



**Interstate Natural Gas Association of America**

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May 15, 2017

U.S. Environmental Protection Agency  
Office of Regulatory Policy and Management  
Office of Policy  
1200 Pennsylvania Ave. N.W.  
Mail Code 1803A  
Washington, D.C. 20460

Re: Docket ID No. EPA-HQ-OA-2017-0190  
Evaluation of Existing Regulations, 82 Fed. Reg. 17,793 (Apr. 13, 2017) – Water Issues

The Interstate Natural Gas Association of America (INGAA), a trade association that represents members of the interstate natural gas pipeline industry, respectfully submits these comments in response to the United States Environmental Protection Agency's (EPA) request for input on its review of existing regulations "to alleviate unnecessary regulatory burdens" on the American people.

INGAA member companies transport more than 85 percent of the nation's natural gas, through some 190,000 miles of interstate natural gas pipelines. Pipelines operate in a highly competitive market, which affects service offerings and prices, including competition between gas supply basins, competition among pipelines, and increased competition with firm shippers that can sell their excess capacity on a secondary market. Across the United States, INGAA member companies operate over 6,000 stationary natural gas-fired spark ignition RICE and over 1,000 stationary natural gas-fired combustion turbines installed at compressor stations along the pipelines to transport natural gas to local gas distribution companies, industrial users, gas marketers, and gas-fired electric generators.

These comments summarize INGAA's concerns with EPA's existing water quality certification regulations and policies that may impose "regulatory burdens." INGAA appreciates your consideration of these comments and welcomes additional dialogue. Please contact me at 202-216-5955 or [ssnyder@ingaa.org](mailto:ssnyder@ingaa.org) if you have any questions. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Sandra Y. Snyder".

Sandra Y. Snyder  
Regulatory Attorney for Environment & Personnel Safety  
Interstate Natural Gas Association of America

In response to the United States Environmental Protection Agency's (EPA's) request for input on its review of existing regulations "to alleviate unnecessary regulatory burdens" on the U.S. economy and the American people, the Interstate Natural Gas Association of America (INGAA) respectfully submits these comments to the Office of Water.

### **EXECUTIVE SUMMARY**

To reduce the regulatory burdens on interstate pipeline and other infrastructure projects created by the uncertainties in the Clean Water Act (CWA) Section 401 certification process, INGAA recommends that EPA amend its regulations implementing CWA Section 401 to ensure that states comply with the statutory requirement to act on water quality certification requests "within a reasonable period of time (which shall not exceed one year)." Amendments are needed to address states' actions that result in delays when acting on requests for water quality certification beyond "a reasonable period of time (which shall not exceed one year)." These clarifications would effectively enable federally-approved natural gas infrastructure projects to proceed on schedules established by the lead federal agencies such as Federal Energy Regulatory Commission ("FERC") or US Army Corp of Engineers ("USACE").

### **DETAILED COMMENTS**

The CWA Section 401 requires an applicant for a federal license or permit involving activities that may result in discharges to navigable waters to provide the federal licensing or permitting agency a certification from the state in which the discharge originates that the discharge will comply with state water quality standards.<sup>1</sup> The state's certification may set forth appropriate limitations or place appropriate additional requirements upon the applicant, which become conditions on the federal license or permit.<sup>2</sup> This certification requirement is waived, however, if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after the state's receipt of a request for certification."<sup>3</sup>

In some cases, obtaining state water quality certifications prevent or delay the execution of projects that are supported by customer demand and have overall federal approval from FERC, the lead environmental review agency under the National Environmental Policy Act ("NEPA") for construction and operation. The criteria and processes for evaluating water quality certification applications vary by state, subjecting interstate pipelines to a patchwork of inconsistent and unpredictable procedures and timelines. Many states routinely delay, and more recently, have denied, issuance of Section 401 certification for a variety of political, administrative, or other reasons.

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<sup>1</sup> 33 U.S.C. § 1341(a)(1).

<sup>2</sup> 33 U.S.C. § 1341(d).

