



May 24, 2019

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Docket No. EPA-HQ-OW-2018-0855

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Constitution Ave., N.W.
Washington, D.C. 20460

**Re: Clean Water Act Section 401 Water Quality Certification
Pre-Proposal Recommendations**

Dear Administrator Wheeler:

The American Gas Association (AGA) respectfully submits these comments in response to the U.S. Environmental Protection Agency's (EPA) request for pre-proposal recommendations regarding EPA's plans to develop rulemaking and guidance to help improve the Clean Water Act Section 401 Water Quality Certification process, pursuant to Executive Order 13868.¹

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 71 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

¹ Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15495 Apr. 15, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf>.

AGA supports the comments filed in this docket on May 24, 2019 by the Interstate Natural Gas Association of America (INGAA). For the reasons stated in INGAA's comments, we agree that EPA should take appropriate action to ensure that state water quality reviews under Clean Water Act section 401 are effective, efficient and consistent with the scope and timeline prescribed by the statute. In particular, EPA should clarify that state 401 certifications are statutorily limited in scope to address whether a project's "discharge will comply with the applicable provisions" of the Act specified in section 401, and that they are statutorily limited to occur "within a reasonable period of time" which can be less than but must not exceed one year after the state receives the initial request for certification.

Section 401 of the Clean Water Act recognizes the importance of Federal Cooperation and sets out clear guideposts balancing the roles of the federal and state governments. Congress explicitly provided in section 401(a)(1), 33 U.S.C. §1341(a)(1), that the federal government would not issue a license or permit for a project with potential discharges without providing a reasonable opportunity for an affected state to evaluate water quality impacts. However, that opportunity is not unlimited. The state certification is limited in scope to evaluating whether discharges from a project the impact of a project's potential discharges on water quality in compliance with specific sections of the Clean Water Act:

"Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State...that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."

Further, Congress clearly limited the time period within which a state should make this determination. Section 401 provides:

*"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 receipt of such request**, the certification requirements of this subsection shall be waived with respect to such Federal application."*

In our members' experience, most states conduct their 401 certifications within the appropriate bounds of the statute, focusing their reviews on water quality issues and completing their reviews to provide a 401 certification decision within far less than one year – often within 90 days or less after receiving the initial request. This has been their experience in most states for intrastate natural gas utility projects that require federal permits, for example from the U.S. Army Corps of Engineers.

However, a few states have exceeded the statutory limits on the scope or timeline for their 401 certification in order to block interstate natural gas pipelines. These state actions significantly affect AGA member natural gas utilities and their customers by restricting the availability of supply. For example, AGA member National Grid recently was forced to announce a moratorium on processing new natural gas service applicants in its New York City and Long Island service territory, due to the State of New York's lengthy process culminating in a section 401 denial, without prejudice, for the Northeast Supply Enhancement (NESE) gas pipeline. While the project proponent has said it believes it can address the issues raised by the state, the delay is in turn impeding service to customers. National Grid has said it needs the additional pipeline capacity to serve new residential, commercial and industrial natural gas customers in Brooklyn, Queens and Long Island – including the conversion of about 8,000 customers per year from heating oil to cleaner natural gas. Other state section 401 decisions described by INGAA that exceed the statutory timeline and/or scope have similarly imposed supply constraints on AGA gas utilities and their customers, restraining the ability of affected utilities to extend service to convert customers from heating oil to natural gas, which would reduce energy costs to those customers and significantly improve air quality and reduce greenhouse gas emissions.

In order to provide these important benefits to energy customers, we agree with INGAA that EPA should take appropriate action in its planned rulemaking and guidance to ensure that the 401 process is conducted consistently and in accordance with statutory limits on the scope and timeline for state 401 certifications.

AGA appreciates the opportunity to comment. If you or your staff have any questions, please contact me.

Respectfully Submitted,

A handwritten signature in black ink that reads "Pamela A. Lacey". The signature is written in a cursive, flowing style.

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