U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2922IT
Attn: Docket ID No. EPA-HQ-OW-2021-0302
1200 Pennsylvania Avenue, NW
Washington, DC 20460

August 2, 2021

Re: Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 84 Fed. Reg. 29,541 (June 2, 2021)

Dear Docket Clerk,

The GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency ("EPA") in conjunction with its intent to reconsider and revise the regulations governing Clean Water Act ("CWA") Section 401 certifications. *See* Notice of Intention to Reconsider and Revise the CWA Section 401 Certification Rule, 84 Fed. Reg. 29,541 (June 2, 2021) ("Notice of Intent").

GPA Midstream Association has served the U.S. energy industry since 1921 and has nearly 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the U.S., commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane, and natural gasoline purchased in the U.S. from more than 400 natural gas processing facilities. In 2017-2019 period, GPA Midstream members spent over $105 billion in capital improvements to serve the country's needs for reliable and affordable energy.

Introduction

As an initial matter, GPA Midstream would urge EPA not to consider revising the Section 401 water quality certification regulations for the second time in two years. Previously, these regulations went without substantive revisions for nearly 50 years. The CWA Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("Section 401 Certification Rule"), was a necessary update in response to recent court decisions and a pattern of abuse by a handful of state certifying agencies that misused Section 401 to unilaterally veto federally-approved interstate infrastructure projects for political reasons, wasting millions of dollars and driving up energy costs for consumers and businesses in the process. In some respects, the Section 401 Certification Rule did not go far enough to curb those abuses and prevent state certifying agencies from straying beyond the role assigned to them by the CWA. Nevertheless, with the Section 401 Certification Rule effective for only a year, the Notice of Intent implies that EPA not only may rescind important

aspects of the Rule, but confer new powers on state certifying agencies.[1] Such a revision to the regulations could not only conflict with the language of the CWA and other federal statutes, but would give state certifying agencies free reign to block any politically controversial interstate infrastructure project. American companies building vital infrastructure need less red tape, not more.

If EPA proceeds with reconsideration, it should not make material changes. Specifically:

- Pre-Filing Meeting. EPA should retain the requirement to submit a pre-filing meeting request. It is a useful start to the formal administrative process for a certification application.
- Certification Requests. EPA should retain the minimum requirements for purposes of starting the review timeline, as it provides important certainty to an applicant while retaining a state certifying agency's ability to request additional information within the CWA framework.
- Reasonable period of time. EPA should not revise the framework set in the 2020 rulemaking, which appropriately frames the factors a federal agency may consider in determining a "reasonable period of time" for a particular state review. Any suggestion that the states should have a role in setting this period is not authorized by the CWA.
- Scope of certification. Here, GPA Midstream urges EPA to correct its current interpretation and properly limit a state certifying agency's authority to deny an application to the five CWA provisions expressly listed in Section 401(a)(1) of the Act. State-only water quality requirements may only be conditions attached to an approved certification and cannot be grounds to deny a certification.
- Enforcement. EPA should not seek to expand state or citizen enforcement authority, as to do so may present significant conflicts with other federal laws. Existing CWA authorities and direction are sufficient.
- Additional "reopeners." EPA should not try to expand the ability of states to try to reopen decided water quality certifications. There is a limited right afforded by statute – and any further regulatory authority would be unlawful, add undue complexity, and deprive developers of some degree of certainty to an already complex and lengthy permitting process.

I. Statutory Background

Under Section 401(a)(1), 33 U.S.C. § 1341(a)(1), any applicant for a federal license or permit for any project that may discharge into a navigable water must apply for a water quality certification from the state certifying authority where the discharge will originate.[2] The state

[1] Since the Notice of Intent raises many issues similar to EPA's 2019 proposed rulemaking, GPA Midstream attaches and incorporates by reference its October 21, 2019 comments ("GPA 2019 Comments").

[2] States are not the only entities that may consider a CWA Section 401 application. Where a project would discharge to interstate waters, the project proponent would apply to "the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate" or "where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator."

certifying authority will review the application to determine whether the discharge will comply with five specific provisions of the CWA: Sections 1311, 1312, 1313, 1316, and 1317. 33 U.S.C. § 1341(a)(1). The state certifying authority may grant a water quality certification, with or without conditions, deny it, or intentionally waive it. *Id.* Where a state certifying authority denies a water quality certification, meaning that it determines that the project will not comply with any of the five CWA provisions listed in § 401(a), the project may not receive any federal license or permit authorizing the project's construction or operation. *Id.*

Where a state grants a water quality certification with conditions, those conditions must comply with CWA Section 401(d). 33 U.S.C. § 1341(d). These conditions may include "any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the project will comply with four specified provisions of the Clean Water Act "and with any other appropriate requirement of State law…." *Id.* Where the state water quality requirement includes conditions complying with Section 401(d), those conditions "shall become a condition of any Federal license or permit" for the project. *Id.*

Regardless of what action a state certifying agency takes, the CWA provides that the it must take some action on the "request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." *Id.* § 1341(a)(1). If a state fails to act within this time frame, the state waives its right to grant or deny a water quality certification, or impose any conditions on the project, and the project may proceed with federal licensing or permitting. *Id.*

II. The Section 401 Certification Rule was Necessary to Counter Abuses

In proposing the Section 401 Certification Rule, EPA correctly recognizes that the process needed reform. This is, in large part, because a small number of state certifying agencies were determined to block the construction of critical interstate energy infrastructure for policy reasons. One strategy has been to unduly prolong the review of Section 401 applications, in part, by continually demanding irrelevant information in order for the applications to be deemed "complete." Another has been for state certifying agencies to demand that project proponents continually withdraw and re-submit their applications or receive a denial.

New York State's misuse of Section 401 is emblematic of the potential for abuse by states that have different policy objectives than the federal permitting authorities – abuse that the 2020 rulemaking revisions sought to address. For example, in 2017 New York Governor Andrew Cuomo declared that "the State must double down by investing in the fight against dirty fossil fuels and fracked gas from neighboring states…." Andrew M. Cuomo, New York 2017 State of the State at 57-58.[3] Governor Cuomo's attempt to block natural gas projects "from neighboring

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33 U.S.C. § 1341(a)(1). Further, pursuant to 33 U.S.C. § 1377(e), Indian tribes may be treated as States for purposes of Section 401 water quality certifications.

[3] *Available at*, https://www.governor.ny.gov/sites/default/files/atoms/files/2017StateoftheStateBook.pdf; *see also* Marie J. French, Rally targets Cuomo over natural gas infrastructure, renewables progress, Politico (April 23, 2018) ("A spokesperson for the governor's campaign on Friday said the governor had placed a moratorium on new natural gas pipelines in the state. The spokesperson on Monday clarified that the governor has not approved any new pipelines.").

states" was not based on documented water quality concerns. Rather, with $360 million investment in renewable energy projects by the New York State Energy Research and Development Authority, and another $4 billion planned for investment by 2020, Governor Cuomo wanted to protect his state-funded renewable energy projects from competition. *Id.* at 58-61. Section 401 certification, wielded by the New York State Department of Environmental Conservation ("NYSDEC"), would be a primary weapon in that cause.

NYSDEC began its campaign against the Constitution Pipeline which, after receiving approval from the Federal Energy Regulatory Commission ("FERC"), submitted an application for a water quality certification on August 22, 2013. Constitution Pipeline Company, LLC, Petition for Declaratory Order, FERC Dkt No. CP-18-5-000 (Oct. 11, 2017) ("Constitution Petition") at 1. After demanding that Constitution Pipeline withdraw its application and re-submit an identical application on May 9, 2014 and April 27, 2015, NYSDEC informed Constitution Pipeline that it would grant the water quality certification but then denied it. *Id.* For added effect, NYSDEC announced the denial on Earth Day 2016. *Id.* at 1-2, 5. NYSDEC's review and ultimate denial took nearly three years. *Id.* at 5.[4]

According to NYSDEC, it lacked the necessary information to make a determination. *See* GPA 2019 Comments, Attachment A, NYSDEC, Joint Application: DEC Permit # 0-9999-00181/00024 Water Quality (Apr. 22, 2016) ("Constitution Denial") at 1. NYSDEC asserted a lack of information to properly evaluate Constitution Pipeline's application despite FERC issuing an Environmental Impact Statement ("EIS") for the project – a process that saw NYSDEC submit nine separate sets of comments to FERC while assuring that it would rely on the EIS in evaluating Constitution Pipeline's water quality certification application – and receiving nineteen supplemental responses to information requests from the project proponent. Constitution Petition at 22, n. 77; Constitution Denial at 6-7, Table 1.

