U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Washington, DC 20004
40 CFR Part 121
[EPA-HQ-OW-2025-0272; FRL-12813-01-OW]

To whom it may concern:

This letter provides comments from the American Petroleum Institute ("API"), American Fuel & Petrochemical Manufacturers ("AFPM"), GPA Midstream, and the Independent Petroleum Association of America ("IPAA") (collectively, "the Associations") in response to the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") request for information on revising the regulations for Section 401 of the Clean Water Act ("CWA").

The Associations appreciate and support EPA's May 21, 2025 memorandum, "Clarification regarding Application of Clean Water Act Section 401 Certification," which clarifies that the statutory intent of Section 401 water quality certifications is to protect water quality.[1] As explained in more detail below, the Associations encourage EPA to pursue a rulemaking that restores the previous 2020 final rule on Section 401 of the CWA. The procedural guardrails, timelines, and specific interpretation found in that rule would provide the regulatory certainty and consistency needed for project developers to receive permits in a timely fashion. Because of the length of this letter, we have included a table of contents below.

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[1] *See Memorandum, "Clarification regarding the Application of Clean Water Act Section 401 Certification,"* clarification-re-application-of-cwa-401-certification_may-2025.pdf https://www.epa.gov/system/files/documents/2025-05/clarification-re-application-of-cwa-401-certification_may-2025.pdf

I. SUMMARY

The CWA uses a "cooperative federalism" approach to achieve its aims by establishing complementary roles for federal agencies, states and authorized Tribes.[2] CWA Section 401 gives each state an important but limited role in the permitting of federal projects that could affect water quality. Specifically, federal agencies cannot authorize activities that may result in a discharge into waters of the United States ("WOTUS") until the state whose waters would be affected by the discharge certifies that the activity will comply with Sections 301, 302, 303, 306, and 307 of the CWA (or waives the Section 401 requirement, either affirmatively or through inaction).

Section 401 authority is powerful. When triggered, state certification or waiver is an essential requirement for the federally licensed activity to proceed. But to preserve the CWA's federal-state balance, that authority is also limited and circumscribed—Section 401 only authorizes states to address water quality, and only within reasonable time limits, "which shall not exceed one year."[3]

In 2020, EPA undertook a "holistic analysis of the statutory text, legislative history, and relevant case law," and published a final rule that provided a comprehensive framework for implementation of Section 401. 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Rule"). The 2020 Rule, which remained in effect until November 26, 2023, clarified the limits Section 401 places on state action by effecting Congress's decision to limit the scope of state review to water quality determinations.

In 2023, with the Administration change, EPA promulgated a new rule.[4] The 2023 Rule contradicts the EPA's prior interpretation of the CWA, legislative history, and relevant case law, and imposes mandatory requirements on states that exceed their statutory authority under the CWA and disrupts the CWA's cooperative federalism framework.

The 2023 Rule burdens states by requiring them to conduct a water quality certification review that exceeds the statutory requirements of Section 401(a). Under the 2023 Rule, states must evaluate the entire "activity" proposed, including construction and operation of the project, not simply the discharges into navigable waters, to determine whether it will comply with applicable water quality

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[2] Certifying authority means the entity responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act Section 401. Certain Tribes have been approved by EPA to administer the water quality certification program within their reservation boundaries.

[3] 33 U.S.C. § 1341(a)(1).

[4] https://www.federalregister.gov/d/2023-20219

requirements. This assessment requires states to look beyond the enumerated sections of the CWA cited in Section 401(a) to assess compliance with "any other water quality-related requirement of state or tribal law," an exceedingly broad standard that plainly exceeds the scope of review allowed by Section 401(a). The 2023 Rule further requires states to impose conditions that may bear little relation to water quality to "assure" the activity will comply with applicable water quality requirements, or to deny the water quality certification.

The 2023 Rule expands the workload of the states' environmental agencies, complicating and lengthening the Section 401 review process and making certification determinations more vulnerable to legal challenge. The 2023 Rule interferes with the states' ability to define the legal scope of their review of applications for water quality certification. And it forces states to defend in court why they did not consider every potential anticipated or perceived "water-quality related" impact of a project, however tenuous a legal standard that exceeds Congressional intent and statutory authority.

