UNITED STATES OF AMERICA
BEFORE THE
ENVIRONMENAL PROTECTION AGENCY

Updating Regulations on Water Quality Certification	))	**Docket No. EPA-HQ-OW-2019-0405**

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION IN SUPPORT OF PROPOSED RULE

Pursuant to the comment procedures outlined in the Proposed Rule Updating Regulations on Water Quality Certification, published in the Federal Register on August 22, 2019,[1] the Natural Gas Supply Association ("NGSA") respectfully submits these comments in support of the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act ("CWA") Section 401 ("Proposed Rule"). NGSA strongly supports the EPA's efforts to provide clarity and standardize the framework for certifying authorities to follow when evaluating certification requests under Section 401 of the CWA. If adopted, these clarifications will provide for a more efficient process that restores cooperative federalism and mitigates regulatory uncertainty.

I. INTEREST OF THE NGSA

Founded in 1965, NGSA represents integrated and independent energy companies that produce and market domestic natural gas. NGSA is the only national trade association that solely focuses on producer-marketer issues related to the

[1] *Updating Regulations on Water Quality Certification*, Environmental Protection Agency, 84 FR 44080 (2019).

downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of different manners. NGSA members ship billions of cubic feet of natural gas on interstate pipelines on a daily basis and are greatly impacted by the outcome of this proceeding.

NGSA encourages the use of natural gas within a balanced national energy policy and supports the benefits of competitive markets. NGSA has consistently advocated for well-functioning natural gas markets, policies that support market transparency, efficient nomination and scheduling protocols, just and reasonable transportation rates, non-preferential terms and conditions of transportation services and the removal of barriers to developing needed natural gas infrastructure. NGSA has a long-established commitment to ensuring a public policy environment that fosters a growing, competitive market for natural gas. NGSA also supports a balanced energy future, one which ensures a level playing field for all market participants and eliminates excessive regulatory barriers to supply.

II. COMMENTS

NGSA supports EPA's proposed clarifications to its regulations at 40 C.F.R. Part 121, which relate to the water quality certification provisions of Section 401 of the CWA. Section 401(a)(1) of the CWA states:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted

> until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.[2]

While many states adhere to the clear process laid out by the statue during permitting of infrastructure projects, implementation of Section 401 has become inconsistent. Thus, guidance from EPA, the agency charged with administering the CWA, is needed and will benefit all parties participating in the certification process.

The regulation of the siting and construction of interstate natural gas pipelines presents a clear example of cooperative federalism. The Natural Gas Act ("NGA") grants the federal government, through the Federal Energy Regulatory Commission ("FERC" or "Commission"), the sole authority to approve the construction of interstate natural gas pipelines and to regulate the transportation of natural gas for resale on these interstate pipelines.[3] In addition, the lead federal agency has the exclusive authority to grant a waiver of the certification process when a State or Tribe has not acted within a reasonable period of time.[4]

Congress also provided an important, but narrow, role for the States/Tribes to issue Section 401 water quality certifications related to a Federal license or permit to

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[2] 33 U.S.C. § 1341(a)(1).

[3] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

[4] *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

conduct any activity that may result in any discharge into navigable waters.[5] However, this certification may be waived if the State or Tribe fails to act within a reasonable period of time after receipt of a request for water quality certification.[6]

The process for siting and constructing interstate natural gas pipelines has become subject to additional regulatory barriers that are inconsistent with Congressional intent and the clear language of Section 401(a)(1) of the CWA. Despite an interstate gas pipeline having federal approval, some states have misused Section 401 as a tool to indefinitely delay a project or block it entirely for reasons unrelated or well beyond the scope of their 401 authority. In other cases, the denial is granted well past the statutory one-year timeframe for review that is required in the CWA. The Proposed Rule, if implemented, would increase regulatory certainty for project proponents and states by affirming the timeframe and a clear process for determining whether a particular entity has waived its water quality certification.