Yet, despite professing a lack of information, NYSDEC still declared that the Constitution Pipeline would harm state water quality. It reached this conclusion by (1) claiming that the Constitution Pipeline would not comply with state laws well beyond what Section 401 authorizes state certifying authorities to consider, (2) contradicting decisions made by FERC and for which FERC has exclusive authority under the Natural Gas Act, and (3) rejecting the conclusions in FERC's EIS regarding the projects effect on water quality.

For instance, NYSDEC declared that the Constitution Pipeline would cause adverse environmental impacts to state-jurisdictional wetlands, forested lands, riparian vegetation, and spring seeps. Constitution Denial at 3. None of these purported impacts are regulated under any section of the CWA, much less the five specific CWA sections enumerated in Section 401(a)(1). It further justified its denial based on demands that Constitution Pipeline analyze different routes, stream crossing methods, pipeline depths, and blasting plans than those approved by FERC. *Id.* at 3, 8, 12-13. This directly impinges on FERC's exclusive authority under the Natural Gas Act to regulate interstate natural gas facilities, such as the Constitution Pipeline. *See*, *e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988) (the Natural Gas Act provides FERC with exclusive jurisdiction over interstate natural gas facilities); *Nat'l Fuel Gas Supply Corp. v. Publ.*

[4] By contrast, Pennsylvania granted a water quality certification to Constitution Pipeline after only five months. *Id.* at 4-5.

Serv. Comm'n, 894 F.2d 571, 576-77 (2d Cir. 1990) ("Congress has occupied the field of regulation regarding interstate gas transmission facilities" and the Natural Gas Act preempts state environmental regulations). Lastly, NYSDEC rejected the environmental conditions, such as the erosion and turbidity mitigation measures, imposed by FERC through the project's EIS and Certificate of Public Convenience and Necessity to ensure compliance with water quality standards, claiming it lacked unspecified information. Constitution Denial at 3, 8-9, 12.

The Constitution Pipeline was not an isolated instance of NYSDEC's disregard for the limitations on state certifying agencies imposed through Section 401 and other federal statutes. GPA Midstream's 2019 comments detail similar abuses by NYSDEC with respect to the Northern Access 2016 Pipeline, Northeast Supply Enhancement Project, and the Millennium Pipeline. GPA 2019 Comments at 3-5. For the Millennium Pipeline, NYSDEC denied a Section 401 water quality certification solely on the basis that FERC's Environmental Assessment for the project did not adequately analyze the indirect effect of downstream greenhouse gas emissions, which is clearly not a water quality criteria. NYSDEC is not alone. As noted in GPA Midstream's 2019 comments, the Washington Department of Ecology adopted NYSDEC's tactics in denying a water quality certification for the Millennium Bulk Terminal export facility. GPA 2019 Comments at 6. More recently, the North Carolina Department of Environmental Quality denied a water quality certification to the Mountain Valley Pipeline Southgate Project based on its uncertainty that a related pipeline section would be built in the future.[5]

The penchant of some state certifying agencies to exceed the very limited powers provided under CWA 401 not only violates the CWA but can lead to conflicts with other federal statutes. NYSDEC's denial of a water quality certification is one example where an overly expansive view of Section 401's scope effectively nullified FERC's findings in its EIS and Certificate of Public Convenience and Necessity without NYSDEC ever having to challenge either agency action in court. Instead, NYSDEC determined that it could unilaterally supersede FERC's determinations with respect to the pipeline's route, crossing methods, impacts on water quality, and environmental mitigation measures. The Section 401 Certification Rule was an incomplete measure to begin reigning in problematic behavior. In contemplating any proposed revisions to the Rule, EPA should be mindful of the reasons why Section 401 regulations needed reform in the first place.

III. Issues Raised in Notice of Intent

EPA's Notice of Intent raised several specific issues for which it is requesting comment. GPA Midstream addresses many of those issues below.

A. Pre-Filing Meeting Requests

A number of GPA Midstream's members generally support the requirement to submit a meeting request to the state certifying agency at least 30 days prior to submitting a Section 401 application. Although many project proponents typically engage in extensive discussions before submitting an application, a formal pre-filing meeting request provides the state certifying agency an opportunity to discuss the information it requires from the applicant and marks a formal

[5] *See* Letter from S. Daniel Smith to Mountain Valley Pipeline, LLC (April 14, 2021) at 1, *available at*, https://files.nc.gov/ncdeq/pipelines/2018-1638v3-MVP-Southgate-04292021.pdf.

beginning of the administrative record for the application. GPA Midstream would not recommend that EPA eliminate this procedure or shorten the timeframe.

Other members, however, note that the pre-application meeting request requirement unnecessarily delays permitting for several types of projects. For instance, some U.S. Army Corps of Engineers District Offices have adopted a policy where they will decline to begin reviewing permit applications until the expiration of the 30-day meeting request period. This is true even for smaller, uncontroversial projects that typically receive Section 401 water quality certifications in short order. In these instances, the pre-application request requirement unnecessarily adds a month to permit review times that are already long; often 12 months for an individual Section 404 permit or approximately eight months for a Letter of Permission. Any revision to the Section 401 Certification Rule should advise that federal permitting agencies should not postpone reviewing permit applications until an applicant officially files for a Section 401 water quality certification with the state certifying agency.

B. Certification Requests

EPA's Notice of Intent stated that the Agency "is concerned" that the minimum requirements for water quality certification requests listed in 40 C.F.R. § 121.5 "potentially limit state and tribal ability to get information they may need before the CWA Section 401 review process begins." 86 Fed. Reg. at 28,543. GPA Midstream does not share EPA's concern. The requirements listed in 40 C.F.R. § 121.5 constitute the "components that the Agency believes are necessary to provide a certifying authority with clear notice that a request has been submitted" so as to "start the statutory clock" for purposes of review. 85 Fed. Reg. at 42,245. As EPA previously noted, "[n]othing in the final rule's definition of 'certification request' precludes a project proponent from submitting additional, relevant information or precludes a certifying authority from requesting and evaluating additional information within the reasonable period of time." *Id.*

GPA Midstream further agrees with EPA that it will often be in the project proponent's interest that "relevant information about the discharge and potential impacts to the receiving waters is provided to the certification authority early in the certification process." *Id.* Indeed, the purpose of the pre-filing meeting notification is to allow the project proponent and the state certifying agency to better understand what information will be required as part of the application. *Id.* at 42,241. GPA Midstream does not believe that 40 C.F.R. § 121.5 can be reasonably read as constraining the state certifying agency's ability to request that more particular information be included in an application. Further, project proponents have every incentive to provide necessary and relevant information with their applications, as failing to do so would exacerbate the risk of the state certifying agency denying a water quality certification.

C. Reasonable Period of Time

EPA raises two concerns with respect to the "reasonable period of time," not to exceed one year, that state certifying agencies have to review water quality certification applications. The first is EPA's concern "that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests…." 86 Fed. Reg. at 29,543. EPA does not elaborate on what constitutes a "sufficient role." GPA Midstream believes that the state certifying agency has no role in determining what is a "reasonable period of time." EPA is charged with

interpreting any ambiguous terms under CWA section 401, *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003), not state certifying agencies.

That the Section 401 Certification Rule expressly acknowledged that "federal licensing and permitting agencies determine the reasonable period of time, either categorically or on a case-by-case basis" – a practice that long pre-dated the Rule – is perfectly sensible. 85 Fed. Reg. at 42,258; *see also id.* at 42,259 (noting that "federal licensing and permitting agencies should continue to fill this role as they have done for the past several decades."). A federal agency that is permitting the project at issue, and many similar projects, is in the best position to understand its complexity and what constitutes a "reasonable period of time" for review. *See id.* ("decades of experience" give federal agencies "the necessary knowledge and expertise to establish a reasonable period of time.").

Moreover, EPA's concern is not well founded, as nothing within the statute contemplates a role for state certifying agencies in establishing a "reasonable period of time." This is for good reason: the entire point of the statutory deadline is to prevent state certifying agencies from tying up projects awaiting federal permits through unreasonable delays. In 2005, Congress amended the Natural Gas Act to make challenging state certifying agency decisions and delays easier because Congress determined that "applicants … were encountering difficulty proceeding with natural gas projects that depended on obtaining state agency permits." *Islander East Pipeline v. Conn. Dep't of Environ.*, 482 F.3d 79, 85 (2d Cir. 2006) (citing Congressional legislative history materials describing state certifying agency delays). The D.C. Circuit was more blunt: "Congress amended section 19(d) of the Natural Gas Act to allow this Court to compel action from foot-dragging agencies." *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017); *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) ("it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.") (emphasis in original). Given the frustration of Congress (and courts, federal agencies, and project proponents) with state certifying agency delays, GPA Midstream believes it would be unwise to give those same agencies the ability to grant themselves extensions of time.

