COMMENTS SUBMITTED BY THE COMPETITIVE ENTERPRISE INSTITUTE REGARDING ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION IMPROVEMENT RULE, PROPOSED RULE

87 Federal Register 35,318 (June 9, 2022)
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I. INTRODUCTION

The Competitive Enterprise Institute is a policy and analysis organization committed to advancing the principles of free markets and limited government. We are particularly concerned about regulatory overreach and its adverse impacts, both at the federal and state levels. We are pleased to have the opportunity comment on the proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule (Proposed Rule).[1]

This comment will focus on one specific aspect of Section 401 of the 1972 Clean Water Act, and that is the recent trend towards the misuse of this provision by some states in pursuit of a climate change agenda. The text and history of the Clean Water Act militates heavily against invoking Section 401 for any reason other than water quality concerns directly attributable to the project at issue. Nonetheless, it has been used in the last several years to target fossil fuel-related projects unlikely to have otherwise raised any Section 401 objections.

We believe the Clean Water Act, 401 Certification Rule, (2020 Rule) provided a much-needed restatement of the Clean Water Act's original intent as well as restoration of the proper implementation of Section 401 that prevailed during its first several decades in existence.[2] In doing so, the 2020 Rule would have served to rein in the recent misuse of this longstanding program to pursue unrelated climate policy objectives. CEI led a coalition comment in favor of what would become the 2020 Rule.[3]

We now are concerned that the Proposed Rule will once again open the door to the use of Section 401 by states to target fossil fuel-related projects without any

[1] 87 FR 35318 (June 9, 2022).
[2] 85 FR 42210 (July 13, 2020).
[3] 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, October 21, 2019, https://cei.org/sites/default/files/CEI_401_Coalition_Letter_Final%20102119.pdf.

legitimate water quality rationale. Allowing this expansion of the Clean Water Act would not only violate the law but would impede the delivery of affordable domestic energy to end users, both in the U.S. and around the world, and do so at a time when this energy is badly needed. For these reasons, we urge the agency to withdraw the Proposed Rule.

II. BACKGROUND

Section 401 essentially grants veto power to the certifying authority (usually a state but sometimes a tribe) most directly impacted by a proposed project "which may result in any discharge into the navigable waters…."[4] Thus, the federal government cannot give its approval unless the state either certifies that the project will comply with all relevant water quality requirements (and may impose specific conditions on the project to ensure compliance) or waives such certification. The certifying authority must do so in a reasonable period of time "which shall not exceed one year" after receiving the request.[5]

Until the last decade, states had used their Section 401 authority based solely on water quality concerns. However, in recent years Section 401 has grown into something never intended – a means to block fossil fuel projects regardless of water impacts.[6] For example, the state of New York has invoked Section 401 to stop new natural gas pipelines no different than ones that had routinely received state certifications in the past. It has also been used by the State of Washington to stop a coal export facility and Oregon against a liquefied natural gas (LNG) export facility.

Beyond outright rejections, some states have adopted the practice of deciding that a project's permit application is incomplete and demanding additional data while asserting that the one-year clock must be reset each time they do so. The certifying authority's apparent goal is to induce project developers to give up on their own and abandon the project, thereby avoiding the political consequences of an official rejection. These consequences can be substantial given the jobs associated with such projects as well as the affordable energy they help provide.

The 2020 Rule sought to alleviate these and other concerns. Among other things, it clarified that Section 401 applies only to water quality issues directly related to the proposed project and that the statutory one-year clock cannot be reset at state discretion once a request for certification has been received. In so doing, it also helped restore the proper federal/state balance and preserve interstate commerce, especially by ensuring that

[4] 33 U.S.C. 1341(a)(1).
[5] 33 U.S.C. 1341(a)(1).
[6] See, Environmental Protection Agency Press Release, "What They Are Saying: EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act," June 20 2020, https://www.epa.gov/newsreleases/what-they-are-saying-epa-issues-final-rule-helps-ensure-us-energy-security-and-limits.

those states benefitting from and supportive of proposed projects cannot be harmed by other states for reasons unrelated to the Clean Water Act.

The 2020 Rule has since been vacated by a federal district court but subsequently reinstated by the Supreme Court pending ongoing litigation.[7] In any event, the Proposed Rule at issue here would largely replace its provisions.

III. ARGUMENT

A. Climate Change Is Not A Valid Consideration Under Section 401

The law is clear that Section 401 can only be invoked for discharges into navigable waters that may violate specified water quality provisions in the law. In no way can climate change fit under this scheme. The fact that fossil fuels transported by a proposed pipeline or export facility will eventually be combusted somewhere and emit carbon dioxide is completely unrelated to Section 401.

Granted, the Supreme Court has broadened the definition of the water quality concerns that a state may take into consideration, and indeed the exact parameters of Section 401 remain a matter of ongoing debate and litigation.[8] But even under this expansive judicial interpretation of the program the only relevant factors are potential water quality violations proximate to the project at issue. Climate change remains well beyond the bounds of this program.

Simply put, the emission into the air of carbon dioxide or other greenhouse gases is not a water quality issue under the statute, and strained attempts to link climate change with water quality does not make it one. For example, assertions that a specific project's infinitesimally-small greenhouse gas contribution adds to climate-related water issues around the globe does not bring it within the scope of the Clean Water Act. Nor does speculation that climate change may one day alter the location of a proposed facility so as to render that project problematic.

In sum, Section 401 cannot be transformed into a climate provision allowing either project rejection on climate grounds or imposition of climate-related conditions by the certifying authority. Doing so would require statutory authority that has yet to be enacted by Congress.

