



Via e-filing on [www.regulations.gov](http://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

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.<sup>1</sup> 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

---

<sup>1</sup> 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));<sup>2</sup> 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).<sup>3</sup> The Second Circuit vacated NYSDEC’s denial for the Millennium Pipeline. *New York State Dep’t of Env’tl 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.<sup>4</sup> 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.<sup>5</sup> Thus, these delays result in impacts up and down the natural gas supply

---

<sup>2</sup> Available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>.

<sup>3</sup> FERC also found NYSDEC had waived its right to act. 164 FERC ¶ 61,084 (August 6, 2018).

<sup>4</sup> 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.

<sup>5</sup> *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 within 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

---

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).<sup>6</sup> 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”).<sup>7</sup> 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,<sup>8</sup> 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).

---

<sup>6</sup> 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).

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup> 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);

---

<sup>9</sup> 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 Env’tl 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 Env’tl 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.

\*\*\*

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,

A handwritten signature in black ink, appearing to read "Matt Hite". The signature is written in a cursive, flowing style.

Matt Hite

Vice President of Government Affairs  
GPA Midstream Association