EPA's second concern is that the Section 401 Certification Rule "limits the factors that federal agencies may use to determine the reasonable period of time." 86 Fed. Reg. at 29,543. GPA Midstream believes that EPA is misreading the Section 401 Certification Rule. Federal agencies need only "consider" three very basic factors: (1) the project's complexity, (2) the nature of its discharge, and (3) the "potential need for additional study or evaluation of water quality effects from the discharge." 85 Fed. Reg. at 42,259. Each of these "factors maintain flexibility for federal agencies to consider project-specific or categorical information…." *Id.* The Notice of Intent did not provide any support for EPA's newfound concerns with these factors, or describe how these factors would meaningfully constrain a federal agency's discretion to grant a state certifying agency additional time. As such, GPA Midstream does not believe these factors should be revisited.

D. Scope of Certification

EPA now also raises concerns that the "narrow scope of certification and conditions" under the Section 401 Certification Rule "may prevent state and tribal authorities from adequately protecting their water quality." 86 Fed. Reg. at 29,543. GPA Midstream disagrees. Indeed, EPA's current interpretation of the scope of certification as set out in the Section 401 Certification Rule is not too narrow – it is too broad. EPA should take this opportunity to correct its interpretation of the scope of certification so that it is consistent with the text and structure of Section 401(a)(1).

In the preamble to the final Section 401 Certification Rule, EPA stated that "[a] certifying authority may deny certification if it is unable to determine that the discharge from the proposed activity will comply with the applicable sections of the CWA and appropriate requirements of state law." 85 Fed. Reg. at 42,217 (emphasis added). This statement regarding what may be considered in granting or denying a water quality certification is incorrect. EPA appears to have merged two separate and distinct grants of authority under Sections 401(a)(1) and 401(d).

Section 401(a)(1) defines the grounds upon which a state certifying agency may deny a water quality certification. These are an applicant's failure to comply with the applicable provisions of 33 U.S.C. §§ 1311 (effluent limitations), 1312 (water quality related effluent limitations), 1313 (EPA-approved water quality standards), 1316 (national standards of performance), and 1317 (toxic and pretreatment effluent standards). State certifying agencies are not authorized to deny a water quality certification for any other reason. EPA's interpretation impermissibly incorporates the "any other appropriate requirement of State law" language from Section 401(d) into Section 401(a)(1). State certifying agencies may only consider "any other appropriate requirement of State law" in establishing conditions when granting a water quality certification. Nothing in Section 401(a)(1) authorizes a state certifying agency to deny an application on the ground that the proposed project would not comply with "any other appropriate requirement of State law." Thus, EPA's current interpretation of the scope of certification is impermissibly overbroad. EPA should correct this error and specify that state certifying agencies may only deny an application where there is evidence that the proposed project's discharges would violate the five CWA sections specifically listed in Section 401(a)(1).

Although EPA stated that it has "identified a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that state are empowered to protect their water quality," 86 Fed. Reg. at 29,542, Congress delineates the extent of, and conditions that apply to, that cooperative federalism through the CWA's text. Neither EPA nor state certifying agencies have the authority to broaden the grounds listed within Section 401(a)(1) for denying an application. Some state certifying agencies have attempted to do so, denying several applications, in whole or in part, on the project proponent's purported failure to comply with state laws or obtain state permits that are arguably related to "water quality requirements" but wholly outside the five listed statutes in Section 401(a)(1).

Thus, the current language in 40 C.F.R. §§ 121.3, 121.5(b), and 121.5(c) is overly broad to the extent that they allow state certifying agencies to deny an application for failure to comply with state "water quality requirements" that are not EPA-approved water quality standards under CWA § 303. While these may be grounds to impose conditions on a certification under Section 401(d) ("any other appropriate requirement of State law"), Congress did not authorize state

certifying agencies to deny a water quality certification for failure to comply with state law requirements under Section 401(a)(1). Should EPA undertake any revisions to the Section 401 Certification Rule, it should revise the regulations to clarify and confirm that states may only deny an application where the proposed project's discharges will not comply with the five statutes listed in Section 401(a)(1).

E. Certification Actions and Federal Agency Review

EPA requested comment on whether it is appropriate for federal agencies to review state certifying agency grants or denials for compliance with procedural requirements. 86 Fed. Reg. at 29,543. The D.C. Circuit has already determined that federal permitting agencies are obligated to do so. In *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), a party challenged Washington's water quality certification for a hydroelectric project by alleging that the state failed to comply with the public notice requirements in Section 401(a)(1). The court held that, because "some minimal form of public notice is an explicit requirement of section 401, which is federal law, and therefore in a case such as this one, where public notice has been called into question, we think FERC has a role to play in verifying compliance with state notice procedures at least to the extent of obtaining an assertion of compliance from the relevant state agency." *Id.* at 68. Without ensuring that the state certifying agency complied with Section 401's requirements, FERC had no "authority to act." *Id.* GPA Midstream believes that evaluating a state certifying agency's compliance with the basic minimum requirements laid out in the Section 401 Compliance Rule, a federal permitting agency is discharging its duty under *City of Tacoma* without substantively evaluating the state certifying agency's decision. *See*, *e.g.*, *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (FERC may not alter or reject substantive conditions imposed by state certifying agencies).

Separately, EPA requested comment on whether a state certifying agency's failure to adhere to procedural requirements should result in waiver without an opportunity to cure the identified deficiencies. 86 Fed. Reg. at 29,543. GPA Midstream does not oppose providing an opportunity to cure deficiencies so long as doing so does not reset the time for a state certifying agency to act. Such an interpretation would not only create an exemption to the "reasonable period of time" requirement that is not authorized by the statute, but it would allow for improper gamesmanship. Assuming that a state certifying agency had a one year deadline to grant or deny an application, it could wait until the 365th day, issue a procedurally deficient denial, and then take additional time to "cure" its defective denial. This process could continue indefinitely while depriving the project proponent of either a waiver or a final agency action that it may challenge in court. The D.C. Circuit has already condemned such gamesmanship in *Hoopa Valley Tribe*. 913 F.3d at 1104 ("it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*."). If, however, the state certifying agency issued a procedurally defective decision on the 335th day (assuming it had one year to act), GPA Midstream does not oppose the agency using the additional 30 days of the time period to cure the deficiency. We believe this would motivate state certifying agencies to process applications expeditiously to provide themselves with some leeway to cure any unexpected procedural issues .

F. Enforcement

EPA requested comments on the potential role of state certifying agencies in enforcing certification conditions and "whether the CWA citizen suit provision applies to Section 401." 86 Fed. Reg. at 29,543. GPA Midstream does not see any role for state certifying agencies in enforcing certification conditions other than the procedure in 33 U.S.C. § 1341(a)(3) (the "reopener" provision discussed below), or any role that may be specified under the federal permitting authority's applicable statutes and regulations.

Where a state certifying authority grants a water quality certification with conditions, those conditions "shall become … condition[s] on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d). In some instances, such as with respect to a certification condition for a Nationwide Permit, the state certifying agency may have an enforcement role if it can satisfy the requirements of the CWA citizen suit provision. In other instances, however, federal statutes may not allow for an enforcement role. For example, where a certification condition is included in a Certificate of Public Convenience and Necessity for a natural gas pipeline, the Natural Gas Act specifies that FERC has the exclusive power to bring an enforcement action for any violation of that Certificate. 15 U.S.C. § 717s(a). As a condition to a Natural Gas Act Certificate, that condition would not be "an effluent standard or limitation under this chapter" for purposes of filing a CWA citizen suit. 33 U.S.C. § 1365(a)(1) (emphasis added). GPA Midstream urges EPA to approach this issue with great caution as attempting to grant state certifying agencies enforcement roles could cause significant conflicts with statutes administered by other federal agencies.

G. Modifications to the Certification Through a "Reopener" Provision

GPA Midstream opposes the authorization of any form of "reopener" provision for water quality certifications, other than what is already granted in the CWA. Section 401(a)(3) includes a form of "reopener" in that, within 60 days after certification, the State may notify the federal permitting agency that "there is no longer reasonable assurance that there will be compliance with the applicable provisions of" the CWA "because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements." 33 U.S.C. § 1341(a)(3). The CWA does not authorize EPA to create a reopener provision in any other form, for any other reasons, or for any time period other than sixty days.

