UNITED STATES OF AMERICA
BEFORE THE
ENVIRONMENAL PROTECTION AGENCY

Clean Water Act Section 401	)	**Docket No. EPA-HQ-OW-2022-0128**
Water Quality Certification	)	
Improvement Rule	)	

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION

Pursuant to the comment procedures outlined in the federal register notice on the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule ("proposed rule"),[1] the Natural Gas Supply Association ("NGSA") respectfully submits the following comments. EPA is seeking input on its proposed rule to revise and replace the Agency's requirements for water quality certifications under the 2020 Clean Water Act Section 401 Certification Rule ("2020 Rule")[2].

After the inception of the state water quality certification framework by Congress in 1970, the EPA promulgated implementing regulations for water quality certification in 1971 ("1971 Rule").[3] The EPA did not update its implementing regulations until 2020, and prior to the update, the 1971 Rule did not fully reflect the current statutory language, nor did it reflect or account for water quality certification practices and judicial interpretations of section 401 that have evolved over the past 50 years. While many significant updates to increase transparency and clarity were adopted in the 2020 Rule, the EPA states its intent is to update the existing regulations once again,

[1] Clean Water Act Section 401 Water Quality Certification Improvement Rule, Environmental Protection Agency, 87 FR 35318 (June 9, 2022).
[2] Clean Water Act Section 401 Certification Rule ("401 Certification Rule"), 85 FR 42210 (July 13, 2020).
[3] Congress originally created the state water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970, which granted states certification authority. Two years later, Congress revised the Federal water quality protection framework when it enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or CWA). The EPA promulgated implanting regulations for water quality in 1971 ("1971 Rule"), however, it did not update the regulations after Congress revised its framework in 1972.

but will focus on returning to the core principles of the statutory text of the 1972 Clean Water Act. As EPA reconsiders and revises the 2020 Rule, NGSA encourages EPA to prioritize efficiencies and clarity needed during the water quality certification process in any final rule. While there are several provisions in the proposal we support as discussed in more detail below, we also share our recommendations to ensure the rule does not result in overly burdensome regulations or undue hurdles to building needed natural gas infrastructure.

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 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

i. EPA's final rule should promote regulatory certainty needed for investment in natural gas infrastructure to support electric reliability, a lower carbon energy future and our allies abroad.

NGSA's members are leading the transition to a reliable and lower-emissions energy future for the world by supporting policies to protect the environment and investing billions of dollars in new technologies and practices to continue the momentum of innovation. The natural gas industry depends on regulatory certainty from federal agencies to make these investments possible; allocating capital for significant expenditures and securing customer commitments may take years going through the permitting process. When balancing a state's role in the water quality certification process with the Federal agency review requirements for a permit, a predictable and efficient regulatory framework is necessary to support the orderly development of natural gas infrastructure. Natural gas infrastructure is needed to support the transition to a lower carbon energy future, and it is in EPA's interest to facilitate this with regulations that promote an efficient and modern approach that continues to protect water quality.

Further, sufficient natural gas infrastructure is critical to maintain electric grid reliability and provide the flexibility required to accommodate the way most natural gas generators use gas. As states develop plans for a future energy grid, investment in natural gas infrastructure will continue to play a key role in reliability. In NERC's long-term reliability assessment, it recognizes that, "additional pipeline infrastructure is needed to reliably serve [electricity] load."[4] Further, it says that pipeline expansions are recognized as "mechanisms promoting fuel

[4] NERC, Long-Term Reliability Assessment at 38 (Dec. 2020) https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf

assurance," and that "[p]ipeline expansion into constrained areas significantly promotes [bulk power system] fuel assurance."[5]

In addition to helping maintain reliability of the domestic electric grid, natural gas serves a key role in the world energy landscape. This critical role became especially apparent with Russia's invasion of Ukraine. On January 28, 2022, in response to the escalating conflict in Ukraine, U.S. President Biden and European Commission President von der Leyen issued a joint statement committing the United States to intensifying strategic energy cooperation for the security of supply of natural gas to the European Union in order to avoid "supply shocks" that could result from a further Russian invasion of Ukraine.[6] President Biden committed that:

> The United States will strive to ensure, including working with international partners, additional liquified natural gas (LNG) volumes for the EU market of at least 15 bcm in 2022 with expected increases going forward.[7]

