

Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking

U.S. Environmental Protection Agency

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1 Introduction

Under Clean Water Act (CWA) section 401, a federal agency cannot issue a license or permit that may result in a discharge into waters of the United States unless the authority (state/territory/authorized tribe/EPA) where the discharge would originate issues a section 401 water quality certification or waives its authority to do so. States, territories, and authorized tribes are the certifying authorities when the discharge originates within their jurisdiction, while the EPA is the certifying authority for lands of exclusive federal jurisdiction and tribal lands where tribes do not have Treatment as a State (TAS) authorization. Certifying authorities have exercised their section 401 certification authority for various federal licenses and permits that include, but are not limited to, dredge-and-fill activities in waters of the United States that require CWA section 404 permits from the U.S. Army Corps of Engineers (Corps), CWA section 402 industrial and municipal point source discharge permits issued by the EPA, permits issued under sections 9 and 10 of the Rivers and Harbors Act by the Corps (or the U.S. Coast Guard for bridges and causeways under section 9), and projects requiring licenses from the Federal Energy Regulatory Commission (FERC) or the Nuclear Regulatory Commission (NRC).

Section 401 certification decisions have varying effects on certifying authorities and project proponents (Table 2-1). When certifying authorities waive their section 401 certification authority, the project proponent faces no additional effects or processing times. However, a waiver does not necessarily indicate that the activity will comply with applicable water quality standards (WQS) and other CWA provisions since certifying authorities may waive certification for a variety of reasons, including a lack of resources to evaluate the request. The certifying authority can also waive its authority by exceeding the reasonable period of time for certifications, which is up to one year.¹ Conversely, when certifying authorities deny section 401 certification, the effects on project proponents can be significant, including potential processing delays and changes in project viability (see Section 4.1.3). However, the certification process provides certifying authorities with an important tool to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies (U.S. EPA, 2019a). Finally, when certifying authorities grant certifications or grant with conditions, the effects on project proponents vary depending on request review time, license/permit type, and required conditions (if applicable).

2 Overview of Current Practice

The CWA section 401 certification process allows the certification authority (state/territory/tribe/EPA) to protect its water quality from adverse effects caused by potential discharges from federally licensed or permitted activities. Under current practices, certifying authorities determine whether the proposed activity and discharge requiring a federal license or permit is consistent with technology-based effluent limitations (CWA section 301), water quality-based effluent limitations (CWA section 302), water quality standards and implementation plans (CWA section 303), national standards of performance (CWA section 306), toxic and pretreatment effluent standards (CWA section 307). When issuing a certification, authorities may include conditions necessary to assure compliance with those enumerated provisions of the CWA and any other appropriate requirement of state law.² The certifying authority is determined based on the location (e.g., state, U.S. territory, tribal land) where the discharge originates. All states and U.S. territories have section 401 certification authority automatically. Tribes receive section 401 certification authority upon approval of TAS by the EPA. The EPA is responsible for section 401

¹ 33 U.S.C. § 1341(a)(1)

² 33 U.S.C. § 1341(d)

certification decisions on tribal lands where tribes do not have TAS and on lands with exclusive federal jurisdiction.

Section 401 gives the certifying authority four options: grant, grant with conditions, deny, or waive certification. Under current practice, certifying authorities make these determinations as follows:

- 1) **Grant certification.** Granting section 401 certification to a project proponent for a federal license or permit signifies that the certifying authority has determined that the proposed activity and discharge will comply with WQS, other relevant provisions of the CWA, and any other appropriate requirement of state law. When granted, the federal license or permit may issue.
- 2) **Grant certification with conditions.** Certifying authorities may include limitations or conditions in their certifications as necessary to ensure compliance with WQS, other provisions of the CWA, and any other appropriate requirement of state law. Once section 401 review is triggered, the certifying authority may consider and impose conditions on the discharge and the project activity in general to ensure compliance with the CWA and any other appropriate requirement of state law. Some courts have concluded that the federal agency must include all of the certifying authority's conditions as part of the resulting license or permit. In practice, some certifying authorities have included conditions on a section 401 certification that are not within the proposed scope of certification. When granted with conditions, the federal license or permit may issue.
- 3) **Deny certification.** Certifying authorities deny certification if they cannot certify that discharge will comply with WQS and other applicable sections of the CWA. A certification denial prohibits the federal agency from issuing the license or permit. In practice, some certifying authorities have issued denials for reasons that extend beyond water quality and are not within the proposed scope of certification. When denied, the federal permit may not issue.
- 4) **Waive review.** Certifying authorities may waive section 401 certification, either explicitly through notification to the project proponent or implicitly by failing or refusing to act on the certification request within the allotted timeframe. Although the CWA establishes a time limit of "any reasonable period not to exceed one year" for certifying authorities to complete their section 401 certification analysis and decision, the EPA's existing certification regulations³ specify that the licensing or permitting agency determines the "reasonable" time period within that one-year timeframe. Under section 401, the clock starts upon the receipt of a request for certification. In practice, certifying authorities have adopted the practice of relying on "complete applications" to start the clock, as defined by the certifying authority. A waiver does not indicate a certifying authority's opinion regarding the water quality implications of a proposed activity or discharge since a certifying authority may waive certification for a variety of reasons, including a lack of resources to evaluate the request. When certifying authorities waive their section 401 authority, the federal licensing or permitting agency may continue with its own process and issue the license or permit without an affirmative certification from the certifying authority.

Table 2-1: Summary of potential section 401 certification decision effects on project proponents and certifying authorities under current practice			
Section 401 Decisions	Magnitude of Potential Effect on Project Proponents	Effect on Certifying Authority / WQS	Potential Processing Time Effects
Review waived within, or at expiration of,	None – project proponent not subject to conditions from certifying authority	Varies - waiver does not necessarily indicate that the activity will comply with applicable WQS	No delay

³ 40 CFR § 121.16(b)

Table 2-1: Summary of potential section 401 certification decision effects on project proponents and certifying authorities under current practice			
Section 401 Decisions	Magnitude of Potential Effect on Project Proponents	Effect on Certifying Authority / WQS	Potential Processing Time Effects
reasonable period of time			
Grant without conditions issued within reasonable period of time	None	Certifying authority has determined that the proposed activity will comply with WQS and other CWA provisions	No delay
Grant with conditions issued within reasonable period of time	Varies depending on whether conditions are water quality related	Conditions allow the certifying authority to ensure compliance with applicable WQS and other CWA provisions	No delay
Denials issued within reasonable period of time	High – project proponent must either discontinue the project or modify plans; project proponent may also challenge denial in court	Denial prohibits license/permit issuance for the activity that does not comply with WQS and other CWA provisions	Potential for extended delay / project withdrawal or modification
Grant without conditions issued beyond reasonable period of time	Low to medium, depending on how long after the reasonable period of time	Certifying authority has benefited from more time than statute allows and determined that the proposed activity will comply with WQS and other CWA provisions	Delayed beyond reasonable period of time
Grant with conditions issued beyond reasonable period of time	Medium to high, depending on how long after the reasonable period of time and whether conditions are water quality related	Certifying authority has benefited from more time than statute allows; conditions allow the certifying authority to ensure compliance with applicable WQS and other CWA provisions	Delayed beyond reasonable period of time
Deny beyond reasonable period of time	High	Certifying authority has benefitted from more time than statute allows; denial prohibits license/permit issuance for the activity that does not comply with WQS and other CWA provisions	Delayed beyond reasonable period of time

In summary, granting certification, with or without conditions, allows the federal agency to issue the license or permit consistent with any conditions of the certification. Denying certification prohibits the federal agency from issuing the license or permit. Waiving certification allows the license or permit to be issued without comment from the certifying authority.

Certifying authorities have exercised their section 401 certification authority for dredge-and-fill activities in waters of the United States that require section 404 permits from the Corps, for section 402 industrial and municipal point source discharge permits issued by the EPA, for permits issued under sections 9 and 10 of the Rivers and Harbors Act by the Corps or U.S. Coast Guard, and for projects requiring FERC or NRC licenses. Typically, certifying authorities conduct section 401 certification review at the same time as the federal agency's license or permit review. Some certifying authorities have established joint

application procedures with federal agencies to ensure simultaneous review (e.g., Alabama,⁴ New York,⁵ Oregon,⁶ South Carolina⁷).

The federal licensing or permitting agency may set the certification response time limit to any “reasonable period of time (which shall not exceed one year).”⁸ The certifying authority waives section 401 certification review if it does not respond within the allotted time limit. Federal agencies have established varying timeframes up to one year. For example, the Corps’ federal regulations provide a 60-day response period for section 401 certification reviews associated with section 404 permits.⁹ FERC federal regulations provide a full year for certifying authorities to act on a certification request.¹⁰ The EPA regulations governing the certification of federally issued section 402 NPDES permits provide certifying authorities 60 days to act on section 401 certification requests associated with a draft permit.¹¹ The EPA’s generally applicable regulations suggest a time limit of six months.¹² Certifying authorities have used different approaches when they need more time for review than has been set by the federal agency or authorized by section 401, including:

- 1) Determine that a request is “incomplete” until the certifying authority is prepared to issue the certification.
- 2) Restart the clock by coordinating with the project proponent to withdraw and resubmit the request for certification. The recent *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* decision (see Section II.F.4.b of the preamble) concluded this practice is inconsistent with section 401.
- 3) Deny section 401 certification “without prejudice” when they lack data necessary for their analysis and then encourage the project proponent to resubmit the request once data gaps have been addressed.