The limitations Congress imposed on reopeners are sensible and provide finality to both the project proponent and the federal permitting agency. Limiting the reopener to sixty days ensures that certification terms are settled after a specific period of time. It precludes state certifying agencies from revoking certifications, imposing new or different certification conditions, or eliminating conditions for constructed and operating facilities years after issuing the certification due to relatively routine changes in water quality criteria, new and different uses of the waters, or simply changes in political mood. This provides finality while also guarding against the project proponent's inability to comply with applicable CWA provisions or the potential for obtaining a certification through misrepresentation. *See id.* § 1341(a)(4) (opportunity for state certifying agency to have certification suspended before initial operation); *see also* § 1341(a)(3)

(project proponent's failure to notify state certifying agency of changes in project construction or operation that may result in CWA violations nullifies the certification). The scheme already incorporated into the statute is both the exclusive grounds for reopening a certification and strikes an appropriate balance between the various competing interests.

GPA Midstream further endorses the two main reasons against additional reopener provisions provided in the Section 401 Certification Rule. First, certifications are merged into federal permits that state certifying agencies do not administer or enforce. 85 Fed. Reg. at 42,279. Federal agencies have their own processes for modifying permits established by regulation. GPA Midstream strongly opposes any revision to the Rule that would purport to authorize state certifying agencies to circumvent these federal regulatory processes and unilaterally alter or rescind federal permits. Second, such reopener provisions could be used to effectively circumvent the statutory deadline for state certifying agencies to grant, deny, or waive certification. *Id.* at 42,279-80. GPA Midstream agrees. Given the tactics already used by state certifying agencies, as described in *Constitution Pipeline v. NYSDEC*, 868 F.3d 87, 94 (2d Cir. 2017) and *Hoopa Valley Tribe*, EPA should not create a structure under which those state agencies could seek to manipulate reopener provisions by granting a certification within the statutory deadline and then suspend that certification to avoid waiver.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's request and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

Attachment A

Via e-filing on www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2822IT
Attention: Docket ID No. EPA-HQ-OW-2019-0405
1200 Pennsylvania Avenue, NW
Washington, DC 20460

October 21, 2019

Re: Updating Regulations on Water Quality Certification
EPA-HQ-OAR-2019-0405, 84 Fed. Reg. 44,080 (Aug. 22, 2019)

Dear Docket Clerk:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments to the U.S. Environmental Protection Agency ("EPA") on its proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019) ("Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 80 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

GPA Midstream members construct and operate interstate natural gas pipelines. Other members gather and process natural gas for transmission on interstate natural gas pipelines. Therefore, the appropriate use of Section 401 to ensure Clean Water Act ("CWA" or "Act") compliance is of vital importance to our members, regardless of whether they are seeking to construct new pipelines or to rely on new energy infrastructure to market their products.

Summary

GPA Midstream strongly supports EPA's efforts to revise and update regulations for Clean Water Act Section 401 state water quality certifications. Ensuring clear, consistent, and expeditious certifications is vital to the Nation's policy of developing the energy infrastructure necessary to support a dynamic economy. GPA Midstream's members support cooperative

GPA Midstream Association
Sixty Sixty American Plaza, Suite 700
Tulsa, Oklahoma 74135
(918) 493-3872

federalism and enjoy excellent working relationships with dozens of state agencies on permitting issues. Unfortunately, some of the ambiguities involved in the Section 401 water quality certification process have allowed a handful of states to block or delay necessary energy infrastructure projects for political reasons, wasting millions of dollars and driving up energy costs for consumers and businesses. As discussed below in more detail, updated EPA regulations will greatly support energy infrastructure development in the following ways:

- Congress defined the respective federal and state roles in regulating infrastructure projects subject to Section 401. Revised regulations could better enforce those roles and prevent a disruption of the balance between federal and state regulation created by Congress.

- EPA regulations can clarify the grounds on which a state may deny a water quality certification under Section 401(a), preventing an undue expansion of state regulatory authority and helping to limit burdens on both project proponents and state agencies.

- Clarifying the types of conditions that states may impose on water quality certifications can avoid unnecessary conflicts with other federal regulatory programs, including the Natural Gas Act and the National Environmental Policy Act ("NEPA").

- Definitions of "certification request" and "receipt" can ensure that the rules for a state agency's waiver of a Section 401 certification are clear, objective, minimize the opportunity for abuse, and follow the D.C. Circuit's recent *Hoopa Valley Tribe* decision.

GPA Midstream strongly urges EPA to finalize rules consistent with Executive Order 13868, Promoting Energy Infrastructure and Economic Growth, in that they reduce confusion and uncertainty and allow the necessary development of energy infrastructure in a way that protects both the environment and the proper roles of federal, state, and tribal regulatory agencies.

I. Statutory Background

Under Section 401 of the Clean Water Act, any applicant for a federal license or permit for any project that may discharge into a navigable water must provide a certification from the state where the discharge will originate that the discharge will comply with five specific provisions of the Clean Water Act. 33 U.S.C. § 1341(a)(1). A state may grant such a water quality certification, with or without conditions, deny it, or waive it. *Id.* Where a state denies a water quality certification, meaning that the state determines that the project will not comply with any of the five Clean Water Act provisions listed in § 401(a), the project may not receive any federal license or permit authorizing its construction or operation. *Id.*

Where a state grants a water quality certification with conditions, those conditions must comply with CWA Section 401(d). 33 U.S.C. § 1341(d). These conditions may include "any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the project will comply with four specified provisions of the Clean Water Act "and with any other appropriate requirement of State law…." *Id.* Where the state water quality requirement includes conditions complying with Section 401(d), those conditions "shall become a condition of any Federal license or permit" for the project. *Id.*

Regardless of whether a state chooses to grant, grant with conditions, or deny a water quality certification, the CWA provides that the state must take some action on the "request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." Section 401(a)(1). If a state fails to act within this time frame, the state waives its right to grant or deny a water quality certification and the project may proceed with federal licensing or permitting. *Id.*

II. The Section 401 Certification Process Requires Reform

In its Proposed Rule, EPA correctly recognizes that the Section 401 certification process needs reform. This is, in large part, because a small number of state governments have determined to block the construction of critical interstate energy infrastructure for policy reasons. Misusing their Section 401 certification authority has been a primary way to advance that agenda – and the Proposed Rule would properly address those states' improper use of the CWA.

A. New York's actions to block energy infrastructure demonstrate how the Section 401 certification process can be abused and needs to be reformed.

New York, for one, has sought to block four interstate gas pipelines passing through the state using Section 401.[1] These provide clear support for the reform EPA is advancing.

Constitution Pipeline. New York's actions regarding the Constitution Pipeline is one example. On April 22, 2016, the New York State Department of Environmental Conservation ("NYSDEC") denied a Section 401 application for the Constitution Pipeline, claiming the pipeline proponent both failed to provide various categories of information and that the pipeline would result in environmental harms well outside the scope what should be considered in evaluating a Section 401 application. *See* Attachment A, NYSDEC, Joint Application: DEC Permit # 0-9999-00181/00024 Water Quality Certification/Notice of Denial (Apr. 22, 2016). NYSDEC claimed it lacked necessary information, despite receiving nineteen supplements to the application – an application that NYSDEC ordered to be withdrawn and re-submitted twice. *Id.* at 6-7. NYSDEC required the project proponent to analyze routes, stream crossing methods, pipeline depth, and blasting plans that were different from those approved by FERC, the federal agency with exclusive jurisdiction over those issues. *Id.* at 3, 8, 12, 13; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988) (the Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."). Despite the purported lack of information, NYSDEC declared the pipeline would cause adverse environmental impacts to state-jurisdictional wetlands, forested lands, riparian vegetation, and spring seeps. *Id.* at 3. Yet, none of these alleged impacts are within the proper scope of a state agency's Section 401(a) review.

