

October 21, 2019

Comments Submitted by Free Market Groups on the U.S. Environmental Protection Agency's proposed rule, Updating Regulations on Water Quality Certification, 88 Fed. Reg. 44080, (August 22, 2019).

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

Submitted Via: www.regulations.gov

We write in support of the U.S. Environmental Protection Agency's proposed rule, Updating Regulations on Water Quality Certification, 88 Fed. Reg. 44080, (August 22, 2019) (the "Proposed Rule").

Section 401 of the federal Clean Water Act was intended as a way to enlist states in protecting water quality standards within their borders. Under current regulation, however, Section 401 is vulnerable to misuse for other purposes, such as the consideration of factors Congress did not intend agencies to consider in granting water quality certifications and state discrimination against interstate commerce. In recent years, with increasing frequency, states have misused the Section 401 certification authority for purposes that have nothing to do with the Clean Water Act and which are contrary to significant considerations of national policy, including the explicit policy of the Natural Gas Act, that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a).

The Proposed Rule strikes a better balance between state prerogatives and federal authority under the Clean Water Act and properly ensures that state water quality certifications will be determined on the basis of water quality standards, as provided by the Act and in keeping with congressional intent.

The Proposed Rule is needed not just to ensure that Section 401 is implemented consonant with congressional intent, but also to preserve and expand the historic gains that the United States has made over the last decade in achieving energy security and providing affordable, accessible, and clean sources of natural gas and electricity to working families and private industry across the country. The Trump administration's strategy of becoming the world's dominant energy producer depends upon the efficient deployment of energy and transportation infrastructure.

Moreover, it is the policy of the Natural Gas Act to establish an interstate marketplace for natural gas, in which sellers and buyers in different states can transact for mutual benefit without hindrance from other states. The Natural Gas Act leave to the states only that natural gas infrastructure that is purely intrastate. 15 U.S.C. § 717(a).

To ensure that no region of the country is left behind, and that all Americans are able to enjoy the full economic, strategic, and environmental benefits of the energy revolution, it is vital for Section 401 to work in harmony with other federal environmental policies, rather than in conflict with them as has too often been the case in recent years.

We believe that the Proposed Rule will accomplish these important goals.

I. Background.

Like many environmental statutes, the Clean Water Act provides states with the opportunity to assist the federal government in the implementation of federal regulations. States avail themselves of this opportunity because of the flexibility that these laws provide to them. That flexibility is, however, limited by the relevant statutory provisions and by the Constitution's structure of competitive federalism.

Section 401(a)(1) of the Clean Water Act, for example, provides states a carefully delimited opportunity to assess whether a proposed project may have specific water quality impacts, and specifically whether any potential discharge "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a)(1). States may make their certifications contingent on the project meeting such conditions as the states may require to ensure compliance with applicable water quality standards.

The certification is limited as to time as well as scope. Under Section 401(a)(1), the state has only one year to provide the certification, counting from the date of request. "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."

Despite the clear language of the statute, some states have made their Section 401 certification determinations on the basis of factors that have nothing to do with water quality, factors that Congress clearly did not intend states to take into account when it delegated the certification authority. *See*, 5 U.S.C. § 706(2), *and see*, *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003) (holding that agencies action must respond to all relevant factors without relying on considerations Congress did not intend them to weigh).

For example, New Jersey denied a Section 401 certification to the PennEast pipeline until a survey of the entire linear project route was completed, and then denied the company the access necessary to survey the land.

The state of Washington denied a Section 401 certification to the Millennium Bulk Terminal project designed to export clean coal from several Western states. The state explicitly relied on factors Congress clearly did not intend states to consider, such as rail safety, vehicle traffic, and noise.

The State of New York denied a Section 401 certification to the Millennium Valley pipeline based not on water quality standards, but on the fact that the federal agency (FERC) had not conducted an analysis of downstream climate effects, clearly not a factor that Congress intended the states to consider when it granted the 401 certification delegation.

The State of New York's recent denial of a 401 certification to the Constitution pipeline was nominally based on water quality standards, but the State has repeatedly moved the goalposts on what it would deem satisfactory, after requiring Constitution to resubmit its request for certification multiple times. The effect of New York's handling of the Constitution certification request was to extend the decision well past the one-year deadline, at great expense to the company, when the state apparently intended to reject the permit from the start.

The abuse of the 401 authority creates serious problems at several levels. It is an arbitrary and capricious abuse of companies that have invested tens or hundreds of millions of dollars to deliver badly needed infrastructure; it deprives other states of the benefits of America's new energy abundance, in a clear discrimination against interstate commerce; it benefits the position of America's adversaries; and it hurts the environment. For example, New York's denial of certification for the Constitution pipeline effectively deprives the New England states of natural gas from Pennsylvania's abundant reserves, forcing those states to rely on more expensive LNG imports from Russia and on coal. As a result, residents of New England states (as well as New York and the producing states) are deprived of economic benefit to the benefit of autocratic energy producers like Russia.

