UNITED STATES OF AMERICA
BEFORE THE
ENVIRONMENAL PROTECTION AGENCY

Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule	**)** **)** **)**	**Docket No. EPA-HQ-OW-2021-0302-0001**

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION

Pursuant to the comment procedures outlined in the U.S. Environmental Protection Agency's ("EPA" or "Agency") Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, published in the Federal Register on June 2, 2021 ("Notice of Intent"),[1] the Natural Gas Supply Association ("NGSA") respectfully submits the following comments. In the Notice of Intent, the EPA is seeking input on how to revise the requirements for water quality certifications under the 2020 Clean Water Act Section 401 Certification Rule ("401 Certification Rule")[2]. As discussed in more detail below, NGSA strongly supported the 401 Certification Rule and encourages EPA to preserve the provisions in the rulemaking, which improved the water certification process for stakeholders through several key clarifications and updates.

I. INTEREST OF THE NGSA

Founded in 1965, NGSA represents integrated and independent energy companies that produce, ship and market domestic natural gas and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of

[1] *Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, Environmental Protection Agency, 86 FR 29541 (2021).
[2] Clean Water Act Section 401 Certification Rule ("401 Certification Rule"), 85 FR 42210 (July 13, 2020).

different manners. NGSA members ship and/or supply billions of cubic feet of natural gas per day on interstate pipelines and could be 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 is dedicated to achieving a cleaner future through strong partnerships with renewables and supporting innovative technologies and market solutions that reduce emissions, such as a price on carbon. Our companies are committed to reducing methane emissions as an essential component of achieving a clean energy future. 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.

II. COMMENTS

Section 401 of the Clean Water Act (CWA) provides States and Tribes ("certifying authorities") with an important, but narrowly focused, role in the federal permitting process: the authority to issue a CWA Section 401 water quality certification for proposed infrastructure projects. Under CWA Section 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into navigable waters, unless the certifying authority where the discharge would originate either issues a CWA Section 401 water quality certification finding or the certification is waived. EPA promulgated implementing regulations for water quality certification in 1971 consistent with Congress' intent of abiding by the principles of cooperative federalism and providing a clear role for certifying authorities within the federal permitting process.

The regulation of the siting and construction of interstate natural gas pipelines presents a clear example of cooperative federalism. The Natural Gas Act grants the federal government,

through the Federal Energy Regulatory Commission ("FERC"), 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, FERC, as 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]

While many certifying authorities adhere to the clear process laid out by the statute during the permitting of infrastructure projects, implementation of Section 401 was applied inconsistently. Thus, the process for siting and constructing interstate natural gas pipelines became subject to additional regulatory barriers that are inconsistent with Congressional intent and the clear language of Section 401 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 Section 401 authority.[5] In an effort to clarify and reaffirm how CWA Section 401 should be implemented by certifying authorities, the EPA undertook a lengthy and thorough rulemaking process in 2019 to update the implementing regulations for CWA Section 401.[6]

[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).
[5] See Letter from Thomas Berkman, Deputy Commissioner and General Counsel, New York State Department of Environmental Conservation, to Georgia Carter, Vice President and General Counsel, Millennium Pipeline Company, and John Zimmer, Pipeline/LNG Market Director, TRC Environmental Corp. (Aug. 30, 2017) (denying section 401 certification because ''FERC failed to consider or quantify the effects of downstream [greenhouse gas emissions] in its environmental review of the Project'').
[6] See *Updating Regulations on Water Quality Certification*, Environmental Protection Agency, 84 FR 44080 (2019).

NGSA strongly supported the proposed rulemaking because the clarifications and updates provided much needed regulatory certainty in the certification process.[7] In July 2020, EPA issued a final rule, the 401 Certification Rule, which incorporated its updates and clarifications to its regulations at 40 C.F.R. Part 121. Importantly, the updated provisions preserved Congressional intent and are consistent with the plain language of the CWA Section 401 statute.