The denial also failed to consider FERC's Environmental Impact Statement ("EIS") for the project, which included the information that NYSDEC claimed it needed. Instead, without addressing the determinations in the EIS, NYSDEC reached conclusions opposite to FERC's EIS on every category of purported environmental harms, including that the project would have no

[1] Some state agencies believe the Section 401 water quality certification program does not require reform. *See* Comments of Association of State Wetland Managers, EPA-HW-OW-2018-0855-0028 at 4; Comments of Oregon Department of Environmental Quality, EPA-HW-OW-2018-0855-0037 at 1. That ignores how some states are using the program improperly.

permanent impact on water quality. FERC, Final Environmental Impact Statement, Constitution Pipeline and Wright Interconnect Projects, Vol. I (Oct. 2014) at 4-54 to 4-58. Further, NYSDEC summarily rejected the erosion and turbidity mitigation measures required by FERC in its EIS and Certificate of Public Convenience and Necessity. Yet, NYSDEC had never challenged FERC's EIS or Certificate Order for the project.

Northern Access 2016 Pipeline. New York similarly failed to conform its actions to the scope of its authority when it conducted a Section 401 review of the Northern Access 2016 Pipeline. NYSDEC denied a water quality certification for the pipeline based, in part, on the NYSDEC's simultaneous denial of state-law freshwater wetland and stream-crossing permits. *See* Attachment B at 12-13 (April 4, 2017). The Natural Gas Act, however, preempts those state permits, and thus cannot be the basis for a state to deny a 401 certification. *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571, 577 (2d Cir. 1990) ("Congress has occupied the field of regulation regarding interstate gas transmission facilities" and the Natural Gas Act preempts state environmental regulations).

NYSDEC's other bases for denial likewise strayed far outside the scope of a state's Section 401(a) review. The denial imposed a *de facto* ban on dry stream crossings already approved by FERC, Attach. B at 5-6, and relied on purported impacts to riparian vegetation from both construction and the maintenance of a necessary pipeline right-of-way, a state-listed threatened salamander called the Eastern Hellbender, and state-jurisdictional wetlands. *Id.* at 8-12; *see also id.* at 4-5 (NYSDEC's review of water quality certification applications determined whether "the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State" writ large "including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment.") (emphases added).

Further, as with the Constitution Pipeline, NYSDEC failed to address the conclusions of FERC's Environmental Assessment ("EA"), the mitigation measures in the EA, and FERC's exclusive jurisdiction over pipeline routing. *See id.* at 2 (asserting FERC "disregarded the Department's concerns" about the EA during FERC's proceedings); *id.* at 12 (claiming the route approved by FERC should have entirely avoided a specific creek). As with the Constitution Pipeline, instead of challenging FERC's EA and Order, NYSDEC collaterally attacked those actions through the Section 401 water quality certification process.

Northeast Supply Enhancement Project. NYSDEC's May 15, 2019 denial of a water quality certification for the Northeast Supply Enhancement Project rested on similar grounds, collaterally attacking FERC's NEPA determination and mitigation measures and its Certificate Order. *See* Attachment C. NYSDEC even went so far as to claim that the project's greenhouse gas emissions justified its denial of the water quality certification. *Id.* at 10.

Millennium Pipeline. An August 30, 2017 NYSDEC denial of a water quality certification for the Millennium Pipeline was premised solely on a D.C. Circuit decision finding that FERC's EA for the project failed to adequately analyze the indirect effects of downstream greenhouse gas emissions. *See* Attachment D.

From available public statements, New York appears to be using the Section 401 certification process to advance a state policy agenda to stop all interstate natural gas pipeline

infrastructure in New York. *See* Gov. Andrew M. Cuomo, State of the State 2017 at 57-58 ("the State must double down by investing in the fight against dirty fossil fuels and fracked gas from neighboring states to achieve the goals outlined in the Governor's Clean Energy Standard." (emphasis added);[2] Marie J. French, *Rally targets Cuomo over natural gas infrastructure, renewables progress*, Politico (April 23, 2018) ("A spokesperson for the governor's campaign on Friday said the governor had placed a moratorium on new natural gas pipelines in the state. The spokesperson on Monday clarified that the governor has not approved any new pipelines."). Section 401 has been the primary vehicle for enforcing that agenda – and that is not a proper use of its delegated authority.

B. Courts and FERC have agreed that New York's actions are improper and sought to reverse them – but those are *not* adequate remedies.

Courts and FERC have reversed some of New York's improper uses of the Section 401 certification authority. FERC determined that NYSDEC had waived its ability to issue or deny a water quality certification for the Constitution Pipeline. 168 FERC ¶ 61,129 (Aug. 28, 2019). The Second Circuit vacated and remanded NYSDEC's denial of the Northern Access 2016 pipeline's water quality certification application as arbitrary and capricious, *National Fuel Gas Supply Corporation v. New York State Department of Environmental Conservation*, 761 Fed. Appx. 68 (2d Cir. Feb. 5, 2019).[3] The Second Circuit vacated NYSDEC's denial for the Millennium Pipeline. *New York State Dep't of Envt'l Conserv. v. FERC*, 884 F.3d 450 (2d Cir. 2018).

However, agency and judicial reversal of improper state actions is not a replacement for regulatory reform.[4] Success before FERC and in the courts cannot make up for the years of lost time and the resulting increased costs, lost revenue, and lost wages for the workers who fabricate and install these pipelines – and the cascading upstream impacts to the midstream facilities that process natural gas for delivery to interstate transmission lines. This is especially true given that review of state agency actions, or potential waivers, must take place in multiple forums. The Constitution Pipeline had to appeal aspects of New York's denial to FERC (waiver), the Second Circuit (review of NYSDEC's denial under the Natural Gas Act, 15 U.S.C. § 717r), and the Northern District of New York (preemption of state permits and other requirements outside the scope of Section 401(a)). These lengthy and extended proceedings delay vital infrastructure improvements and unnecessarily impose millions of dollars of additional costs. This is not limited to pipeline company costs. Days after NYSDEC denied a water quality certification for the Northeast Supply Enhancement Project, National Grid and Consolidated Edison declared that they would no longer accept new natural gas customers until new pipeline infrastructure could deliver the necessary supply.[5] Thus, these delays result in impacts up and down the natural gas supply

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[2] *Available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf.

[3] FERC also found NYSDEC had waived its right to act. 164 FERC ¶ 61,084 (August 6, 2018).

[4] Some of the examples discussed above are not final and litigation continues. For instance, with respect to the Northern Access pipeline, NYSDEC petitioned for review of FERC's finding of waiver to the Second Circuit and has purported to deny the pipeline a water quality certificate for a second time. The pipeline proponent has petitioned for review of the second denial in the Second Circuit.

[5] *See* Mary Esch, NYC, Long Island Gas Customers are Casualties in Fight Over New Pipelines, NBC 4 New York (Sept. 18, 2019), *available at*, https://www.nbcnewyork.com/news/local/NYC-Long-Island-Gas-Customers-Are-Casualties-in-Fight-Over-New-Pipelines-560660081.html; Consolidated Edison, About the Westchester natural Gas

chain, increasing costs and reducing certainty for midstream companies that require new pipeline infrastructure to transport their products to market.

C. Other states have similarly misused the 401 certification process

New York is not alone. Although GPA Midstream has not catalogued water quality certification denials for all states and other industries, it is aware that the Washington Department of Ecology ("WDOE") denied a water quality certification for the Millennium Bulk Terminal, a coal export facility, using an approach similar to NYSDEC. *See* Attachment E. WDOE based its denial on matters that ranged far outside the scope of review Congress provided in Section 401(a), including claims that the project will purportedly impact state-jurisdictional wetlands, that the U.S. Army Corps of Engineers had not yet provided a jurisdictional determination establishing wetland boundaries, that Millennium Bulk Terminal did not provide requested hydrologic and soil sample analyses, that the company purportedly did not adequately characterize groundwater impacts, that it did not have a state-law permit to reuse stormwater for dust control, and that the site was formerly contaminated by an aluminum smelter. None of these fall with the scope of a state's 401 review authority as a matter of law.

In sum, EPA has correctly recognized an issue that needs to be addressed. Moreover, because EPA administers the CWA 401 program, the courts look to EPA to provide its interpretation of Section 401. *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003) (FERC's "interpretation of the CWA is not entitled to the usual judicial deference, however, because the Environmental Protection Agency (EPA) – and not FERC – is charged with administering the statute.") Therefore, it is necessary for EPA to promulgate regulations that implement fully the limitations on Section 401 review established by Congress.