On March 8, 2022, President Biden Issued Executive Order 14066 prohibiting the importation of Russian energy products, including oil and LNG.[8] Secretary of Energy Granholm told industry that to offset this supply loss, "right now, we need oil and gas production to rise to meet current demand."[9]

Exports of LNG to aid our European allies in reducing their reliance on Russian natural gas requires a variety of domestic infrastructure, not just export terminals. Natural gas needs to

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[5] *Id*. at 34.
[6] The White House, Joint Statement by President Biden and President von der Leyen on U.S.-EU Cooperation on Energy Security (Jan. 28, 2022), https://tinyurl.com/25zvbd5r.
[7] The White House, Joint Statement Between the United States and the European Commission on European Energy Security (Mar. 25, 2022), https://tinyurl.com/ykp6w6cz.
[8] Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, Executive Order 14066, 87 Fed. Reg. 13,625 (Mar. 10, 2022), https://www.federalregister.gov/documents/2022/03/10/2022-05232/prohibiting-certain-imports-and-new-investments-with-respect-to-continued-russian-federation-efforts.
[9] Dep't of Energy, **Remarks as Prepared for Delivery by Secretary of Energy Jennifer Granholm at CERAweek 2022 (Mar. 9, 2022),** https://www.energy.gov/articles/secretary-granholm-ceraweek-keynote-luncheon-and-11-fireside-chat-sp-globals-dan-yergin.

move through pipelines to reach the export terminals. The EPA's final rule must consider the impact of its regulations on our national security policy.

ii. Pre-filing meetings are important to early coordination but would further benefit from added flexibility.

NGSA supports EPA's proposal to retain the 2020 Rule provision requiring project proponents to request a pre-filing meeting with the certifying authority at least 30 days before submitting a water quality certification request. This provision promotes early engagement and coordination between the project proponent and certifying authority to discuss the project and identify any concerns before the statutory timeframe for review begins.

While these meetings foster advanced communication and coordination, we agree with EPA that the process could benefit from additional flexibility. We support the proposal's update to give certifying authorities the ability to waive or shorten the pre-filing meeting request. Given the unique circumstances involving each project, including that some projects may be smaller scale/less complex, or others need emergency approval, allowing flexibility with the pre-filing requirement will help to streamline the certification process as needed. We encourage EPA to take this one step further and clarify that if a certifying authority does not respond to a project proponent after submitting the pre-filing meeting request or is unable to meet before the 30-day time period has expired, it should result in an automatic waiver of the meeting. While the EPA expects that it will provide written acknowledgement that the pre-filing meeting request has been received within 5 days of receipt when it serves the role as certifying authority, it does not propose this expectation for other certifying authorities. Codifying this provision will ensure project proponents are not indefinitely delayed from filing their certification requests and that the pre-filing meetings remain a helpful tool instead of a potential impediment.

While general parameters on timing and waiver are necessary to keep the certification process efficient, NGSA agrees with EPA's approach to refrain from defining the pre-filing meeting process, such as defining meeting subject matter or meeting participants. The Agency must carefully balance clear and efficient guidelines without making the process overly prescriptive and burdensome.

iii. EPA should establish a predictable and streamlined process for requesting certification.

Once a project proponent has gone through the pre-filing meeting process, they can submit a certification request, which triggers the statutory review. Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent, however, the statute does not define either "receipt" or "request for certification." This previously led to confusion, inefficiencies, and extended litigation over what is deemed a complete application and when the clock started for review. Significantly, in *New York State Department of Environmental Conservation v. FERC*, the Second Circuit held that the plain language of section 401(a)(1) provides that the reasonable period of time begins after receipt of the request for certification, not when a certifying authority deems the request "complete."[10] To promote clarity regarding certification request submissions, the EPA is proposing to establish a limited list of "request for certification" requirements for all certifying authorities. We agree this will provide all stakeholders with predictability and transparency on the minimum information needed when applying.

[10] See *New York State Department of Environmental Conservation v. FERC* . 884 F.3d 450, 455 (2d Cir. 2018).

While the EPA's proposed list includes basic project information, which is similar to the 2020 Rule, it also proposes to include a copy of the draft license or permit as a new certification request requirement. As the EPA recognizes, this would mean that a project proponent could not apply until *after* a Federal agency develops and provides the project proponent with a draft license or permit for the project. NGSA is concerned this will delay the certification process, and instead encourages EPA to adopt its alternative approach to submit either a copy of its officially submitted permit application *or* a copy of the draft permit. Providing more flexibility will ensure project proponents can move through the inter-agency permitting process in a timely manner.