Section 401 certification authority rests with the jurisdiction where the discharge originates. However, other jurisdictions downstream or otherwise potentially affected by the discharge have an opportunity to provide comments on the federal license or permit. If the EPA Administrator determines at his or her discretion that a discharge subject to section 401 certification may affect water quality of neighboring jurisdictions, the EPA is required to notify those jurisdictions and allow them to submit their views and objections about the proposed license or permit and associated section 401 certification.¹³ These jurisdictions may also request that the federal licensing or permitting agency hold a hearing at which the EPA also submits its evaluations and recommendations concerning the neighboring jurisdiction’s objections. The federal agency must then condition the license or permit to ensure compliance with water

⁴ <http://www.adem.state.al.us/DeptForms/Form166.pdf>

⁵ <https://www.nan.usace.army.mil/portals/37/docs/regulatory/geninfo/genp/jointappinstruc.pdf>

⁶ <https://www.nwp.usace.army.mil/Missions/Regulatory/Apply/>

⁷ <https://scdhec.gov/environment/water-quality/water-quality-certification-401-process-explained>

⁸ 33 U.S.C. §1341(a)(1)

⁹ 33 CFR § 325.2

¹⁰ 18 CFR § 4.34(b)(5)(iii)

¹¹ 40 CFR § 124.53(c)(3)

¹² 40 CFR § 121.16(b): period shall generally be considered to be 6 months, but in any event shall not exceed 1 year.

¹³ 33 U.S.C. §1341(a)(2)

quality requirements of neighboring jurisdictions. Recommendations from neighboring jurisdictions do not have the same weight as conditions from the certifying authority. The federal agency does not need to follow specific recommendations from neighboring jurisdictions and can instead develop its own measures to comply with water quality requirements. However, the federal agency cannot issue the license or permit if it cannot ensure compliance with neighboring jurisdictions' water quality requirements.¹⁴

The Association of Clean Water Administrators¹⁵ recently surveyed the 50 states about their section 401 certification processes, including the average number of certification requests and denials, certification timeliness, request completeness, and best practices (ACWA, 2019). Thirty-one states provided survey responses. Survey responses indicate that the average length of time for states to issue a certification decision once they receive a complete request is 132 days. Responding states cited incomplete requests as the most common reason for delays. Survey results also indicate that denials are uncommon, with 17 states averaging zero denials per year and other states issuing denials rarely (ACWA, 2019). A 2011 review of Wisconsin's section 401 certification program found that Wisconsin denied approximately 2 percent of projects in 2009 and 2010 (ASWM, 2011a). During this timeframe, the most common cause for denial was the availability of a practical alternative that would better allow the project proponent to avoid or minimize impacts (ASWM, 2011a). A similar review of Delaware's section 401 certification program found that Delaware had not issued any denials in the last few years (ASWM, 2011b). Additional summary survey information was made available by the Western States Water Council (Western States Water Council, 2014). This survey further suggests that denials are uncommon, and most decision are made between 40-90 days.

While these summary survey data do not adhere strictly to the EPA's requirements regarding data and information quality (US EPA, 2001) (i.e. requirements guiding data generation and acquisition, data validation and usability, etc.), due to a lack of existing data on section 401 processes these results are being used for context when assessing the potential impacts of this proposed rule.

3 Overview of Federal Licenses/Permits and Certifying Authority Responses

Under section 401, certifying authorities decide whether to grant, grant with conditions, deny, or waive section 401 certifications. Certifying authorities typically conduct section 401 certification review at the same time as the federal agency's license or permit review to minimize delay and issue a section 401 certification in a timely manner.

The majority of federal permits that are subject to section 401 certification are CWA section 404 permits issued by the Corps. As described in Section 2, other federal licenses/permits include, but are not limited to, CWA section 402 permits issued by the EPA, FERC hydropower and pipeline licenses, Rivers and Harbors Act sections 9 and 10 permits, and NRC licenses. For a list of state websites with public documentation of licenses/permits and section 401 certification documents, see Table 8-1 in Appendix A. The EPA requests comment on the completeness of this summary of federal agencies involved in section 401 permitting.

¹⁴ 33 U.S.C. §1341(a)(2)

¹⁵ ACWA is a national organization representing the State, Interstate and Territorial officials who are responsible for the implementation of surface water protection programs throughout the nation.

Table 3-1 presents summary permit information, both available publicly and provided to the EPA by the federal agency, specific to section 401.

Table 3-1: Permit summary data by certifying authority		
License/Permit Type	Annual Average # Licenses/Permits Issued^a	Time Provided for Section 401 Review
CWA Section 404	50,159 general; 2,511 individual ^b	60 days – 1 year ^h
Rivers and Harbors Act Section 10	8,607 general; 1,670 individual ^c	60 days – 1 year ^h
CWA Section 402	16 general; 150 individual ^d	60 days ⁱ
Rivers and Harbors Act Section 9	30-35 ^e	1 year ^e
Federal Energy Regulatory Commission license	47 ^f	1 year ^j
Nuclear Regulatory Commission license	3 ^g	1 year

a. Includes all permits issued by the relevant federal agency (section 401 certification either granted, granted with conditions, or waived)

b. Estimate based on the annual average number of 404 permits from 2013-2018 based on counts provided by the Corps.

c. Estimate based on the annual average number of section 10 permits from 2013-2018 based on counts provided by the Corps.

d. Estimate based on the annual average of EPA-issued 402 permits from 2012-2017.

e. Estimate based on personal communication with Shelly Sugarman, Bridge Permits and Policy Division, Coast Guard Bridge Program.

f. Estimate based on annual average license issuance for hydropower facilities/major natural gas pipelines from 2013-2018 (FERC, 2019a, 2019b)

g. Estimate based on annual average number of licenses for operating nuclear power reactors from 2013 to 2018 (NRC, 2018)

h. Timeframe depends on Corps district. Corps regulations (33 CFR 325.2) specify that waiver could occur if the certifying authority does not issue a decision within 60 days. In practice, many Corps districts allow a longer timeframe.

i. 40 CFR §124.53(c)(3), unless unusual circumstances warrant a longer timeframe.

j. 18 CFR § 4.34(b)(5)(iii)

3.1 Section 404 Permits

The Corps issues two types of CWA section 404 permits, general and individual. General permits are for activities that are similar in nature, cause only minimal adverse environmental impacts when performed separately, and have only minimal cumulative environmental impacts (USACE, 2017). There are three types of general permits: Nationwide Permits (NWP), Regional General Permits (RGPs), and Programmatic General Permits (PGPs). The most common general permits are NWPs, which provide streamlined review and authorization for activity categories that are determined by the Corps to have minimal adverse impacts on the aquatic environment. NWPs automatically expire, unless renewed, every five years. The Corps has 52 NWPs as of March 2017, which are effective through March 18, 2022 (USACE, 2017). RGPs are issued on a regional basis by an individual Corps district (USACE, n.d.-a). There is no standard set of RGP activity categories that applies to all states, and there are varying numbers of RGPs issued by different Corps Districts. PGPs authorize states with regulatory programs similar to the 404 program to issue permits for certain activity categories, which differ from the activities covered under NWPs, rather than requiring the Corps to directly issue the 404 permits (USACE, n.d.-a).

Certifying authorities exercise their section 401 certification authority at various levels of stringency for section 404 permits. Almost all states issue “programmatic” or “blanket” section 401 certification for activities covered under certain NWPs and RGPs. When a certifying authority issues blanket certification, all actions or activities that meet the requirements of the NWP or RGP receive section 401 certification without additional review. Certifying authorities can issue blanket certifications with or without conditions. Some states condition certain NWPs to address concerns that the NWP requirements do not sufficiently prevent potentially authorized activities from causing or contributing to exceedances of WQS and criteria. NWPs that require additional review, for which the project proponent needs to submit a section 401 request, vary by state. For example, Colorado does not require any additional review on

NWPs (Colorado Environmental Records, n.d.), whereas California may require additional review for 40 NWPs (California Water Boards, 2018). This variability is due to multiple factors, including specific NWP conditions, differing project impacts, and applicable WQS. As for RGPs, states generally issue blanket certifications with or without conditions. Additional review is usually not required because the Corps often incorporates conditions in RGPs that meet WQS.

The Corps issues individual 404 permits for projects with more than minimal individual or cumulative impacts. Individual permits are subject to additional project specific review and involve a more comprehensive public interest review (USACE, n.d.-a). After reviewing the individual permit request, the certifying authority (state/territory/tribe/EPA) typically develops a section 401 certification with additional conditions that project proponents must meet to comply with sections 301, 302, 303, 306, and 307 of the CWA, as well as any other appropriate requirement of state law. This process allows the certifying authority to ensure that the 404 permit complies with WQS, other applicable CWA provisions, and any appropriate requirement of state law.

Some states require additional review of any permit, general or individual, that would authorize discharges to certain waters or is related to a certain activity. For example, Arizona reviews projects that would affect an “Outstanding Arizona Water,” an impaired or non-attaining water, or a lake (Arizona Department of Environmental Quality, 2018). North Carolina reviews all projects related to oil and gas structures on the outer continental shelf, coal mining, and stormwater management facilities (North Carolina Department of Environmental Quality, n.d.).

Certifying authorities typically review each request for an individual 404 permit.

3.2 Section 402 NPDES Permits

The National Pollutant Discharge Elimination System (NPDES) permit program addresses water pollution by regulating point sources that discharge pollutants to waters of the United States. Table 3-2 lists non-404 federal permits, including the section 402 NPDES permit program, and licenses subject to section 401 certification authority as well as the types of activities that each license/permit type authorizes. For 402 NPDES permits, section 401 certification only applies when the EPA is the permitting authority. A state may receive authorization for one or more of the NPDES program components. EPA retains authorization for the program components for which a state is not authorized, and requests 401 certification from the state/tribe. For example, if the state has not received authorization for federal facilities, EPA would continue to issue permits to federal facilities (e.g., military bases, national parks, federal lands, etc.), and would request 401 certification for that permit. The EPA is the sole permitting authority for three states (Massachusetts, New Hampshire, and New Mexico), the District of Columbia, all U.S. territories except the Virgin Islands, and federal and tribal lands. All other states¹⁶ and the Virgin Islands have authorization to issue 402 permits for either the entire NPDES program or certain components. NPDES program components include the NPDES permit program, authority to regulate federal facilities, state pretreatment program, general permits program, and biosolids program (U.S. EPA, 2019b). Table 3-2 contains the number of states and territories that issue section 401 certifications on 402 permits for each NPDES program component. Figure 8-1 in Appendix A shows a map of states and territories and their NPDES program status.