The 2023 Rule imposes substantial additional and improper burdens upon project developers, states, and ultimately, U.S. consumers. Where a state denies a water quality certification under Section 401, the federal agencies are prohibited from issuing the permit or license for the project, which would thwart nationally important projects and impede the development of critical infrastructure necessary to modernize the nation's means of generating and delivering energy. The 2023 Rule was challenged in court and that litigation is currently being held in abeyance.

President Trump's January 20, 2025 Executive Order (EO) 14154, "Unleashing American Energy," declared an official "energy emergency" and highlights the need for efficient permitting in. Section 5 of the EO. Subsection (d) of Section 5 directs relevant agency heads to "undertake all available efforts to eliminate all delays within their respective permitting processes, including through, but not limited to, the use of general permitting and a permit by rule. For any project an agency head deems essential for the Nation's economy or national security, agencies shall use all possible authorities, including emergency authorities, to expedite the adjudication of Federal permits. Agencies shall work closely with project sponsors to realize the ultimate construction or development of permitted projects."[5]

Further, subsection (e) of Section 5 directs the Director of the National Economic Council and the Director of Legislative Affairs to prepare recommendations to Congress to "(i) facilitate the permitting and construction of interstate energy transportation and other critical energy infrastructure, including, but not limited to,

[5] *See* https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/

pipelines, particularly in regions of the Nation that have lacked such development in recent years."[6] Additionally, Section 3 of EO14156, *Declaring a National Energy Emergency,* states that "agencies shall identify and use all relevant lawful emergency and other authorities available to them to expedite the completion of all authorized and appropriated infrastructure, energy, environmental, and natural resources projects that are within the identified authority of each of the Secretaries to perform or to advance."[7] Revising Section 401 to narrow its scope in line with the Clean Water Act could help advance the administration's goals of facilitating the permitting and construction of energy infrastructure and providing greater certainty in the permitting process.

We urge EPA to maintain the position outlined in its May 21, 2025 memorandum referenced above, and to move forward with a swift but thoughtful rulemaking to ensure effective implementation of Section 401. To that end, and the interest of constructively engaging with EPA in this reconsideration process, the Associations provide the following comments.

II. THE ASSOCIATIONS AND THEIR INTERESTS

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are committed to the safe transportation of natural gas, crude oil and petroleum products, and support sound science and risk-based regulations, legislation, and industry practices that have demonstrated safety benefits. API members engage in exploration, production, and construction projects that routinely involve both state and federal water permitting and are, and will continue to be, affected by CWA Section 401.

The IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by federal regulatory policies. Independent producers develop about 91 percent of American oil and natural gas wells, produce about 83 percent of American oil, and produce more than 90 percent of American natural gas and natural gas liquids. The IPAA is dedicated to ensuring a strong, viable American

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[6] *Id.*

[7] *See* https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-energy-emergency/

oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

GPA Midstream is composed of over 50 corporate members that directly employ over 57,000 employees that are engaged in the gathering, transportation, processing, treating, storage and marketing of natural gas, natural gas liquids (NGLs), crude oil, and refined products, commonly referred to in the industry as "midstream activities." In 2023, GPA Midstream members operated over 506,000 miles of pipelines, gathered over 91 Bcf/d of natural gas, and produced over 5.3 million barrels/day of NGLs from over 365 natural gas processing facilities.

AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation to move their products to and from refineries and petrochemical facilities and have made significant infrastructure investments to support and improve the safety and efficiency of the transportation system. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil and natural gas as feedstocks for the transportation fuels and petrochemicals they manufacture. Pipelines are the primary mode for transporting crude oil and natural gas to refiners and petrochemical facilities and refined products from those same facilities to distribution terminals serving consumer markets. Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances. AFPM member companies own, operate, and rely on pipeline infrastructure as part of their daily operations. AFPM member companies also are leaders in human safety and environmental responsibility. AFPM supports robust analyses of infrastructure projects to ensure that environmental impacts are appropriately considered.

III. RESPONSES TO EPA'S QUESTIONS FOR CONSIDERATION

DEFINING SCOPE

The text, structure, and history of the Clean Water Act reflect that Section 401 certification procedures are triggered by Section 401(a)(1) only when a federally licensed or permitted activity has the potential to result in a discharge from a point

source into a WOTUS. Because Section 401(a)(1) states that the certification must conclude that potential discharges "will comply with the applicable provisions of 301, 302, 303, 306, and 307," Section 401(a)(1) also therefore limits the scope of the certifying authority's inquiry to those enumerated provisions.

