuaries for several reasons. Most directly, increasing human populations in watersheds results in increasing nutrient loading rates to estuaries such as the IRL. The population growth rate in east-central Florida is one of the fastest in the US, conferring necessary re-estimates of non-point source nutrient loading to the IRL. Increased nutrient loading rates should be updated in FDEP TMDL models as increasing human population density occurs in the IRL BMAP watersheds. Other climate change related phenomena in the southeast US, include warming temperatures in aquatic ecosystems, increased precipitation resulting from more intense and frequent tropical storms and hurricanes and El Nino/La Nina cycling, increase in stochastic rainfall events resulting in increased nutrient loading to Florida's estuaries. Further, warming water temperatures, increased aquatic ecosystem acidification, and consequently, increased dissolved CO2 in aquatic systems, etc. all confer advantages to HABs and disadvantages to seagrass communities, further confounding the calibration of NNCs/TMDLs As increased stochastic nutrient loading to the IRL system continues and increasing periodicity and intensity of HABs have occurred since the 2013 EPA NNC approval, the scientific community has taken notice and reported the following.

Sinha et al. (2017) reported that climate change induced increases in precipitation in the US will increase nutrient loading to coastal waters in the 21st century by 19%. Offsetting this increase will require a 33% reduction in nitrogen loads, presenting a significant management challenge.

Phlips et al (2020) reported how increases in intensity and frequency of El Nino events and hurricanes, resulting in increased precipitation and nutrient loads, and have subsequently increased HAB events in the IRL system.

Phlips et al. (2021) reported that over the past 23 years of record, an increase in physical factors, such as El Nino cycling and tropical storm events has resulted in increased nutrient concentrations, and an ecological "regime shift" with a dramatic increase in peak biomass of phytoplankton HABs that has coincided with seagrass loss in the Indian River Lagoon system.

Barile (2018) reported that recent intense rainfall events have resulted in significant mobilization of human wastewater from OSDS in the IRL BMAP watersheds and from wastewater treatment plant dumping into the IRL, both increasing nutrient loadings and resulting increased incorporation of wastewater nutrients into macroalgal HABs in the IRL system.

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EXHIBIT 2

EARTHJUSTICE

February 7, 2022

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VIA ELECTRONIC AND CERTIFIED MAIL

Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning Water Pollution in the Indian River Lagoon and Effects on Species Under National Marine Fisheries Service Jurisdiction

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency ("EPA") is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality in the Indian River Lagoon and its effect on species under the jurisdiction of the National Marine Fisheries Service ("NMFS"). Specifically, EPA has unlawfully failed to reinitiate section 7 consultation with NMFS in light of significant new information undermining EPA and NMFS's conclusions that the current estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the threatened green turtle, the threatened loggerhead turtle, the endangered smalltooth sawfish, and the threatened Johnson's seagrass.

On December 20, 2021, we provided notice that EPA is in violation of the ESA for failing to reinitiate consultation with the U.S. Fish and Wildlife Service ("FWS") in light of the recent catastrophic die-off of manatees in the Indian River Lagoon caused by nutrient pollution.[1] We explained that new evidence shows that the current estuary-specific numeric nutrient criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to account for the impact of legacy pollution. Recent scientific evidence shows that this same pollution currently devastating the manatee causes tumors in green and loggerhead turtles, contributes to loss of key habitat for the smalltooth sawfish, and is leading to the disappearance of Johnson's seagrass. EPA must therefore reinitiate consultation with NFMS to address the harms from nutrient pollution to these species.

I. LEGAL BACKGROUND

A. EPA's Obligations in Approving Water Quality Standards under the Clean Water Act

The Clean Water Act ("CWA") was enacted almost 50 years ago to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the "Clean Water Act"). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as "total maximum daily loads" ("TMDLs") for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. §130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida's development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA's CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide "reasonable assurances" that point and nonpoint source control measures will achieve the expected load reductions.[2]

B. EPA's Consultation Obligations under the ESA

Congress enacted the Endangered Species Act in 1973 to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16

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[1] *See* Letter from Center for Biological Diversity et al. to EPA re Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon (Dec. 20, 2021).

[2] *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021).

U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species "the highest of priorities," so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state's water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) ("EPA & NMFS MOU"). Such "action agencies" must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—NMFS in the case of the green and loggerhead turtles, the smalltooth sawfish, and Johnson's seagrass. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with NMFS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of NMFS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where "discretionary Federal involvement or control over the action has been retained or is authorized by law." 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act]." *See also* EPA & NMFS MOU at 11206 ("EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA."); *Wild Fish Conservancy v. United States Env't Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

> (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
> (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA's approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida's Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida's Department of Environmental Protection ("FDEP") set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as the numeric nutrient criteria on July 29, 2013, and they are codified as the "Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion" under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with NMFS—as well as with the FWS[3]—multiple times under 50 C.F.R. § 402.13 on its approval of Florida's water quality standards.[4] NMFS concluded that EPA's approval of the estuary-specific numeric nutrient criteria would not likely jeopardize any species under NMFS jurisdiction.[5]

III. NEW INFORMATION REQUIRES REINITATION OF CONSULTATION

Three significant pieces of new information underscore the requirement for EPA to reinitiate consultation with NMFS under 50 C.F.R. § 402.16 on Florida's estuary-specific numeric nutrient criteria. First, new information indicates harm to the green and loggerhead turtles, the smalltooth sawfish, and Johnson's seagrass, due to deterioration in water quality resulting from continuing nitrogen and phosphorus pollution in the Indian River Lagoon, calling into question the overall adequacy of the current TMDLs. Second, new information demonstrates there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, new information indicates that the

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[3] *See* Letter from Center for Biological Diversity et al. to EPA re Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon (Dec. 20, 2021) (detailing FWS consultation history).

[4] *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

[5] *See id.* at 186.

current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety. Finally, new information suggests that the TMDLs underestimated the role of septic systems and climate change in nutrient loading in the Indian River Lagoon and that the TMDLs are therefore inadequate to prevent harmful algal blooms.

A. New Information Demonstrates Harm to Green and Loggerhead Turtles, Smalltooth Sawfish, and Johnson's Seagrass Due to Continuing Deterioration in Water Quality

Manatees are not the only species suffering from the collapse of the Indian River Lagoon. Nutrient pollution causes harm to green and loggerhead turtles, smalltooth sawfish, and Johnson's seagrass. EPA must therefore reinitiate consultation with NMFS to consider whether the current water quality standards are adequate to protect these species.

1. *Green Turtle (Chelonia mydas) and Loggerhead Turtle (Caretta caretta)*

Green turtles (*Chelonia mydas*) were listed under the Endangered Species Act on July 28, 1978, with breeding populations in Florida and along the Pacific Coast of Mexico listed as endangered and all other populations listed as threatened.[6] In 2007, 11 distinct population segments ("DPS") were identified by NMFS and FWS, and in 2015 the listing status of each DPS was reevaluated. The North Atlantic DPS is now listed as threatened and includes the green turtle population that resides in the Indian River Lagoon.[7] "Historically, green turtles were exploited for their fat, meat and eggs, causing global population declines."[8] Bycatch, direct harvest, vessel strikes, loss of nesting habitat, pollution, climate change and disease continue to plague the species.[9] The Indian River Lagoon serves as an important foraging and developmental habitat for juvenile turtles in this DPS, and "[d]evelopmental habitats require the same intensity of protection as nesting beaches. If we fail to protect these habitats and their juvenile turtle residents, there will be no need to preserve nesting beaches."[10]

Loggerhead turtles (*Caretta caretta*) were listed as threatened throughout their range under the Endangered Species Act on July 28, 1978.[11] In 2011, the listing was revised to reflect nine DPSs. Five DPSs were listed as endangered and four were listed as threatened. Loggerhead turtles found in the Indian River Lagoon are in the Northwest Atlantic Ocean DPS which is listed

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[6] Seminoff et al., Status Review of the Green Turtle (*Chelonia mydas*) Under the Endangered Species Act (March 2015).
[7] *Id.*
[8] NOAA, Green Turtle (*Chelonia mydas*), *available at* https://www.fisheries.noaa.gov/species/green-turtle (last visited Jan. 6, 2022).
[9] *Id.*
[10] Zug and Glor, Estimates of Age and Growth in a Population of Green Sea Turtles (*Chelonia mydas*) from the Indian River lagoon system, Florida: A Skeletochronological Analysis (Aug. 1998); NOAA, Green Turtle (*Chelonia mydas*), *available at* https://www.fisheries.noaa.gov/species/green-turtle (last visited Jan. 6, 2022).
[11] NOAA, Loggerhead Turtle (*Caretta caretta*), *available at* https://www.fisheries.noaa.gov/species/loggerhead-turtle (last visited Jan. 10, 2022).

as threatened.[12] Threats to loggerheads include pollution, bycatch, loss of nesting habitat, vessel strikes, direct harvest, and climate change.[13] The Indian River Lagoon provides important developmental habitat for loggerhead subadults.[14]

One of the greatest threats to the green turtles in the Indian River Lagoon is the debilitating effects of fibropapillomatosis, "a chronic and often lethal tumor-forming disease in sea turtles."[15] It is characterized by tumor growth that occurs on the skin, eyes, conjunctiva, and visceral organs. The severity of the disease is determined by the size and location of the tumor growths, with mobility and organ function frequently impeded, leading to the stranding of turtles on beaches and subsequent death.[16] Since "[c]ancers have the potential to drive already threatened wildlife towards extinction" fibropapillomatosis is an exceptionally concerning issue[17]—so much so that the National Oceanic and Atmospheric Administration (NOAA) and FWS convened an expert workshop in 2017 to determine how to deal with the high prevalence of tumors in Florida turtles and the resulting high mortality rate.[18] Unfortunately, the workshop addressed current ineffective rehabilitation practices without addressing the root cause of the issue.

A 2021 study found a recent increase in the prevalence of fibropapillomatosis in green turtles, with the prevalence of fibropapillomatosis in the Indian River Lagoon particularly high.[19]

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[12] *Id.*
[13] *Id.*
[14] Ehrhart, Marine Turtles of the Indian River Lagoon System (1983).
[15] Van Houtan, et al., Eutrophication and the Dietary Promotion of Sea Turtle Tumors (Sep. 30, 2014).
[16] Herbst and Klein, Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors (1995); Perrault, et al., Insights on Immune Function in Free-Ranging Green Sea Turtles (*Chelonia mydas*) with and without Fibropapillomatosis (Mar. 18, 2021); Dujon, et al., Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors (Oct. 8, 2021); Stacy, et al., Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis (Sep. 6, 2017).
[17] Dujon, et al., Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors (Oct. 8, 2021).
[18] Stacy, et al., Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis (Sep. 6, 2017).
[19] Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat (Oct. 2021); Herbst and Klein, Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors (1995); Perrault, et al., Insights on Immune Function in Free-Ranging Green Sea Turtles (*Chelonia mydas*) with and without Fibropapillomatosis (Mar. 18, 2021); Stacy, et al., Report of the Technical Expert Workshop: Developing Recommendations for Field Response, Captive Management, and Rehabilitation of Sea Turtles with Fibropapillomatosis (Sep. 6, 2017).

The article explained that there was a strong correlation between the increased numbers of green turtles suffering from tumors and eutrophication of coastal waters caused by nutrient pollution.[20]

It was originally thought that only green turtles acquire fibropapillomatosis but studies now show that all marine turtles, including the loggerhead turtle, are susceptible to these debilitating tumors, "raising concerns about disease impacts on these species."[21] Fibropapillomatosis is not widely researched in loggerhead turtles and its exact impact on loggerhead turtle populations is not fully understood, but the tumors are associated with heavily polluted coastal waters in all turtles.[22] It can therefore be assumed that the effects of fibropapillomatosis could be equally detrimental to the loggerhead turtle in the Indian River Lagoon. EPA must therefore reinitiate consultation with NMFS to consider new information demonstrating harm to green and loggerhead turtles from nutrient pollution in the Indian River Lagoon.