The two basic types of NPDES permits are individual and general permits. Typically, dischargers seeking coverage under a general permit are required to submit a notice of intent (NOI) to be covered by the permit. The EPA’s general permits cover discharges meeting general permit requirements in areas where

¹⁶ Idaho is authorized to issue NPDES permits for individual industrial permits, individual municipal permits, and the state pretreatment program. Idaho is projected to be fully authorized by July 1, 2021.

the EPA is the NPDES permitting authority (see U.S. EPA, 2017). The EPA works with certifying authorities during the development of 402 general permits to ensure that all certifying authorities subject to the EPA's general permits will issue section 401 certification for the general permit. For EPA-issued individual and general NPDES permits, certifying authorities can add conditions to ensure that the EPA's general permit requirements are consistent with WQS, applicable CWA provisions, and other appropriate requirements of state law, and the EPA must incorporate these conditions into the general permit.

3.3 FERC

Projects requiring FERC licenses, which cover interstate natural gas pipelines and hydropower projects (FERC, 2018), are also subject to section 401 authority. See Figure 8-2 in Appendix A for a map of interstate pipelines in the contiguous United States. Certifying authorities typically review each section 401 request for projects requiring a FERC license rather than waiving review. Certifying authorities have inadvertently waived their section 401 authority for projects requiring a FERC license by exceeding the one-year time limit (see Sections 9.2 and 9.3). Although section 401 denials for projects requiring FERC licenses are rare, a few cases have garnered attention. Section 4.1.1 discusses recent section 401 denials for natural gas pipelines.

3.4 Rivers and Harbors Act Sections 9 and 10

Rivers and Harbors Act sections 9 and 10 permits cover construction of structures in navigable waters. Section 9 permits authorize construction of bridges and causeways, which fall under U.S. Coast Guard jurisdiction, as well as dams and dikes, which fall under Corps jurisdiction.¹⁷ Section 10 permits authorize construction of wharfs, piers, dolphins, booms, weirs, breakwaters, bulkheads, and jetties, which all fall under Corps jurisdiction (USACE, n.d.-b). The EPA found no examples where states, territories, or authorized tribes waived their section 401 authority to review projects requiring these permits.

3.5 NRC

NRC issues licenses for nuclear power plants, which are all subject to section 401 review. Figure 8-3 in Appendix A shows the locations of all nuclear power plants in the United States, which mostly lie east of the Mississippi River (U.S. Energy Information Administration, 2019). The EPA found no examples where certifying authorities waived their section 401 authority to review actions or activities requiring NRC licenses.

¹⁷ 33 U.S.C. § 401

Table 3-2: Non-404 permits and licenses subject to section 401 water quality certification		
Federal license/permit	Authorities that issue Section 401 certifications	Permitted activities
402		
NPDES Individual permits	3 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS ¹	Discharges from individual wastewater treatment plants; concentrated animal feeding operations; pesticide requests; and stormwater from municipal separate storm sewer systems, construction, and industrial activities.
NPDES General permits	4 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS ¹	Discharges from wastewater treatment plants; concentrated animal feeding operations; pesticide requests; and stormwater from municipal separate storm sewer systems, construction, and industrial activities.
Federal facilities	8 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS ¹	Discharges from federal facilities.
Pretreatment	13 states, D.C., all 8 territories, and tribes with TAS ¹	Discharges from industrial users to publicly owned treatment works (POTWs).
Biosolids	42 states, D.C., all 8 territories, and tribes with TAS ¹	Discharge of sewage sludge from wastewater treatment plants.
Federal Energy Regulatory Commission (FERC)		
FERC license	See map in Figure 8-2	Construction and operation of interstate natural gas pipelines and hydroelectric projects.
Rivers and Harbors Act Sect. 9 and 10		
Section 9 permit	All states, D.C., territories, and tribes with TAS	Construction of bridge, dam, dike, or causeway that results in discharge to navigable waters.
Section 10 permit	All states, D.C., territories, and tribes with TAS	Construction of wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures that results in discharge to navigable waters.
Nuclear Regulatory Commission (NRC)		
NRC license	See map in Figure 8-3	Construction and operation of nuclear power plants.

¹U.S. EPA (2019b).

4 Section 401 Certification Case Studies

This section focuses on denials and other high-profile section 401 certification cases.

4.1 Denials

This section describes four recent energy-related section 401 certification denial cases. The four cases presented in this section include three natural gas pipelines in New York State (Section 4.1.1) and a coal export terminal in Washington State (Section 4.1.2). Section 4.1.3 discusses impacts of denials on certifying authorities and project proponents.

4.1.1 New York Natural Gas Pipelines

FERC regulates natural gas pipeline market entry under the Natural Gas Act by issuing a section 7(c) certificate of public convenience and necessity authorizing the construction of new facilities (Weiler and Stanford, 2018). Under the Energy Policy Act of 2005,¹⁸ FERC has the authority to set a schedule for federal and state agencies to reach a final decision on requests for authorizations necessary for proposed natural gas pipeline projects. The Energy Policy Act of 2005 also specified that in cases in which another agency delays issuing a required permit, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction to address the matter.

FERC recently granted NGA section 7(c) certificate authorization for the construction of three different interstate natural gas pipeline projects in New York State. FERC conducted environmental reviews, including analyses of each pipeline project's impact on water resources, and found that construction and operation of each pipeline project would result in no significant environmental impacts (Weiler and Stanford, 2018). The New York State Department of Environmental Conservation (NYSDEC) took a contrary position and denied issuance of section 401 certification for all three pipeline projects (Weiler and Stanford, 2018). Table 4-1 summarizes the three natural gas pipeline cases. Appendix B provides additional details about each case.

Table 4-1: Section 401 certification denial cases			
Project Description	Request Timeline	Reasons for Denial	Current Status
Constitution Pipeline: 124-mile pipeline from Susquehanna County, PA to Schoharie County, NY that would provide 650,000 dekatherms/day of firm transportation service.	Project proponent filed 401 request on August 22, 2013. NYSDEC requested additional information until it considered the request complete in December 2014. In April 2015, NYSDEC requested the project proponent to withdraw and resubmit the request to restart the one-year time limit.	NYSDEC issued a denial in April 2016, stating the request failed to address significant water resource impacts that could occur from the project and failed to demonstrate compliance with NYS WQS.	Proponent appealed NYSDEC's decision to the Second Circuit, but the court upheld the denial. The Hoopa Valley ruling (see Section II.F.4.b of preamble) opened the possibility that NYSDEC waived its 401 certification authority by exceeding the one-year time limit. In February 2019, U.S. Court of Appeals granted FERC's request to remand the pipeline question for a new review, which is ongoing. NYSDEC informed FERC in April 2019 that they would appeal any decision that waives the state's section 401 certification review.

¹⁸ 119 Stat. 594; P.L. 109-58; 42 U.S.C. § 15801

Table 4-1: Section 401 certification denial cases			
Project Description	Request Timeline	Reasons for Denial	Current Status
Valley Lateral Pipeline: 7.8-mile extension of an existing pipeline in Orange County, NY to serve a new gas-powered power plant in Wawayanda, NY.	Project proponent filed section 401 request on November 13, 2015. NYSDEC initially deemed the request incomplete and requested additional information through August 2016. Project proponent urged NYSDEC to complete its review after receiving FERC authorization in November 2016, but NYSDEC said it had until August 2017 to make a determination. In December 2016, the D.C. Circuit stated that NYSDEC's delay operated as a section 401 waiver and enabled Millennium to bypass NYSDEC.	In August 2017, NYSDEC denied the project proponent's request on the grounds that FERC's environmental review of the project was inadequate because it failed to consider downstream greenhouse gas emissions from the electric generator shipper.	Project proponent waited a few months after the D.C. Circuit's decision before submitting a request to FERC in July 2017 to proceed with construction, arguing that NYSDEC had waived its section 401 authority. In September 2017, FERC issued an order stating that NYSDEC had waived its section 401 authority by exceeding the one-year time limit and issued a Notice to Proceed with Construction. NYSDEC appealed FERC's decision to the U.S. Court of Appeals, but the court ruled in FERC's favor. In July 2018, FERC authorized the project proponent to place the new pipeline into service.
Northern Access Pipeline: Project includes 99 miles of pipeline from Sergeant Township, PA to Elma, NY and ancillary facilities to expand firm service by 847,000 dekatherms/day.	Project proponent filed section 401 request in February 2016. After NYSDEC did not notify the project proponent about whether the request was complete, they agreed to a March 2, 2016 receipt date if NYSDEC issued a decision within the next year. In January 2017, NYSDEC asked the project proponent to amend the prior agreement so that April 8, 2016 would be the receipt date instead of March 2, and the project proponent complied. After receiving the amendment, NYSDEC deemed the request complete.	In April 2017, NYSDEC denied the project proponent's request for failing to demonstrate compliance with state WQS because the project did not adequately mitigate impacts to water quality and thus jeopardized biological integrity and impeded best uses of affected waterbodies.	On August 6, 2018, FERC ruled that NYSDEC waived its section 401 certification authority by exceeding the one-year time limit. NYSDEC asked FERC to reconsider the decision. On April 2, 2019, FERC upheld its prior decision that NYSDEC waived its section 401 review and stated that the recent Hoopa Valley decision (see Section II.F.4.b of preamble) reinforced their determination.

See Appendix B for additional details and sources.

4.1.2 Millennium Bulk Terminals in Washington State

Millennium Bulk Terminals—Longview, LLC (Millennium) proposed to construct and operate an export terminal in Cowlitz County, Washington along the Columbia River (U.S. Army Corps of Engineers, 2016). The proposed export terminal would receive rail shipments of coal from the Powder River Basin in Montana and Wyoming, and the Uinta Basin in Utah and Colorado. Export terminal employees would receive, blend, and load coal onto vessels in the Columbia River for export. The proposed export terminal would have a maximum throughput of 44 million metric tons of coal per year. The purpose of the proposed project was to transfer western U.S. coal from rail to ocean-going vessels for export to Asia.