Importantly, the proposed rule also provides clarity on the roles of the States/Tribes and the federal government, which will restore the cooperative federalism that Congress established in passing Section 401 of the CWA. Further, the proposed rule will enhance the efficiencies of the water quality certification process by clearly setting forth the scope of the process for review or certification requests under Section 401 of the CWA. NGSA applauds EPA's efforts to update its regulations, which will

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[5] *See* 33 U.S.C. § 1341(a)(1); *see also S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

[6] 33 U.S.C. § 1341(a)(1).

greatly assist all participants to better know and anticipate the process of filing for, and obtaining, the necessary water quality certifications. This should restore Section 401 certification to its intended purpose of ensuring water quality, while enabling the development of critical infrastructure to serve consumers.

A. The Proposed Rule Clarifies The Length Of The Water Quality Certification Process.

1. The Proposed Rule correctly interprets the statute to trigger the water quality certification process upon receipt of a request.

Section 401 of the CWA states that a certification review commences upon the **receipt** of a request. While this language is clear on its face, the Proposed Rule clarifies that the statutory timeline for certification review is triggered upon receipt of a "certification request" rather than receipt of a "complete request or application," which was subjective and the requirements varied from state to state. To increase consistency across applications, the Proposed Rule also better defines "certification request" and identifies a list of documents and information that must be included so that all interested participants will be aware when the timeline for review commences.[7] In particular, by establishing a uniform definition and requiring a project proponent to provide the required information, the Proposed Rule will ensure consistent understanding of when a certification request has been "received" by the States or Tribes, so that the certification review can commence.[8]:

[7] *See* Proposed Rule at 40 C.F.R. § 121.1(c)

[8] *See id.* (requiring the project proponent to identify multiple criteria, including a statement that "The project proponent hereby requests that the certifying authority

This clarifying definition of "certification request" is consistent with case law. In *N.Y. State Dep't of Envtl. Conservation v. FERC*, the U.S. Court of Appeals for the Second Circuit determined that the statutory language was plain and established a bright-line rule regarding the beginning of the review process – upon receipt of the request.[9] The court also determined that the statute did not require the application to be "complete" and concluded that if the statute had required a "complete" application, the States or Tribes could misinterpret the bright-line rule into a subjective standard.[10]

In addition, this clarifying definition is consistent with the FERC's long-standing interpretation of the same language in the statute. In Order No. 464, which the FERC implemented more than 30 years ago, the FERC determined that the "not longer than one year" clock commenced upon receipt of the request for a water quality certification.[11] The FERC correctly found that "failing to find waiver due to information requests from state agencies could encourage the states to ask applicants to provide additional data in order to give themselves more time to process certification requests, **in contravention of Congress' intent**."[12] The U.S. Court of Appeals for the Ninth

review and take action on this CWA 401 certification request within the applicable reasonable period of time.").

[9] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

[10] *Id.* at 456.

[11] *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water* Act, Order No. 464, FERC Stats. & Regs. ¶ 30,730 at 30,545 (1987).

[12] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38, n.44 (2019) (emphasis added).

Circuit upheld the FERC's Order No. 464, finding that "the rulemaking was fully consistent with the letter and intent of 401(a)(1) of the CWA . . .."[13]

The FERC has also held that:

> It is much easier and more predictable for the Commission and all parties concerned to determine when an application for water quality certification is actually filed with a state agency and commence the running of the one-year waiver period from that date, instead of the date when an application is accepted for filing in accordance with state law."[14]

The FERC recently reaffirmed its interpretation of "receipt" under the statute in Order No. 2002, when it addressed a request by commenters who recommended that the Commission revise its interpretation such that the statutory one-year period for action established by CWA Section 401 is deemed to begin when the State deems the application complete. The FERC stated:

> We decline to do so. This was our practice prior to 1991, but it was found to be unduly burdensome because it put the Commission in the frequently difficult posture of trying to ascertain and construe the requirements of many and divergent state statutes and regulations. The existing rule, in contrast, is clear and simple.[15]

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[13] *State ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992).

[14] *See Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters*, Order No. 533, FERC Stats. & Regs. ¶ 30,932 at 30,345-46 (1991).

[15] *Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150 at 30,735 (2003).

Further, in numerous interstate natural gas pipeline proceedings, the FERC has applied this interpretation that the triggering event specified in Section 401 of the CWA commences upon receipt of the certification request by the State.[16]

Thus, the Proposed Rule's interpretation of the triggering event for Section 401 water quality certification is consistent with the plain meaning of the statute and with the interpretation that the courts and other federal agencies have used. In addition, the Proposed Rule's interpretation of the triggering event is clearer and simpler than the alternative, which would insert EPA into the business of interpreting various State requirements to determine when an application is "received" under a State's particular rules and laws.