2. *Smalltooth sawfish (Pristis pectinata)*

Smalltooth sawfish (*Pristis pectinata*) were once commonly found in waters from Texas to North Carolina. Now they are only found in the waters of southern Florida, and it is thought that their population is less than 5% of its size at the time of European settlement.[23] This decline is due to bycatch and habitat loss, especially the loss of red mangrove habitats. NOAA listed the U.S. DPS of smalltooth sawfish as endangered in 2003.[24] It was the first marine fish to receive federal protection.[25]

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[20] Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat (Oct. 2021; Van Houtan, et al., Land Use, Macroalgae, and a Tumor-Forming Disease in Marine Turtles (Sep. 29, 2010); Van Houtan, et al., Eutrophication and the Dietary Promotion of Sea Turtle Tumors (Sep. 30, 2014); Dujon, et al., Sea Turtles in the Cancer Risk Landscape: A Global Meta-Analysis of Fibropapillomatosis Prevalence and Associated Risk Factors (Oct. 8, 2021); Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded versus a Nondegraded Habitat (Oct. 2021).

[21] Herbst and Klein, Green Turtle Fibropapillomatosis: Challenges to Assessing the Role of Environmental Cofactors (1995); Aguirre and Lutz, Marine Turtles as Sentinels of Ecosystem Health: Is Fibropapillomatosis and Indicator (May 13, 2004).

[22] Aguirre and Lutz, Marine Turtles as Sentinels of Ecosystem Health: Is Fibropapillomatosis and Indicator (May 13, 2004).

[23] NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009)

[24] *Id.*

[25] NOAA, Smalltooth Sawfish (*Pristis pectinate*), *available at* https://www.fisheries.noaa.gov/species/smalltooth-sawfish (last visited Jan. 10, 2022).

Sawfish rely primarily on red mangroves as nurseries.[26] Red mangroves are one of the primary mangrove species in the Indian River Lagoon.[27] Nurseries provide food for maturing sawfish as well as protection from predators.[28]

Mangrove loss worldwide has been catastrophic ranging from 20% to 35% since 1980, at a 1-8% rate of loss per year.[29] This rate of loss exceeds that of tropical rainforests and coral reefs.[30] The Indian River Lagoon alone has seen an 86% loss in its mangrove population since the 1940s.[31] "If special management needs aren't addressed, the functional elimination of nurseries through habitat destruction could push populations [of smalltooth sawfish] to a tipping point where suitable nursery areas become a limiting factor to recovery."[32] This is especially relevant in the Indian River Lagoon where the Florida Fish and Wildlife Conservation Commission states that a fisherman in the late 1800s caught 300 smalltooth sawfish in one season.[33] In comparison, only seven sawfish have been caught in the Indian River Lagoon since 2016.[34]

The loss of mangrove habitats is due primarily to anthropogenic threats including logging for timber and fuel, and removal for coastal development and aquaculture.[35] But research shows

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[26] Brame, et al., Biology, Ecology, and Status of the Smalltooth Sawfish *Pristis pectinata* in the USA (May 23, 2019); NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).
[27] SJWMD, Indian River Lagoon: An Introduction to a Natural Treasure (2007).
[28] Brame, et al., Biology, Ecology, and Status of the Smalltooth Sawfish *Pristis pectinata* in the USA (May 23, 2019); NMFS and NOAA, Smalltooth Sawfish Recovery Plan (*Pristis pectinata*) (Jan. 2009); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012); Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).
[29] Polidoro, et al., The loss of Species: Mangrove Extinction Risk and Geographic Areas of Global Concern (April 8, 2010); FAO, Status and Trends in Mangrove Area Extent Worldwide (Dec. 2003), *available at* https://www.fao.org/3/j1533e/j1533e00.htm (last visited Jan. 5, 2022); Valiela, et al., Mangrove Forests: One of the World's Threatened Major Tropical Environments (Oct. 2001).
[30] Valiela, et al., Mangrove Forests: One of the World's Threatened Major Tropical Environments (Oct. 2001).
[31] FDEP, Florida's Mangroves (Feb. 11, 2021).
[32] Norton, et al., Designating Critical Habitat for Juvenile Endangered Smalltooth Sawfish in the United States (Aug. 13, 2012).
[33] FFWCC, General Information on Smalltooth Sawfish, *available at* https://myfwc.com/research/saltwater/fish/sawfish/general-information/ (last visited Jan. 6, 2022).
[34] Galoustian, Endangered Juvenile Smalltooth Sawfish found in St. Lucie River (Nov. 19, 2020).
[35] Polidoro, et al., The loss of Species: Mangrove Extinction Risk and Geographic Areas of Global Concern (April 8, 2010); Valiela, et al., Mangrove Forests: One of the World's Threatened Major Tropical Environments (Oct. 2001).

that mangroves are also sensitive to the effects of eutrophication. High nutrient water content causes an increase in above-ground production, creating an appearance of high productivity and proliferation, but this comes at the cost of root production. Without a solid root foundation, mangroves are at risk to changes in weather and habitat conditions.[36] Nutrient pollution may thus continue to exacerbate the loss of mangrove habitats in the Indian River Lagoon, causing further loss of habitat for the smalltooth sawfish. EPA must therefore reinitiate consultation with NMFS to consider new information suggesting that nutrient pollution in the Indian River Lagoon may be contributing to loss of habitat, or causing other harmful impacts, for the smalltooth sawfish.

3. *Johnson's Seagrass (Halophila johnsonii Eiseman)*

Johnson's Seagrass (*Halophila johnsonii Eiseman*) is a rare seagrass found only in lagoons on the east coast of Florida and was the first marine plant species to be listed under the ESA.[37] In the Indian River Lagoon, Johnson's seagrass is found between Sebastian and Jupiter Inlets.[38]

Eutrophication is considered "a major cause of seagrass disappearance worldwide."[39] Its impact has been highly detrimental on the seagrass in the Indian River Lagoon.[40] Seagrass loss in the Indian River Lagoon has been disastrous with a 58% loss in the last decade.[41] Phytoplankton blooms caused by high nutrient loads resulted in "a 95% loss of seagrass cover" between 2011 and 2017 in the northern and central segments of the Indian River Lagoon.[42] Johnson's Seagrass is especially susceptible to the effects of these blooms.[43] EPA must therefore reinitiate consultation with NMFS to consider new information suggesting that nutrient pollution in the Indian River Lagoon may be contributing the loss of Johnson's seagrass.

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[36] Lovelock, et al., Nutrient Enrichment Increases Mortality of Mangroves (May 19, 2009); Reef, et al., Nutrition of Mangroves (June 21, 2010).
[37] NMFS is currently reevaluating the listing status of Johnson's seagrass based on new genetic information suggesting it is not a unique taxon. *See* 86 Fed. Reg. 72,908 (Dec. 23, 2021). However, unless and until that process concludes in the delisting of Johnson's seagrass from the endangered species list, EPA and NMFS have a duty to ensure its protection.
[38] Dawes et al., Seagrass Biodiversity in the Indian River Lagoon (1995).
[39] Burkholder, et al., Seagrass and Eutrophication (2007); *see also* Schmdt, et al., Regional-Scale Effects of Eutrophication on Ecosystem Structure and Services of Seagrass Beds (2012); Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).
[40] Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021); SJRWMD, Recognizing the Importance of Seagrass, Working to Improve Water Quality (Mar. 4, 2021).
[41] Moore, Can this Seagrass Restoration Method Work even Before Indian River Lagoon Gets Clean? (Oct. 7, 2021); *see also* Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).
[42] Herren, et al., Septic Systems Drive Nutrient Enrichment of Groundwaters and Eutrophication in the Urbanized Indian River Lagoon, Florida (Oct. 9, 2021).
[43] NMFS and NOAA, Final Recovery Plan for Johnson's Seagrass (*Halophila johnsonii* Eiseman) (Sep. 2002).

B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions

In addition to the recent information detailing harms to federally-protected species from nutrient pollution, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.[44] Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a "Blue-green Algae Task Force," appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that "[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards." Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended "the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts." *Id.* It further recommended "that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically." *Id.*

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[44] *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with "the assumptions and requirements of any available wasteload allocation" in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, "the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable").

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, Marine Pollution Bulletin 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of "emergency wet weather" surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.[45]

Finally, a 2020 Florida Public Employees for Environmental Responsibility ("Florida PEER") report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* https://www.peer.org/2020-florida-enforcement-report/ (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, "the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach." *Id.* at 35. As Florida PEER Director Jerry Phillips explained, "[r]ather than seeking major reductions in our pollution load, DEP's reliance on small fines makes pollution an acceptable cost of doing business." *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* https://www.peer.org/florida-pollution-enforcement-fell-into-covid-coma/ (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.[46]

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[45] *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida's Indian River Lagoon, 43 Harmful Algae 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

[46] *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, Florida Today (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, Florida Today (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, Florida Today (May 7, 2021).

EPA must thus reinitiate consultation with NMFS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

2. The TMDLs Lack Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) ("CIRL BMAP"). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans ("BMAPs"), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon ("NIRL BMAP"); and (3) the Banana River Lagoon ("BRL BMAP"). These BMAPs include agricultural best management practices ("BMPs") that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner's responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services ("FDACS") is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the rules, none have faced penalties.[47] As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, "[u]nfortunately we have not seen a hammer come down from

[47] *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/ (last visited Dec. 1, 2021).

FDEP. . . . There's a carrot and there's a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick's not working."[48]

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.,* CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinitiate consultation with NMFS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass loss, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which "fluxes" nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.[49] Brevard County recently posited that "[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters." Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases

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[48] *Id. See also* MacLaughlin, Will Basin Management Action Plans Restore Florida's Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs "need more regulatory teeth if they are to succeed"); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) ("[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation").

[49] Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan (last visited on Dec. 1, 2021).

light availability to seagrass and further contributes to seagrass loss.[50] It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.[51]

EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading" in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety "to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality." EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the "Spatial Watershed Iterative Loading or 'SWIL' Model"—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.,* NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.[52] EPA must therefore reinitiate consultation with NMFS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

D. New Information Suggests the TMDLs Underestimate the Role of Septic Systems and Climate Change in Nutrient Loading in the Indian River Lagoon

The attached expert report by Dr. Peter Barile compiles additional new scientific evidence indicating that the current TMDLs in the Indian River Lagoon are insufficient at preventing harmful algal blooms and seagrass loss. Specifically, Dr. Barile's report explains that nutrient loads from septic tanks were underestimated in the approved numeric nutrient criteria and that they do not account for the confounding role of climate change in driving nutrient loading. He concludes that the current numeric nutrient criteria for nitrogen "are an order of magnitude above the maximum concentrations reported . . . for sustaining growth of some seagrass species found in the Indian River Lagoon system." Barile Report at 8. EPA must therefore reinitiate consultation in light of evidence that the current TMDLs are insufficient to protect ecosystem health in the Indian River Lagoon.

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[50] Phlips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, Estuarine, Coastal and Shelf Science (Sep. 2002).
[51] Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, Florida Today (Nov. 24, 2013).
[52] *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, Water (2021) (explaining that in Lake Okeechobee, "[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake").

IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinitiate formal consultation with NMFS concerning EPA's approval of Florida's estuary-specific numeric nutrient criteria in light of recent new information about harms to federally-protected species under NMFS jurisdiction and new information indicating that the current numeric nutrient standards are insufficient. If EPA is unwilling to take action within sixty days to reinitiate consultation, we plan to seek redress through litigation.

