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U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2922IT
Attn: Docket ID No. EPA-HQ-OW-2022-0128
1200 Pennsylvania Avenue, NW
Washington, DC 20460

August 8, 2022

Re: Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35,318 (June 9, 2022)

Dear Docket Clerk,

GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide these comments to the U.S. Environmental Protection Agency ("EPA") in response to its proposal rule, Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35,318 (June 9, 2022) ("Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 60,000 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 United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2018-2020 period, GPA Midstream members spent over $90 billion in capital improvements to serve the country's needs for reliable and affordable energy.

Summary

The Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (the "2020 Rule") was a necessary reform to regulations that had not been updated in nearly 50 years. The reforms were largely justified by the Clean Water Act.[1] Revisions to these regulations, if any, should involve minor, incremental changes, not significant alterations. The Proposed Rule,

[1] GPA Midstream filed comments in support of the proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019). *See* EPA-HQ-OW-2019-0405-0808 (Oct. 21, 2019). GPA Midstream also filed comments in response to Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 84 Fed. Reg. 29,451 (June 2, 2021). *See* EPA-HW-OW-2021-0302-0050 (Aug. 2, 2021). GPA Midstream incorporates those comments by reference.

however, rejects the scalpel and chooses the sledgehammer, significantly re-writing the 2020 Rule to adopt interpretations contravened by the statutory text and unsupported by Supreme Court precedent or any other case law. GPA Midstream opposes significant aspects of the Proposed Rule and urges EPA not to finalize it for the following reasons.

First, although we appreciate that EPA is not seeking to restore past practices and interpretations of Section 401 that sought to afford certifying agencies more than one year to act on applications. As the D.C. Circuit Court previously held in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), the "commonplace" practice of delaying action on certification applications beyond one year violated the Clean Water Act. There is significant concern, however, that the Proposed Rule's revisions as to what may be deemed a complete application could cause enough confusion to allow States to return to such commonplace practices.

Second, with respect to the scope of review under Section 401(a), GPA Midstream supported the 2020 Rule even though it likely provided States opposed to critical fossil fuel infrastructure with more power to block such projects than Congress likely intended. EPA is now proposing to make such obstruction of critical infrastructure easier by misreading the Section 401 and Supreme Court precedent interpreting it. Specifically, the Proposed Rule's interpretation of the scope of the certifying agency's review – asserting that an agency may "deny water quality certifications based on the potential impact of the 'activity as a whole' on waters of the United States," 87 Fed. Reg. 35,318, 35,329 (June 9, 2022) – is prohibited by the statute.

EPA Should Not Revise the Minimum Application Requirements

The 2020 Rule clarified that the time for a certifying agency to act begins upon receiving a request for certification, not when the agency subjectively deems the application to be "complete." 85 Fed. Reg. at 42,243. As both the 2020 Rule and the Proposed Rule observed, the Second Circuit already determined that "[t]he plain language of Section 401" prohibits the "complete application" theory and that "states could blur" Section 401's "bright-line" time limit "into a subjective standard, dictating that applications are 'complete' only when state agencies decide they have all the information they need." *New York State Dep't of Envtl. Conserv. v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018). GPA Midstream appreciates that the Proposed Rule is not seeking an overt return to the unlawful "complete application" theory.

GPA Midstream is concerned, however, that the Proposed Rule is attempting to revise the minimum standard for what constitutes a "complete application." 87 Fed. Reg. at 35,333-36. Although EPA would require state and tribal certifying agencies to define what information would be needed for a "complete application," experience shows that those agencies may not identify that information "clearly enough to provide project proponents with full transparency as to what is required." *Id.* at 35,334. Certifying agencies hostile to fossil fuel infrastructure often use vague and shifting demands for additional information to prolong the application process and to portray the applicant as uncooperative. *See*, *e.g.*, *Constitution Pipeline v. New York State Dep't of Envtl. Conserv.*, 868 F.3d 87, 94-98 (2d Cir. 2017) (detailing constantly shifting information demands from state agency that were impossible to satisfy). The 2020 Rule sought to curb such abuses and EPA should not open a door to allow a return to those practices. EPA may hope that certifying agencies "clearly" identify any additional information requirements for applications "with full transparency," 87 Fed. Reg. at 35,334, but the Proposed Rule does not, and realistically could not,

enforce any such transparency requirements against state or tribal agencies. Because such revisions to the minimum standards are unnecessary and have such potential for abuse, GPA Midstream urges EPA not to finalize them as proposed (or without clear and consistent direction for certifying agencies).

GPA Midstream also opposes a new requirement to submit a draft copy of the federal license or permit as part of an application package to a certifying agency. 87 Fed. Reg. at 35,336. Instead, GPA Midstream prefers the Proposed Rule's alternative approach of submitting only the application for a federal license or permit for the obvious reason that no draft federal license or permit would exist when the company must submit a Section 401 application. Providing a copy of the federal application provides certifying agencies ample information about the proposed project to review and act on the certification request.

EPA also eliminated the helpful accountability information that was part of 121.6(b):

> "(b) Within 45 days of receiving notice of the certification request from the project proponent, the Federal agency shall provide, in writing, the following information to the certifying authority: (1) The date of receipt; (2) The applicable reasonable period of time to act on the certification request; and (3) The date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request. (c) In establishing the reasonable period of time, the Federal agency shall consider: (1) The complexity of the proposed project; (2) The nature of any potential discharge; and (3) The potential need for additional study or evaluation of water quality effects from the discharge."

