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Docket No. EPA-HQ-OW-2019-0405

Environmental Protection Agency  
Office of Water  
Oceans, Wetlands, and Communities Division  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

**Re: Proposed Rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket No. EPA-HQ-OW-2019-0405, RIN 2040-AF86**

Dear Administrator Wheeler,

The American Gas Association (AGA) respectfully submits these comments in response to the Environmental Protection Agency's ("EPA" or "the Agency") proposed rule, "Updating Regulations on Water Quality Certification", published in the Federal Register on August 22, 2019.<sup>1</sup> In this Proposed Rule, the EPA is seeking to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act ("CWA") section 401. AGA appreciates the opportunity to comment on this proposal and strongly supports EPA's efforts to restore predictability, reasonableness, and regulatory certainty to the 401 certification process. AGA strongly supports the protection of water quality through the effective implementation of the CWA and respects the important role that states and tribes play in these objectives. If implemented, the Proposed Rule will provide a common framework for implementing section 401 that will offer project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty. Providing clear and consistent guidance regarding the implementation of section 401 is critical to the development and construction of natural gas infrastructure. AGA commends EPA for properly balancing its important environmental protection objectives with regulatory predictability and efficiency.

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,

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<sup>1</sup> 84 Fed. Reg. 44080 (Jun. 13, 2019) (hereinafter, "Proposed Rule").

marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

Natural gas utilities nationwide add, on average, nearly 630,000 customers each year, or one customer every minute. More homes and business in the United States use natural gas today than ever before, and the numbers continue to increase. In order to meet this increasing demand, AGA members require regulatory certainty to maintain existing infrastructure and develop new infrastructure. Providing clarity and balance to the 401 certification process will help facilitate the environmentally-responsible construction and maintenance of natural gas infrastructure and help AGA members provide timely, safe, reliable and affordable service to the 178 million Americans that enjoy the benefits of natural gas and the millions more that want it, but do not yet have access.

CWA section 401<sup>2</sup> provides that a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the state or authorized tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with existing water quality requirements, or waives the certification requirement.<sup>3</sup> As the agency charged with administering the CWA, EPA is responsible for developing a common framework for certifying authorities to follow when carrying out the requirements of section 401. However, EPA has not updated its certification regulations in over 50 years.<sup>4</sup> In April 2019, the President issued Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," which directed EPA to review the CWA Section 401 process and EPA's existing certification regulations and interim guidance, issue new guidance to states, tribes, and federal agencies, and propose new section 401 regulations within 120 days of the Order.<sup>5</sup> The Executive Order also directed EPA to "take into account the federalism considerations underlying section 401 and to focus its attention on the appropriate scope of water quality reviews and conditions, the scope of information needed to act on a certification request in a reasonable period of time, and expectations for certification review times."<sup>6</sup>

During the development of the Proposed Rule, EPA engaged in extensive stakeholder outreach with states, tribes, other federal agencies, and interested stakeholders to solicit input regarding the section 401 certification process and recommendations regarding how that process could be improved. During this pre-publication outreach period, AGA submitted comments supporting comments filed by the Interstate Natural Gas Association of America (INGAA) and urging EPA to "take appropriate action to ensure that state water

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<sup>2</sup> 33 U.S.C. § 1341

<sup>3</sup> *Id.*; see also Proposed Rule at 44081.

<sup>4</sup> Proposed Rule at 44099.

<sup>5</sup> Exec. Order No. 13,868, 84 Fed. Reg. 15496 (Apr. 15, 2019).

<sup>6</sup> *Id.* at section 3.a.

quality reviews under Clean Water Act section 401 are effective, efficient and consistent with the scope and timeline prescribed by the statute.”<sup>7</sup> Specifically, AGA recommended that EPA clarify that state section 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 states or tribes reviewing section 401 applications act within a reasonable period of time, not to exceed one year.<sup>8</sup>

AGA supports the extensive comments submitted by IGNAA in this docket on October 21, 2019. AGA is pleased that EPA, in its Proposed Rule, seeks to implement the section 401 certification process in a manner that would be applied consistently for project proponents across the country and in accordance with the clear limits provided in the statutory text of the CWA. Specifically, AGA commends EPA for confirming that certifying authorities are required to act on a request for certification “within a reasonable period of time, which shall not exceed a year.”<sup>9</sup>

AGA believes that EPA’s proposed rule appropriately recognizes the importance of cooperative federalism and clearly balances the important role of the federal and state governments in implementing the CWA and preserving the quality of our nation’s waters. 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 are in compliance with specific sections of the CWA.<sup>10</sup> The Proposed Rule, if implemented, would establish a process that maintains the important role that states play in protecting water quality while adhering to the plain language of the CWA.