Sincerely,

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Report on recent scientific evidence (post-2013) to compel the USEPA and FDEP to reassess Indian River Lagoon, FL Numerical Nutrient Criteria

Peter Barile, Ph.D. Senior Scientist
Marine Research & Consulting, Inc., Melbourne FL

This is an expert report by Peter Barile, Ph.D., Senior Scientist, Marine Research & Consulting, Inc. Melbourne, Florida, on the scientific description of the health of the Indian River Lagoon as it relates to the 2013 EPA-approved Numerical Nutrient Criteria for the Indian River Lagoon system, excess nutrient loading and concentrations, harmful algal blooms and subsequently to seagrasses die-off and loss of over 400 manatees in Brevard County in 2021.

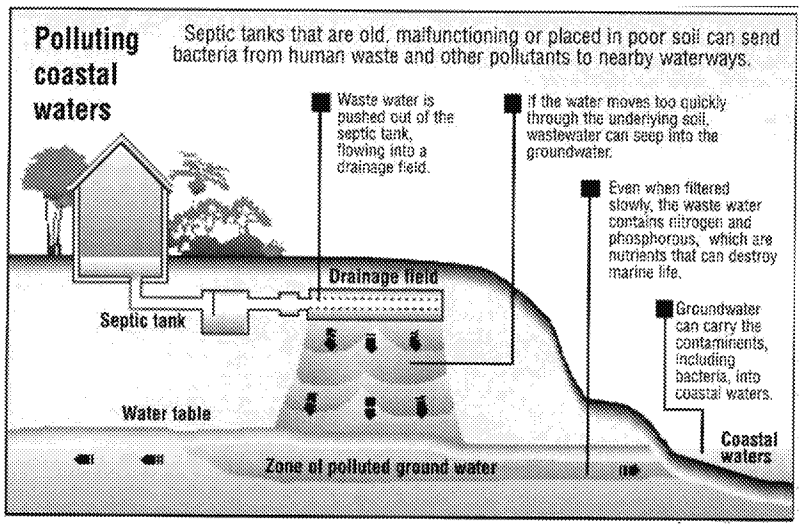
Dr. Barile has a Ph.D. in Environmental Sciences, a Master of Science degree in Marine Biology and a Bachelor's degree in Biological Sciences, all from Florida Tech in Melbourne, FL. Dr. Barile is a former Link Foundation Post Doctoral Fellow in the Division of Marine Science at Harbor Branch Oceanographic Institution in Ft. Pierce, FL. and a former NOAA Sea Grant- Knauss Marine Policy Fellow with residence in the US federal government's executive branch on ocean policy development at the National Science Foundation in Washington, D.C. Dr. Barile has 30 years of experience as a scientist and has authored over 20 peer-reviewed scientific articles, book chapters and public policy documents largely on Florida aquatic ecosystems, including the Indian River Lagoon. He has been relied upon to give expert consultation and testimony to the Florida legislature on the role of land-based sources of pollution to Florida's aquatic ecosystems and served on the Florida Senate's Consumer Fertilizer Task Force.

This report addresses new scientific information that may be used to compel the US Environmental Protection Agency (EPA) under the Clean Water Act to require the Florida Department of Environmental Protection (FDEP) to reassess its Numerical Nutrient Criteria (NNC) for Impaired Waters of the Indian River Lagoon. This analysis includes new scientific evidence, since adoption of the 2013 EPA-approved NNC, revising the understanding of nutrient loading sources to the IRL system and processes that now confound the models used to create the IRL NNC. Since the EPA's adoption of the 2013 NNC, the FDEP's TMDL nutrient reduction

regulatory program has resulted in 1) annual nutrient load and nutrient concentration exceedances that have resulted in 2) unprecedented high density phytoplankton blooms, 3) a 95% loss of historic seagrass coverage in the northern Indian River Lagoon (NIRL), and 4) subsequent die-off of nearly 400 manatees in the NIRL BMAP/TMDL area during 2021.

1) Florida DEP underestimated the contribution of nutrient loads from septic tanks

Recent modeling work in Florida indicates that nutrient loading from septic tanks (OSDS) is the second largest nutrient loading source to Florida's aquatic ecosystems (Badruzzaman et al. 2012). The University of Florida's Institute of Food & Agricultural Sciences estimates that there are 2.6 million septic tanks in the state that discharge nearly 426 million gallons of wastewater per day into Florida's ground and surface waters (UF-IFAS 2022). Nearly 300,000 OSDS are in the counties along the IRL system. The widespread pollution of OSDS effluent into the IRL is supported by the hydrogeological properties of the surficial aquifer along the Lagoon that mobilizes effluent downgradient to the IRL's surface waters.



From: Barile and Lapointe (1999)

The EPA's NNC are based upon a NIRL BMAP nutrient load estimate that there are 16,171 residences within this watershed basin that utilize Onsite Sewage Disposal Systems (OSDS) or septic tanks for human waste water treatment (FDEP 2021).

This value may be an underestimate, as Brevard County alone has nearly 90,000 residences on septic tanks, where the SJRWMD (1993) estimated that nearly 70% may be "problem tanks" where changing environmental conditions may directly mobilize effluent to nearby surface or groundwaters beyond those available in the TMDL estimates for the central (CIRL) and northern (NIRL) Indian River Lagoon BMAP areas.

Barile (2018) estimated that 43% of the residences and a total of 91,630 residences utilize septic tanks for human sewage disposal in Brevard County. With flooding conditions associated with heavy wet weather and tropical storm activity, steady state models of septic tank effluent loading to adjacent surface waters, such as the SWIL model used in the FDEP's NIRL BMAP nutrient loading estimates, are recognized to be conservative and an underestimate of this significant nutrient loading source.

In fact, a 2016 State of Florida South Florida Water Management District resolution (Resolution of the Governing Board #2016-0712, July 14, 2016) indicated that ***"human wastewater including septic tanks is the major source of excess nitrogen in the Indian River Lagoon and is underestimated in past nutrient loading models."***

Figure 2 to the right is the 2021 FDEP BMAP of the residential septic systems (OSDS) in the NIRL watershed.

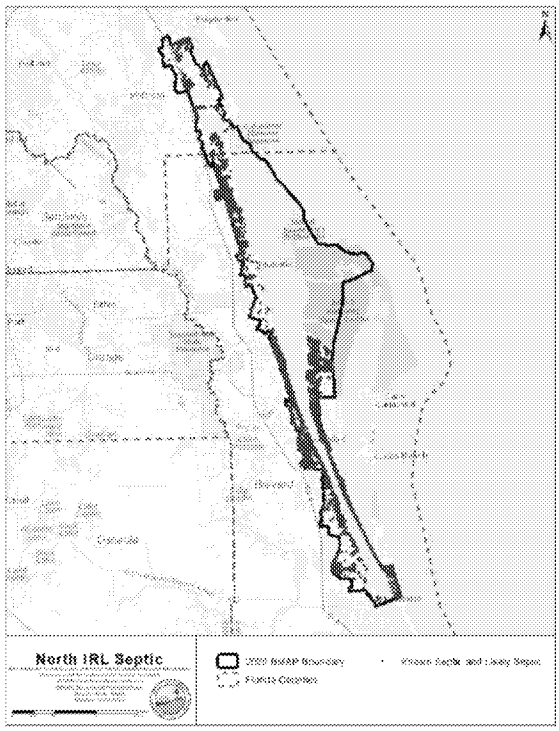


Figure 2. Location of septic systems in the NIRL.

The process of mobilization of septic tank (OSDS) effluent, as a previously underestimated and significant nutrient loading source to the Indian River Lagoon, has been documented recently in several published peer-reviewed academic journal contributions.

In the counties along the ~150 mile long lagoon, nearly 50% of the residences utilize OSDS for wastewater treatment (Barile, 2018), which is significantly higher than the Florida or US national average.

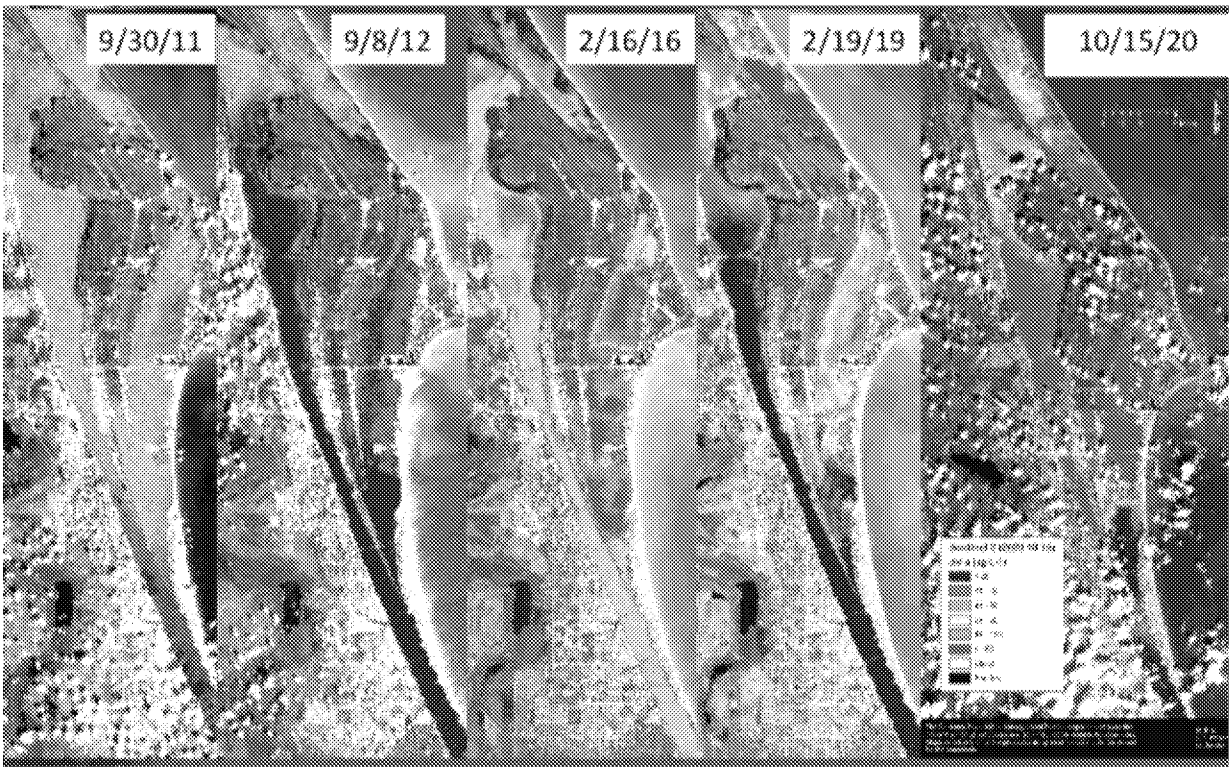
Lapointe et al. (2017) reported significantly high concentrations of septic tank (OSDS) inorganic nitrogen and phosphorus in groundwater monitor wells downgradient and adjacent to residential communities utilizing OSDS in the St. Lucie River, FL the primary tributary to the southern IRL. In adjacent surface waters evidence of significantly elevated wastewater nutrients were detected along with the conservative synthetic wastewater tracer, sucralose. Macroalgae and phytoplankton HAB blooms in both the St. Lucie River and southern Indian River Lagoon were enriched with OSDS wastewater nitrogen as a primary source, including the "green guacamole" *Microcystis* blooms that caused a public health crisis and international media attention in the summer of 2016.

Herren et al. (2021) reported the movement of septic tank (OSDS) effluent with high concentrations of reactive nitrogen and phosphorus into adjacent groundwaters and then into adjacent surface waters of the Sebastian River and Vero Beach lateral canal tributaries and into the CIRL. They traced OSDS as the dominant nitrogen source into macroalgae HABs in the downstream estuary. The study further used a conservative wastewater tracer, sucralose, as an additional line of evidence to trace OSDS loading from OSDS drainfields into adjacent ground and surface waters. There was significantly higher movement of OSDS nitrogen and phosphorus into adjacent ground and surface waters in the rainy "wet" season compared to the dry season.