The June 30, 2022 Supreme Court decision in West Virginia v. Environmental Protection Agency further underscores that these half century-old statutory provisions dealing exclusively with local and regional water quality issues cannot be redefined decades later into a powerful climate policy tool to be used by states at their discretion.[9] Much as the Supreme Court majority held that EPA cannot target coal and natural gas-

[7] Louisiana et al. v. American Rivers et al., 596 U.S._____(2022).
[8] PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994).
[9] 597 U.S.____(2022).

fired electricity generation on climate change grounds in the absence of specific statutory authority to do so in the 1970 Clean Air Act, neither can states do so to fossil fuel-related projects under the 1972 Clean Water Act.

Nonetheless, the Proposed Rule repeatedly references the need to comport with the Biden Administration's overriding priority of climate change, including 13 references to Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis."[10] More significantly, it replaces language in the 2020 Rule reiterating that Section 401 pertains to direct impacts of the project on nearby water quality with language giving certifying authorities considerable latitude in determining when the Clean Water Act is applicable. In so doing, the Proposed Rule may be opening the door to state rejection of fossil fuel-related projects that raise no serious water quality concerns but merely make a marginal contribution to fossil fuel supplies that will be used remotely from the project location.

B. The One-Year Deadline Cannot Be Bypassed

The Clean Water Act makes clear that certifying authorities must render a decision under Section 401 within a reasonable period of time that cannot under any circumstances extend beyond one year after receipt of a request.[11] Nowhere does the statute allow states to bypass the time limit by requesting additional information from project developers and resetting the one-year clock whenever they do so.

Nonetheless, this is what some states have done for projects, including fossil fuel-related ones.[12] The 2020 Rule effectively restated the Clean Water Act's original time limit, but the Proposed Rule may serve to once again allow states to engage in these dilatory tactics.

The one-year deadline may have particular importance for fossil fuel-related projects in the years ahead. By engaging in extended delaying tactics, states can induce project developers to give up and withdraw their application without ever having to officially reject a project and answer to the project's beneficiaries. These fossil energy infrastructure projects enjoy considerable public support. For example, unions that benefit from the jobs these projects create have strongly spoken out against recent Section 401 rejections.[13] Further, given the current spike in energy prices and growing concerns about adequacy of supplies in some states and regions (as well as opportunities to supplant Russian energy exports with American ones), future rejections of projects that would bring more domestic energy to market may prove particularly unpopular. This is particularly true of the tremendous surplus of natural gas bottled up in the Appalachian region and unable to reach end users on the East Coast (or LNG export facilities) due to

[10] 87 FR, at 35319, 35320, 35323, 35325, 35326, 35359, 35360.
[11] Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019).
[12] N.Y. Dep't of Enviro. Conservation v. FERC, 884 F.3d 450 (2d Cir. 2018).
[13] See, Letter from Terry O'Sullivan, President, Laborers International Union of North America (LIUNA), to Rep. Jerold Nadler (R-NY), May 29, 2019, https://d3ciwvs59ifrt8.cloudfront.net/4e6226e6-e7fe-4444-a953-cbc9cd0b20ab/21054880-394b-465f-9105-18ecfc172386.pdf.

inadequate pipeline capacity, while several proposed pipelines have been rejected under Section 401.[14]

Allowing states to effectively stop fossil-fuel projects through additional requests for information and limitless deadline extensions would let them shirk political accountability. Whether or not this is the reason for inclusion of the one-year hard deadline in the Clean Water Act, that deadline cannot be violated.

C. The Proposed Rule Compromises Federalism And Interstate Commerce

The Proposed Rule asserts that "the 2020 Rule deviated sharply from the cooperative federalism framework central to section 401 and the CWA," and that the Proposed Rule would help restore this framework.[15] The agency's reasoning is that the 2020 Rule reinforced the limits under which certifying states may reject a project or impose conditions under Section 401, while the Proposed Rule gives certifying states considerably more latitude. However, this is a narrow view of federalism that ignores the interests of other states also impacted by such projects as well as the larger importance of protecting interstate commerce.

While the provisions of Section 401 apply specifically to the state in which the potential discharge into navigable waters originates, other states also have a stake in such projects. This is especially so for fossil fuel-related infrastructure projects. Most notably, the states producing the energy have an interest in transporting it to willing buyers but would be thwarted by a certifying state's rejection of pipelines and export facilities. In addition, there are end users of such energy in states other than the certifying authority itself.

The Clean Water Act struck a workable balance by giving certifying states powerful authority – up to and including blocking a project entirely – but only allowing the use of that authority under proscribed conditions set out in the statute. Doing so not only adheres to statutory intent, but also ensures that commerce in energy between the several states and other nations is not unduly restricted. In contrast, it is the Proposed Rule upsets the balance and enables some states to exert excessive power over others and infringe on interstate commerce.

IV. CONCLUSION

Despite the narrow focus of Section 401 of the Clean Water Act on specific water quality issues, some states have misused the program to advance unrelated climate policy objectives by using this provision to delay or block fossil fuel projects. The 2020 Rule

[14] U.S. Energy Information Administration, Natural Gas Weekly Update, February 2, 2022, https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2022/02_03/.
[15] 87 FR at 35319.

helped restore the original intent of the law, but the Proposed Rule would enable states to stray well beyond their statutory authority. Doing so violates both the law as well as the Constitutional protection of interstate commerce, especially so regarding national energy markets. For these reasons, we believe the Proposed Rule should be withdrawn.

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