Millennium identified demand within the Asian market for western U.S. low-sulfur subbituminous coal and determined that existing West Coast terminals were unavailable to serve this need (USACE, 2016).

4.1.2.1 Water Quality Certification Denial

Millennium first submitted a 404 permit request to the Corps and a section 401 request to the Washington Department of Ecology in February 2012 but withdrew the requests in February 2013 with the intention of resubmitting after completion of the environmental review process (Washington Department of Ecology, 2019). Millennium resubmitted its section 401 request in July 2016. The Corps (2016) issued a draft Environmental Impact Statement (EIS) for the proposed project under the National Environmental Policy Act in September 2016. Cowlitz County and the Washington Department of Ecology also issued an EIS under the State Environmental Policy Act in April 2017 (Washington Department of Ecology, 2019). After reviewing these reports, the Washington Department of Ecology denied section 401 certification for the project in September 2017. The denial stated that the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and tribal resources as a result of not meeting state WQS, and that the project would not meet state WQS (Washington Department of Ecology, 2019).

4.1.2.2 Current Status

To date, all court challenges to the section 401 certification denial have resulted in rulings favorable to the Department of Ecology. Millennium appealed the section 401 certification denial to Cowlitz County Superior Court and the Washington State Pollution Control Hearings Board. The Cowlitz County Superior Court dismissed Millennium's appeal in March 2018, stating that the appeal must first be heard by the Pollution Control Hearings Board (Washington Department of Ecology, 2019). The Pollution Control Hearings Board ruled in Washington Department of Ecology's favor in August 2018.¹⁹ Millennium submitted a second appeal to the Cowlitz County Superior Court following the Pollution Control Hearings Board's ruling. Millennium also filed a challenge in Federal District Court against the Washington Department of Ecology director, the Department of Natural Resources commissioner, and the Washington governor, arguing that the section 401 certification denial interfered with foreign and interstate trade (Fairbanks, 2018). A federal judge dismissed the case against the Department of Natural Resources commissioner in October 2018, but the case against the Washington Department of Ecology director and the Washington governor will continue (Fairbanks, 2018). In December 2018, a U.S. District Court ruled against a portion of Millennium claims by determining that the State of Washington's section 401 certification denial did not violate two federal laws, the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act.²⁰

Although Washington denied section 401 certification for the proposed export terminal, the Corps restarted the federal permitting and environmental review process in November 2018 (Washington Department of Ecology, 2019). This decision prompted the Washington State Attorney General to send a letter to the Corps Lieutenant General expressing concern that restarting the permitting process undercuts the state/federalism partnership and section 401 of the CWA (Ferguson, 2018). The Corps' efforts to update the EIS and coordinate compliance with Section 106 are ongoing.²¹

¹⁹ Millennium Bulk Terminals—Longview, LLC v. State of Washington, Department of Ecology, PCHB No. 17-090 (2019)

²⁰ Case No. 3:18-CV-05005-RJB, United States District Court, Western District of Washington at Tacoma (2019)

²¹ Personal communication with Patricia Graesser, USACE Public Affairs Supervisor

4.1.3 Impacts of Denials

4.1.3.1 *On Certifying authorities*

Certifying authorities deny certification if they cannot certify that the discharge will comply with WQS and other applicable sections of the CWA. Denials are an important option for ensuring that discharges from activities requiring a federal license or permit comply with the CWA. Some certifying authorities try to engage with project proponents early in the project development stages to better communicate their requirements, minimize activity impacts, and reduce the likelihood of certification denial (ACWA, 2019). For example, the Colorado Department of Public Health and Environment engages in pre-filing process with project proponents for large, complex projects to streamline the review process and minimize requests for additional information (Western States Water Council, 2014).

4.1.3.2 *On Project proponents*

Section 401 certification denials increase costs to project proponents in several ways. First, section 401 certification denials can delay proposed projects, which may increase total costs above the original cost estimates. Second, a denial may cause the project proponent to forgo the project after having invested funds and staff time into project development, environmental assessment, and mitigation planning. Project proponents can challenge a section 401 certification denial in court (incurring legal costs), but if the courts do not rule in their favor, they will need to invest additional resources to revise plans accordingly and submit a revised request to receive section 401 certification. Working closely with the certifying authority during the project development stages and providing all materials that the certifying authority requires to make a section 401 certification determination may help project proponents avoid denials and associated costs.

In addition to direct impacts on project proponents, recent section 401 certification denials on large infrastructure projects, such as natural gas pipelines and export terminals, highlighted the potential for section 401 certification denials to have broader economic impacts. While data to quantify these effects are limited, studies have noted that recurring section 401 certification denials of FERC-approved natural gas pipelines affects transportation of natural gas and could jeopardize the reliability of gas-fired electric generators (Weiler and Stanford, 2018).

4.2 Section 401 Certification Interpretations

Court decisions related to section 401 certification issuance have generated interpretations of CWA section 401 provisions, including clarifications regarding the timeline for review, the types of discharges subject to section 401 certification, the scope of federal agency authority, and how withdrawals and resubmittals of the same requests affect the one-year time limit for certifying authorities to exercise their section 401 certification authority. See section II.F.4 of the proposed rule preamble for detailed discussion of the relevant court decision on section 401.

5 Possible Effects of Proposed Section 401 Certification Regulations

Executive Order 13868 on Promoting Energy Infrastructure and Energy Growth directs the EPA to review and revise section 401 guidance to states, authorized tribes and federal agencies, and to publish a proposed rule to revise the EPA's existing certification regulations. On June 7, 2019, the EPA issued the revised guidance for states, authorized tribes, and federal agencies to provide recommendations concerning the implementation of CWA section 401 (U.S. EPA, 2019a).

The EPA is proposing the following clarifications, presented here across four categories, to its existing certification regulations:²²

- 1) **Timeline:** The timeline for action on a section 401 certification is proposed to begin upon receipt of a certification request by the certifying authority. Review timeline is reinforced as one year.
- 2) **Scope:** The scope of a section 401 certification review, and the decision whether to issue or deny a section 401 certification, is proposed to be limited to an evaluation of whether the potential discharge will comply with applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.
- 3) When the EPA is the certifying authority, the EPA is proposing additional procedures for pre-filing engagement and requests for additional information. Under the proposal, project proponents would be required to request a pre-filing meeting with the EPA, when it acts as the certifying authority, at least 30 days prior to submitting a request for certification to help ensure a timely section 401 certification decision. As proposed, when EPA is the certifying authority, it would be allowed to request additional data from the project proponent within 30 days of receipt of a request for certification; the EPA would only request additional information that could be collected or generated within the established reasonable period of time; and the EPA would include a deadline for the project proponent response, allowing sufficient time to review the information and act on the request within the federal agency's timeframe.

This section summarizes how each proposed revision differs from current implementation of CWA section 401. The section also presents potential impacts of each proposed revision. Table 5-1 summarizes potential impacts of the proposed revisions on certifying authorities and project proponents.

Table 5-1. Summary of possible impacts of proposed section 401 revisions				
Revision	Certifying authorities		Project Proponent	
	Potential Pros	Potential Cons	Potential Pros	Potential Cons
Timeline	Improved clarity of when clock starts; less litigation about delays/potential waiver	Potentially less time to collect and generate information to inform decision; may lead to more denials or waivers	Improved clarity of when clock starts; less litigation about delays/potential waiver	Potentially more denials
Scope	In circumstances where the proposed scope is more narrow than current state or tribal practices, the proposal may translate to shorter section 401 request review times	Potential exclusion of conditions if conditions extend beyond the proposed scope of certification; potential waiver if reasons for denial extend beyond the proposed scope	Reduced wait times; fewer non-water quality conditions on certification	Additional legal challenges from certifying authorities and environmental organizations

²² 40 CFR § 121

Table 5-1. Summary of possible impacts of proposed section 401 revisions				
Revision	Certifying authorities		Project Proponent	
	Potential Pros	Potential Cons	Potential Pros	Potential Cons
Pre-Filing Engagement & Additional Information Requests	Pre-filing meetings result in fewer incomplete requests; additional information request procedures may limit extended back and forth with project proponents	Not all EPA regions have the budget/capacity to support pre-filing meetings; limitations on additional information request timeline could result in insufficient data for decision and lead to more denials	Pre-filing meetings help establish data needs for a timely review; additional information procedures limit the timeline for requests to make process more efficient	Increased labor burden and project development costs from pre-filing meeting; additional fee/burden if initial request denied due to insufficient data

5.1 Timeline

5.1.1 Proposed Revision

The CWA establishes a time limit of “any reasonable period not to exceed one year” for certifying authorities to complete their section 401 certification analysis and decision. The EPA’s existing certification regulations²³ specify that the licensing or permitting agency determines the “reasonable” time period within that one-year timeframe, and the proposed section 401 regulations reaffirm this practice.

The proposed revision clarifies that the timeline for action on a section 401 certification begins upon receipt of a certification request by the certifying authority. The CWA states that certifying authorities must act on a request for certification “within a reasonable period of time (which shall not exceed one year) after receipt of [a certification] request.”²⁴ Existing practice indicates that the certifying authority determines what constitutes a “complete request” that starts the review clock. However, the statute does not use the “complete application” term.

This proposal clarifies that for a review timeline to start, the project proponent must submit a written request for certification to the certifying authority that includes the following information:

1. Identification of the project proponent(s) and an appropriate point of contact;
2. Identification of the proposed project;
3. Identification of the applicable license or permit and includes a copy of all application materials provided to the federal agency;
4. Identification of any discharge that may result from the proposed project and the location of such discharge and receiving waterbodies;
5. A description of the methods and means used or proposed to monitor the discharge and the equipment or measures employed or planned for the treatment or control of the discharge;

²³ 40 CFR § 121.16(b)

²⁴ 33 U.S.C. § 1341(a)(1)

6. A list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals received or denials already made; and
7. The following statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable timeframe.”