In accordance with Executive Order 13990, 'Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,' EPA was directed to review its rulemakings issued within the last four years. In its Notice of Intent, EPA is seeking input on whether to revise certain provisions and requirements for water quality certifications under the 401 Certification Rule. As discussed in more detail below, we encourage EPA to preserve the provisions that were clarified and/or updated in the 401 Certification Rule since they have made the process for water quality certifications more efficient and consistent. It is important that the rulemaking continues to maintain the right balance of giving certifying authorities the tools to protect their water quality while enabling the development of critical infrastructure to serve consumers. Any additional changes EPA is considering should not add unnecessary delays or barriers to determining water quality certification and should not reach beyond the limited scope and statutory intent of Section 401 of the CWA.

A. The 401 Certification Rule's Requirements for a "Certification Request" Created a More Efficient and Consistent Application Process.

NGSA encourages EPA to retain the 401 Certification Rule's updated provision on certification requests since it provided much needed clarity on the definition and elements

[7] Comments of the Natural Gas Supply Association, EPA, Docket No. EPA-HQ-OW-2019-0405 (October 19, 2019).

comprising an official request for a water quality certification. Given that Section 401 of the CWA states that a certification review commences upon the *receipt* of a request, it is essential that all stakeholders have a clear understanding of what is required to trigger certification review. Prior to the rulemaking, in some instances, certifying authorities went back to project sponsors multiple times for more information, stating that the applications were incomplete, and the clock for review could not start until they deemed it complete.[8] These actions can delay the timeframe for a water quality certification determination and at times, impede the project from commencing construction since it cannot move forward without all necessary state and federal permits. Additionally, each State or Tribe may have different requirements for applications, making the process unnecessarily difficult to navigate if you need certifications across different states. To mitigate these issues, the 401 Certification Rule correctly adopted: a uniform definition for a certification request as "a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c)." Id. at 121.1(c); clarified that the statutory timeline for certification review is triggered upon receipt of a "certification request;" and incorporated a single defined list of required certification request components applicable to all certification actions. The rule identifies a list of documents and information that must be included so that all interested participants meet the same requirements for a certification.

NGSA believes these updates and clarifications have improved the certification process. By establishing a uniform definition and requiring a project proponent to provide standardized information, the 401 Certification Rule ensures consistent understanding of when

[8] See *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455–56 (2d Cir. 2018). Considering Millennium Pipeline Company's certification request, the court disagreed with the State of New York and held that the statutory time limit is not triggered when a State determines that a request for certification is 'complete.'

a certification request has been "received" by States or Tribes, so that the certification review can commence. While EPA expresses concern that a uniform, defined list of requirements limits information certifying authorities may need before the review process starts, this is reconciled with the rule's implementation of pre-filing meetings, which project proponents are required to request with the certifying authority before submitting their application. Certifying authorities should take advantage of the pre-filing meetings to discuss any additional information they might like to see from the project proponent.

Further, the 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] Additionally, this clarifying definition is consistent with the FERC's long-standing interpretation of the same language in the statute. In Order No. 464, which FERC implemented more than 30 years ago, FERC determined that the "not longer than one year" clock commenced upon receipt of the request for a water quality certification.[10] 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**."[11] The U.S. Court of Appeals for the Ninth 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 . . .."[12]

[9] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).
[10] *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).
[11] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38, n.44 (2019) (emphasis added).
[12] *State ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992).

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."[13]

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.[14]

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.[15] Thus, the 401 Certification Rule's definition and 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.

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[13] *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).
[14] *Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150 at 30,735 (2003).
[15] *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).

B. EPA Should Preserve the Clearly Defined Scope of Certification Intended in the Statute and Implemented Under the 401 Certification Rule.