<sup>3</sup> *Id.* Most commonly, the Section 401 certification requirement is triggered when a pipeline project applies for a CWA Section 404 dredge and fill permit from the U.S. Army Corps of Engineers (USACE or the Corps). USACE regulations governing the Section 404 permitting process set forth the applicable procedures where the Corps determines that Section 401 certification is required. Under these regulations, a state waives certification if it fails or refuses to act on a request for certification "within 60 days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act." 33 C.F.R. § 325.2(b)(1)(ii). According to Corps regulations, the waiver period commences when a project proponent makes a "valid request" for certification to the state certifying agency. *Id.*

Many states implement state-specific standards for what constitutes receipt of a “request” for certification sufficient to start the statutory review period under CWA Section 401.<sup>4</sup> In some cases, states use their water quality certification authority in what in effect is a “veto” of interstate projects routed within their jurisdiction.<sup>5</sup> This has the potential to derail the development of critical interstate pipeline projects unless immediate changes are made to the CWA and its implementing regulations to require states to apply the CWA Section 401 requirements in a more transparent and even-handed manner.

More commonly, states, through the Section 401 certification process, impose costly delays by postponing consideration of a project’s application well beyond the statutory deadline. These delays can be compounded by administrative appeals once the Section 401 certification is issued. In some states (*e.g.*, Massachusetts) a Section 401 certification is not effective until the administrative appeal is complete. Others (*e.g.*, Georgia) stay the effectiveness of the certification if an administrative appeal is brought.

EPA regulations implementing CWA Section 401 were promulgated in 1971 and have not been updated since 1979. The regulations provide only minimal criteria for state-issued water quality certifications, and they do little to clarify what constitutes receipt of a “request” for certification, which is the triggering event for starting the statutory waiver period.<sup>6</sup> 40 C.F.R. § 121.16, for example, provides little specificity in describing the timeframe for a state to act on a water quality certification application before the requirement will be deemed waived. The regulation provides for waiver either upon: (1) written notification from the certifying agency that it expressly waives certification; or (2) written notification from the federal licensing or permitting agency to the EPA Regional Administrator that the certifying agency failed to act on the certification request “within a reasonable period of time after such request, as determined by the licensing or permitting agency<sup>7</sup> (which period shall generally be considered to be 6 months, but in any event shall not exceed one year).”<sup>8</sup> The regulations do not, however, specify what

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<sup>4</sup> For example, New Jersey has taken the position that a Section 401 certification application is not “complete” until a project has finished 100% of its required surveying *and* can demonstrate a property interest (either through condemnation or execution of voluntary easement agreements) in all of the needed parcels along the route. This means that New Jersey will not start the one-year clock until the condemnation process is complete.

<sup>5</sup> As a case in point, the Constitution Pipeline was shelved when in April 2016 the New York Department of Environmental Conservation (NYDEC) denied a water quality certification requested by the project, ending a multi-year standoff between the state and project sponsors. The process began in August 2013, when Constitution Pipeline first submitted its joint application for Section 401 water quality certification and a Section 404 permit to the State. At the State’s request, the project’s application was subsequently withdrawn and re-submitted on May 9, 2014 and again on April 27, 2015, each time extending the one-year timeframe for the Department’s review. Even though the Constitution Pipeline received full construction and operation authorization from the Federal Energy Regulatory Commission (FERC) in December 2014, the NYDEC ultimately denied Constitution’s request for water quality certification in April 22, 2016. Likewise, on April 7, 2017, NYDEC denied a water quality certification to National Fuel Gas Supply Corporation and Empire Pipeline, Inc. in connection with the Northern Access 2016 Project. The Northern Access 2016 Project was approved by FERC on February 3, 2017. These outcomes reflect the extent to which a state can exercise veto power over an interstate project in a manner inconsistent with FERC’s exclusive authority over interstate natural gas pipelines under the federal Natural Gas Act.