The EPA recommends that state and tribal requirements that go beyond the request requirements detailed above be revised after the establishment of final EPA regulations to ensure consistency with the EPA’s regulations and those of other states. EPA is soliciting comment on the potential costs of revising these requirements.

Additional proposed revisions reinforce the existing one year timeline for project review. The proposed changes reiterate a firm one year review timeline from receipt of a certification request and prohibit a certifying authority from taking actions for the purpose of extending the timeline beyond one year from receipt of the section 401 request.

5.1.2 Potential Impacts of Revision

For both certifying authorities and project proponents, this revision would provide clarity regarding the start of the review clock and reduce litigation about whether certifying authorities waived their section 401 authority by exceeding the section 401 timeframe. Recent New York State natural gas pipeline case studies (see Sections 4.1.1, 9.2, and 9.3) demonstrate that the “complete application” standard for starting the clock has caused confusion and delays. In these cases, the certifying authority requested additional information from the project proponent before deeming the section 401 requests complete and starting its review. Although the certifying authority issued a decision within a year of deeming the request complete, FERC ultimately ruled that the certifying authority had waived section 401 authority by exceeding the one year timeframe. The “upon receipt of certification request” standard would reduce confusion about when the clock starts, reduce the number of inadvertent waivers and reduce delays.

Extended delay while waiting for a certification decision is an opportunity cost to the project proponent. Any sidelined investment funds awaiting a permit decision could have been invested elsewhere. The sooner the project proponent knows of a denial the sooner alternative investments can be considered which could generate benefits. Similarly, faster granting of certification would allow proposed projects to begin generating benefits sooner.

Legal risk and associated costs could also be minimized under the current proposed regulation. By providing more transparency and better defining milestones and responsibilities, both project proponents and other entities are less subject to the legal risk inherent in poorly defined approval processes.

Establishing that the review clock starts upon receipt of a request could lead to certifying authorities having less information available to make a section 401 certification decision if initial certification requests are incomplete. If the data gaps are significant, certifying authorities may respond by issuing more denials. Based on recent survey results (ACWA, 2019), incomplete requests are the most common cause of section 401 review delay. The list of information and materials required in a certification request could help ensure that certifying authorities receive all information necessary to make a section 401 certification decision in the initial certification request.

The EPA expects that the proposed request requirement clarifications will, in cases where certifying authority requirements go beyond these proposed requirements, reduce the burden placed on project proponents and certifying agencies involved in the section 401 certification process. Clear and transparent requirements allow all entities to make decisions with symmetrical information which should lead to reduced ambiguity, confusion, and delay.

The proposed revisions prohibiting actions by the certifying authorities to extend the clock is an attempt to deter the “withdrawal and resubmit” process which allowed for a project timeline to be informally extended beyond one year. By specifically addressing the mechanism whereby section 401 certifications were allowed to be informally extended, the EPA expects that requests for certification will be acted upon within the one year statutory timeline, allowing for a more streamlined and transparent process. If a certifying authority approaches the end of the one-year timeline and is unable to certify a section 401 request, two options remain available: denial or waiver. The CWA does not prevent a project proponent from reapplying for a section 401 certification once the original request is denied, and the proposal reaffirms the ability for a project proponent to submit a new certification request. In the case of a denial, the project proponent can submit a new request for certification that addresses the water quality issues identified in the denial in addition to the other request requirements.

5.2 Scope

5.2.1 Proposed Revision

The CWA section 401 certification process allows the certifying authority to protect water quality of federally regulated waters from adverse effects caused by discharges from federally licensed or permitted activities by determining whether the discharges comply with sections 301, 302, 303, 306, and 307 of the CWA.²⁵ Section 401 regularly references requirements to ensure compliance with “applicable effluent limitations” and “water quality requirements,” prompting the EPA to propose that the scope of a section 401 certification review, and the decision whether to issue or deny a section 401 certification, be focused on water quality impacts from point source discharges to navigable waters. Specifically, the EPA proposes to define the scope of certification as follows: “The scope of a section 401 certification is limited to assuring that a discharge from a federally-licensed or permitted activity will comply with water quality requirements.” See preamble section III.D for a full analysis of the proposed scope of certification. Under the proposal, any condition added to a section 401 certification that is not within the proposed scope of certification may not be included in the federal license or permit, and the condition does not become federally enforceable. If a certifying authority denies section 401 certification for reasons outside of the scope of certification (i.e., fails to meet the requirements of section 401), the EPA is proposing that the federal agency will treat the action in a similar manner as a waiver (U.S. EPA, 2019a). For both certifications with conditions and denials, the EPA is proposing that if a federal agency receives the certification decision prior to the end of the reasonable time period and determines they are not consistent with section 401, the federal agency may provide the certifying authority an opportunity to remedy any deficiencies within the remaining time period.

Additional proposed changes clarify what information must be present for a valid condition under a section 401 certification. Such information includes:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with the applicable water quality requirements;
2. A citation to federal, state, or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

While these proposed requirements could produce an additional marginal administrative burden specific to this rulemaking, such a burden is not likely to be substantive. Certifying authorities are likely already consulting their respective water quality criteria and applicable requirements during their section 401

²⁵ 33 U.S.C. § 1341(a)(1)

review. The proposed changes would require disclosure of the basis for conditions to the project proponent, federal agency, and the public.

5.2.2 Potential Impacts of Revision

For states and tribes that currently review, condition or deny certifications on the basis of non-water quality impacts, the proposed scope could reduce the time that certifying authorities spend reviewing certification requests, potentially reducing labor costs. In these circumstances, reduced review times could translate into reduced wait times for project proponents. The water quality requirements limitation could also reduce the number of non-water quality related conditions required by the certifying authority, potentially reducing compliance costs for project proponents. For the majority of states and tribes that implement the section 401 certification program consistent with the CWA, these proposed revisions will have no impact.

However, limitations on the scope of section 401 review could reduce the authority of certifying authorities to protect against project impacts that could indirectly affect water quality and cause environmental and public health impacts, such as air pollution impacts on water resources through precipitation. Certifying authorities may respond by issuing more denials. Additionally, the water quality impacts limitation could lead to additional legal challenges from certifying authorities and environmental organizations, which could delay proposed actions and activities.

5.3 Pre-Filing Engagement and Additional Information

5.3.1 Proposed Revision

Pre-Filing Engagement: In its pre-proposal submittal to the docket,²⁶ ACWA indicated that incomplete requests are the most common cause of section 401 review delay (ACWA, 2019). In pre-proposal docket submissions, outreach, and correspondence project proponents suggested the lack of clear state processes and prolonged information requests contributed significantly to the delay in the 401 certification process. The Agency has also been made aware of relatively low staffing availability in many state certification programs.

In an effort to promote more complete requests, states have taken steps to inform project proponents about the information required to make a section 401 certification determination. Twenty-one states have used one of the following options to ensure completeness: (1) explain what constitutes a complete request in state regulations, (2) accept the federal Army Corps of Engineers request in lieu of a separate section 401 request form (for section 404/10 permits), or (3) list information requirements on the section 401 request form. Many states also work with project proponents through early engagement to ensure awareness of request requirements (ACWA, 2019).

The proposed revisions would make pre-request consultations more readily available when the EPA is the certifying authority. Under the proposal, thirty days prior to filing a request for certification, project proponents must submit a request for a meeting with the EPA. The proposed regulation would give the EPA the option to meet with project proponents before receiving a certification request to learn more information about a proposed project. The EPA would also have the option to deny the meeting request if the parameters and impacts of the project are sufficiently clear.

Additional Information: When certifying authorities need more information to make a section 401 certification determination, they ask project proponents to submit additional data. Under the proposed revisions, when the EPA acts as the certifying authority, it would need to issue the request for additional information within 30 days of receipt of a request for certification, and the request could only cover

²⁶ Docket No. EPA-HQ-OW-2018-0855

information that can be collected or generated within the established reasonable period of time (i.e., no National Environmental Policy Act review findings unless the request is submitted at or near the conclusion of the NEPA process). Under the proposed revisions, the EPA would include a deadline for the project proponent response, allowing sufficient time to review the additional information and act on the request within the agency's section 401 review timeframe.

5.3.2 Potential Impacts of Revision

Pre-filing Engagement: Many states have already implemented pre-filing meetings, indicating states believe the meetings are beneficial for improving communication of data needs and reducing the number of incomplete certification requests. These efforts could similarly benefit the EPA when it acts as the certifying authority by increasing the likelihood of receiving all necessary information in the initial request and by reducing the need to contact project proponents for additional information. Pre-filing meetings also benefit project proponents by helping them understand the data required for a timely section 401 review.

However, certifying authorities currently engage in these efforts on an inconsistent basis. The proposed revisions would require project proponents to submit written pre-filing meeting requests to the EPA, which could place a burden on project proponents, especially those already familiar with section 401 certification request requirements. The pre-filing meeting could also place a burden on the EPA regions, particularly those with limited staff and resources. To minimize this burden, the EPA could decline meeting requests for routine or non-complex projects and only accept the meeting for larger or complex projects where uncertainty exists.

Although the pre-filing meetings can place additional burden on both project proponents and the EPA, the process could save burden elsewhere in the section 401 certification process. The existing "withdrawal and resubmit" process highlights "unofficial" engagement currently occurring for larger and more complex projects. The pre-filing meeting would make this back and forth communication between the project proponent and the EPA more formal and shifts its occurrence to earlier in the process, which could help project proponents better accommodate concerns in the original planning stages and reduce confusion later in the process.

Additional Information: Limiting additional information requests to within 30 days of receiving the section 401 request would make the section 401 certification process more efficient. The 30-day limitation would also condense the time that the EPA and project proponents spend communicating about the status of the certification request. Since the EPA would need the additional materials to make a permit decision, they are more likely to receive the information they need to make a decision in a timely manner. Project proponents would have great incentive to provide all requested materials prior to the end of the reasonable period to minimize the risk of a denial. The EPA would have the remainder of the reasonable period of time to receive and review the additional materials to inform the Agency's decision.