Lapointe et al. (2015) reported wastewater nitrogen from OSDS as the primary loading source supporting macroalgae HABs at sites along the ~150 mi. IRL system. Sewage nitrogen from OSDS was also reported as a primary source of nitrogen supporting "super bloom" and "brown tide" phytoplankton blooms in the Indian River Lagoon. Total dissolved nitrogen and phosphorus concentrations were also measured above EPA's NNC nutrient thresholds despite high concentration phytoplankton blooms and macroalgae blooms that should deplete water column nutrient concentrations.

Kang et al. (2015) reported for the 2012-2013 "brown tide" *Aureoumba lagunensis* bloom event in the NIRL and Mosquito Lagoon that this HAB species was supported by a sewage nitrogen source from OSDS in the adjacent watersheds. This brown tide in 2012-2013 was a driver in the loss of ~95% of the seagrasses in the NIRL where the 2021 manatee UME occurred.

Barile (2018) documented widespread incorporation of wastewater nitrogen into macroalgal biomass at > 70 sites within tributaries and among the IRL system from Volusia to Palm Beach County. The study indicates that macroalgae HAB species incorporate elevated nitrogen and phosphorus from wastewater into their biomass more significantly during the rainy "wet season" when both elevated mobilization of nearby OSDS effluent sources and where dilapidate wastewater infrastructure either leaks or spills occur. Higher macroalgae tissue nitrogen contents in the rainy season also suggest that nitrogen loads are "externally" derived, and not supplied by "internal" cycling from the sediments or muck deposits.



SJRWMD (2021) Composite image of 2011-2020 HAB chlorophyll levels in the NIRL, all color shades lighter than blue (green, yellow, orange and red) are indicative of excessive HAB chlorophyll levels with higher concentrations from green to red. For reference, any shade darker than "purple" is an NNC exceedance. The HABs in "red" are >20x over the NNC concentration threshold for chlorophyll.

2) The 2013 EPA NNC for the IRL may not be adequate to mitigate harmful algal blooms

The northern and central IRL, Banana River and Mosquito River Lagoons, all "Impaired Waters" portions of the Indian River Lagoon system subject to Clean Water Act and subsequent EPA NNC regulatory action, experienced historically unprecedented and significant "Super blooms" of phytoplankton in 2011-2012 as the FDEP's NNC & TMDL's were going through review and adoption by the EPA. Since the adoption of the 2013 EPA-approved NNCs, nearly every rainy season since has caused excessive external nutrient loads (still ~50% above 2021 NIRL BMAP threshold nitrogen and phosphorus loading estimates) that have resulted in unprecedented phytoplankton and macroalgal HABs.

Whitehouse and Lapointe 2015 reported that widespread macroalgae HABs, *Chaetomorpha* sp. and *Ulva* sp., in the NIRL that overgrow and shade out seagrasses as they have high uptake affinities for low levels of inorganic nitrogen and phosphorus. These macroalgae HAB species, through this physiological ecology study, are demonstrated to reach maximum photosynthetic rates (e.g. *Ulva* sp. doubling biomass every 2 days) at very low level nutrient concentrations, well below the 2013 EPA-approved NNC's for nitrogen and phosphorus. This peer-reviewed scientific study concludes that the current NNC's are not sufficient to limit HABs in the northern IRL where >95% seagrass die-off has occurred and >400 manatees died in 2021.

3) The 2013 EPA-approved NNC for the IRL may not be adequate to mitigate seagrass die-off

The process of seagrass loss in estuaries is directly related to water quality declines. Specifically, these processes have been well documented for the northern Indian River Lagoon. Lapointe et al. (2015) reported the relationship between human sewage nitrogen, blooms of phytoplankton and macroalgae cover and their relation to seagrass loss in the NIRL. The 2021 FDEP BMAP TMDL report for the NIRL has acknowledged the relationships between poor water quality and seagrass demise, and that water quality has been "non-compliant" to support seagrass growth since 2007, per the statement below.

"The mean depth limits of seagrass coverage in the IRL decreased over the years because of changes in water quality resulting from anthropogenic influences. As polluted runoff reaches the Lagoon, it contributes to conditions that prevent the seagrass from growing in deeper water."

Since the 2013 BMAP, further evaluations of the seagrass depth limits in the NIRL have been conducted to reassess whether the NIRL project zones have continued to be compliant. **Table 23** and **Table 24** list the results of both steps of these evaluations since 2013, including the number of years that passed Step 2 of the evaluation. In 2020, the evaluation was conducted using the 2013, 2015, 2017, and 2019 seagrass mapping data, which were the latest datasets available at that time. **Figure 15** and **Figure 16** show the results of both steps of the 2020 evaluation for Project Zones A and B, respectively. Neither of the project zones was compliant. As indicated in the 2013 BMAP, DEP assigns detailed allocations in project zones where compliance is not maintained.

Table 23. Summary of seagrass compliance results, Step 1

Step 1	North A	North B
2007 – 2013	Fail	Fail
2009 – 2015	Fail	Fail
2011 – 2017	Fail	Fail
2013 – 2019	Fail	Fail

Table 24. Summary of seagrass compliance results, Step 2

Note: Parentheses indicate number of years passing of those assessed for the compliance period of record.

Step 2	North A	North B
2007 – 2013	Fail (0 of 4)	Fail (0 of 4)
2009 – 2015	Fail (0 of 4)	Fail (0 of 4)
2011 – 2017	Fail (0 of 4)	Fail (0 of 4)
2013 – 2019	Fail (0 of 4)	Fail (0 of 4)

Lapointe et al. 2020 reported that excessive nutrient loads during the rainy "wet season," which coincides with the period of peak seagrass growth, causes phytoplankton HABs that reduced downwelling light levels (Kd) below scientifically recognized thresholds known to support seagrass growth or seagrass ecosystem restoration. This study detailed the relationships of excess nitrogen loading from sewage, high water column ammonium concentrations, high levels of downwelling light attenuation (Kd) to seagrasses, and biochemical evidence of light limitation to remaining seagrass tissue, indicating stress from low light availability that results in seagrass loss. Carbon isotope analysis, coupled with other

biochemical and environmental data indicate severe light limitation of seagrass growth, even in seagrasses that have survived mortality events during "super bloom" HABs or low dissolved oxygen events resulting from macroalgae and phytoplankton HABs. Furthermore, the current 2013 EPA-approved NNC for nitrogen concentrations found in the NIRL are an order of magnitude above maximum concentrations, reported in Lapointe et al. 2020, for sustaining growth of some seagrass species found in the Indian River Lagoon system. Excess nutrient concentrations reported for the IRL can be directly toxic or indirectly lethal to seagrasses in the IRL system. NNC for the IRL should be revised to address these effects on seagrasses.

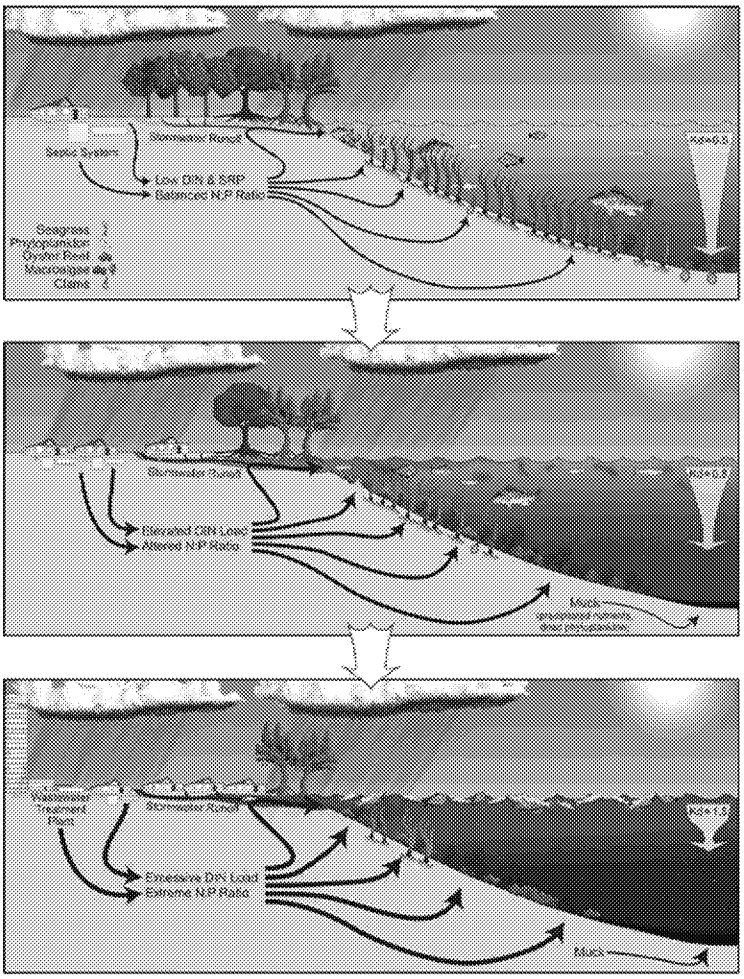


Figure from: Lapointe et al. (2020)

Escalating IRL eutrophication, resulting from low to elevated to excessive nutrient loads and the ecological consequences, including phytoplankton and macroalgae algal blooms, lower downwelling light, seagrass loss, fish kills and muck accumulations. Under elevated nutrient enrichment, the bottom of large portions of the IRL become a "dead zone" devoid of oxygen or light.

4) The 2013 EPA-approved NNC for the IRL does not account for the confounding role of climate change driven nutrient loading and responses of IRL HABs and seagrass communities.

In an invited presentation to then Gubernatorial candidate Congressman Ron DeSantis in August 2018, I provided the case study, based upon the peer-reviewed and published Barile (2018) article, on how human-induced climate change significantly increased nutrient loading into the Indian River Lagoon which resulted in a historically significant "brown tide" event in 2017-2018 and continued seagrass loss. Specifically, I described to the soon to be elected Governor how an intense Category 4 hurricane in September 2017 named Irma, strengthened by anthropogenically induced warming of the Caribbean Sea, resulted in storm conditions that caused the dumping of 30 million gallons or untreated sewage into an already beleaguered Indian River Lagoon. The direct nutrient loading from this event resulted in several tons on "new" nitrogen not accounted for in the EPA-NNC of FDEP TMDL.

In fact, climate change impacts are causing serious impacts to the sustainability of coastal estuaries for several reasons. Most directly, increasing human populations in watersheds results in increasing nutrient loading rates to estuaries such as the IRL. The population growth rate in east-central Florida is one of the fastest in the US, conferring necessary re-estimates of non-point source nutrient loading to the IRL. Increased nutrient loading rates should be updated in FDEP TMDL models as increasing human population density occurs in the IRL BMAP watersheds. Other climate change related phenomena in the southeast US, include warming temperatures in aquatic ecosystems, increased precipitation resulting from more intense and frequent tropical storms and hurricanes and El Nino/La Nina cycling, increase in stochastic rainfall events resulting in increased nutrient loading to Florida's estuaries. Further, warming water temperatures, increased aquatic ecosystem acidification, and consequently, increased dissolved CO2 in aquatic systems, etc. all confer advantages to HABs and disadvantages to seagrass communities, further confounding the calibration of NNCs/TMDLs As increased stochastic nutrient loading to the IRL system continues and increasing periodicity and intensity of HABs have occurred since the 2013 EPA NNC approval, the scientific community has taken notice and reported the following.

Sinha et al. (2017) reported that climate change induced increases in precipitation in the US will increase nutrient loading to coastal waters in the 21st century by 19%. Offsetting this increase will require a 33% reduction in nitrogen loads, presenting a significant management challenge.

