



April 20, 2021

SUBMITTED VIA EMAIL

Michael Regan, Administrator
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U.S. Environmental Protection Agency
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Re: Request for EPA to Withdraw its Proposed Rule regarding the Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs

Dear Administrator Regan and Acting Assistant Administrator Fox:

We write on behalf of several local, state, and national conservation organizations devoted to protecting our nation's lands, water, and wildlife to urge the U.S. Environmental Protection Agency ("EPA") to withdraw its proposed rule regarding the criminal negligence standard for state or tribal Clean Water Act section 402 and 404 programs, published on December 14, 2020.¹ The proposed rule would allow a state program to adopt "any" negligence standard for criminal violations of the Clean Water Act, in violation of the plain language of the federal statute. At a time when our waterways need more protection, not less, the proposed rule would allow enforcement under state programs to be less stringent than federal enforcement, also in violation of federal law.

President Biden ran on a platform that prioritized environmental justice, which included improving water quality and guaranteeing safe and clean water for all Americans.² Shortly after the election, the Biden Administration immediately took executive action to review harmful rollbacks of water protection standards and to protect our public lands and waters.³ Taking the right action on this proposed rule presents the perfect opportunity for the new administration to uphold its commitments to clean water, to withdraw an ill-conceived Trump-era proposal, and to set the standard for robust environmental protection and enforcement over the next four years and beyond. We urge the EPA not to promulgate this unlawful, unreasonable rule that would ultimately result in weakened and inconsistent protections for wetlands, water, and wildlife.

¹ The text of the proposed rule can be found here: <https://www.federalregister.gov/documents/2020/12/14/2020-26777/criminal-negligence-standard-for-state-clean-water-act-402-and-404-programs>. On January 13, 2021, Earthjustice and a coalition of local, state, and national conservation organizations submitted comments opposing the proposed rule. The comment letter can be found here: <https://www.regulations.gov/comment/EPA-HQ-OW-2020-0517-0008>.

² Democratic National Committee, *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, available at: <https://joebiden.com/climate-plan/> (last visited March 30, 2021); *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, available at: <https://joebiden.com/environmental-justice-plan/> (last visited March 30, 2021)

After decades of failing at protecting and cleaning up our nation’s waters, Congress passed the Clean Water Act in 1972 to comprehensively expand and strengthen laws protecting America’s waters from pollution and degradation. To this day, the Clean Water Act remains one of our nation’s bedrock environmental laws. Congress made plain that federal law sets the Clean Water Act minimum standards for water quality, permitting, effluent limits, and enforcement. While a state Clean Water Act program need not mirror the federal program, it absolutely must provide at least the same level of protections to the nation’s water resources, which includes enforcement safeguards.⁴ In other words, state-assumed Clean Water Act programs may be more stringent and effective than their federal counterparts, but they can never be less so. EPA’s proposed rule, if promulgated, would directly contradict the law and result in less stringent enforcement, immediately and effectively weakening the longstanding protections the Clean Water Act provide.

EPA’s proposed rule would result in less stringent enforcement, less deterrence, and less protections under the Clean Water Act by allowing states to apply distinctly different negligence mens rea⁵ standards in state-assumed 402 or 404 permitting programs. Ordinary negligence, the federal standard under the Clean Water Act, is one of the lowest mens rea standards: it is the failure to use care that a reasonably prudent and careful person would under similar circumstances. Criminal or gross negligence, on the other hand, is a higher mens rea standard, often defined as reckless indifference or gross careless disregard of the safety of others and can be the basis for violent crimes such as manslaughter.

In the context of environmental offenses, a *lower* mens rea standard like ordinary negligence provides for *more robust* criminal enforcement of permit violations—and therefore greater environmental protections—because it sets a lower bar the government must meet to bring an enforcement action and prove a violation of the law. Ordinary negligence is therefore more protective of our nation’s waters than criminal negligence.

If EPA allows a state to administer a Clean Water Act program that does not allow for enforcement of violations committed with ordinary negligence, the result would be to effectively exclude an entire class of permit violations that would be subject to criminal liability under federal law. This would undermine the enforcement and deterrent effect intended by Congress and result in weaker environmental protections for our nation’s waters. This is an unreasonable and unjust outcome that EPA should not allow.

³ The White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>; FACT SHEET: The American Jobs Plan (March 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

⁴ See 40 C.F.R. § 233.1(d), EPA’s regulation for state-assumed 404 programs, which states, “[a]ny approved State program shall, at all times, be conducted in accordance with the requirements of the [Clean Water] Act. . . [w]hile States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”

⁵ In the context of criminal enforcement, mens rea refers to the specific mental state of a person who committed an act, to determine if that act was a crime, and in turn, the person’s level of guilt and the seriousness of the crime.

Moreover, EPA may not lawfully promulgate this rule. With regard to crimes committed negligently, Congress adopted ordinary negligence as the standard for Clean Water Act section 402 and 404 violations, demonstrating the seriousness with which the legislature viewed violations of these programs and its intention to support broad deterrence and enforcement.⁶ Furthermore, the very text of the statute governing section 402 and 404 violations, Clean Water Act section 309(c)(1), and case law make clear that ordinary negligence is the standard whether it is a federal or state-issued permit. Because Congress has plainly spoken to the negligence standard required to violate a section 402 or 404 permit, EPA, by law, may not regulate otherwise.

In addition to being unlawful and contrary to the intent of the Clean Water Act, EPA's proposed rule would allow states to implement inconsistent and contrary levels of water resource protections through differing levels of enforcement. This is a very real and immediate problem that directly contradicts the basic policy and purpose of Congress to provide a minimum baseline of water protections across the nation. In practice, it would allow for a polluter to remain free of criminal penalties in one state but be subject to penalties in another state for the very same activity—activity in a body of water that could affect both states if the water system traverses or borders multiple states.

Such a system is directly contrary to the concept that the federal Clean Water Act sets the minimum guarantees and protections for all waters. It further is directly contrary to the principle in United States Supreme Court case *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), that an upstream state cannot issue permits or take actions that will negatively affect a downstream state's ability to meet that state's water quality standards. A different mens rea standard in an upstream or bordering state would remove the ability of the downstream state to obtain equal and adequate enforcement of standards and permit requirements. EPA's proposed rule is therefore impractical and likely to lead to inconsistent enforcement contrary to long-established, basic Clean Water Act requirements for consistent baseline protection of water resources.

EPA's proposed rule is contrary to the law, contrary to Clean Water Act basic principles, and would undermine compliance with, and enforcement of, the Clean Water Act. We therefore respectfully request that EPA withdraw the proposed rule in its entirety, close docket number EPA-HQ-OW-2020-0517, and follow through on the Biden Administration's commitment to protecting our environment by upholding the Clean Water Act to the greatest extent possible under the law.

⁶In section 309(c)(1) of the Clean Water Act, Congress adopted ordinary negligence as the negligence standard for violations of section 402 or 404 permits, as interpreted by every Circuit Court of Appeals that has considered the matter. See *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *United States v. Pruett*, 681 F.3d 232, 243 (5th Cir. 2012); *United States v. Maury*, 695 F.3d 227, 259 (3d Cir. 2012).

Sincerely,

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