III. EPA Should Properly Define the Scope of State Authority Under Section 401

There appears to be some needless confusion regarding the scope of a state's proper review under Section 401, especially with respect to the grounds upon which a state may deny a water quality certification. EPA itself appears to have inadvertently confused these grounds where it stated in the proposed rulemaking preamble that "[u]nder section 401, a certifying authority may grant, grant with conditions, deny, or waive certification" depending upon "whether the proposed activity will comply with the applicable provisions … of the CWA and any other appropriate requirement of state law." 84 Fed. Reg. at 44,085 (emphases added). This summary inadvertently melds two separate and distinct grants of authority under Section 401(a) and 401(d). Each one should be defined separately and properly by regulation.

A. EPA's Regulations Should be Clear that States May Only Deny a Water Quality Certification Where a Proposed Project Fails to Comply with the Clean Water Act Standards Expressly Listed in Section 401(a)

As EPA recognized elsewhere in the proposed rulemaking preamble, Section 401 has two primary components: (1) Section 401(a) expressly limits the basis for a state's determination to

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Moratorium, *available at*, https://www.coned.com/en/save-money/convert-to-natural-gas/westchester-natural-gas-moratorium/about-the-westchester-natural-gas-moratorium.

grant or deny a water quality certification to five specific Clean Water Act standards, and (2) once a state grants a water quality certification, Section 401(d) allows the state to impose certain conditions to comply with the Clean Water Act or "any other appropriate requirement of State law." 84 Fed. Reg. at 44,089 (discussing distinction between the two sections as described in *PUD No. 1 of Jefferson County* and *City of Tacoma v. Washington Department of Ecology*, 411 U.S. 700, 711-712 (1994)) (emphasis added).[6] Some states have erroneously collapsed these two distinct sections of the CWA into a single standard, under which they purport to deny a water quality certification for alleged non-compliance with any state law requirement, not limited to the five Clean Water Act standards listed in Section 401(a). *See, e.g.*, NYSDEC Reply in Opposition to Motion of National Fuel Gas Supply Corporation and Empire Pipeline, Inc. for Leave to Answer and Answer of National Fuel Gas Supply Corporation and Empire Pipeline, Inc., FERC Docket Nos. CP15-115-000, CP15-115-001 (Oct. 19, 2016) at 5-8 (claiming the Supreme Court in *PUD No. 1* broadened the state's authority to deny water quality certification applications without regard to whether regulations are "directly attributable to the CWA or to promulgation under state authority alone").[7] This is not what Section 401(a) provides and it is not what Congress intended.

Congress has the sole power to regulate interstate commerce, and the Clean Water Act is a statute premised upon the Commerce Clause. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). Although the Clean Water Act contains a general policy of preserving state responsibilities and rights, 33 U.S.C. § 1251(b), and the statute contains several schemes relying upon cooperative federalism, in Section 401 the Congress set a very specific balance between state authority over water quality and federal authority over interstate commerce. States may deny a water quality certification only for a project's inability to comply with five specific Clean Water Act standards listed in Section 401(a). Failing to construe that grant of authority strictly will alter the balance established by federal law and allow expansive state regulation of energy infrastructure projects to encroach on federal interests in ways that Congress never intended.

For these reasons, EPA regulations should clarify and confirm that States may not deny a water quality certification for any reason other than non-compliance with the five Clean Water Act standards specified in Section 401(a). Of these five,[8] the reference to Section 303 requires further clarification. Contrary to the claim made by some states that Section 401(a) covers any state standard plausibly related to water quality, the statute is clear on its face: Section 401(a) only references Section 303 water quality standards. It does not include a general reference to water quality "requirements" or even water quality "standards." Section 303 in turn is limited to water quality standards submitted to, and approved by, the EPA Administrator. 33 U.S.C. §§ 1313(a)(2)-(3), (c)(2)(A), (c)(3), (e)(2)-(3).

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[6] As listed in Section 401(a), these five standards are 33 U.S.C. §§ 1311 (effluent limitations), 1312 (water quality related effluent limitations), 1313 (EPA-approved water quality standards), 1316 (national standards of performance), and 1317 (toxic and pretreatment effluent standards).

[7] NYSDEC relied on a state appellate court decision in *Matter of Chasm Hydro, Inc. v. New York State Department of Environmental Conservation*, 58 A.D.3d 1100, 1101 (N.Y. App. 3d Dept. 2009), holding that Section 401 allows New York to regulate a hydroelectric dam's operations, notwithstanding FERC's exclusive jurisdiction under the Federal Power Act, whenever that regulation has some ostensible relationship to water quality.

[8] The five requirements are "that any such discharge will comply with the applicable provisions of" CWA Sections 301, 302, 303, 306, and 307. 33 U.S.C. § 1341(a)(1).

In the preamble to the proposed rule, EPA correctly recognizes this statutory framework, stating that "appropriate requirements" are interpreted to "mean the regulatory provisions of the CWA" which are "EPA-approved provisions." 84 Fed. Reg. at 44,095. Unfortunately, proposed sections 121.3 and 121.5(b) and (c) would appear to inadvertently include language that could be viewed as potentially inconsistent with this straightforward interpretation of the Act. Proposed section 121.3, defining the scope of certification, refers to "water quality requirements," not EPA-approved water quality standards under Clean Water Act § 303 as provided by the Act. Proposed sections 121.5(b) and (c) do likewise. *See* proposed § 121.5(b) (states may deny a water quality certification application where "the discharge from a proposed project will comply with water quality requirements.") (emphasis added); proposed § 121.5(c) ("Any grant of certification shall be in writing and shall include a statement that the discharge from the proposed project will comply with water quality requirements.") (emphasis added). The reference to "water quality requirements" is potentially vague and could be read to convey an authority to state agencies far beyond what Congress permits in Section 401(a).

Hence, based on the explicit language of the Act, for "water quality standards," EPA should revise its proposed regulations to clarify and confirm that states may only deny a water quality certification application where the proposed project's discharges will not comply with EPA-approved water quality standards. An anticipated failure to comply with any other state law water quality requirement, regulation, or standard may not – and indeed cannot as a matter of federal law – provide a justification for denying a certification.

Including this clarification is sound policy. Properly limiting a state's review under Section 401(a) to EPA-approved water quality standards would streamline the water quality certification application process, reduce the time that a state agency needs to review of those applications, and reduce resulting litigation. Much of the information demanded by states is unrelated to EPA-approved water quality standards and are therefore outside the boundaries of Section 401(a). For instance, as NYSDEC documented in its denial of the Constitution Pipeline's water quality certification, many of its demands for supplemental information related to wetland mitigation, pipeline re-routing, and pesticide use. Attachment A at 6-7. Limiting state review to EPA-approved water quality standards would eliminate expensive, time-consuming, and unnecessary demands for supplemental information.

Further, the final rulemaking preamble should clarify that states may not rely upon the phrase "any other appropriate requirement of state law" as a ground for denying a water quality certification. This phrase is only found in Section 401(d), not Section 401(a). Section 401(d) states that, where a state agency grants a certification, it may impose conditions "necessary to assure that any applicant for a Federal license or permit will comply with" Sections 301, 302, 306, and 307 of the Clean Water Act "and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d) (emphasis added). Regardless of what "any other appropriate requirement of State law" may mean, EPA should clarify that Section 401(a) only authorizes a state to deny an applicant's failure to comply with the five Clean Water Act standards specifically listed there. Under the statute, States may consider appropriate State law requirements only after they have chosen to grant the Section 401 certification.

B. State Conditions on a Water Quality Certification Should be Limited to Those Necessary to Ensure Compliance with EPA-approved Water Quality Standards

In fashioning the rule, EPA should limit state conditions on a water quality certification. In *PUD No. 1*, the Supreme Court held that the conditions a state imposes when granting a water quality certification are limited by the term "appropriate." 511 U.S. at 712. The Court acknowledged that "state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.* at 713. However, the Court declined to "speculate on what additional state laws, if any, might be incorporated by this language." *Id.* Because Section 401 water quality certifications could create conflicts with other federal statutes, EPA should limit its interpretation of "any other appropriate requirement of state law" in Section 401(d) to only include EPA-approved water quality standards.

1. EPA must consider the exclusive regulatory authority of other federal agencies under other federal statutes.

Section 401 water quality certifications may be issued for several types of projects subject to exclusive federal agency jurisdiction, such as those licensed or permitted under the Federal Power Act, Natural Gas Act, and Atomic Energy Act. States are broadly preempted from regulating any aspect of facility construction or operation under these laws with the only exceptions being explicit federal carve-outs, such as under Section 401. *See, e.g.*, *California v. FERC*, 495 U.S. 490 (1990) (Federal Power Act); *Schneidewind*, 495 U.S. 293 (Natural Gas Act); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983) (Atomic Energy Act). Interpreting conditions imposed as "other appropriate requirement[s] of State law" narrowly and limiting them to those necessary to ensure that the proposed project's discharge will not violate EPA-approved state water quality standards can avoid unnecessary conflicts with these federal regulatory programs.