Phlips et al (2020) reported how increases in intensity and frequency of El Nino events and hurricanes, resulting in increased precipitation and nutrient loads, and have subsequently increased HAB events in the IRL system.

Phlips et al. (2021) reported that over the past 23 years of record, an increase in physical factors, such as El Nino cycling and tropical storm events has resulted in increased nutrient concentrations, and an ecological "regime shift" with a dramatic increase in peak biomass of phytoplankton HABs that has coincided with seagrass loss in the Indian River Lagoon system.

Barile (2018) reported that recent intense rainfall events have resulted in significant mobilization of human wastewater from OSDS in the IRL BMAP watersheds and from wastewater treatment plant dumping into the IRL, both increasing nutrient loadings and resulting increased incorporation of wastewater nutrients into macroalgal HABs in the IRL system.

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Message

From: Palmer, Leif [Palmer.Leif@epa.gov]
Sent: 5/2/2022 1:50:40 PM
To: Bouma, Stacey [Bouma.Stacey@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]
CC: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Nicholson, John [Nicholson.John@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; R4ORC.SPECIALASSISTANT [R4ORC.SPECIALASSISTANT@epa.gov]
Subject: RE: QUESTION: Manatee NOI briefing May 5 - Is it OKAY for RA to attend.....
Attachments: 60-Day Notice of Violations of the ESA for Failing to Reinitiate Consultation Concerning Unusual Mortality Event for Manatees (1).pdf

That's correct. The NOI does not mention the Sierra Club. Since this is in an internal briefing, Daniel can certainly participate.

Copying Kavita for awareness.

Leif Palmer
Regional Counsel
Office of Region Counsel
EPA Region 4
404/562-9542
770/856-2876

From: Bouma, Stacey <Bouma.Stacey@epa.gov>
Sent: Monday, May 2, 2022 9:15 AM
To: Palmer, Leif <Palmer.Leif@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>
Cc: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Nicholson, John <Nicholson.John@epa.gov>
Subject: QUESTION: Manatee NOI briefing May 5 - Is it OKAY for RA to attend.....

Leif,

Checking to make sure the RA should not be recused from this May 5 @ 1pm briefing.

It looks like NOI is from Earthjustice, on behalf of Center for Biological Diversity, Defenders of Wildlife, and Save The Manatee Club. Making sure Sierra Club is not a party.

Thanks, Stacey

Stacey Bouma
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EARTHJUSTICE

December 20, 2021

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VIA ELECTRONIC AND CERTIFIED MAIL

Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failing to Reinitiate Consultation Concerning the Unusual Mortality Event for Manatees in the Indian River Lagoon

Dear Officials of the U.S. Environmental Protection Agency:

On behalf of Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club, we hereby provide notice in accordance with the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Environmental Protection Agency ("EPA") is in violation of the ESA for failing to reinitiate consultation under ESA section 7, *id.* § 1536, concerning water quality and the unprecedented mortality event for Atlantic Florida manatees (*Trichechus manatus latirostris*) ("manatees") in the Indian River Lagoon. Specifically, the EPA has unlawfully failed to reinitiate section 7 consultation with U.S. Fish and Wildlife Service ("FWS") in light of significant new information undermining EPA and FWS's conclusions that the Clean Water Act ("CWA") estuary-specific numeric nutrient criteria are not likely to adversely affect any federally listed species or their critical habitats, including the manatee and its habitat.

More than 1,000 manatees have died so far this year in Florida, as part of a catastrophic "Unusual Mortality Event." This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year. More than half of those deaths occurred in the northern Indian River Lagoon due to starvation and malnutrition caused by seagrass die-offs attributable to nutrient pollution and associated harmful algal outbreaks.

Congress enacted the ESA and CWA to prevent such harms. These statutes require that EPA-approved water quality standards ensure the protection of water quality and threatened species such as the manatee. However, the current estuary-specific numeric nutrient criteria fail to fulfill these mandates. New information shows that the current criteria suffer from lax enforcement, an inappropriately long trajectory to achieve compliance, and a failure to take into account the impact of legacy pollution. As a result, approximately 12% of the estimated Florida manatee population statewide has died, with the Atlantic subpopulation having lost approximately 19% of its population. In short, both the Indian River Lagoon and the manatee are presently in the midst of ecological collapse. Further, it appears likely that the 2021 Unusual Mortality Event will not be a one-time event, but rather portends a grim future of continued manatee deaths unless more effective actions are taken to address the key environmental factor driving them—nutrient pollution of key estuary habitats that is destroying habitat, including food for manatees and many other species. Together, the ESA and the CWA require such actions. This letter provides notice that your agency is violating the law by failing to take them.

I. LEGAL BACKGROUND

A. EPA's Obligations in Approving Water Quality Standards under the Clean Water Act

The Clean Water Act was enacted almost 50 years ago to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251–1387 (2013) (the "Clean Water Act"). To achieve this goal, the CWA requires states to set water quality standards protective of public health and the environment, 33 U.S.C. § 1313(c), and to develop pollution budgets known as "total maximum daily loads" ("TMDLs") for each pollutant impairing a waterbody, *id.* § 1313(d); 40 C.F.R. §130.2(i). These TMDLs set a numeric target reflecting the maximum amount of the pollutant that a waterbody can contain and still be considered in compliance with water quality standards. 33 U.S.C. § 1313(d).

EPA oversees Florida's development of water quality standards and TMDLs. *Id.* § 1313(c)(3), (d)(2). Pursuant to guidance implementing EPA's CWA regulations, EPA is to carefully review the adequacy of TMDLs, including ensuring that the TMDLs have a margin of safety to account for lack of knowledge concerning the relationship between load and wasteload allocations and water quality and that the TMDLs provide "reasonable assurances" that point and nonpoint source control measures will achieve the expected load reductions.[1]

B. EPA's Consultation Obligations under the ESA

Congress enacted the Endangered Species Act in 1973 to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16

[1] *See* EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021).

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U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species "the highest of priorities," so that they can recover to the point where federal protection is no longer needed. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Section 7(a)(2) of the ESA imposes on federal agencies such as EPA a substantive duty to ensure that actions they authorize or carry out—including approval of a state's water quality standards—are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11202 (Feb. 22, 2001) ("EPA & FWS MOU"). Such "action agencies" must discharge this obligation in consultation with the appropriate expert fish and wildlife agency—FWS in the case of the manatee. *See id.*; 50 C.F.R. § 402.01(b). If the action agency determines its action may adversely affect listed species or critical habitat, it must initiate formal consultation with FWS. 50 C.F.R. § 402.14(a). If the action agency determines, with written concurrence of FWS, that the proposed action is not likely to adversely affect any listed species or critical habitat, the action agency need not initiate formal consultation. *Id.* § 402.13(c).

The ESA also requires that consultation be reinitiated in certain circumstances where "discretionary Federal involvement or control over the action has been retained or is authorized by law." 50 C.F.R. § 402.16. With regards to state water quality standards, EPA has continuing discretionary involvement and control under 33 U.S.C. § 1313(c)(4)(B), which allows it to revise water quality standards "in any case where the [EPA] Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act]." *See also* EPA & FWS MOU at 11206 ("EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA."); *Wild Fish Conservancy v. United States Env't Prot. Agency*, 331 F. Supp. 3d 1210, 1222–26 (W.D. Wash. 2018) (finding that EPA retains discretionary involvement and control over approved water quality standards for the purposes of reinitiating consultation). Reinitiation of consultation is required:

> (1) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
> (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a).

II. HISTORY OF INDIAN RIVER LAGOON WATER QUALITY STANDARDS AND ESA CONSULTATION

On June 13, 2012, Florida submitted revised water quality standards for EPA's approval under 33 U.S.C. § 1313(c). *See* Decision Document of United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act, Review of Amendments to Florida's Rule 62-302 and 62-303 (Nov. 30, 2012) (approving Fla. Admin. Code Ann. r. 62-302.531). EPA approved the revisions on November 30, 2012. *Id.* The revisions included a rule adopting a framework for developing criteria to numerically interpret the existing statewide narrative nutrient criterion that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." *Id.* at 18. The framework explains that where a site-specific nutrient analysis has been performed for a particular waterbody—including through development of a total maximum daily load—this site-specific analysis will be considered the applicable numeric interpretation of the narrative criterion for a particular waterbody. *Id.*; Fla. Admin. Code Ann. r. 62-302.531. For the Indian River Lagoon and its constituent Banana River Lagoon, Florida's Department of Environmental Protection ("FDEP") set TMDLs for nitrogen, phosphorus, and dissolved oxygen in 2009. *See* FDEP, TMDL Report, Nutrient and Dissolved Oxygen TMDLs for the Indian River and Banana River Lagoon (Mar. 2009). EPA approved these TMDLs as nutrient criteria on July 29, 2013, and they are codified as the "Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion" under Fla Admin. Code r. 62-302.532(aa) (referencing Fla Admin. Code r. 62-304.520 (Indian River Lagoon TMDLs)).

Pursuant to section 7 of the ESA, EPA consulted with FWS—as well as with the National Marine Fisheries Service ("NMFS")[2]—multiple times under 50 C.F.R. § 402.13 on its approval of Florida's water quality standards. This included (1) consulting with FWS on EPA's approval of Florida's revisions in 2012;[3] (2) consulting with FWS on EPA's approval of amendments to these revisions in 2013—which among other things, approved the specific TMDLs for the Indian River Lagoon;[4] and (3) consulting with FWS on EPA's approval to changes made to Florida's statewide estuary-specific numeric nutrient criteria in 2017 (which did not alter the previously approved TMDLs for Indian River Lagoon).[5]

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[2] *See* National Marine Fisheries Service, Biological Opinion on EPA Approval of Water Quality Standards Under Section 303 of the Clean Water Act 3–4 (July 29, 2016) (detailing consultation history with NMFS).

[3] Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012).

[4] Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013).

[5] Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017).

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In each of its informal consultations with FWS, EPA concluded that its approval would not adversely affect the manatee,[6] and FWS agreed.[7]

III. NEW INFORMATION REQUIRES REINITATION OF CONSULTATION

FWS has already recognized that reinitiation of consultation is required here, asking EPA on August 10, 2021, to reinitiate consultation. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). However, upon information and belief, no such consultation has been reinitiated.

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[6] *See* Letter from Annie Godfrey, Chief of EPA Water Quality Standards Section to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Dec. 20, 2012) (transmitting Biological Evaluation concluding that "[t]he EPA has determined that its approval of the addition of numeric criteria for springs, lakes, streams, and estuaries, which are primarily outlined within Rule 62-302, as well as the procedure for developing alternative criteria will not likely adversely affect or will beneficially affect listed species, critical habitat and food sources"); Letter from Joanne Benante, EPA Water Quality Planning Branch, to Larry Williams, FWS Field Office Supervisor South Florida Ecological Services Office (Oct. 25, 2013) (transmitting Biological Evaluation concluding that "[o]verall, the EPA has determined that the chemical, physical, and biological data and the scientifically sound approaches used to develop the [numeric nutrient criteria ("NNC")] resulted in NNC that will provide for the protection of a healthy, well-balanced biological community and will ensure the protection of water quality and aquatic life. For all of these reasons, the EPA has determined that the NNC adopted by the State of Florida . . . are not likely to adversely affect listed species and that implementation of the NNC will avoid excessive concentrations of nutrients that can lead to the imbalance of flora and fauna"); Letter from Joanne Benante, EPA Chief Water Quality Planning Branch, to Dr. Heath Rauschenberger, FWS North Florida Ecological Services Office (Feb. 8, 2017) (noting that "EPA continues to arrive at a finding of [No Effect and Not Likely to Adversely Affect] for the unchanged list of FWS's species of concern[.]")