<sup>6</sup> See 40 C.F.R. § 121.1 *et seq.*

<sup>7</sup> Both FERC and the USACE set a shorter deadline (*i.e.* the “reasonable period of time”) for the certifying agency’s review than one year from receipt of the request. As noted herein, the applicable USACE regulations set the “reasonable period of time” as within 60 days of receipt of a “valid request”, unless such period is shortened or lengthened based on notice from the USACE District Engineer to the certifying agency. FERC sets the “reasonable period of time” for the certifying agency’s action on a Section 401 certification request as within 90 days of FERC’s issuance of a final NEPA document, in accordance with its Notice of Schedule for Environmental Review for the project.

<sup>8</sup> 40 C.F.R. § 121.16.

constitutes receipt of a “request” for certification, nor do they emphasize that one year from receipt of a request for a Section 401 certification is *outside* time limit for certification decisions—including the resolution of any state administrative appeal or adjudicatory processes to review a certification once issued.<sup>9</sup>

This lack of clarity about the deadline for states to act on water quality certification requests has compelled project sponsors to resort to litigation to obtain a definitive determination on waiver.<sup>10</sup>

In order to reduce the regulatory burdens on interstate pipeline and other infrastructure projects created by the uncertainties in the CWA Section 401 certification process, INGAA recommends that EPA amend its regulations to prescribe more clearly how the CWA statutory deadline applies to state certification decisions.<sup>11</sup> Specifically, EPA could:

- Prescribe standardized criteria for the states consistent with CWA Section 401 language that the statutory clock begins to run upon the state’s “receipt” of an application for a water quality certification;
- Specify that the period for determining whether a waiver has occurred includes the time necessary to resolve any state administrative review of a water quality certification;
- Specify that, where federal permitting agencies, such as FERC or USACE, set “federal authorization deadlines,” such deadline becomes the “reasonable period of time” set forth in CWA Section 401 for purposes of such federal permitting agency’s determination as to waiver; and

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<sup>9</sup> *C.f.*, *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) (holding that the Corps, as the federal permitting agency, was required to incorporate into a Section 404 permit only those conditions included in a state’s certification that were issued within the CWA one-year statutory deadline, and that it had no obligation to include those conditions imposed as a result of a state administrative challenge that was not resolved until after the one-year statutory period for certification had concluded).

<sup>10</sup> *See, e.g.*, *Millenium Pipeline Company v. Seggos*, Case No. 16-1415 (D.C. Cir. Dec. 5, 2016) (pipeline company petition seeking judicial review of NYDEC failure to act on Millenium’s application for Section 401 water quality certification and a court determination that the state agency had waived certification); *Berkshire Environmental Action Team, Inc. et al. v. Tennessee Gas Pipeline Co. et al.*, Case No. 16-2100, Respondent’s Response Brief (Doc. No. 00117080472) (1st Cir. Nov. 14, 2016) (arguing among other things that if the court determined that a certification issued by the state agency was not yet “final” because it was subject to ongoing state administrative review proceedings, that the state had waived certification because the review had not been completed within one year); *Constitution Pipeline Co. v. NYDEC et al.*, Case No. 16-1568 (2d Cir. May 5, 2016) (pipeline company petition seeking judicial review of NYDEC denial of water quality certification, arguing among other things that the state agency waived certification by issuing its denial outside of the statutory deadline); *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 725 (4th Cir. 2009) (pipeline company petition seeking judicial review of State of Maryland’s denial of Section 401 water quality certification, also arguing that the denial was untimely); *National Fuel Gas Supply Corp.*, Docket No. CP15-115-002 (FERC 2017) (pipeline company request in connection with FERC Order Issuing Certificates of Public Convenience and Necessity seeking clarification, or in the alternative, rehearing as to NYDEC’s waiver of Section 401 water quality certification via NYDEC’s failure to act by the end of the 90-day federal authorization deadline set in FERC’s Notice of Schedule for Environmental Review for the project).

<sup>11</sup> For example, EPA regulations governing the certification of federally-issued CWA Section 402 NPDES permits allow states sixty days to issue certification, specifying that the period runs “from the date the draft [federal] permit is mailed to the certifying State agency.” 40 C.F.R. § 124.53(a)(3).

- Prohibit state agency practices intended to prolong the certification process, such as requiring an applicant to withdraw and re-submit a certification application in order to re-start the statutory clock.