For instance, FERC has exclusive authority over all facilities used in the interstate transportation of natural gas. *Schneidewind*, 485 U.S. at 301 (citing 15 U.S.C. §§ 717c, 717d, 717f); *see also Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571, 577 (2d Cir. 1990) ("Congress has occupied the field of regulation regarding interstate gas transmission facilities…."). FERC's mandate is to ensure that the construction and operation of interstate natural gas transmission facilities is in the public interest. 15 U.S.C. §§ 717(a), 717f. This public interest analysis covers "the interests of landowners and the surrounding community, including environmental impacts." Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 at 61,396. Further, FERC's environmental review of natural gas pipeline impacts is "undeniably a regulation of a facility used in the interstate transportation of natural gas" that is subject exclusive FERC authority. *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 576. Independently, FERC must review all potential environmental impacts under NEPA.

The results of these environmental reviews lead to mitigation or precautionary measures to minimize or avoid environmental impacts. Those measures are set forth in FERC Certificate Orders and constitute binding conditions on the issuance of a Certificate of Public Convenience and Necessity. For instance, in FERC's Certificate Order for the Constitution Pipeline, it included

forty-three binding conditions related to environmental compliance. 149 FERC ¶ 61,199, Appendix. These include mitigation measures for all construction procedures, the adoption of minor route variations for environmental purposes, invasive species management, in-stream blasting, stream water withdrawal, measures to avoid or relocate mussels, and protections for state-listed species, among others. *Id.* at ¶¶ 1, 11-13, 24-25, 27-28, 30, 35. Many of these require further approval by FERC's Office of Energy Projects and specifically require coordination with state environmental agencies. *See*, *e.g.*, *id.* at ¶¶ 28 (consultation with NYSDEC for water withdrawal from four waterbodies); 30 (consultation with NYSDEC and other agencies regarding mitigation measures for any dwarf wedgemussels encountered).

2. A properly framed interpretation of Section 401 will avoid unnecessary conflicts with federal law.

With this extensive federal overlay, EPA should read "other appropriate requirement of state law" under Section 401(d) to foreclose states from imposing additional or conflicting environmental requirements that would frustrate the exclusive regulatory authority of other federal agencies and circumvent judicial review under NEPA. This is the very encroachment on Congress' clear allocation of regulatory authority that the *PUD No. 1* dissent warned against when it cautioned that an expansive interpretation of water quality certification conditions could "significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act." 511 U.S. at 724.

NYSDEC's denial of a water quality certification for the Constitution Pipeline illustrates such conflicts.[9] There, NYSDEC ignored the mitigation measures imposed by FERC under the Natural Gas Act and NEPA and claimed that, in April 2016, it lacked "sufficient information to demonstrate compliance with New York State water quality standards," even though FERC issued its EIS in October 2014. Attachment A at 1. NYSDEC then concluded that the project could adversely impact several acres of streams and wetlands, could destroy in-stream habitat, that changes to riparian vegetation and spring seeps could harm trout, potentially destabilize stream banks, and cause turbidity and sedimentation leading to the death of unidentified aquatic life. *Id.* at 3-4. Yet, FERC, under the Natural Gas Act and NEPA, found no significant impacts and, importantly, no water quality standard violations. 149 FERC ¶ 61,199 at 79.

NYSDEC never challenged FERC's Certificate Order or EIS. Consideration of an "appropriate" state requirement should not allow states to collaterally attack decisions made by agencies under federal regulatory schemes that broadly occupy the field or NEPA by repudiating them through the Section 401 process instead of properly challenging those decisions as required by federal law. *See* 15 U.S.C. § 717r(a) (requiring "[a]ny … State … or State commission aggrieved by an order issued by the commission in a proceeding under" the Natural Gas Act to "apply for a rehearing within thirty days after the issuance of such order."); *id.* § 717r(b) (requiring a party to file a request for rehearing prior to obtaining judicial review in a court of appeals);

[9] Although this is an example of a denial, instead of a grant of a water quality certification with conditions, it demonstrates how state agencies can create significant conflicts with federal law through an overly broad reading of state authority under Section 401(d).

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (judicial review of NEPA decisions is under the Administrative Procedure Act).

Had NYSDEC granted the water quality certification in this case, an expansive reading of Section 401(d) could have led to conditions that entirely changed FERC's pipeline construction procedures (such as prohibiting dry crossings and mandating the use of horizontal directional drilling at all crossings), required significant route changes, prohibited blasting or water withdrawal, imposed extensive wetland replacement or mitigation projects, prohibited right-of-way maintenance, and many other conditions that contradicted FERC's Certificate Order. Any of these conditions could add significant cost or delay to interstate infrastructure projects or constitute a "poison pill," turning an ostensible grant of a water quality certification into a practical denial.

3. EPA should adjust the proposal to properly frame the states' role.

To frame the states' proper role, EPA should adjust the language in the proposed regulation. As proposed, § 121.5(d)(1) could be read to endorse a broad interpretation of the conditions that states may impose through water quality certifications. It allows states to grant certifications with conditions related to "water quality requirements," without limiting the conditions to those necessary to enforce EPA-approved water quality standards or foreclosing states from imposing conditions that are inconsistent with federal agency orders, actions, or regulations.

EPA could provide significant clarity by defining "other appropriate requirement of State law" in Section 401(d) as limited to those conditions necessary for ensuring compliance with EPA-approved water quality standards, but excluding conditions that (1) conflict with the decisions of either a federal regulatory body with statutory jurisdiction over environmental impacts, (2) a finding or condition issued pursuant to NEPA, or (3) impose state or local law that is not approved by EPA. GPA Midstream appreciates that Section 401 permits States to "play a valuable role in protecting water quality of federally regulated waters within their borders" even where "Congress has preempted a regulatory field." 84 Fed. Reg. at 44,085. However, nothing in Section 401(d) permits state agencies to circumvent judicial review of agency orders or NEPA reviews or to impose state law requirements that are preempted by other federal statutes. To the extent that state law conditions may conflict with federal agency orders, they should only be deemed "appropriate" where those conditions are "necessary" to enforce EPA-approved water quality standards. Clarifying the proposed regulations will ensure that States play a constructive and appropriate role – to only impose conditions that are consistent with the very narrow carve-out Congress provided in Section 401(d) and are harmonized with other federal laws.

C. Section 401 Does not Authorize the Regulation of "Activities" Other than Discharges

EPA correctly noted the confusion created by the statute's use of "discharge" in Section 401(a) and "applicant" in Section 401(d). 84 Fed. Reg. at 44,089. To find the term "applicant" synonymous with the term "activities," as EPA's existing regulations do, allows for state agencies to regulate well beyond what Section 401 allows. Regulating an "activity" has no limiting principle, can interfere with exclusive federal agency jurisdiction, and see state agencies extract "conditions" that are little more than coerced benefits to the state. *See* 84 Fed. Reg. at 44,094

(citing examples where certificate conditions required the construction of biking and hiking trails, payments to state agencies, and public access to waters as the regulation of "activities").

As with the term "appropriate," EPA should interpret the term "applicant" in a way that limits state authority to that specified by the Congress in Section 401(d) and avoids conflicts with other federal laws. GPA Midstream agrees with EPA's proposal to interpret "applicant" as being only the "individual or entity that has applied for a grant, a permit, or some other authorization." 84 Fed. Reg. at 44,096. This interpretation is consistent with the language and structure of Section 401 and will avoid expanding the scope of Section 401 beyond what Congress intended.

IV. EPA's Proposed Regulations Help Clarify the Rules for Waiver

GPA Midstream appreciates EPA's effort to clarify the rules for when a state waives its right to grant or deny a water quality certification. The term "receipt" has been especially contentious as state agencies frequently take the position that the Section 401 review period only begins to run upon receipt of a "complete application" – a determination that state agencies reserve exclusively to themselves and one that may come many months after a project proponent has actually submitted its application. GPA Midstream also supports EPA's definition of "certification request" but does not believe it is essential to necessary regulatory reform.