To state the obvious, no aspect of the CWA's text, structure, or purpose can be construed to suggest that Congress envisioned Section 401 to authorize state certifications based on impacts wholly unrelated to water quality. In many cases, Congress required that these impacts be assessed under different statutes.[8] Further, while Section 401 provides states a limited role in reviewing the prospective impacts of proposed federally licensed or permitted projects, states may have other authority to regulate the operation of those projects. States can request, and often receive, delegated permitting and enforcement authority under CWA Section 402 and 404, under the Clean Air Act, and through other federal statutes as well. The more limited role for states under Section 401 does not diminish states' jurisdiction under these statutory provisions. To the contrary, these other statutory provisions demonstrate that certification reviews are not the proper mechanism for addressing the broader potential environmental impacts that some states have misconstrued Section 401 to encompass.

Overall, the 2020 Rule adopted a scope of review, consistent with the statute and legislative history, which focused on assuring that the "discharge" from the permitted activity would comply with water quality requirements. The 2023 Rule, however, abandons the statute's focus on the "discharge," and instead requires certifying authorities to undertake a broad scope of certification review that encompasses the entire activity subject to the Federal license or permit: "When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the activity will comply with applicable water quality requirements."[9]

WATER QUALITY REQUIREMENTS

Although the CWA does not define "water quality requirements," the meaning can be readily discerned by the scope of Section 401(a)(1). "Water quality requirements" refers to the federal, state, or tribal requirements adopted pursuant to authority under Sections 301, 302, 303, 306, and 307. While the EPA should interpret "water quality requirements" more narrowly, the Agency is plainly precluded from defining the term

[8] For example, the National Environmental Policy Act requires review of multi-media effects, while other statures address impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act).
[9] 88 Fed. Reg. at 66,662; 40 C.F.R. § 121.3(a).

such that its scope is more comprehensive than the limited scope of the Section 401 review.

The 2023 Rule further broadens the required scope of certification review by defining "water quality requirements" as: (1) "any limitation, standard, or other requirement under the provisions enumerated in Section 401(a)(1)"; (2) "any Federal and state or Tribal laws or regulations implementing the enumerated provisions, and" (3) "any other water quality-related requirement of state or Tribal law" regardless of whether they apply to point or nonpoint source discharges.[10]

Section 401(d) requires the certifying authority to "set forth any 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" requirements and "with any other appropriate requirement of State law...."[11] The 2023 Rule wrongly incorporates requirements from 401(d) into the definition of "water quality requirements," contrary to the statute. By doing so, it grants states and tribes the ability to override federal authority, allowing them to veto projects based on their own broader or subjective water quality standards—well beyond the limited scope Congress envisioned.

NEIGHBORING JURISDICTIONS

EPA's determination of whether a discharge "may affect" the water quality of another jurisdiction involves some discretion, but the Agency's discretion is not unbounded.[12] Section 401 provides a "meaningful standard against which to judge the Agency's exercise of discretion."[13]

EPA's "may affect" determination considerations should be drawn directly from the text, structure, and history of Section 401. As such, the Agency's rules should explain that the potential "discharge" under Section 401(a)(2) refers to effluent flowing or issuing from a point source to a WOTUS. Additionally, the phrase "the quality of the waters of any other State"[14] must be interpreted consistently with the 401 Certification Rule's definition of "water quality requirements" so that the Agency's "may affect" determination is based on the likelihood that a discharge will cause a downstream violation of a federal, state, or tribal requirements adopted pursuant to authority under Sections 301, 302, 303, 306, and 307. Further, because Congress's

[10] 40 C.F.R. § 121.1(j); 88 Fed. Reg. at 66,602.
[11] 33 U.S.C. §1341(d).
[12] *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.* ("Weyerhaeuser"), 139 S. Ct. 361, (2018).
[13] *Weyerhaeuser Co.*, 139 S. Ct. at 370 (citation and quotation marks omitted).
[14] 33 U.S.C. § 1341(a)(2).

authority to enact the CWA, and Section 4(b)(2) in particular, derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause,[15] the downstream "waters" that EPA must analyze must be limited to WOTUS, properly construed[16].