In addition to the EPA's proposed limited requirements for all certification requests, the EPA is also proposing to allow certifying authorities to define their own additional certification requirements. If EPA moves forward with this approach, it must take steps to ensure certifying authorities' additional requirements are objective, predictable, consistent, and transparent from the outset to all stakeholders. Given the litany of requirements project proponents must comply with, both with the certifying authority and other Federal agencies during the permitting process, certifying authorities need to streamline their process to minimize any additional risk that could come with a state-by-state approach to certification requests. Additionally, EPA should approve or monitor certifying authorities' additional requirements to ensure the requirements do not become overly burdensome or complicated. If applications are continuously sent back to project proponents over not meeting the certifying authorities' standards, this could be viewed as a sign that the additional requirements were created as a threshold too high for applicants to comply with. EPA should proactively address the potential for issues to arise by establishing a lead

agency, such as the EPA or FERC, to help achieve the delicate balance of moving projects forward while giving every state its own authority to develop certification request requirements.

iv. EPA should take a position on withdrawing and resubmitting certification requests under its reasonable period of time provision.

EPA's proposed rule provides Federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided the reasonable period of time does not exceed one year from the receipt of the request for certification. Given the FERC has already explicitly defined the "reasonable period" for certifying authority action as the maximum one-year timeframe under the statute, NGSA does not have any additional comment on EPA's proposal to set the reasonable period of time. Further, we appreciate the EPA affirming the statutory timeframe for the reasonable period of time is not to exceed one year from receipt of the application, so that there is no ambiguity remaining on how long a certifying authority has to review an application. However, NGSA is concerned with the EPA's decision declining to take a position on the legality of withdrawing and resubmitting a certification request.

The case law on whether it is permissible to withdraw and resubmit an application request is complex. Since neither the *Hoopa Valley Tribe v. FERC*[11] court decision nor the text of Section 401 categorically precludes withdrawal and resubmission, EPA should take a position on this to ensure it is not misused to unreasonably delay and frustrate the certification process. Perhaps EPA could outline criteria for extreme circumstances, including but not limited to: a major change to the project route; the project becomes temporarily infeasible due to financing or market conditions; or a change to project/parent company ownership. While established criteria

[11] See *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (holding that a repeated, coordinated withdrawal and resubmittal of a certification request resulted in a waiver).

is preferable to any bright line standard, implementing a safeguard may be appropriate, such as requiring consultation with the Federal permitting agency (FERC) for any requests from the certifying authority to have the project proponent resubmit an application. This will promote the cooperative federalism EPA is seeking in its final rule.

v. EPA should explicitly define issues and impacts outside the scope of water quality certification if it moves forward with broadening the scope in its final rule.

The EPA is proposing to return the scope of certification to the broader standard from the 1971 Rule, which authorizes the certifying authority to evaluate and place conditions on the "project in general" or the "activity as a whole." EPA further proposes to define the term "activity as a whole" to capture "any aspect of the project activity with the potential to affect water quality."[12] Therefore, when a certifying authority reviews a federally licensed or permitted activity, it must determine whether the "activity as a whole" will comply with "water quality requirements." Accordingly, EPA is now proposing to define "water quality requirements" to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state laws or regulations implementing the enumerated provisions, and any other water-quality related requirement of state or tribal law regardless of whether they apply to point or nonpoint source discharges.

NGSA is concerned broadening the scope and defining "activity as a whole" and "water quality requirements" to include only what could be considered by a certifying authority, but not explicitly defining issues or conditions that are outside the scope, could exacerbate scope creep issues industry faced prior to the 2020 Rule. Certifying authorities should perform thorough assessments related to water quality when processing a water quality certification for a proposed

[12] Federal register notice p. 35345

project -- and with proper implementation of Section 401, certifying authorities have effectively done so. However, in certain instances, the scope of certification was expanded to include issues unrelated to water quality and misused as the basis for denial of a certification.[13] While EPA states in its proposal that it would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality, it does not propose to explicitly define impacts outside the scope for a certification. If EPA moves forward with broadening the scope of certification, the boundaries of review and conditions must be clear to all stakeholders.