A. EPA Correctly Proposes to Clarify That State Agency Review Periods Should Begin Upon Documented Receipt of the Application and not Upon Receipt of a "Complete Application"

The word "receipt" is a key aspect of Section 401 as it begins the Section 401 state agency review period. Further, because a state agency's failure to act before this review period expires results in a waiver of the water quality certification, ambiguities about when "receipt" occurs have caused significant controversies. Some state agencies have used both the receipt date of an application, and claims that an application is not "complete," to circumvent the statutory deadline for state action. GPA Midstream supports EPA's proposed definition of "receipt" as well as EPA's rejection of any purported need to receive a "complete application."

The time between the initial application and a "complete application" can span far beyond the one year maximum deadline under Section 401. For instance, with respect to NYSDEC's denial of a water quality certification for the Constitution Pipeline, the state did not deem the application complete until nearly 16 months after the company's initial application. Attachment A at 6. A state agency may repeatedly request additional information – regardless of whether or not it is relevant to Section 401(a) – for months on end and then take a virtually unlimited amount of time to declare the application "complete." *See Millennium Pipeline Company, LLC*, 151 FERC ¶ 61,186 (Nov. 15, 2017) P 40 ("Under New York DEC's reading of the statute, a state agency can request supplemental information over an indefinite period of time, holding both the applicant and the effectiveness of the Commission's authorizations in limbo.").

Any limitations on state agency requests for supplemental information or definitions of a "complete application" are matters of state administrative law whereas a determination of waiver is a matter of federal law. *See Constitution Pipeline Company, LLC v. New York State Dep't of Envt'l Conserv.*, 868 F.3d 87, 100 (2017) (D.C. Circuit determines waiver under Natural Gas Act);

Millennium Pipeline Co., LLC v. Seggos, 860 F.3d 696 (D.C. Cir. 2017) (FERC must make initial determination of waiver for the Millennium Pipeline project); *New York State Dep't of Envt'l Conserv. v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (FERC properly determined that NYSDEC waived a water quality certification for the Millennium Pipeline project); *see also Millennium Pipeline Company, LLC*, 151 FERC ¶ 61,186 at P 24 (rejecting NYSDEC's claim that state agencies have the sole authority to determine when Section 401's statutory deadline begins to run and when waiver results). Therefore, a scheme that turned on a state law determination of when a federal deadline began to run could allow, and has allowed, state agencies to circumvent the Section 401 review period.

Section 401 contains no indication that Congress intended to incorporate state administrative law into Section 401 or otherwise make federal law subordinate to state agencies. Inferring that state administrative law should play such a key role in a federal statute, without any express statement by Congress, would be unreasonable given the federal interests involved in a potential waiver determination. As the D.C. Circuit recently noted in a case finding waiver of a water quality certification for a hydroelectric project, where state agencies overstep the boundaries in Section 401, "the states usurp FERC's control over whether and when a federal license will issue," "indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). Thus, disputes regarding if and when waiver occurred not only create conflicts between states and project proponents, but between states and other federal regulatory agencies.

As a practical matter, where federal agencies or courts must confront a claim of waiver, they should not be put in a position to untangle state administrative regulations on what constitutes a "complete" application, including decades of state case law on the subject. Further, the subjective question of whether any particular application was indeed "complete" or whether information demanded by states was truly necessary or merely a stalling tactic would involve factual dispute necessitating fact discovery. Neither state agencies nor project proponents relish the idea of answering extensive document requests or dragging their respective employees into depositions to recount years of phone calls, meetings, and e-mail correspondence regarding what information a state agency did or did not require as part of a "complete" application.

EPA's proposed definition of "receipt," "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures," 84 Fed. Reg. at 44,120, provides an objective standard with a date documented in the administrative record. This will remove ambiguity, subjective judgment, and discretion from the calculation of how long a state agency must act on an application while safeguarding the federal interests implicated in Section 401.

Some state agencies, in demanding virtually unlimited time to determine whether an application is "complete," claim that enforcing the text of Section 401 would require them to grant water quality certifications based on bare bones or incomplete applications. *Millennium Pipeline Company, LLC*, 151 FERC ¶ 61,186 at P 42 (rejecting NYSDEC's claim that state agencies would have to act on applications that "provide little or no information or explanation" while "drag[ging] out the process to deprive the permitting agency with needed record evidence") (internal quotations omitted). This is, of course, incorrect. Nothing in the statute compels state agencies to grant water quality certifications.

B. GPA Midstream Supports EPA's Definition of "Certification Request"

GPA Midstream supports EPA's definition of "certification request," although it questions whether a formal definition is necessary. We are not aware of any disputes between project proponents, state agencies, or federal agencies where it was unclear whether a request has actually been made. Nevertheless, defining "certification request" to include a written request with basic information about the project is helpful and may dispel any confusion about when the applicable deadline for state agency review has begun.

GPA Midstream understands that the information provided under the definition of "certification request" does not preclude project proponents from providing more expansive information to state agencies, such as information requested by an agency during a pre-application meeting, or cut off the ability of a state agency to reasonably request additional information relevant to Section 401(a). As noted above, project proponents have no incentive to withhold necessary and relevant information from state agencies as this would put they would risk receiving a defensible denial of a water quality certification.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's proposed rule and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

Attachment A

Attachment B

Attachment C

Attachment D

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8543 I F: (518) 402-9018
www.dec.ny.gov

August 30, 2017

Ms. Georgia Carter
Vice President and General Counsel
Millennium Pipeline Company LLC
One Blue Hill Plaza, 7th Floor
PO Box 1565
Pearl River, NY 10965

Mr. John Zimmer
Pipeline / LNG Market Director
TRC Environmental Corp.
650 Suffolk St., Suite 200
Lowell, MA 01854

Re: 3-3399-00071/00001 – Valley Lateral Project
Notice of Decision

Dear Ms. Carter and Mr. Zimmer:

On November 23, 2015, Millennium Pipeline Company LLC (Millennium) submitted to the New York State Department of Environmental Conservation (Department) the above-referenced Joint Application for the Valley Lateral Project (Project). The Joint Application was for a Water Quality Certificate (WQC) pursuant to Section 401 of the Clean Water Act, as well as permits pursuant to Environmental Conservation Law (ECL) Article 15, Protection of Waters and Article 24, Freshwater Wetlands.

On August 30, 2017, the Department submitted to the Federal Energy Regulatory Commission (FERC) a Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay with regard to the Project (Request) in relation to FERC Docket No. CP 16-17. A copy of the Request is attached to this Notice as Exhibit A. In accordance with 6 NYCRR Part 621, the Department provides this Notice to Millennium that Millennium's Joint Application for the Project is deemed denied as of the date of this Notice, consistent with the Department's Request to FERC. As required by 6 NYCRR § 621.10, a statement of the Department's basis for this Decision is provided below.

Pursuant to 6 NYCRR § 621.10(f), "[a]n application for a permit may be denied for failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which it is sought, including applicable findings required by article 8 of the ECL and its implementing regulations in Part 617 of this Title . . . . " Here, FERC's environmental review of the Project, conducted pursuant to the National Environmental Policy Act (NEPA), takes the place of an

environmental review conducted under the State Environmental Quality Review Act (ECL Article 8). Based on the recent decision by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Sierra Club, et al. v. FERC*, -- F.3d--, 2017 WL 3597014 (D.C. Cir., Aug. 22, 2017), as described in more detail in Exhibit A, FERC's environmental review of the Project is inadequate and deficient.

In addition, pursuant to 6 NYCRR § 621.10(f), an application for a permit may be denied "for any of the reasons set forth in section 621.13(a)(1)-(6) of this Part." Among these reasons is "newly discovered material information or a material change in environmental conditions, relevant technology or *applicable law or regulations* . . . ." (emphasis added). Here, as described in the attached Request (Exhibit A), there has been a material change in applicable law during the course of the Department's review of the Joint Application. Namely, as further explained in Exhibit A, the *Sierra Club* decision found that FERC failed to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project as part of NEPA review. Here, just as in *Sierra Club,* FERC failed to consider or quantify the indirect effects of downstream GHG emissions in its environmental review of the Project that will result from burning the natural gas that the Project will transport to CPV Valley Energy Center.

For the foregoing reasons, and in the event that FERC denies the Department's Request, Millennium's Joint Application for the Project is deemed denied as of the date of this Notice due to (i) the lack of a complete environmental review for the Project and (ii) a material change in applicable law (the D.C. Circuit's decision in *Sierra Club*). The Department reminds Millennium that, during the pendency of FERC's review of the Department's Request, commencement of any and all activities related to the construction of the Project are currently prohibited.

Sincerely,

Thomas Berkman
Deputy Commissioner and General Counsel

cc: FERC
Karen Gaidasz, NYSDEC

Attachment E