The 30-day limitation could prevent the EPA from obtaining enough information to make an informed decision, particularly if project proponents do not submit additional information before the deadline, which could lead to more denials. The requirement to submit a request for additional information within 30 days of receipt of a certification request could be problematic for EPA regions with limited resources, particularly when the proposed project is complex. The 30-day limitation could result in rushed requests that do not address all data gaps, ultimately resulting in more denials when the EPA does not have sufficient information to make a section 401 certification determination. Project proponents may face additional costs from the proposed 30-day limitation if their initial section 401 certification request is denied due to insufficient information. They could incur labor burden costs to draft a second section 401

certification request and may need to pay an additional fee upon resubmittal, depending on the certifying authority's fee structure.

However, the EPA will learn about proposed projects at least 30 days prior to receiving section 401 requests through the proposed pre-filing meeting request. Since the EPA can begin to consider potential information needs after receiving pre-filing meeting requests, it has 60 days total (30 days prior to request receipt and 30 days after request receipt) to consider proposed projects and assess information needs. The combined timeframe of these two proposed revisions will reduce the possibility of rushed additional information requests and subsequent denials.

5.4 Effects on Partner Federal Agencies, States, and Tribes

Federal agencies play an important role in facilitating information collection, sharing that information amongst involved parties and clearly communicating project milestones and deadlines during the section 401 certification process. The changes proposed in this rulemaking highlight how federal agencies are uniquely poised to promote pre-request coordination to harmonize project planning activities, including data needs and timelines. These proposed changes do not explicitly require any federal agencies to change their existing regulations to reflect these updated requirements; however, the EO directs federal agencies to update their regulations to ensure consistency with the EPA's final updated regulations. This proposal highlights the need for clear communication between entities and outlines opportunities for federal agencies to facilitate this communication. While this proposal encourages federal agencies to work closely with certifying authorities and project proponents, formalization of this process via an agency rulemaking may not be required. The EPA requests comment on whether these proposed changes would necessitate any subsequent additional federal rulemakings from implementing agencies.

Similarly, states and tribes may decide to modify their existing regulations to comply with changes proposed in this EPA rulemaking. Subsequent rulemakings promulgated by other federal agencies (i.e. Corps, FERC, etc.) could further increase the need for additional state and tribal updates. The incremental labor hours required for rulemaking efforts are likely specific to each state and authorized tribe and will depend on existing requirements, the level of public interest, and administrative procedures.

6 Possible Effects on Case Studies

This section discusses how the proposed changes could have impacted the denial case studies presented in Section 4.1.

6.1 New York Natural Gas Pipelines

Table 6-1 summarizes how the proposed changes could have impacted recent denial cases for natural gas pipelines in New York State.

Table 6-1: Possible impacts of the proposed section 401 revisions on recent New York State pipeline denials			
Proposed Revision	Constitution Pipeline	Valley Lateral Pipeline	Northern Access Pipeline
Timeline	Project proponent filed section 401 request on August 22, 2013. Under revision, a decision would have been required by August 2014 (actually issued April 2016).	Project proponent filed section 401 request on November 13, 2015. Under revision, a decision would have been required by November 2016 (actually issued August 2017).	Project proponent filed section 401 request in February 2016. Under revision, a decision would have been required by February 2017 (actually issued April 2017).
Scope	NYSDEC denied section 401 certification for failing to demonstrate	NYSDEC denied section 401 certification because FERC's environmental review of the	NYSDEC denied section 401 certification for failing to demonstrate

Table 6-1: Possible impacts of the proposed section 401 revisions on recent New York State pipeline denials			
Proposed Revision	Constitution Pipeline	Valley Lateral Pipeline	Northern Access Pipeline
	compliance with NYS WQS, so the proposed scope limitation would not have impacted this case.	project failed to consider downstream greenhouse gas emissions from the electric generator shipper. Since this reason is not related to water quality, FERC may have treated this denial as a waiver under the proposed scope limitation.	compliance with state WQS, so the proposed scope limitation would not have impacted this case.

Overall, the proposed revisions that could have resulted in the biggest outcome changes for the New York pipeline cases are the proposed timeline changes. The review timeline revision would have necessitated a section 401 certification decision within one year of receiving the request for certification. Instead, a decision took three years in the Constitution case, nearly two years in the Valley Lateral case, and 14 months in the Northern Access case.

NYSDEC may have still denied section 401 certification for these cases under the proposed revisions. Under the proposed timeline revisions, NYSDEC may not have received enough information to make a section 401 certification determination, or the information they received may have led to the same conclusion. The process, however, would have been much faster under the proposed revisions. Extended delays for a certification decision are an opportunity cost to the project proponent. Any sidelined investment funds awaiting the certification decision could have been invested elsewhere. The sooner the project proponent knows of a denial the sooner alternative investments can be considered which could generate benefits. Similarly, granting certification sooner would allow proposed projects to begin generating benefits sooner. The Valley Lateral pipeline denial is the most likely of the three cases to have a different result under the proposed revisions. In this case, NYSDEC denied section 401 certification because of greenhouse gas effects, which does not fall within the proposed scope of certification.

6.2 Millennium Bulk Terminals in Washington State

Millennium first submitted a 404 permit request to the Corps and a section 401 request to the Washington Department of Ecology in February 2012 via a Joint Aquatic Resources Permit Application (JARPA), which serves as a joint application for federal, state, and local aquatic resource permits.²⁷ Millennium withdrew its JARPA in February 2013 at the Corps' request to allow the federal agency more time to complete its regulatory process,²⁸ with the intention of resubmitting after the environmental review process (Washington Department of Ecology, 2019). Millennium resubmitted its JARPA in July 2016. Assuming the project proponent still withdrew its JARPA and resubmitted near the conclusion of the environmental review process under the proposed revisions, the Washington Department of Ecology would have needed to issue a section 401 certification determination by July 2017 to comply with the proposed timeline revision and avoid waiving review. The Washington Department of Ecology actually issued its decision two months later in September 2017, one year after the Corps issued its EIS. If the project proponent no longer agreed to withdraw its section 401 certification request and resubmit near the conclusion of the environmental review process, the Washington Department of Ecology would have

²⁷ Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology. Docket 18-2-00994-08. Petition for Review

²⁸ Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology. Docket 18-2-00994-08. Petition for Review

been required to act on the initial request by February 2013, the same month that the project proponent withdrew the initial request.

The Washington Department of Ecology's certification denial for the project, dated September 2017, identified several reasons, including that the section 401 certification request did not provide reasonable assurance that the project would meet state WQS, the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and tribal resources, increased cancer risk from diesel pollution, more traffic congestion and delayed emergency response times, increased vessel traffic on the Columbia River, and limited tribal fishing access. In this case, the State's assertion that the certification request did not provide reasonable assurance that the project would meet WQS would be within the proposed scope of certification.

7 References

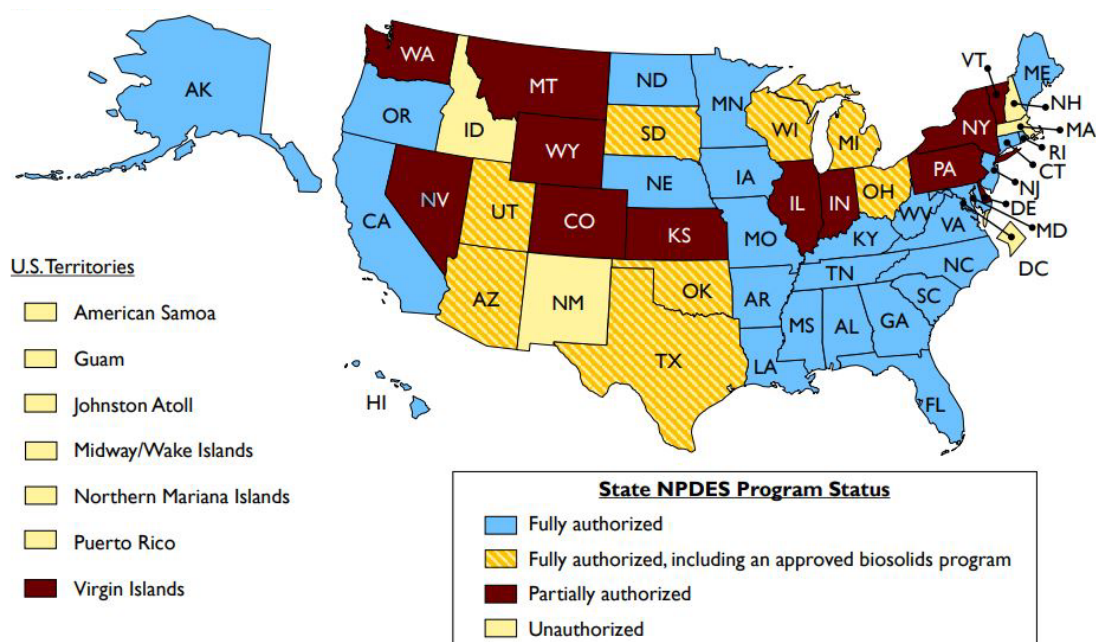
- Arizona Department of Environmental Quality. (2018, February 21). Why do I need a State Water Quality Certification, CWA Section 401? Retrieved from Arizona Department of Environmental Quality: <https://azdeq.gov/why-do-i-need-state-water-quality-certification-cwa-section-401>
- Association of Clean Water Administrators (ACWA). (2019, May). 401 Certification Survey Summary. Retrieved from: <https://www.acwa-us.org/wp-content/uploads/2019/05/ACWA-State-401-Cert-Survey-Summary.pdf>
- Association of State Wetland Managers (ASWM). (2011a, July). 401 Certification Program Summary: Wisconsin. Retrieved from https://www.aswm.org/pdf_lib/401_cert/wisconsin_case_study.pdf
- Association of State Wetland Managers (ASWM). (2011b, July). 401 Certification Program Summary: Delaware. Retrieved from https://www.aswm.org/pdf_lib/401_cert/delaware_case_study.pdf
- Berk Consulting. (2012, April 12). Economic and Fiscal Impacts of Millennium Bulk Terminals Longview. Seattle, Washington.
- California Water Boards. (2018, December 5). Water Quality Certification. Retrieved from California Water Boards: <https://www.waterboards.ca.gov/sanfranciscobay/certs.htm>
- Cocklin, J. (2019, April 3). New York Cautions FERC on Waiving State's Constitution Pipe Review. Retrieved from Natural Gas Intelligence: <https://www.naturalgasintel.com/articles/117917-new-york-cautions-ferc-on-waiving-states-constitution-pipe-review>
- Colorado Environmental Records. (n.d.). State of Colorado Water Quality Certification. Retrieved from: <https://environmentalrecords.colorado.gov/HPRMWebDrawer/RecordView/1213810>
- Downey, J. (2019, March 4). Duke Energy's stalled Constitution Pipeline wins second hearing from regulators. Retrieved from Charlotte Business Journal: <https://www.bizjournals.com/charlotte/news/2019/03/04/duke-energy-s-stalled-constitution-pipeline-wins.html>
- Fairbanks, K. (2018, Oct 26). Judge dismisses claims against DNR leader in Millennium suit. Retrieved from The Daily News: https://tdn.com/news/local/judge-dismisses-claims-against-dnr-leader-in-millennium-suit/article_effdc76-d2e6-5c44-972e-2e7ef10ee23c.html
- Federal Energy Regulatory Commission (FERC). (2018, August 14). Federal Energy Regulatory Commission. Retrieved from What FERC Does: <https://www.ferc.gov/about/ferc-does.asp>