There is ample case law establishing that the scope of review by certifying authorities is limited, and this should clearly be demarcated in the regulations. In *American Rivers et. al. v. FERC*, the Second Circuit affirms that Section 401 authorizes states to impose only conditions that relate to water quality. The decision states, "this is plainly true. Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."[14] The court goes on to reference additional case law supporting a limit on the scope in *Pud No. 1 of Jefferson County v. Washington Department of Ecology*, which states, "although Section 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded."[15] Given the legal precedent, EPA should make its regulations clear regarding what is within and outside the scope of review.

[13] 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'').
[14] See Am. Rivers, Inc. v. FERC, 129 F.3d 99, 107 (2d Cir. 1997)
[15] *Pud No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)

vi. EPA should consider a recourse option or more proactive role for project proponents for certification decisions.

EPA is proposing that any grant of certification with conditions shall (1) identify any conditions necessary to assure that the activity as a whole will comply with water quality requirements and (2) include a statement explaining why each condition is necessary to assure that the activity as a whole will comply with water quality requirements. NGSA encourages EPA to adopt this approach to maintain transparency and put the burden of proof on states to justify any conditions included.

Unlike the 2020 Rule, EPA does not interpret the statute as allowing a Federal agency to review whether a certifying authority included certain regulatory defined elements in its certification decisions or question certifying authority conditions. By limiting the role of the Federal agency's review, there is little to no timely recourse if a project proponent disagrees with a certifying authority's denial or conditions imposed on a certification. At this time, the project proponent may only challenge the certifying authority's decision in the appropriate court of jurisdiction.

Given that the EPA is broadening the scope of certification standard for issuing certifications and conditions, applicants should be afforded some type of timely recourse if they disagree with the conditions or denial. Judicial review for certifying authority decisions poses significant risk to a project's permitting timeline. NGSA encourages EPA to adopt a middle ground approach between the 2020 Rule and 2022 proposal that would allow for arbitration between the project proponent and certifying authority. If the certification is denied or there is disagreement on the conditions imposed, we suggest stakeholders move to arbitration for 60 days. If no settlement can be agreed upon, then the project proponent could move for judicial

review. A middle ground approach would enhance cooperation and coordination between stakeholders and could lead to less litigation for certifying authorities and extended delays for pending projects.

vii. Modifications must be limited to non-substantive issues and not used as a tool to reconsider the merits of a certification.

The EPA is proposing to reintroduce a modifications process for certifications similar to the 1971 Rule. This would allow certification modifications to occur after a certification is issued, provided the certifying authority and Federal agency agree to the modification. NGSA supports this update and flexibility to adapt to changing circumstances or new information.

In its proposal, EPA intends that, as used here, a modification means a change to an element or portion of a certification or its conditions; it does not mean the wholesale reversal of a certification decision. NGSA strongly encourages EPA to clearly state in its final rule that the modifications process cannot result in reconsideration of an approved certification. Modifications should be limited to non-substantive issues and not as a tool or opportunity to reopen the record for additional consideration of the merits of the certification. If any of the modifications up for consideration focus on the conditions imposed on the certification, the burden of proof must fall on the certifying authority to prove these are non-substantive changes that will not have a significant impact on the project's construction or operation.

Moreover, EPA's proposal contemplates two additional limitations: 1) that the certifying authority and the Federal agency must agree that a certification modification be made; and 2) the certifying authority may modify only those portions of the certification that the two parties agree should be modified. However, once agreed upon, the certifying authority is solely responsible for drafting the modification language. NGSA encourages the EPA to adopt its alternative

approach whereby the actual language of the certification modification would be agreed upon by both the Federal agency and the certifying authority. This is an important change to foster cooperative federalism as Congress intended and limit a certifying authority from taking any unilateral actions to modify a certification after issuance.

While reintroducing a limited modifications process for certifications will provide needed flexibility, the process should not result in delays or inefficiencies. EPA should adopt a provision that provides project proponents with a more explicit and expansive role in the modification process. With all parties working together, non-substantive modifications can be handled more effectively.

III. Conclusion

If EPA moves forward with revising the 2020 Rule, NGSA encourages EPA to prioritize clarifications and updates that will promote regulatory certainty for stakeholders in the certification process. NGSA supports several provisions in the proposal, and we urge EPA to ensure that any final rule does not create overly burdensome regulations or undue hurdles to receiving a water quality certification. NGSA offers several recommendations to achieve this balance between promoting cooperative federalism with a defined role for certifying authorities and moving pending projects under Federal agency review forward.

Respectfully submitted,

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