[7] *See* Letter from Larry Williams, FWS Florida State Supervisor, to Annie Godfrey, Chief of EPA Water Quality Standards Section 7 (July 31, 2013) ("the Service concurs with EPA's determination that the revised nutrient standards are not likely to adversely affect the West Indian manatee or its critical habitat"); Letter from Larry Williams, FWS Field Supervisor South Florida Ecological Services Office, to Joanne Benante, EPA Water Quality Planning Branch (Nov. 15, 2013) ("The adopted TMDLs in the Indian River Lagoon contain [Total Nitrogen ("TN")] and [Total Phosphorus ("TP")] loading targets that were established to support the restoration of seagrass beds. Historical seagrass coverage was evaluated in conjunction with historic estimates of point and nonpoint nutrient inputs to establish TMDLs suitable for seagrass proliferation. Implementation of the TMDLs would result in significant reductions in TN (51 percent) and TP (47 percent) loading in the central Indian River Lagoon, which includes the segments within the [FWS South Florida Ecological Services Office] area of responsibility (TMDL 2009b)"); Letter from Jay B. Herrington, FWS Field Supervisor, to Joanne Benante, EPA Water Quality Planning Branch (May 3, 2017) ("the Service concurs with EPA's determination that the changes made to the Florida's statewide estuary-specific numeric nutrient criteria under review is not likely to adversely affect any federally listed species or their critical habitats").

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Three significant pieces of new information underscore the requirement for EPA to reinitiate consultation with FWS under 50 C.F.R. § 402.16 on Florida's estuary-specific numeric nutrient criteria. First, new information suggests mass die-offs of manatees in the Indian River Lagoon are due to deterioration in water quality as a result of continuing nitrogen and phosphorus pollution, calling into question the overall adequacy of the current TMDLs. As FWS has already recognized, this unprecedented die-off alone requires reinitiation of consultation. Second, new information suggests there is a lack of reasonable assurance that the current measures to reduce point and nonpoint source pollution will achieve expected load reductions. Third, and finally, new information indicates that the current TMDLs do not adequately take into account pollution from legacy muck, and therefore do not contain an adequate margin of safety.

A. New Information Suggests Mass Die-Offs of Manatees are Due to Continuing Deterioration in Water Quality

More than 1,000 manatees have died so far this year in Florida, with the majority on the Atlantic coast as part of an unprecedented die-off that has been officially declared an "Unusual Mortality Event" by the Working Group on Marine Mammal Unusual Mortality Events and FWS.[8] This represents roughly double the average number of deaths in years prior, and it is the most deaths ever recorded in a year.[9] The Florida Fish and Wildlife Conservation Commission estimates the total number of Florida manatees to have been 8,800 as of 2015–16, with roughly 4,000 on the Atlantic coast.[10] In other words, Florida has lost roughly 12% of its manatee population this year alone, and nearly 19% of the Atlantic population.[11]

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[8] *See* Florida Fish and Wildlife Conservation Commission, Marine Mammal Pathobiology Laboratory, 2021 Preliminary Manatee Mortality Table with 5-Year Summary From 01/01/2021 to 12/03/2021, *available at* https://myfwc.com/media/25428/preliminary.pdf (last visited Dec. 16, 2021) (stating that a total of 1038 manatees have died in Florida from 01/01/2021 to 12/03/2021); Florida Fish and Wildlife Conservation Commission, Manatee Mortality Event Along The East Coast 2020-2021, *available at* https://myfwc.com/research/manatee/rescue-mortality-response/ume/ (last visited Dec. 15, 2021).

[9] *Id.*; *see also* Allen, As Seagrass Habitats Decline, Florida Manatees Are Dying Of Starvation, NPR (June 21, 2021), *available at* https://www.npr.org/2021/06/21/1006332218/as-seagrass-habitats-decline-florida-manatees-are-dying-of-starvation (last visited Dec. 1, 2021).

[10] Hostetler, et al., Updated Statewide Abundance Estimates for the Florida Manatee (2018), *available at* https://f50006a.eos-intl.net/ELIBSQL12_F50006A_Documents/TR23-18Hostetler-USAEF.pdf (last visited Dec. 1, 2021).

[11] *Id.*; *see also* Florida Fish and Wildlife Conservation Commission, Manatee Mortalities on the Florida Atlantic Coast, Staff Report (Aug. 4, 2021), *available at* https://www.wfla.com/wp-content/uploads/sites/71/2021/08/FWC-Manatee-Mortalities-Report.pdf (last visited Dec. 16, 2021).

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The majority of these deaths have occurred in the Indian River Lagoon, where a die-off of seagrass has left the manatees to starve to death.[12] The Indian River Lagoon is an estuary that includes Mosquito Lagoon, Banana River Lagoon, and the Indian River. It has more species of plants and animals than any other estuary in North America. The lagoon's seagrass includes Johnson's seagrass, a rare seagrass found only in lagoons on the east coast of Florida that was the first marine plant species to be listed under the ESA.[13] The seagrass in the lagoon formerly provided habitat and forage for many commercially, recreationally, and ecologically important species, including manatees, sea turtles, spotted sea trout, redfish (red drum), snook, tarpon, mullet, sheepshead, pompano, seahorses, blue crabs, hermit crabs, pink shrimp, scallops, clams, marine worms, marine snails, and other crustaceans.[14] Seagrass health is therefore not only critical to the survival of the manatee, but to the persistence of other threatened and endangered species of plants and wildlife, the health of commercially and recreationally important species, and the functioning of the ecosystem overall.

The die-off of seagrass is directly related to deteriorating water quality in the Indian River Lagoon.[15] As human development has increased around the Indian River Lagoon, so has the input of nitrogen and phosphorus from wastewater treatment discharges, leaking septic systems, and stormwater runoff carrying nitrogen fertilizer, among other sources. These nutrients, in turn, feed algae super outbreaks, which block light from getting to the seagrass, causing it to die.[16]

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[12] *See* Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) ("This unusual mortality event has been attributed to the effects of starvation tied to lack of suitable forage availability associated with winter aggregation at warm water sites."); Lefebvre et al., Characterizing Manatee habitat use and seagrass grazing in Florida and Puerto Rico: implications for conservation and management, Pacific Conservation Biology Vol 5: 289–98 (2000) (explaining the importance of seagrass to manatee diets).

[13] National Marine Fisheries Service, Final Recovery Plan for Johnson's Seagrass (Sept. 2002).

[14] *See* U.S. Fish and Wildlife Service, Indian River Lagoon, *available at* https://www.fws.gov/refuge/pelican_island/wildlife_and_habitat/indian_river_lagoon.html (last visited Oct. 12, 2021); St. Johns River Water Management District, Indian River Lagoon: An Introduction to a National Treasure (2007).

[15] *See* Memorandum from Gil McRae, Director, Fish and Wildlife Research Institute, to Florida Fish and Wildlife Conservation Commissioners re: Staff Report – Unusual Manatee Mortality along the Florida Atlantic coast (Aug. 4, 2021) ("Seagrass losses in the Indian River Lagoon have been significant due to continuing water quality issues.").

[16] *See, e.g.,* Lapointe, et al., Nutrient Over-Enrichment and Light Limitation of Seagrass Communities in the Indian River Lagoon, an Urbanized Subtropical Estuary, Science of the Total Environment 699 (2020). This deteriorating water quality has also led to other effects on protected species. For instance, a 2021 article found a strong correlation between water pollution in the Indian River Lagoon and the prevalence of tumors in endangered green sea turtles. *See* Sposato, et al., Evaluation of Immune Function in Two Populations of Green Sea Turtles (*Chelonia mydas*) in a Degraded Versus a Nondegraded Habitat, J. Wildlife Diseases 57(4):761-772 (2021).

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As FWS has already recognized, the continued deterioration in water quality—leading to algae outbreaks "that have increased in frequency and duration" and have caused the recent unusual manatee mortality event—require reinitiation of consultation under 50 C.F.R. § 402.16(a)(2) on EPA's approval of the numeric nutrient criteria for water quality standards in estuaries. *See* Letter from Larry Williams, Florida State Supervisor of FWS, to Tony Able, Chief, Water Quality Planning Branch, U.S. EPA (Aug. 10, 2021). Despite FWS's call for reinitiation, however, available information indicates that to date neither agency has formally reinitiated ESA consultation. *See id.* (asking EPA to reinitiate consultation, without itself formally reinitiating consultation). Given the continued water quality deterioration and increasing die-off of manatees, EPA must immediately reinitiate consultation to address the Unusual Mortality Event and to reconsider whether the current TMDLs are adequate to protect the manatee. As discussed below, significant new information indicates they are not.

B. New Information Suggests a Lack of Reasonable Assurances that Point and Nonpoint Source Reductions Will Achieve Expected Load Reductions

In addition to the recent unprecedented die-off of manatees, a growing record of inadequate efforts to comply with and enforce existing water-quality safeguards also necessitates reinitiation of consultation. For EPA to approve a TMDL, EPA must determine that the TMDL provides reasonable assurances that point and nonpoint source control measures will achieve expected load reductions.[17] Lax enforcement and compliance for both point and nonpoint sources suggests that the current TMDLs are ineffective at controlling nutrients into the Indian River Lagoon. EPA must therefore reinitiate consultation to consider this new information suggesting that the current TMDLs are not being effectively implemented and that the TMDLs lack reasonable assurances they will achieve load reductions. *See* 50 C.F.R. § 402.16(a)(1), (3).

1. Recent Reports Suggest Current Stormwater and Wastewater Treatment Facilities Fail to Meet the Presumption that they Achieve Expected Load Reductions

Several recent reports indicate that point source control measures and enforcement are inadequate, suggesting that the TMDLs must be revisited to ensure that they provide reasonable assurances that the wasteload allocation from point sources will be achieved.

First, in 2019, a "Blue-green Algae Task Force," appointed by Governor DeSantis to aid the Florida Department of Environmental Protection, concluded that "[t]he presumption that a stormwater treatment system constructed and permitted in compliance with [best management

[17] *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (requiring effluent limits in permits be consistent with "the assumptions and requirements of any available wasteload allocation" in an approved TMDL); EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 4 (May 20, 2002), *available at* https://www.epa.gov/sites/default/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf (last visited Nov. 30, 2021) (explaining that when waters are impaired by both point and nonpoint sources, "the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable").

