



October 21, 2019

Lauren Kasparck  
Oceans, Wetlands, and Communities Division  
Office of Water (4504-T)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: Updating Regulations on Water Quality Certification, Docket ID No. EPA-HQ-OW-2019-0025**

Dear Ms. Kasparck:

Western Energy Alliance supports the proposed updates to the Clean Water Act (CWA) Section 401 certification process, since they solidify the timeline and scope for states to review and certify permits. We appreciate the opportunity to provide comments on the updates, and believe they will provide greater clarity, predictability, and consistency for federal agencies, states, tribes, and the regulated community. The updates also provide an excellent opportunity to advance EPA's cooperative federalism goal that balances the rights of states and tribes to continue setting their own water quality standards with certainty for industry.

Western Energy Alliance represents 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fourteen employees.

The Section 401 certification process can impact our ability to transport and deliver clean-burning natural gas to customers around the country and world. Pipeline construction permits have been delayed or denied in New York, Oregon, and other states for reasons that appear to stretch the intent of the CWA beyond protecting water. More timely pipeline permitting and construction is needed to handle the large amounts of associated natural gas produced from oil wells. Without pipeline capacity and a market, that excess gas must be flared. A more reasonable, predictable 401 permitting process will help reduce the waste of natural gas that occurs when markets and pipeline capacity is unavailable because of government delay.

### 2019 Guidance Document

We support the rescission of the 2019 Guidance Memo if the new regulations closely adhere to these proposed updates. If the new regulation is largely unchanged from the proposed updates, there will be no need for separate guidance, as the updates are clear and easy to understand.

### Effect on Existing Regulations

Western Energy Alliance supports consistency across federal agencies, and are in agreement with EPA plans to review other federal agency regulations to ensure they are in accordance with the new 401 certification process. We also support EPA recommending to states and tribes that they update their own Section 401 regulations.

### Legal Background

Because the Section 401 language was developed in 1971, before the Clean Water Act was passed by Congress in 1972, it never went through a proper public notice and comment process. We applaud EPA's efforts to rectify that anomaly with this rulemaking, which enables EPA to take a more holistic review than has occurred previously. We find the approach appropriate because it analyzes the agency's authority within the scope of the 1972 CWA Amendments, including the limitation of the rule to water quality considerations.

### Appropriate Scope for Certification Review

Western Energy Alliance strongly supports EPA's assertion in the proposal that, as stipulated by the CWA, Section 401 is triggered by a potential point source discharge into a Water of the United States. Clarifying that the scope of Section 401 is only concerned with discharge will correctly limit certifications within the scope of the CWA.

EPA is on firm legal ground in asserting that Section 401 is about protecting water quality, not other environmental impacts such as air emissions and transportation effects. EPA is right to scope these regulations to solely focus on water quality, and assert that states and tribes may only consider discharges from federally permitted projects. 401 permits are not the correct mechanism for implementing new hiking and biking trails. We support the proposed reinterpretation of section 401 to clearly limit certification to point source discharges to waters of the United States, in accordance with the CWA.

The expansion of the scope of Section 401 certification far beyond water quality concerns has been enabled by perverse interpretations of the words “applicant” and “activity.”<sup>1</sup> EPA has appropriately fixed the interpretation of these terms to their plain language roots.

EPA has correctly observed that states and tribes have abused the certification process to inject unrelated and unenforceable conditions into 401 permits. We support EPA’s proposal to reject conditions included in the permits that go beyond the scope of section 401. The updated regulations would rightly afford states and tribes the ability to remedy the situation and take those unrelated conditions out of the certification.

We support the language in the proposal that clarifies appropriate certification conditions. Correcting the lack of a definition and removing ambiguity will ensure that 401 permits remain within the scope of the CWA. We also support developing specific procedures for determining when a project with potential for discharge will result in an actual discharge.

#### Timeframe for Certification Analysis and Decision

Certification timelines have often been stretched far beyond what can be considered a reasonable amount of time. Western Energy Alliance strongly supports EPA’s affirmation that CWA Section 401 certification must be done within one year, a very reasonable period of time. We further strongly support the recognition that for some smaller or less-complex projects, a reasonable certification timeframe should be six months or less. While some complicated projects could require most of the one-year timeframe, the majority of 401 certification requests are for standard or general permits which should have a much shorter “reasonable time period.” We also support EPA’s provision in the proposal that the reasonable period of time does not stop or pause for any reason once the certification request is received.

#### Certification Requests

We support the proposed inclusion of an enumerated list of documents and information that must be included in a certification request. The list is a helpful tool to ensure the certifying authority is held to the statutory timeframe for a reasonable period of time to act on a certification request. We request that the required list of documents is created into a form or standard application that can be used to ensure the certification request is in an acceptable format for certifying authorities.

#### Contents and Effect of a Certification

The oil and natural gas industry routinely require Section 401 certifications when applying for Section 404 nationwide general permits from the Army Corps of Engineers. We support

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<sup>1</sup> 84 FR 44096-7

the proposed method for certifying agencies to issue an affirmative waiver when the agency does not intend to act on a certification request. It would allow the federal permitting authority to proceed without waiting for the reasonable time period to lapse and would be a huge improvement in government efficiency.

Certification by the Administrator

We support the interpretation of EPA's authority for the Administrator to certify compliance with water quality standards when no state, tribe, or other agency has the authority to give such a certification. The three proposed procedural requirements are an effective regulatory backstop for when a local certifying agency does not exist.

Thank you for the opportunity to comment. We hope EPA can expeditiously finalize this regulation so that important projects, such as pipelines, can be constructed, thereby enabling our industry to continue to grow jobs and expand the economy.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K M Sgamma', with a long horizontal flourish extending to the right.

Kathleen M. Sgamma  
President