In our members’ experience, most states conduct their 401 certification reviews 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

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<sup>7</sup> See AGA letter to the Hon. Andrew Wheeler on May 24, 2019, submitted to Docket No. EPA-HQ-OW-2018-0855.

<sup>8</sup> *Id.*

<sup>9</sup> See Proposed Rule, 40 C.F.R. §121.4(d)(3)

<sup>10</sup> See 33 U.S.C. §1341(a)(1), providing that “[a]ny 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 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 section 1311, 1312, 1313, 1316, and 1317 of this title.” See also, Proposed Rule, 40 C.F.R. § 121.3.

block interstate natural gas pipelines.<sup>11</sup> These state actions significantly affect AGA member natural gas utilities and their customers by restricting the availability of supply and restrain 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.

AGA believes EPA's proposed definition of "certification request"<sup>12</sup> provides much needed regulatory certainty and clarity as to what information is required to initiate a 401 certification request and should help make the 401 certification process more efficient. This proposed definition effectively responds to concerns from certifying agencies that certification requests are incomplete or inadequate by establishing a clear baseline of what information is required to initiate a request. In our view, the proposed definition strikes an appropriate balance between the certifying authority's need for sufficient information to evaluate a request and the permit applicant's ability to obtain and provide the requested information.

AGA also supports the recommendation that EPA strongly encourage certifying authorities to create agency-specific, formal or informal processes that help facilitate meaningful early coordination between the certifying authority and the project proponent. Pre-filing meetings and coordination can help provide increased predictability and efficiency in the section 401 process by providing an early opportunity for dialogue that will help inform agency personnel of the scope and nature of proposed impacts and allow project applicants to better understand the needs of the certifying agency. AGA also supports INGAA's recommendation that EPA clarify that requests from certifying agencies for additional information should be limited to information within the scope of section 401 (i.e., information that is necessary in order to evaluate a project's impact on water quality). Finally, AGA also supports EPA's proposal prohibiting certifying authorities from requesting that a project proponent withdraw a certification request for the purpose of restarting the reasonable period of time.<sup>13</sup>

AGA agrees with INGAA's recommendation that EPA should clarify in the final rule that where a project requires multiple federal authorizations, the "lead" federal agency is responsible for carrying out section 401 responsibilities. Without clarification, the Proposed Rule could result in a scenario where multiple federal agencies are

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<sup>11</sup> See INGAA Comments on EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification dated Oct. 21, 2019, footnotes 17 and 24. See also Attachment B to INGAA's Comments of Oct. 21, 2019.

<sup>12</sup> See Proposed Rule, 40 C.F.R. § 121.1(c)

<sup>13</sup> Proposed Rule, 40 C.F.R. § 121.4(f). Of note, this proposal is consistent with several U.S. Court of Appeals for the District of Columbia Circuit rulings holding that Congress has established a time limit in section 401 that cannot be circumvented or avoided. See, e.g., *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir, 2019).

implementing section 401 without proper coordination. As stated in INGAA's comments, the concept of "lead agency" is well established under existing NEPA regulations and is consistent with Executive Order 13807. The U.S. Army Corps of Engineers will typically be the lead federal agency for intrastate pipeline projects.

Additionally, AGA also supports EPA's proposal to provide an alternative definition "certification request" for federal agencies that issues general permits. Many AGA members frequently make use of Nationwide Permits (NWP) for activities that have minimal individual and cumulative environmental effects (e.g., utility line crossings, erosion control, and stream and wetland restoration activities). AGA agrees with INGAA's recommendation that EPA consider additional revisions to the alternative "definition of certification request" in order to provide appropriate flexibility to federal agencies regarding the information that is required to be submitted with a certification request related to a NWP.

Our member companies rely on timely, transparent federal permits and reviews to meet their construction, maintenance, emergency repair, replacement, and pipeline safety goals. AGA appreciates EPA's efforts to improve and modernize the section 401 process and believes that the Proposed Rule, subject to the recommended changes noted above, strikes an appropriate balance between regulatory efficiency and environmental stewardship.

AGA appreciates the opportunity to comment. If you have any questions, please contact me or Pam Lacey, AGA's Chief Regulatory Counsel, at [placey@aga.org](mailto:placey@aga.org).

Respectfully Submitted,



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