The 401 Certification Rule appropriately clarified the scope of certification and conditions for certifying authorities, which affirmed that the scope is limited to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." The rule then defines "water quality requirements" as "applicable provisions of [sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements *for point source discharges into waters of the United States*" [emphasis added]. The scope is based on the text, structure, and legislative history of the CWA and provides clarity on the breadth and nature of the environmental review that is expected. It would be inappropriate and inconsistent with the statute to broaden the scope of water certifications to include issues outside of water quality.

Further, the 401 Certification Rule preserved 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 into navigable waters of the United States). The rule also appropriately limits certifying authorities from imposing conditions related to auxiliary activities (*e.g.*, constructing trails, unrelated enhancements, air emissions, transportation, and public access to fishing) from its water quality certification review. NGSA supports these clarifications because it is consistent with the statute. States should perform thorough assessments related to water quality when processing a water quality certification request for a proposed project -- and with proper implementation of Section 401, states have effectively done so. The 401 Certification Rule ensured 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.[16] Water quality standards cannot be used as a pretext to change Commission-approved pipeline routes, impose conditions on pipeline projects that are beyond the authority granted to certifying authorities by the CWA, or attempt to block projects on grounds unrelated to water quality.

C. EPA Should Allow More Time to Assess the Utility of Pre-Filing Meetings Until Stakeholders Have More Experience Under the New Process.

The 401 Certification rule requires project proponents to submit a "pre-filing meeting request" to certifying authorities at least 30 days prior to submitting a certification request. NGSA believes there is utility in keeping pre-filing meeting requests because they encourage early stakeholder engagement between the certifying authority and project proponent. While we agree the minimum 30-day timeframe is an appropriate amount of time, EPA should clearly state in the rule that project proponents are allowed to move forward with filing their certification request if the certifying authority declines the pre-filing meeting. Similarly, if the certifying authority is unable to meet with the project proponent within the 30-day timeframe, they should still be permitted to file the certification request 30 days from the initial outreach to schedule the meeting. This ensures project proponents are not delayed for indefinite amounts of time for a precursor meeting, which could unnecessarily delay their water quality certification determination.

Given that the final rule has only been in effect for a few months, the advantages of pre-filing meetings may not be fully understood until certifying authorities and project proponents have had sufficient time to utilize the new process. We support retaining this provision to give stakeholders more time to determine whether these meetings have improved

[16] *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.").

the certification process. EPA should consider revisiting this requirement after ample time has passed and seek stakeholder input on whether to retain the pre-filing requirement or not.

D. Federal Agency Review and Waiver Authority are Key to Fostering Cooperative Federalism in the Certification Process.

NGSA supports the 401 Certification Rule's provision that requires federal agencies to review a certifying authority's actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. Requiring a federal agency's review and affirming its waiver authority improved regulatory certainty for the permitting process by establishing a safeguard. It allows for a check on a certification action, and if the action does not comply with the procedural requirements under Section 401 of the CWA, provides for recourse to rectify any procedural issues. Importantly, this provision does not allow a federal agency to usurp the certifying authority's finding and replace it with its own preferred action; it merely ensures that a certifying authority does not misuse its authority and provides recourse if it does. This achieves the cooperative federalism that is intended by the statute and Congress.

NGSA recognizes that there could be instances where a federal agency waives a water quality certification due to nonsubstantive and easily fixed procedural concerns identified by the federal agency. To minimize or avoid such an outcome, NGSA believes that certifying authorities and the federal agency should communicate during the time the certifying authority is processing the certification application under the reasonable period of time established by the federal agency.

III. CONCLUSION

NGSA supports EPA preserving the clarifications and updated provisions of the 401 Certification Rule, which improved regulatory certainty for stakeholders in the certification

process. Under the 401 Certification Rule, EPA restored the principles of cooperative federalism while clearly defining the tools certifying authorities have to protect their water quality under Section 401 of the CWA. If EPA is considering any changes to the provisions of the 401 Certification Rule, it must ensure it does not create undue hurdles to receiving a water quality certification and must ensure consistency with the limited scope of certification reviews and role of certifying authorities intended under the CWA statute.

Respectfully submitted,

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