EPA's "Activity as a Whole" Standard for Certification is Foreclosed by the Statute and is not Supported by Supreme Court Precedent

EPA interprets Section 401(a) as allowing a certifying agency to "deny water quality certifications based on the potential impact of the 'activity as a whole' on waters of the United States," 87 Fed. Reg. at 35,329. The Proposed Rule states that this interpretation is not only supported by the statute but was "affirmed by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994)." *Id.* at 35,342. Neither assertion is correct. The Proposed Rule can only reach this interpretation by conflating the scope of certification in Section 401(a), providing relatively grounds upon which a certifying agency may grant or deny an application, with Section 401(d), which allows a certifying agency to impose broader conditions on the applicant after it has decided to grant the application. EPA's erroneously asserts that a certifying authority may deny an application under Section 401(a) by using the broader conditioning language of Section 401(d).

Where an applicant for a federal license or permit proposes to conduct an activity "which may result in any discharge into navigable waters," the certifying agency "shall provide the [federal] licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a) (emphasis added). Thus, under Section 401(a) the standard for granting or denying a certification is whether "such discharge" complies with five specific Clean Water Act provisions. By contrast, under Section 401(d), once a certifying agency grants a certification, it may include "any effluent limitation and

other limitations, and monitoring requirements allows a certifying agency to include in "[a]ny effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations or other limitations, under" Clean Water Act sections 1311, 132, 1316, or 1317 or "with any other appropriate requirement of State law." 33 U.S.C. § 1341(d) (emphasis added). Thus, the scope of the certifying authority's review with respect to grant or deny an application is limited to the applicant's discharge (a relatively narrow review). Only if the certifying authority grants a certification may it impose conditions on the "applicant" and its activities (a broader notion of the "activity as a whole").

The Proposed Rule is, therefore, incorrect in criticizing the 2020 Rule's interpretation of "the appropriate scope of review, *i.e.*, rejecting 'activity as a whole' for the narrower 'discharge-only' approach." 87 Fed. Reg. at 35,319. Not only is the 2020 Rule's "narrower 'discharge-only' approach" a perfectly reasonable interpretation of Section 401(a), it is the only plausible interpretation of Section 401(a).[2] The Proposed Rule not only appears to erroneously apply the "activity as a whole" concept from Section 401(d) to Section 401(a), it errs again in asserting that the Supreme Court, in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), has endorsed such an interpretation. A careful review of that case shows that the Supreme Court never considered such an interpretation of Section 401(a).

In *PUD No. 1.*, the Petitioner proposed construction of the Elkhorn Hydroelectric Project, requiring a license from the Federal Energy Regulatory Commission. 511 U.S. at 708-09. This triggered the requirement for a Section 401 water quality certification, which the Respondent granted. *Id.* at 709. The Petitioner only sought review regarding whether the certifying agency could impose a minimum flow requirement under Section 401(d). *Id.* at 709-10. Thus, the Supreme Court never considered "the scope of certification standard" under Section 401(a) as the Proposed Rule mistakenly claims. 87 Fed. Reg. at 35,342. In fact, to the extent that *PUD No. 1* considered Section 401(a) at all, the Court's discussion contradicts the Proposed Rule's interpretation.

The Court held that the minimum stream flow condition was permissible under Section 401(d) because the statute authorizes "'any effluent limitations and other limitations … necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements. *Id.* at 711 (quoting 33 U.S.C. § 1341(d) (emphasis in original)). According to the Court, because the "applicant" is the object of regulation under Section 401(d), it "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of the discharge, is satisfied." *Id.* at 711-12.

The Court, however, was very clear that the scope of review under Section 401(a) and the conditions that may be imposed on the "activity as a whole" under Section 401(d) are very different

[2] The Proposed Rule appears to cite a district court's remand with vacatur of the 2020 Rule as support for the Proposed Rule because the "court found that vacatur was appropriate 'in light of the lack of reasoned decision-making and apparent errors in the rule's scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and the EPA itself has signaled that it could not or would not adopt the same rule upon remand.' Slip op. at 14-15." 87 Fed. Reg. at 35,320 (quoting *In Re Clean Water Act Rulemaking*, 2021 WL 4924844 (N.D. Cal. 21, 2021)). There, EPA not only refused to defend the 2020 Rule but the court reached its decision without considering substantive briefing on the merits, effectively taking EPA's request for remand as a confession of error. The Proposed Rule even acknowledges this at 87 Fed. Reg. at 35,320 n.13. The Supreme Court stayed vacatur of the 2020 Rule. *Louisiana v. Amer. Rivers*, Case No. 21A539 (S. Ct. Apr. 6, 2022).

things. One of the major differences is the Court's determination that Section 401(a) regulates a "discharge" only: "If § 401 consisted solely of subsection (a), which refers to a state certification that a 'discharge' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force." 511 U.S. at 711; *see also id.* at 711-12 ("Section 401(a)(1) identifies the category of activities subject to certification – namely, those with discharges."). Thus, the Proposed Rule is clearly wrong in arguing that the 2020 Rule imposed "a more truncated interpretation ('discharge-only' approach) favored by two dissenting Justices in that case." 87 Fed. Reg. at 35,325. The scope of certification was not at issue in the case, and the Court discussed Section 401(a) only to illustrate its differences with 401(d). Still, every aspect of the majority opinion favors the 2020 Rule's interpretation and provides no support for the Proposed Rule's attempt to re-locate the "activity as a whole" concept from Section 401(d) to Section 401(a). Therefore, EPA should withdraw its interpretation as lacking support in both Section 401(a) and *PUD No. 1*.

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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,

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GPA Midstream Association