- Federal Energy Regulatory Commission (FERC). (2019a). Complete List of Active Hydropower Licenses. Retrived from: <https://www.ferc.gov/industries/hydropower/gen-info/licensing/app-new.asp>
- Federal Energy Regulatory Commission (FERC). (2019b). Approved Major Pipeline Projects (2009-Present). Retrieved from: <https://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp>
- Ferguson, B. (2018, Nov 21). Letter to Lieutenant General Todd T. Semonite Re: Millennium Bulk Terminals-Longview Proposed Coal Export Terminal. Retrieved from <https://ecology.wa.gov/DOE/files/cf/cf06ca42-e617-4ccb-9edb-41eaf4ecb6cd.pdf>
- Marcellus Drilling News. (2019, April 5). FERC Overrules NY DEC on Northern Access Pipeline Rehearing. Retrieved from <https://marcellusdrilling.com/2019/04/ferc-overrules-ny-dec-on-northern-access-pipeline-rehearing/>
- North Carolina Department of Environmental Quality. (n.d.). General Certifications. Retrieved from North Carolina Environmental Quality: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-wetlands-buffer-permitting/general>
- Norton, K. (2019, March 1). Letter from National Tribal Water Council to EPA Re: Early Engagement on Updating and Improving Implementation of Clean Water Act Section 401.
- Sunding, D. (2011). Economic Incentive Effects of EPA’s After-The-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal. The Brattle Group, 1-16.
- U.S. Army Corps of Engineers (USACE). (2016, September). *Millennium Bulk Terminals—Longview: Draft NEPA Environmental Impact Statement*. Retrieved from: https://www.millenniumbulkeiswa.gov/assets/01_executive_summary.pdf
- U.S. Army Corps of Engineers (USACE). (2017, Jan 19). Army Corps of Engineers Releases 2017 Nationwide Permits. Retrieved from <https://www.vnf.com/army-corps-of-engineers-releases-2017-nationwide-permits>
- U.S. Army Corps of Engineers (USACE). (n.d.-a). Obtain a Permit. Retrieved from U.S. Army Corps of Engineers: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>
- U.S. Army Corps of Engineers (USACE). (n.d.-b). Rivers and Harbors Act. Retrieved from US Army Corps of Engineers, Sacramento District: <https://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/Rivers-Harbors-Act/>
- U.S. Energy Information Administration. (2019, April 19). Nuclear Explained: U.S. Nuclear Industry. Retrieved from U.S. Energy Information Administration: https://www.eia.gov/energyexplained/index.php?page=nuclear_use
- U.S. Environmental Protection Agency (U.S. EPA). (2001, March). EPA Requirements for Quality Assurance Project Plans. Retrieved from U.S. Environmental Protection Agency: https://www.epa.gov/sites/production/files/2016-06/documents/r5-final_0.pdf
- U.S. Environmental Protection Agency (U.S. EPA). (2013, February 20). Authorization to Discharge Under the National Pollutant Discharge Elimination System. Retrieved from U.S. Environmental Protection Agency: <https://www3.epa.gov/region1/npdes/permits/2013/finalnh0000621permit.pdf>

- U.S. Environmental Protection Agency (U.S. EPA). (2015, July). NPDES Program Authorizations. Retrieved from U.S. Environmental Protection Agency: https://www.epa.gov/sites/production/files/2015-10/documents/state_npdes_program_status.pdf
- U.S. Environmental Protection Agency (U.S. EPA). (2017, Feb 21). Authorization Status for EPA's Construction and Industrial Stormwater Programs. Retrieved from <https://www.epa.gov/npdes/authorization-status-epas-construction-and-industrial-stormwater-programs#undefined>
- U.S. Environmental Protection Agency (U.S. EPA). (2019a, June 7). Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes. Retrieved from U.S. Environmental Protection Agency: https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf
- U.S. Environmental Protection Agency (U.S. EPA). (2019b, March 27). NPDES State Program Information. Retrieved from U.S. Environmental Protection Agency: <https://www.epa.gov/npdes/npdes-state-program-information>
- U.S. Nuclear Regulatory Commission (NRC). (2018, Aug 17). U.S. Commercial Nuclear Power Reactors - Operating Reactors. Retrieved from: <https://www.nrc.gov/reading-rm/doc-collections/datasets/>
- Washington Department of Ecology. (2019). Millennium Bulk Terminals Longview. Retrieved from <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-at-Ecology/Millennium>
- Weiler, S.A. and M.A. Stanford. (2018). New York's Denial of Water Quality Certification for Three FERC-Authorized Pipelines: Flagrant Fiat or Valid Veto? *Energy Law Journal*, 503-530.
- Western States Water Council. (2014, April). Summary of State Responses: Clean Water Act Section 401 Water Quality Certification Activities.

8 Appendix A. Tables/Figures for Federal License/Permit Overview

Figure 8-1. NPDES program authorizations as of July 2015.



Source: U.S. EPA, 2015

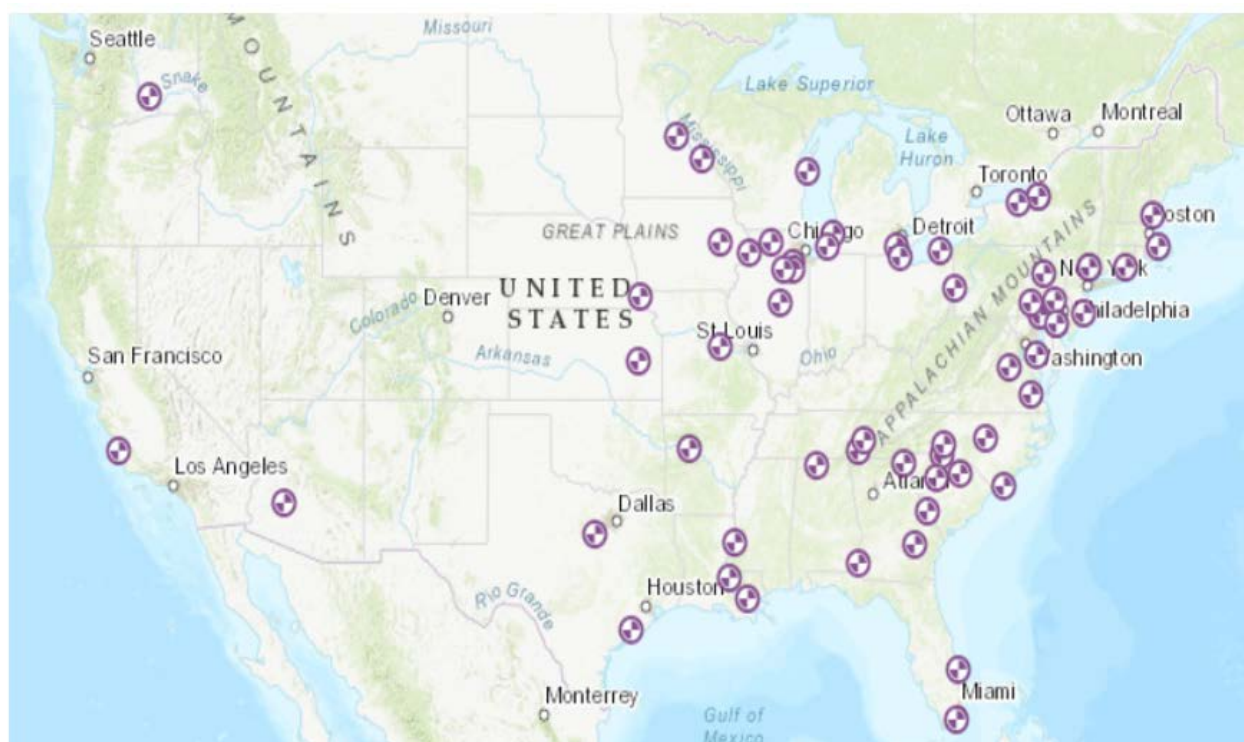
Note: The EPA is currently delegating NPDES authority to Idaho. Idaho is projected to be fully authorized by July 1, 2021.

Figure 8-2. Interstate pipelines in the contiguous United States



Source: Esri, HERE, Garmin, FAO, NOAA, USGS, U.S. EPA, 2018

Figure 8-3. Locations of nuclear power plants in the United States.