2. The Proposed Rule correctly interprets the "reasonable period of time" set forth in the statute.

The Proposed Rule states that the Federal Agency shall establish the reasonable period of time categorically or on a case by case basis, which shall not exceed one year from receipt.[17] In addition, the Proposed Rule prohibits a certifying agency from requesting a project proponent withdraw its certification request or take any other action for the purpose of modifying or restarting the established reasonable

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[16] *See*, *e.g.*, *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186 (2017); *Georgia State Crossing Pipeline LP*, 107 FERC ¶ 61,065 at P 7 (2004) (finding that the "clear and unambiguous language in Section 401(a)(1)" required the State to act within one year of receiving the request for Section 401 certification); *AES Sparrow Point LNG, LLC*, 129 FERC ¶ 61,245 at PP 61-63 (2009) (stating that the triggering event was the receipt of the request for a water quality certification).

[17] Proposed Rule at 40 C.F.R. § 121.4 (a)

period of time.[18] NGSA supports the Proposed Rule and these clarifying standards, which are consistent with the statute, as confirmed by the courts.

The statutory language of Section 401(a)(1) of the CWA demonstrates that the appropriate timeline for a water quality review must be limited to a maximum, not a requirement, of one year. The limitation is designed to prevent an indefinite State delay of federal licensing.[19]

In its currently effective regulations, EPA has interpreted "a reasonable period of time" as six months.[20] By limiting the review period to a maximum of one year, with the understanding that a reasonable period is generally sixth months, EPA has prevented Section 401 review from "hold[ing] federal licensing hostage."[21] While States can and should conduct a robust water quality review for as much of the one-year period as the Federal agency deems necessary, the review should not be "shelved" to "usurp FERC's control over whether and when a license will issue."[22]

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[18] *Id.* at § 121.4 (f).

[19] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1101 (D.C. Cir. 2019) *citing Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011); *see also Hoopa Valley*, 913 at 1104-05 ("Congress intended Section 401 to curb a state's 'dalliance or unreasonable delay.'") (internal citations omitted).

[20] *See* 40 CFR 121.16(b) (2019); *see also*, *Hoopa Valley*, 913 F.3d at 1103-04 (finding that the one-year period is an "absolute maximum" and "does not preclude" review of less than one year).

[21] *See Hoopa Valley*, 913 F.3d at 1104.

[22] *Id.*

B. The Proposed Rule Clarifies The Scope Of the Water Quality Certificate Process

The Proposed Rule properly clarifies the statutory requirements that limit the conditions placed on a water quality certification to water-quality-related conditions (*i.e.*, discharges from the proposed project). The Proposed Rule also appropriately limits the States from imposing conditions related to auxiliary activities (*e.g.*, constructing trails, unrelated enhancements, air emissions, transportation, and public access to fishing) from a State's water quality certification review. The Proposed Rule, therefore, properly applies the language of Section 401, which limits the States' water quality certification conditioning authority to conditions that relate to water quality.[23]

NGSA supports the Proposed Rule because it is consistent with the statute. States should perform thorough assessments related to water quality when processing a water quality certification for a proposed project -- and with proper implementation of Section 401, states have effectively done so. The Proposed Rule's clarification will ensure that States do not impose additional non-water-quality-related conditions on pipeline construction, which would impede the FERC's exclusive routing authority under the Natural Gas Act.[24] Water quality standards cannot be used as a pretext to

[23] *See American Rivers v. FERC*, 129 F.3d 99,107 (2d Cir. 1997) (finding that it was "plainly true" that "Section 401authorizes states to impose only conditions that relate to water quality").

[24] *See National Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.").

change Commission-approved pipeline routes or impose conditions on pipeline projects that are beyond the authority granted to the States by the CWA.

III. CONCLUSION

NGSA strongly supports EPA's proposed rule, which provides all parties with a clear understanding of the scope, timeframe for review and their roles in the certification process. With these clarifications, all parties can work together to achieve our common objective: the permitting of necessary energy infrastructure projects to serve consumers without compromising on environmental standards.

Respectfully submitted,

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