May 24, 2019

Administrator Andrew Wheeler
Environmental Protection Agency
1200 Pennsylvania Avenue, Northwest
Washington, D.C. 20004

Dear Administrator Wheeler:

The Natural Gas Supply Association (NGSA) and the Center for Liquified Natural Gas (CLNG) write to express our support for the Environmental Protection Agency's (EPA) effort to review and clarify federal guidance and regulations regarding implementation of Section 401 of the Clean Water Act (CWA) in response to the Executive Order on Promoting Energy Infrastructure and Economic Growth.[1] NGSA and CLNG believe these clarifications will enhance the predictability and efficiency of the permitting process for interstate natural gas pipelines, Liquified Natural Gas (LNG) facilities and other critical infrastructure projects.

NGSA and CLNG represent major integrated and independent producers and marketers of natural gas, as well as LNG terminal owners. Our member companies supply trillions of cubic feet of natural gas each year to a growing number of power plants, local gas utilities, factories and other industrial users both domestically and abroad. Natural gas is abundant, burns clean, and is affordable, which means lower household energy bills, lower overhead costs for businesses, and the chance to improve air quality globally. However, the benefits of natural gas can only be realized when sufficient natural gas infrastructure is in place to connect supply with demand. The natural gas industry makes significant investments in the natural gas infrastructure necessary to bring gas to market and requires a regulatory process that is certain, transparent and timely to ensure there aren't unnecessary delays and costs. Thus, NGSA and CLNG are greatly affected by the issues EPA is examining; and we encourage EPA to consider the proposed clarifications below with respect to its guidance for implementation of Section 401.

Congress intended for Section 401 of the CWA to provide states with an integral role during the environmental review process for infrastructure permitting. With proper implementation, Section 401 promotes a system of cooperative federalism between the federal government and states to protect water quality while also enabling the development of infrastructure projects. Until recent years, this shared responsibility proved effective and allowed consumers to enjoy access to some 300,000 miles of natural gas transmission pipelines. These pipelines provide a vital link between producers and consumers.

[1] Exec. Order No. 13868, 84 C.F.R. 15495 (2019).

A growing concern for NGSA and CLNG is the practice, by some states, of using their Section 401 authority to disrupt the permitting process. Instead of a proper focus on water quality standards, inconsistent application of Section 401 is often used as a vehicle to oppose natural gas use or push anti-fossil fuel political agendas.

Despite a gas pipeline or LNG project having federal approval, some states have inappropriately used Section 401 as a tool to indefinitely delay a project or block it entirely for reasons unrelated or well beyond the scope of their 401 authority. In other cases, the denial is granted well past the statutory one-year timeframe for review that is required in the CWA.[2]

The repercussions are significant; misuse of the CWA has aggravated the permitting process, disrupted the balance between state and federal roles, and led to long delays at high costs for pipeline infrastructure projects that U.S. companies depend upon for affordable energy. The impacts have a rippling effect, since one state's actions to impede the construction of an interstate pipeline can unfairly block surrounding states access to the benefits of natural gas and lower energy costs. Similarly, it denies producing states the opportunity of a downstream market for its natural gas production and limits which communities can take advantage of the added jobs and tax revenue that can come from an LNG export facility or manufacturing plant.

Misuse of Section 401 is compounded by an outdated interim EPA guidance, the "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," that is not fully aligned with the statutory program. We are encouraged by the Administration's Executive Order aimed at remedying this issue, which directed EPA to engage with federal, state and tribal partners to review and clarify its guidance for implementing Section 401. Per the Executive Order, "to enable the timely construction of the infrastructure needed to move our energy resources through domestic and international commerce, the Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment." We look forward to providing constructive input in that process.

Therefore, as EPA conducts its interagency review, we request EPA to examine and clarify its existing guidance and regulations for states, tribes and federal agencies to reaffirm the following statutory principles:

A. **The timeframe for acting on a 401 water certification request is one year.** The time period for review is one year or less and the statutory clock for a State's review starts upon *receipt* of a project sponsor's submission of a 401 request for certification to the state. Subsequent events, such as requests to withdraw and resubmit or a State's validation of the request, does not impact the one-year timeframe for review.

B. **The lead agency has the authority to grant waiver determinations.** The lead federal agency—not the State—determines whether a "reasonable period of time (not to exceed one year)" has been exceeded. If the lead federal agency determines that the state or tribe

[2] See: New York State Department of Environmental Conservation's decision No. 3-3399-00071/00001 – Millennium Pipeline Company LLC's Valley Lateral Project. In this case, the NYSDEC denied 401 certifications based on issues outside water quality scope.

has not acted on the project's request for a Section 401 certification within the one-year timeframe, the lead federal agency has the authority to waive the requirement for certifications and all federal agencies can move forward with processing their reviews and authorizations.

C. **The scope of review for Section 401 certifications is properly focused only on water quality standards.** A State's review under Section 401(a)(1) is to determine whether the discharge will comply with applicable water quality standards, *not* matters unrelated to water quality.

While many states already adhere to these statutory principles during the permitting process, EPA's new guidance should clearly state that these are the parameters for how Congress intended for Section 401 to be implemented by states. Further, many of these principles have been upheld in recent federal court decisions:

N.Y. State Dep't of Envtl. Conserv. v. FERC[3] – The Second Circuit held that the New York State Department of Environmental Conservation (NYSDEC) waived its authority to review Millennium Pipeline's request for a water quality certification under the CWA by failing to act on that request within one year. The court concluded that FERC did have jurisdiction over the pipeline where the Natural Gas Act provided that FERC had plenary authority over the transportation of natural gas in interstate commerce.

Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conserv[4] – The Second Circuit overturned NYSDEC's decision to deny National Fuel Gas Supply Corp. a water quality certification for its Northern Access Pipeline project because it did not adequately explain its decision. The reviewing panel said the agency failed to support its finding that the Northern Access Pipeline project would violate the state's water quality standards, stating that the agency's "denial letter here insufficiently explains any rational connection between facts found and choices made." In addition, the panel said DEC improperly based its denial "on considerations outside of petitioners' proposal . . .," possibly due to a misunderstanding of the record.

Hoopa Valley Tribe v. FERC[5] - The D.C. Circuit held that the withdrawal-and-resubmission of water quality certification requests for the relicensing of the Klamath Hydroelectric project did not trigger new statutory periods of review. The court found that California and Oregon had waived their Section 401 authority due to exceeding the one-year timeframe for review.

These court decisions underscore the need for EPA to reaffirm the important statutory principles related to the time period for review, waiver authority and the scope of review in its new guidance. Given the various interests and stakeholders examining this issue, at the very least, aligning EPA's

[3] NY State Dept. Of Environmental Conserv. V. FERC, 884 F. 3d 450 (Court of Appeals, 2d Cir. 2018).
[4] Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation, No. 17-1164, 2019 WL 446990 (2d Cir. Feb. 5, 2019).
[5] Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019).

guidance with statutory intent and case law will eliminate confusion related to implementation of Section 401.

For the reasons discussed above, NGSA and CLNG support EPA's effort to review and clarify federal guidance and regulations related to implementation of Section 401 of the CWA. Aligning EPA's guidance with recent case law and reaffirming the statutory principles related to review, waiver authority and scope will promote consistency and efficiency during reviews, and ultimately restore the balance between state and federal roles in the permitting process. Regulatory certainty is imperative to the natural gas industry and our continued investment in critical gas infrastructure to serve consumers.

Sincerely,

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