

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Waiver of the Water Quality Certification )      Docket No. RM20-18-000  
Requirements of Section 401(a)(1) of the )  
Clean Water Act )**

**COMMENTS OF THE NATURAL GAS SUPPLY  
ASSOCIATION AND THE CENTER FOR LIQUIFIED NATURAL  
GAS IN SUPPORT OF PROPOSED RULE**

Pursuant to the Federal Energy Regulatory Commission’s (“FERC”) Notice of Proposed Rulemaking (“NOPR”), published in the Federal Register on October 19, 2020,<sup>1</sup> the Natural Gas Supply Association (“NGSA”) and the Center for LNG (“CLNG”) respectfully submit these comments in support of the proposed regulations that will categorically establish a reasonable period of time for a certifying authority to act on a water quality certification request related to natural gas and liquified natural gas projects pursuant to section 3 or section 7(c) of the Natural Gas Act (NGA). NGSA and CLNG support FERC’s action in this proceeding to ensure that its regulations are consistent with the Environmental Protection Agency’s (“EPA”) Clean Water Act Section 401 Certification Rule (“Certification Rule”), which became effective on September 11, 2020, and simply codify FERC’s already-established practice of allowing CWA certifying authorities up to one year to act after the certifying authority’s receipt of a request for section 401 water quality certification.

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<sup>1</sup> *Waiver of Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Notice of Proposed Rulemaking, FERC, issued September 9, 2020.

## I. INTEREST OF NGSA AND CLNG

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 downstream natural gas industry. NGSA encourages the use of natural gas within a balanced national energy policy and has a long-established commitment to promoting a public policy environment that fosters a growing, competitive market for natural gas. NGSA has consistently advocated promoted improvements in the pipeline permitting process and for the removal of barriers to developing needed natural gas supply and infrastructure.

The CLNG advocates for public policies that advance the use of LNG in the United States, and its export internationally. A committee of the NGSA, CLNG represents the full LNG value chain, including all six large-scale LNG export facilities in the United States, shippers, and multinational developers, providing it with unique insight into the ways in which the vast potential of this abundant and versatile fuel can be fully realized.

## II. COMMENTS

### ***1. Implementing Regulations that Codify EPA's Certification Rule Will Provide the Consistency and Certainty Needed in the Pipeline and LNG Project Review Process.***

The NOPR, which proposes to codify FERC's policy consistent with the directives in the Certification Rule, will provide much-needed regulatory certainty for

project developers and states by affirming the timeframe and setting in place a clear process for determining whether a particular entity has waived its water quality certification determination. NGSAs and CLNG supported EPA's Certification Rule, which clarified its regulations with respect 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.<sup>2</sup>

Congress 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 conduct any activity that may result in any discharge into navigable waters.<sup>3</sup> 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.<sup>4</sup>

In recent years, the process for siting and constructing interstate natural gas pipelines has been increasingly subjected 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 and LNG facility having federal approval, some states have misused Section 401 as a tool to indefinitely delay a project or block the project entirely for reasons unrelated or well beyond the scope of their 401 authority.

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<sup>2</sup> 33 U.S.C. § 1341(a)(1).

<sup>3</sup> 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).

<sup>4</sup> 33 U.S.C. § 1341(a)(1).

In other cases, the denial is granted well past the statutory one-year timeframe for review that is required in the CWA.

Consistent with the EPA’s directive in Section 121.6(a) of the Certification Rule, which requires federal permitting agencies<sup>5</sup> to establish the reasonable period of time for the certifying authority<sup>6</sup> to act on a water quality certification request, the proposed rule will enhance the efficiencies of the water quality certification process by clearly setting forth the period of time a state has to undertake its limited assessments under Section 401 of the CWA. The NOPR will restore Section 401 certification to its intended purpose of ensuring water quality, while enabling the development of critical infrastructure to serve consumers.

Also, as the Commission points out in the NOPR, in addition to complying with the requirements set forth in EPA’s Certification Rule, the Commission is simply codifying its already existing policy in its regulations for interstate pipeline companies and LNG facilities. The Commission’s long-standing practice has been to deem the one-year waiver period to be triggered when the certifying agency receives the request. As the NOPR also points out, the Commission’s practice is to categorically apply a one-year waiver period for water quality certification applications filed in connection to a proposed natural gas or liquefied natural gas

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<sup>5</sup> The Certification Rule defines “Federal Agency” as any federal government agency to which application is made for a license or permit that is subject to the requirements of CWA section 401. Clean Water Act Section 401 Certification Rule, 85 FR 42210, 42285 (July 13, 2020) (to be codified at 40 CFR pt. 121).