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practice] design criteria will not cause or contribute to violations of surface water quality standards in adjacent and/or connected waterbodies has been evaluated and challenged. Available data suggest that a substantial number of stormwater treatment systems throughout the state fail to achieve their presumed performance standards." Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised 3 October 2019. The Task Force recommended "the development and implementation of a stormwater system inspection and monitoring program with the goal of identifying improperly functioning and/or failing systems so that corrective action can be taken to reduce nutrient pollution and other negative environmental impacts." *Id.* It further recommended "that stormwater design criteria be revised and updated to incorporate recent advances in stormwater treatment technologies and other practices that have demonstrated environmental benefits; nutrient reduction specifically." *Id.*

Second, a 2018 review of sewage pollution in the Indian River Lagoon suggested that harmful algae outbreaks are initiated and expanded by wet weather discharges from municipal wastewater treatment facilities. *See* Barile, Widespread Sewage Pollution of the Indian River Lagoon System, Florida (USA) Resolved by Spatial Analyses of Macroalgal Biogeochemistry, Marine Pollution Bulletin 128 (2018). The article explained that although direct surface water discharges of treated human wastewater effluent are prohibited, up to 90 days per year of "emergency wet weather" surface discharges are allowed when significant rain events overload the treatment system capacities. *Id.* at 559; *see also* Indian River Lagoon Act, Chapter 90-262 Laws of Florida, Sec. 2(c) (allowing wet weather discharges). The article posits that these poorly reported wet weather discharges—which can be several million liters per day per treatment plant during wet season events—may be a key factor supporting harmful algal outbreaks. Barile at 560, 572. The article suggests that significant wastewater treatment infrastructure upgrades, including conversion of municipal wastewater treatment plants to high nutrient removal advanced wastewater treatment, as well as mandatory septic-to-sewer conversion, are needed for seagrass regrowth in the Indian River Lagoon. *Id.* at 572.[18]

Finally, a 2020 Florida Public Employees for Environmental Responsibility ("Florida PEER") report disclosed that Brevard County had 38 instances of unpermitted sewage discharges, totaling 552,040 gallons discharged. *See* Florida PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection (2020), *available at* https://www.peer.org/2020-florida-enforcement-report/ (last visited Dec. 1, 2021). Florida PEER also reported that the Florida Department of Environmental Protection conducted fewer inspections in 2020 than in previous years, and that the severity of fines decreased. Moreover, the "the enforcement actions used by the FDEP were largely short-form consent orders that required nothing more than paying a penalty, i.e., the traffic ticket approach." *Id.* at 35. As Florida PEER Director Jerry Phillips explained, "[r]ather than seeking major reductions in our pollution load, DEP's reliance on small fines makes pollution an acceptable cost of doing business." *See* Florida PEER, Press Release, Florida Pollution Enforcement Fell into Covid Coma, (Sep. 15, 2021) *available at* https://www.peer.org/florida-pollution-enforcement-fell-

[18] *See also* Lapointe, et al., Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida's Indian River Lagoon, 43 Harmful Algae 82–102 (March 5, 2015) (suggesting that seagrass loss due to pollution from sewage indicates the need for improved sewage collection and treatment).

into-covid-coma/ (last visited Dec. 1, 2021). This information thus suggests that lax enforcement of unpermitted sewage discharges could be further contributing to nitrogen and phosphorous pollution in the Indian River Lagoon.[19]

EPA must thus reinitiate consultation with FWS under 50 C.F.R. § 402.16 to take into consideration these recent reports demonstrating the lack of reasonable assurances that point source discharge control measures will achieve required load reductions.

2. The TMDL Lacks Reasonable Assurances that the Agricultural Best Management Practices Designed to Control Nonpoint Source Pollution Are Sufficient and Achievable

In addition to recent information indicating that point source discharge controls do not provide reasonable assurances that load reductions will be achieved, further new information suggests that nonpoint sources present an additional source of pollution that is inadequately addressed. Agricultural nonpoint sources are a significant contributor of nitrogen and phosphorous into the Indian River Lagoon. *See* FDEP, Central Indian River Lagoon Basin Management Action Plan 17 (Feb. 2021) ("CIRL BMAP"). To address these nonpoint sources, the FDEP has created three Basin Management Action Plans ("BMAPs"), dividing up the Indian River Lagoon into three subbasins: (1) the Central Indian River Lagoon; (2) the North Indian River Lagoon ("NIRL BMAP"); and (3) the Banana River Lagoon ("BRL BMAP"). These BMAPs include agricultural best management practices ("BMPs") that are aimed at reducing nitrogen and phosphorus runoff from agricultural practices. Under Florida law, it is the agricultural landowner's responsibility to implement the BMPs, and landowners who do not enroll in the BMP Program are supposed to be referred to FDEP for enforcement action.

Unfortunately, however, current landowner enrollment in the BMP program is very low: only 25% of agricultural acres are currently enrolled in the Central Indian River Lagoon, *see* CIRL BMAP at 153; only 6% are enrolled in the North Indian River Lagoon, *see* NIRL BMAP at 27; and 0% are enrolled in the Banana River Lagoon, *see* BRL BMAP at 22. This is far below the current average of 62% enrollment in the BMP Program statewide, and 82% enrollment of irrigated agricultural acres statewide. *See* Florida Department of Agriculture and Consumer Services, Office of Agricultural Water Policy, Status of Implementation of Agricultural Nonpoint Source Best Management Practices 2 (July 1, 2021). Moreover, although Florida Department of Agriculture and Consumer Services ("FDACS") is required to verify that landowners are properly implementing BMPs, including by conducting site visits every two years, FDACS conducted relatively few site visits to the Indian River Lagoon in 2020: only 91 out of 2,824 total visits statewide. *See id.* at 17. Furthermore, of the more than 6,600 referrals statewide from FDACS to FDEP for enforcement for agricultural producers not following the

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[19] *See also* Waymer and Vazquez, Sewage spill keep taxing Indian River Lagoon, other waters; state issues fines, but is that enough?, Florida Today (Aug. 15, 2019). In late 2020, more than seven million gallons of raw sewage spilled into a pond at Sand Point Park that flows directly into the Indian River Lagoon, resulting in a fish die-off. *See* Vazquez, Protestors call for action in Titusville after raw sewage spill into Indian River Lagoon, Florida Today (Jan 9, 2021); Waymer, Titusville sewage fallout could top half a million, Florida Today (May 7, 2021).

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rules, none have faced penalties.[20] As Florida Agricultural Commissioner Nikki Fried described the situation in August, 2021, "[u]nfortunately we have not seen a hammer come down from FDEP. . . . There's a carrot and there's a stick. [FDACS] is the carrot, and FDEP is the stick. And the stick's not working."[21]

Finally, although the BMAPs intend to increase enrollment over time, the BMAPs do not aim to achieve full targeted load reductions until 2035, *see, e.g.,* CIRL BMAP at 16. This lengthy trajectory, coupled with the currently low enrollment by agricultural landowners in the BMP Program and lack of meaningful enforcement, is inappropriate and insufficient given the current ecological collapse of the Indian River Lagoon. EPA must therefore reinitiate consultation with FWS to consider new information demonstrating that the current enrollment and enforcement of BMPs, and planned trajectory of nitrogen and phosphorus reductions, has been insufficient to prevent seagrass and manatee die-offs, and that there are presently insufficient assurances that the measures to reduce nonpoint source pollution in the TMDLs will achieve expected load reductions.

C. New Information Suggests the TMDLs Overlook, and Should Take into Account, Ongoing Contributions of Nitrogen and Phosphorous from Legacy Pollution

New information also highlights the important role that legacy pollution plays in the ecosystem collapse that is underway in the Indian River Lagoon, yet the existing TMDLs fail to account for this factor. Over time, the harmful levels of nutrients entering the Indian River Lagoon have led to muck accumulation on the lagoon bottom, which "fluxes" nutrients back into the lagoon. There are an estimated 5 million cubic yards of muck within the Indian River Lagoon, delivering roughly 30% of the total nutrient load.[22] Brevard County recently posited that "[n]itrogen and phosphorus released each year as muck decays are now larger than any current source of nutrient pollution to lagoon waters." Tetra Tech, Inc. and CloseWaters LLC. (2021) Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida. Not only does legacy muck contribute to

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[20] *See* Chesnes, Ag Commissioner Nikki Fried wants boots on the ground to measure, reduce pollution, TCPalm (Aug. 4, 2021), *available at* https://www.tcpalm.com/story/news/local/indian-river-lagoon/2021/08/04/nikki-fried-visits-sewalls-point-discuss-clean-water-initiative/5452933001/ (last visited Dec. 1, 2021).

[21] *Id. See also* MacLaughlin, Will Basin Management Action Plans Restore Florida's Impaired Waters?, 89 Fla. B. J. 31 (Feb. 2015) (suggesting that BMAPs "need more regulatory teeth if they are to succeed"); Blue-green Algae Task Force, DRAFT consensus Document #1 Final Draft – Revised (Oct. 3, 2019) ("[T]he [Blue-green Algae Task Force] recommends that the effectiveness of BMPs be supported by adequate data to justify the presumption of compliance granted upon enrollment and implementation").

[22] Fox and Tefry, Lagoon-wide Application of the Quick-Flux Technique to determine Sediment Nitrogen and Phosphorus Fluxes, Submitted to Brevard County, Fl. Natural Resources Management Department (June 2019); *see also* Tetra Tech, Inc. and CloseWaters LLC., Save Our Indian River Lagoon Project Plan 2021 Update for Brevard County, Natural Resources Management Department Brevard County, Florida (Feb. 2021), *available at* https://www.brevardfl.gov/SaveOurLagoon/ProjectPlan (last visited on Dec. 1, 2021).

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nitrogen and phosphorus pollution, but it can result in resuspension of sediment which decreases light availability to seagrass and further contributes to seagrass loss.[23] It can also cover the natural bottom of the lagoon so that the seagrass is unable to grow.[24]

EPA's TMDL guidance explains that TMDL submittals should identify all "point and nonpoint sources of the pollutant of concern, including the location of the source(s) and the quantity of the loading" in order for EPA to adequately review the load and wasteload allocations and develop an adequate margin of safety "to account for any lack of knowledge concerning the relationship between load and wasteload allocations and water quality." EPA, Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992 at 1, 4 (May 20, 2002). But despite the outsize importance of this legacy muck as a pollution source, legacy inputs were not accounted for in the nitrogen and phosphorus TMDLs and the "Spatial Watershed Iterative Loading or 'SWIL' Model"—the model that calculates the load allocations for the Indian River Lagoon BMAPs—does not take this legacy muck into account. *See, e.g.,* NIRL BMAP at 39.

Without addressing legacy muck, it is likely that algal outbreaks and seagrass loss will continue.[25] EPA must therefore reinitiate consultation with FWS in light of evidence that the current TMDLs lack an adequate margin of safety that takes into account the nutrient and sediment contributions of legacy pollution.

IV. CONCLUSION

The ESA authorizes citizen suits to enjoin violations of the ESA. 16 U.S.C. § 1540(g)(1)(a). As set forth above, EPA is in violation of the ESA for failing to reinitiate formal consultation with FWS concerning EPA's approval of Florida's estuary-specific numeric nutrient criteria in light of recent manatee mortality and new information suggesting that the current numeric nutrient standards are insufficient to protect against the current manatee die-off as well as protect against future mortality events. If EPA is unwilling to take action within sixty days to reinitiate consultation, we plan to seek redress through litigation.

Sincerely,

Elizabeth Forsyth
Earthjustice Biodiversity Defense Program

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[23] Phlips, Factors Affecting the Abundance of Phytoplankton in a Restricted Subtropical Lagoon, The Indian River Lagoon, Florida, USA, Estuarine, Coastal and Shelf Science (Sep. 2002).
[24] Florida Tech, Florida Tech Scientists and Engineers Seek Answers for Muck in the Indian River Lagoon (Aug. 13, 2017); Waymer, Muck: The arch-enemy lurks deep in Indian River Lagoon – Muck problem expensive to solve, Florida Today (Nov. 24, 2013).
[25] *See* Missimer, et al., Legacy Phosphorus in Lake Okeechobee (Florida, USA) Sediments: A Review and New Perspective, Water (2021) (explaining that in Lake Okeechobee, "[d]espite major efforts to control external nutrient loading into the lake, the high frequency of algal blooms will continue until the muds bearing legacy nutrients are removed from the lake").