EPA's regulations should also include additional considerations that reflect the multi-jurisdictional nature of the Section 401(a)(2) "may affect" determination. For instance, the Agency's regulations should reflect enhanced considerations of the volumes of effluent, the size, flow, and current water quality of the WOTUS, the distance between the potential discharge and the neighboring jurisdiction, and the impacts of other existing and anticipated discharges to the WOTUS. These additional considerations will help avoid triggering the Section 401(b)(2) notification and coordination procedures based on more speculative assertions of downstream impacts.

STAKEHOLDER INPUT

Some states used procedural gimmicks to extend the time the CWA gives them to make certification decisions. And they improperly relied on Section 401 to effectively deny projects based on non-water quality considerations, such as preferences regarding energy policy, extending well beyond what Congress envisioned when it enacted Section 401 of the CWA. The 2023 rule allows states to delay projects indefinitely by labeling a request for certification "denied" or "incomplete" every 364 days, while directing the requester to resubmit the same request for as many years as the state desires. The result is that a state can veto an infrastructure project (e.g., an oil or natural gas pipeline project) without ever deciding, on the merits, that the project actually violates the state's water quality standards. Many companies know from experience that if permitted to do so, some states are likely to continue to use such tactics and prevent the construction of critical energy infrastructure projects.

The 2020 Rule clarified the required components of a certification request to trigger a State's "reasonable period of time" for review, so that the period would not "exceed

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[15] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *See also United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (describing the ''channels of interstate commerce'' as one of three areas of congressional authority under the Commerce Clause); *See also Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). (term ''navigable'' indicates ''what Congress had in mind as its authority for enacting the Clean Water Act: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' Nothing in the legislative history of the Act provides any indication that ''Congress intended to exert anything more than its commerce power over navigation.'' (*Id.* at 168 n.3)).

[16] *In Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) the Supreme Court reined in federal agencies' efforts to expand the geographic scope of their CWA jurisdiction well beyond the limits Congress imposed.

one year from receipt" of the certification request.[17] Any revisions to a potential new rule should include clarification that the certifying authority's review period commences upon the date of the certifying authority's receipt of a request for certification and that this review period cannot exceed one year. The "reasonable period of time" for a certifying authority to act on a request for certification should be 60 days from receipt of a request for certification absent a negotiated "reasonable period of time" with the federal permitting agency not to exceed one year. A new rule should also state explicitly that the certifying authority is not authorized to take any action to extend the reasonable period of time other than where the federal agency extends the reasonable period of time at the request of the project proponent, but in no case shall the reasonable period of time exceed one year from receipt. Moreover, certifying authorities should be required to inform a project applicant within 30 days from receipt of the certification request if additional information is needed to process the certification request.

DATA & OTHER

The Constitution Pipeline was a $683 million project designed to bring gas from the Marcellus Shale to New York City, Long Island, Westchester County, and the greater Hudson Valley before interconnection with two major interstate pipelines already serving New England. In 2014, the state of Pennsylvania granted the project sponsor (one of the Association's members) its section 401 certification. In April 2015, the New York State Department of Environmental Conservation (NYSDEC) requested that the project sponsor withdraw and resubmit its 401 certification request in order to restart the waiver period. Nearly three years after the initial request, NYSDEC denied certification. Following litigation over NYSDEC's denial, FERC concluded that NYSDEC waived its 401 certification authority. Despite FERC's finding that NYSDEC had waived its 401 authority, in February 2020, after years of delay, the project's sponsor halted investment and cancelled the project.

Similarly, the Northeast Supply Enhancement project (NESE) also faced significant delays under section 401 which ultimately resulted in the cancellation of the project.

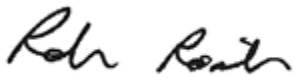
IV. CONCLUSION

Members of API, IPAA, AFPM, and GPA Midstream regularly request state certifications under Section 401 of the CWA to obtain federal approval for projects ranging from new pipeline

[17] 40 C.F.R. § 121.6(a)

construction to routine maintenance. These project proponents are adversely affected when States use their Section 401 authority not to ensure compliance with state federally approved water quality standards but to block or delay infrastructure projects or to second guess federal policy implemented by federal licensing authorities. We look forward to a swift and cooperative rulemaking process that builds in time to address foreseeable legal challenges under the current administration.

Thank you for your consideration of our comments.



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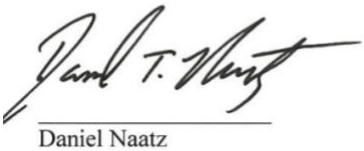

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