II. The Proposed Rule Would Provide Clarity for States Implementing Section 401.

The increasing inconsistency and misuse of the Section 401 authority has occurred in a regulatory vacuum. EPA's regulations implementing Section 401 predate the 1972 Clean Water Act Amendments that revised Section 401 in significant respects, including the procedure and scope for state water quality certifications.

In response to stakeholder calls for greater consistency and clarity in the implementation of Section 401, President Trump issued Executive Order 13868 on "Promoting Energy Infrastructure and Economic Growth" (April 10, 2019). The Order directed EPA to review existing regulations and guidance under Section 401 to improve implementation. EPA issued guidance on June 7, 2019, and issued the Proposed Rule on August 9, 2019.

The Proposed Rule clarifies the scope of state Section 401 certification authority in several significant respects:

- *Narrows the scope of activities that trigger Section 401.* The Proposed Rule would clarify that only the statutorily defined "pollutants" discharged from a "point source" into "waters of the United States" would trigger Section 401. Other activities not falling into those statutory definitions, will no longer be considered to require a Section 401 certification, despite that EPA and courts may have previously considered such activities to be within the ambit of Section 401.

- *Requires certification decisions to be based on water quality factors only.* The Proposed Rule would prohibit consideration of factors unrelated to water quality, such as downstream climate change effects, in state certification decisions.
- *Requires states to act within one year of receiving application.* States will now have one year to issue or deny the certification from the date that an application is received. States will no longer be able to delay the certification decision, and federal agencies may shorten the period to less than one year in certain circumstances.
- *Noncompliant state procedures to be considered waiver of Section 401 authority.* The Proposed Rule would allow Federal agencies to consider state failure to satisfy the Proposed Rule's requirements as a constructive waiver of the Section 401 authority.

III. The Proposed Rule Would Strengthen Federalism.

Executive Order 13868 directed EPA to take into account the federalism concerns underlying Section 401. Section 401 was enacted in part to give states an important role in the maintenance of local water quality standards. But champions of federalism should always oppose state discrimination against interstate commerce.

The right place to strike a balance between federal and state authority under the Clean Water Act is to make sure that the EPA's definition of "waters of the United States" is true to congressional intent. That purpose will hopefully be served by the EPA's proposed rulemaking, Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (February 14, 2019).

In Section F.1. of the Proposed Rule, EPA "seeks comment on whether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce." We believe that Congress has struck the appropriate balance.

The genius of our Constitution's federal structure is that it allows state and local governments to give effect to local choice, while inhibiting the ability of states to diminish local choice by discriminating against interstate commerce. Indeed, the Commerce Clause was designed precisely to give the Federal Government authority to preempt and remove any inappropriate obstacles to interstate commerce at the state level.

The "cooperative federalism" construct of the CWA and other environmental protection statutes must be seen in light of the Constitution's "competitive federalism," a system designed for states to compete freely for people and their capital within a framework of interstate regulatory competition. In the construct of "competitive federalism," undesirable state regulations (whether it be too much regulation or too little) are punished through factor mobility: people vote with their feet. The right level of state regulation is rewarded by the same method. The system breaks down, however, when undesirable regulations in one state have negative impacts in other states, for then factor mobility will punish the latter through no fault of their own.

Of course, each state has authority to provide for the health and safety of its residents, and may enact appropriate legislation for that purpose. What states may not do is treat out-of-state market participants differently than in-state market participants. Yet that is what states such as New York have done: New York is one of the nation's largest consumers of natural gas, with 2/5ths of its power generation and 3/5ths of its home heating coming from gas, and New York produces a significant though dwindling amount of natural gas itself. While forced to import much of its natural gas from nearby states, New York has discriminated against out-of-state natural gas, most visibly through its use of the 401 certification authority.

The case of New York is particularly egregious, as the principal effect of the recent 401 certification denials is not to deprive New York residents of natural gas, but to deprive residents of New England states of natural gas. Hence, New York's discrimination against interstate commerce operates in several senses, against both out-of-state producers and out-of-state consumers. New York's ban on hydraulic fracturing, by contrast, while depriving New Yorkers of much needed economic benefit, is at least theoretically justifiable as a health-and-safety measure, and does not appear to discriminate against interstate commerce.

The federal commerce power is truest to its original purpose when it prevents states from injuring the "competitive federalism" of our Constitution. Hence, champions of the states' dual sovereignty should always oppose state policies that discriminate against interstate commerce.

IV. Conclusion.

The Proposed Rule is a significant and valuable corrective to the problems that have arisen in the implementation of Section 401, and will help keep implementation of the Clean Water Act in line with Congress's original design.

Sincerely,

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