ED_014341_00000077-00012

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Counsel for Center for Biological Diversity, Defenders of Wildlife, and Save the Manatee Club

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ED_014341_00000077-00013

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Southeast Regional Office
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Appointment

From: Kim, Eunjung [Kim.Eun@epa.gov]
on behalf of Millan, Vanessa [Millan.Vanessa@epa.gov]
Sent: 11/17/2022 1:54:02 PM
To: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Jenkins, Brandi [Jenkins.Brandi@epa.gov]; Hairston, Brandy [hairston.brandy@epa.gov]; Champagne, David [Champagne.David@epa.gov]

Subject: FW: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
Location: https://usepa.zoomgov.com/j/1601813017

Start: 11/29/2022 4:00:00 PM
End: 11/29/2022 5:30:00 PM
Show Time As: Tentative

-----Original Appointment-----
From: Millan, Vanessa <Millan.Vanessa@epa.gov>
Sent: Tuesday, November 8, 2022 4:22 PM
To: Millan, Vanessa; Nunez, Alejandra; Kim, Eunjung; Macedonia, Jennifer; Benkeser, Anna; Mmitch3@gmu.edu; Cortez Russell, Loni; Carbonell, Tomas; Jakob, Avivah
Cc: mrauch@momscleanairforce.org; Smith, Grace Y.; Danielle.wright@nasrc.org; sam@evergreenaction.com; Janet McGovern; Martin Hayden; dgreenbaum@healtheffects.org; Paul Billings; zachary.fabish@sierraclub.org; llynch@nrdc.org; Mahyar Sorour; smackler@bipartisanpolicy.org; matthew_davis@lcv.org; bdroessler@environmental-initiative.org; cstarr@eia-global.org; laura.bender@lung.org; Enobakhare, Rosemary; jackerly; thiggins@americanprogress.org; Rose Garr; cjenks@law.harvard.edu; patrick.drupp@sierraclub.org; David McCabe; ebechard@momscleanairforce.org; mreis@momscleanairforce.org; aherzog@hcwh.org; CROZAT, Matt; greed@ucsusa.org; Moltzen, Michael; Johnson, Dennis; Henning, Julie; Simon, Karl; Gunning, Paul; Lupinacci Rausch, Jean; Birnbaum, Rona; Newberg, Cindy; Akerman, Nancy; Cappel, Kirsten; Kee, Annie; Clouse, Matt; Camobreco, Vincent; De Figueiredo, Mark; Elger, Nicholas; Lacount, Melanie; Fisher, Brian; Marcy, Cara; Hathaway, Julia; Johnson, Travis; Bowker, George; Moss, Jacob; Conlin, Beth; Alpert, Adina; Lau, Patrick; Graff, Michelle; Gardarsdottir-Middleton, Thora; Kocchi, Suzie; Denny, Andrea; Smith, Alisa; White, Sharon; Enger, Tracy; Brown, Sheila D.; Cappuccilli, Eva; Durkin, Kim; Errico, Mary; Mitchell, Tracey; Hatcher, Caterina; Hamjian, Lynne; Bird, Patrick; Benoit, Eugene; Isenberg, Madeline; Freeman, Caroline; Toney, Anthony; Rinck, Todd; Watson, Marion; Reynolds, Mary; Lesane, Heidi; Rowson, David; Ashley, Jackie; Baumgart-Getz, Adam; Benedict, Kristen; Brachtl, Megan; Brockman, Larry; Damberg, Rich; Etchells, Elizabeth; Hemby, James; Johnson, Steffan; Koplitz, Shannon; Lasley, Benjamin; Naess, Liz (she/her/hers); Torres, Elineth; Wayland, Richard; Whitlow, Jeff; Roberts, Timothy-P; Marusiak, Eleanor; Hyde, Courtney; Dowdell, Edward (Ned); Thompson, Ashley; Shaw, Betsy; Weaver, Susannah; Biton, Leiran; Greene, Cynthia; Shoaff, John; Profeta, Timothy; Grumet, Stephanie; Mulderrig, Conor; Riley, Alison; Acevedo, Frank; Nwia, Jacqueline; Bertram, Emily
Subject: NGOs & Public Health & Office of Air and Radiation's IRA Stakeholder Discussion
When: Tuesday, November 29, 2022 11:00 AM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: https://usepa.zoomgov.com/j/1601813017

Meeting: This is a virtual roundtable conversation with EPA around the Office of Air and Radiation's provisions in the Inflation Reduction Act.
Date/ Time: Tuesday, Nov. 29, 11:00am-12:30pm EST
Zoom Link: https://usepa.zoomgov.com/j/1601813017
Overview: We are excited to hear your perspectives, priorities, and feedback as we embark on this critical priority. A Request for Information (RFI) was published that includes non-regulatory dockets to provide answers to questions OAR has authored for stakeholders to respond to. The list of discussion questions and dockets can be found HERE.

IRA Provisions Covered:

- Clean Heavy-Duty Vehicles [60101]
- Grants to Reduce Air Pollution at Ports [60102]
- Diesel Emissions Reduction [60104]
- Funding to Address Air Pollution – Fenceline Monitoring [60105(a)]
- Funding to Address Air Pollution – Multipollutant Monitoring [60105(b)]
- Funding to Address Air Pollution – Air Quality Sensors [60105(c)]
- Funding to Address Air Pollution – Emissions from Wood Heaters [60105(d)]
- Funding to Address Air Pollution – Methane Monitoring [60105(e)]
- Funding to Address Air Pollution – Clean Air Act Grants [60105(f)]
- Funding to Address Air Pollution – Mobile Source Grants [60105(g)]
- Funding to Address Air Pollution at Schools [60106]
- Low Emissions Electricity Program [60107]
- Funding for Section 211(O) of the Clean Air Act - RFS [60108]
- Funding for Implementation of American Innovation and Manufacturing Act [60109]
- GHG Corporate Reporting [60111]
- Methane Emissions Reduction Program [60113]
- Climate Pollution Reduction Grants [60114]

(THIS LISTENING SESSION WILL NOT INCLUDE A DISCUSSION OF THE GREEN HOUSE GAS REDUCION FUND.)

Message

From: Hicks, Matt [Hicks.Matthew@epa.gov]
Sent: 6/22/2022 9:16:48 PM
To: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Sable, Kacy [Sable.Kacy@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]
CC: Kupchan, Simma [Kupchan.Simma@epa.gov]
Subject: FW: CBD v. EPA, 21-cv-119 Confidential Settlement Communication
Attachments: ENV_DEFENSE-#994209-v1-FL_404_Settlement_Letter_re_Status_of_Waters.PDF

See attached DOJ's response to Earthjustice on the retained waters issues raised on April 1 and May 19. This includes a summary of the Corps' analysis of the four projects where EJ alleges FDEP made permitting-related decisions in retained waters. Apparently there was a fifth example in Volusia County that EJ raised in its May 19th correspondence which Simma forwarded to the team that same day.

Thanks,

Matt

From: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>
Sent: Wednesday, June 22, 2022 11:36 AM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>
Subject: FW: CBD v. EPA, 21-cv-119 Confidential Settlement Communication

FYI: I sent the attached letter to Plaintiffs this morning. It includes responses from the Corps to the inquiries in Plaintiffs' April 1 and May 19, 2022 settlement communications.

From: Coghlan, Andrew (ENRD)
Sent: Wednesday, June 22, 2022 11:34 AM
To: bmalloy@earthjustice.org; Tania Galloni <tgalloni@earthjustice.org>
Cc: Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Subject: CBD v. EPA, 21-cv-119 Confidential Settlement Communication

Hi Tania and Bonnie,

Attached please find a settlement letter responding to inquiries in your settlement communications of April 1 and May 19, 2022.

Thanks,

Andy

Andrew Coghlan
Trial Attorney
United States Department of Justice
Environmental Defense Section
(202) 514-9275
4 Constitution Square
150 M Street, NE
4.1122

Washington, DC 20002

Message

From: Hicks, Matt [Hicks.Matthew@epa.gov]
Sent: 6/10/2022 6:31:29 PM
To: Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Hansen, Susan [Hansen.Susan@epa.gov]; Gettl
[Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Laycock,
[Nagrani.Kavita@epa.gov]
Subject: FW: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Memorandum
Attachments: ENV_DEFENSE-#993502-v1-
DN_84_MEMORANDUM_re__36__Cross_MOTION_to_Dismiss_filed_by_STATE_OF_FLORIDA__FLORIDA_DEPARTMENT_OF_EN
ENV_DEFENSE-#993500-v1-
DN_83_SUPPLEMENTAL_MEMORANDUM_to_re__36__Cross_MOTION_to_Dismiss_filed_by_FLORIDA_DEPARTMENT_OF_ENVI

Here's FDEP's and FL COC's briefs on the issue of what relief (if any) the EPA might be able to provide to Plaintiffs should the Court find in their favor on the merits of Count Eight (failure to provide 30-day effective date required for rulemaking). It occurred to me that I did not share with you EPA's brief on this same issue that we filed on May 26th. I'll forward that in a moment.

From: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>
Sent: Friday, June 10, 2022 9:48 AM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Zilioli, Erica M CIV USARMY CEHQ (USA) <Erica.M.Zilioli@usace.army.mil>; Wainwright, Katherine T CIV USARMY CESAJ (USA) <Katherine.T.Wainwright@usace.army.mil>; Holmes, Joshua R CIV USARMY CENWS (USA) <Joshua.R.Holmes@usace.army.mil>; Speights, Helen H <helen.speights@sol.doi.gov>
Cc: Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>
Subject: FW: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Memorandum

Hi all,

Attached are briefs filed last night be the Florida Chamber of Commerce and by the State of Florida.

Plaintiffs' reply is due on 6/23.

Thanks,

Andy

From: DCD_ECFNotice@dcd.uscourts.gov <DCD_ECFNotice@dcd.uscourts.gov>
Sent: Thursday, June 9, 2022 5:07 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:21-cv-00119-RDM CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al Memorandum

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viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Jazil, Mohammad on 6/9/2022 at 5:06 PM and filed on 6/9/2022

Case Name:	CENTER FOR BIOLOGICAL DIVERSITY et al v. ANDREW WHEELER et al
Case Number:	1:21-cv-00119-RDM
Filer:	ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS, INCORPORATED (AFCD) FLORIDA CHAMBER OF COMMERCE
Document Number:	84

Docket Text:
MEMORANDUM re [36] Cross MOTION to Dismiss filed by STATE OF FLORIDA, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION by ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS, INCORPORATED (AFCD), FLORIDA CHAMBER OF COMMERCE. (Jazil, Mohammad)

1:21-cv-00119-RDM Notice has been electronically mailed to:

Aaron M. Streett aaron.streett@bakerbotts.com, jacqueline.curtis@bakerbotts.com

Alison C. Finnegan alison.c.finnegan@usdoj.gov, efile_wmrs.enrd@usdoj.gov

Andrew S. Coghlan andrew.coghlan@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV

Anna Marie Sewell asewell@earthjustice.org, acorrea@earthjustice.org, flcaseupdates@earthjustice.org, rwinz@earthjustice.org, selbakri@earthjustice.org, vhuggett@earthjustice.org

Bonnie Malloy bmalloy@earthjustice.org

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Tania Galloni tgalloni@earthjustice.org, acorrea@earthjustice.org, bkleiner@earthjustice.org, flcaseupdates@earthjustice.org

1:21-cv-00119-RDM Notice will be delivered by other means to::

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:suppressed
Electronic document Stamp:
[STAMP dcecfStamp_ID=973800458 [Date=6/9/2022] [FileNumber=7767837-0] [9a0c7636468948f002eb05c85e531504ef8f64e96c14e14dcf053e9c884f25d6bb6fd 44563bf6ae1de75fadd1256e5219b4cdf21270c4aadaf7f74ad3ea17fbe]]

Message

From: Colangelo, Aaron [acolangelo@nrdc.org]
Sent: 3/6/2023 2:06:54 PM
To: Title VI Complaints [Title_VI_Complaints@epa.gov]; Hoang, Anhthu [Hoang.Anhthu@epa.gov]; Hunt, JuanCarlos [Hunt.Juancarlos@epa.gov]
CC: cflowers [cflowers@creej.org]; mgraham@creej.org; Micah West [micah.west@splcenter.org]; Tallman, Sarah [stallman@nrdc.org]; Hammer, Rebecca [rhammer@nrdc.org]; Leefatt, Kimberly [KLeefatt@nrdc.org]; Brown, Alyssa [AlyssaBrown@nrdc.org]
Subject: Title VI Complaint
Attachments: 2023-3-6 CREEJ and NRDC Title VI complaint.pdf

Dr. Hoang, attached is a Title VI complaint being submitted by the Center for Rural Enterprise and Environmental Justice and the Natural Resources Defense Council. Supporting exhibits will follow by separate email.

Best,
Aaron Colangelo
202-289-2376