<sup>6</sup> The Certification Rule defines “Certifying Authority” as the agency with the responsibility to certify compliance with applicable requirements for water quality under CWA section 401. *Id.* The Commission’s regulations refer to a “Certifying Authority” as a “Certifying Agency.”

infrastructure project application.<sup>7</sup> In 2018, in *Constitution Pipeline Co., LLC*, the Commission stated that, “since 1987, the Commission has consistently determined, both by regulation and in our orders on proposed projects, that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification.”<sup>8</sup>

CWA section 401 grants authority to states<sup>9</sup> to review the applicant’s compliance with appropriate federal, state, and tribal water quality requirements for discharge into a water of the United States that may result from a proposed activity that requires a federal license or permit. NGSA and CLNG believe a state’s review of water quality requirements associated with discharge is an important part of the overall certification review process for pipeline and LNG projects that could have impacts in a state. However, states should not be able to use such authority to unduly delay or thwart the construction of projects that are certificated at the federal level and found to be in the public interest.

***2. The NOPR Complies with the EPA’s Certification Rule and the CWA that Require Agencies to Promulgate Regulations that Specify that the One-year Period for State Review Begins Upon Receipt of a Request.***

The NOPR’s proposal to rely on the receipt of a request as the triggering event to begin the one-year timeframe for Section 401 water quality certification not only complies with EPA’s requirement in the Certification Rule and its own long-standing

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<sup>7</sup> *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 16.

<sup>8</sup> 162 FERC ¶ 61,014, at P 16 *reh’g denied*, 164 FERC ¶ 61,029 (2018).

<sup>9</sup> Indian tribes that have been approved for “treatment as a state” status may also have the authority under section 401 to issue water quality certifications.

policy, but is also consistent with the plain meaning of the statute and with the interpretation that the courts. In addition, specifying that receipt of an application is the triggering event to begin the one-year maximum period for state review is clearer and simpler than the alternative, which would insert FERC into the business of interpreting various State requirements to determine when an application is “received” under a State’s particular rules and laws

Section 401 of the CWA states that a certification review commences upon the receipt of a request and EPA’s Certification Rule accurately reflects the statute’s requirement. While this language is clear on its face, some states have interpreted the one-year requirement as beginning when they deemed a project sponsor’s application to be “complete,” which can be highly subjective and result in a multitude of variations from one state to another.

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.<sup>10</sup> 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.”<sup>11</sup> The U.S. Court of Appeals for the Ninth Circuit

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<sup>10</sup> *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).

<sup>11</sup> *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38, n.44 (2019) (emphasis added).

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 . . . .”<sup>12</sup>

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.”<sup>13</sup>

FERC 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.<sup>14</sup>

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.<sup>15</sup> For these reasons,

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<sup>12</sup> *State ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9<sup>th</sup> Cir. 1992).

<sup>13</sup> *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).

<sup>14</sup> *Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150 at 30,735 (2003).

<sup>15</sup> *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).

we fully support codifying that receipt of a request by an applicant is the triggering event to begin the one-year period for state action in FERC's regulations.

***3. FERC's Proposal to Apply a Categorical One-year Waiver Period is Appropriate.***

The Certification 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.<sup>16</sup> In the NOPR, the Commission states that, “[g]iven that it would be administratively inefficient and a potential source of controversy to establish reasonable time periods on a case-by-case basis; that state certifying agencies may vary in terms of their procedures for reviewing requests for water quality certification; and that natural gas projects before the Commission include highly complex proposals that may well take a state a significant time to review, we find that providing the maximum time permitted under the CWA, i.e., a categorical one-year waiver period, is reasonable.”

NGSA and CLNG support the Commission's proposal to rely upon a categorical one-year period as the maximum period for state review as opposed to making that determination on a case-by-case basis. We agree with the Commission's determination that a categorical waiver period is more appropriate than relying on a case-by-case waiver for interstate pipeline and LNG facility applications due to multitude of variations in state practices and the potential for states to argue that they should be exempted from the one-year deadline. A categorical one-year waiver

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<sup>16</sup> Proposed Rule at 40 C.F.R. § 121.4 (a)



period ensures consistency among states in the timeframe; providing much-needed certainty to project developers and consumers alike and limits any potential for undue discrimination in the application of the deadline for state action.

### III. CONCLUSION

NGSA and CLNG support FERC's proposed rule, which provides states, project applicants and other stakeholders with a clear understanding of the timeframe for state review in the certification process. With finalization of these regulations, 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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