Source: U.S. Energy Information Administration, U.S. Energy Mapping System, April 17, 2018

Table 8-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	Website title	Link
Arkansas	Instream 401 Certification and Short Term Activity Authorization	https://www.adeg.state.ar.us/water/planning/instream/
California (San Diego Region)	San Diego Region – Wetlands and Riparian Protection	https://www.waterboards.ca.gov/rwqcb9/water_issues/programs/401_certification/
California (San Francisco Bay)	Clean Water Act Section 401 Water Quality Certification	https://www.waterboards.ca.gov/sanfranciscobay/certs.html
Maine	Hydropower and Dams	https://www.maine.gov/dep/land/dams-hydro/index.html#state
Mississippi	Recently Issued Permits and Certifications	https://www.mdeq.ms.gov/ensearch/recently-issued-permits-certifications/
New Hampshire	Projects Requiring Individual 401 Certification for Federal Licenses or Permits (other than FERC)	https://www.des.nh.gov/organization/divisions/water/wmb/section401/coe_ind.htm

Table 8-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	Website title	Link
North Carolina	Environmental Request Tracker	https://deq.nc.gov/permits-regulations/permit-guidance/environmental-request-tracker
Oregon	Section 401 Hydropower Certification	https://www.oregon.gov/deq/wq/wqpermits/Pages/Section-401-Hydropower.aspx
Texas	401 Certification Tracking System	https://www6.tceq.texas.gov/cmpts/index.cfm
Washington	401 Water Quality Certifications for non-hydropower permits	https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification/non-hydropower-401-certifications

9 Appendix B. New York Natural Gas Pipelines Case Study Details

9.1 Constitution Pipeline

The Constitution Pipeline, proposed by Constitution Pipeline Company LLC, is an interstate pipeline that would provide up to 650,000 dekatherms per day of firm transportation service through approximately 124 miles of pipeline extending from Susquehanna County, Pennsylvania to Schoharie County, New York (Weiler and Stanford, 2018). Since the proposed pipeline would cross 289 surface waterbodies, Constitution's EIS focused on water issues (Weiler and Stanford, 2018). FERC concluded that the project would have some adverse environmental impacts, but the proposed plan would reduce these impacts to less-than-significant levels. On December 2, 2014, FERC granted Constitution certificate authorization to construct and operate the proposed pipeline, subject to 43 environmental conditions and other requirements.

9.1.1 Water Quality Certification Denial

Constitution filed a request for a FERC license on June 13, 2019.²⁹ Constitution initially filed a request with NYSDEC for section 401 certification on August 22, 2013 (Weiler and Stanford, 2018). However, NYSDEC deemed the request incomplete until FERC issued a draft EIS and asked Constitution to provide more information about stream crossings, freshwater wetlands, and related permits. Constitution submitted additional information on November 27, 2013. NYSDEC requested additional time to comply with section 401's one-year requirement on May 9, 2014, so Constitution withdrew and resubmitted its request. NYSDEC continued to request additional information, which prompted Constitution to supplement its request in August, September, November, and December of 2014. NYSDEC considered the request complete in late December of 2014. In April 2015, NYSDEC again requested more time to comply with the one-year requirement, prompting Constitution to again withdraw and resubmit its request. In April 2016, nearly four years after NYSDEC first began working with Constitution on the proposed pipeline, NYSDEC denied the section 401 certification request, stating that the Constitution request failed to meaningfully address the significant water resource impacts that could occur from the project and failed to provide sufficient information to demonstrate compliance with New York State WQS. Constitution appealed this decision to the Second Circuit, but the court ruled in favor of NYSDEC. Constitution's subsequent petition for certiorari to the U.S. Supreme Court and its request to FERC for a declaratory order that NYSDEC had waived its section 401 certification authority by exceeding the maximum one-year period were also denied (Weiler and Stanford, 2018).

9.1.2 Current Status

On November 5, 2018, FERC granted Constitution a two-year extension until December 2, 2020 to allow Constitution to obtain the necessary approvals and complete construction of the pipeline.³⁰ A recent D.C. Court of Appeals Decision, *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*³¹ (see Section II.F.4.b of the preamble), prompted the D.C. Circuit to grant FERC a voluntary remand in February 2019

²⁹ 149 FERC ¶ 61,199

³⁰ *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 24 (2018)

³¹ 2019 WL 321025 (D.C. Cir. 2019).

to consider whether NYSDEC waived its section 401 authority on the Constitution Pipeline project.³² The Hoopa Valley decision stated that repeated withdrawals and resubmissions of the same section 401 certification request violated the one-year time limit for section 401 decisions. The court declined to decide whether withdrawal of a section 401 request and submission of a new request can restart the one-year period, or how different a request would need to be to restart the clock.³³ The Hoopa Valley ruling opened the possibility that NYSDEC waived its section 401 certification authority by exceeding the one-year time limit. In February 2019, the U.S. Court of Appeals for the Washington D.C. Circuit granted FERC's request to remand the pipeline question for a new review following the Hoopa Valley ruling (Downey, 2019). NYSDEC informed FERC in April 2019 that they would appeal any decision that waives the state's water quality certification review and stated that courts would likely reverse a finding of a waiver (Cocklin, 2019).

9.2 Valley Lateral

Millennium Pipeline Company's Valley Lateral pipeline project includes a 7.8-mile extension of an existing pipeline in Orange County, New York to serve a new gas-powered power plant in Wawayanda, New York (Weiler and Stanford, 2018). In the Environmental Assessment, Millennium determined that the proposed route would cross 12 waterbodies (seven perennial, four intermittent, and one ephemeral), and impact approximately 1.9 acres of wetlands. Millennium concluded that the primary impact of the project would be the temporary alteration of wetland vegetation from clearing and excavation and planned to use horizontal directional drilling and conventional bore construction methods to minimize clearing. FERC concluded that Millennium's Environmental Construction Standards, particularly the wetlands minimization and mitigation measures, met or exceeded the FERC's Waterbody Construction Procedures and that approval of the Valley Lateral Project would not constitute a major federal action that would significantly affect the quality of the human environment. FERC granted certificate authorization for Millennium's Valley Lateral project, subject to compliance with 17 multi-part environmental conditions. One of the conditions was to file documentation that it had received all authorizations required under federal law, including section 401 certification from New York State (Weiler and Stanford, 2018).

9.2.1 Water Quality Certification Denial

Millennium filed requests with NYSDEC for section 401 certification and other New York environmental permits on November 13, 2015, the same date it filed the FERC request (Weiler and Stanford, 2018). NYSDEC initially deemed the request incomplete pending FERC's completion of the Environmental Assessment. After FERC issued the Environmental Assessment, NYSDEC still considered the request incomplete and requested information needed to complete the request in June 2016, including an assessment of the project's impacts on federal and state endangered species and clarifications about impacts on water quality and wetlands. Millennium provided additional information in August 2016 (Weiler and Stanford, 2018).

After FERC issued certificate authorization in November 2016, Millennium urged NYSDEC to complete its review after FERC issued certification authorization in November 2016, but NYSDEC said it would continue reviewing the request to determine whether the request was complete and had until August 2017 to make a section 401 certification determination (Weiler and Stanford, 2018). In December 2016, more than a year after filing the section 401 certification request, Millennium petitioned the D.C. Circuit for

³² Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, D.C. Cir. Case No. 18-1251 (2019).

³³ *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 2019 WL 321025 (D.C. Cir. 2019).

review of the NYSDEC's delay. The D.C. Circuit rejected Millennium's petition, holding that the pipeline did not have standing to bring the petition because the pipeline was not injured by NYSDEC's delay since the inaction operated as a section 401 waiver and enabled Millennium to bypass NYSDEC. Millennium waited a few months after the D.C. Circuit's decision before submitting a request to FERC in July 2017 to proceed with construction of the Valley Lateral project, arguing that NYSDEC had waived its right to issue the section 401 certification. In August 2017, NYSDEC denied Millennium's request on the grounds that FERC's environmental review of the project was inadequate because it failed to consider downstream greenhouse gas emissions from Millennium's electric generator shipper (Weiler and Stanford, 2018).

9.2.2 NYSDEC Decision Overturned

In September 2017, FERC issued a declaratory order stating that NYSDEC had waived its section 401 certification authority by waiting more than one year to issue a decision (Weiler and Stanford, 2018). FERC subsequently issued a Notice to Proceed with Construction. NYSDEC appealed FERC's decision in the U.S. Court of Appeals, but the court ruled in FERC's favor. In July 2018, with the construction work of the pipeline completed, FERC authorized Millennium to place the new pipeline facilities into service (Weiler and Stanford, 2018).

9.3 Northern Access Pipeline

The Northern Access Project, proposed by National Fuel Supply Corporation and Empire Pipeline Inc., includes approximately 99 miles of pipeline, one modified and one new compressor station, a new dehydration facility, and ancillary facilities. The project would expand firm service on National Fuel's system by 497,000 dekatherms per day and on Empire's system by 350,000 dekatherms per day.³⁴

FERC's Northern Access Environmental Assessment, released in July 2016, found that pipeline construction would not likely result in significant impacts on groundwater resources since most construction would involve shallow, temporary, and localized excavation (Weiler and Stanford, 2018). The Environmental Assessment stated that seven private water wells and no public water wells are located within 150 feet of the project area. The project area includes 261 waterbodies, and the proposed pipeline would cross 134 of these. Many of the impacted streams and wetlands in New York State support several significant animal species, including trout (brown and rainbow) and the Eastern Hellbender, which is a State-listed species of concern.³⁵ FERC determined that the greatest potential impact from pipeline construction would result from sediment loading, particularly from the wet open-cut crossing method, but National Fuel planned to use that method for only one crossing at Buffalo Creek in Erie County since other methods were not feasible. National Fuel proposed using dry crossing methods at 195 crossings and horizontal directional drilling at five crossings to minimize impacts. National Fuel provided an Erosion and Sediment Control and Agricultural Mitigation Plan, which incorporated State and Federal regulatory plans, procedures, and manuals, to mitigate impacts resulting from water crossings. On February 3, 2017, FERC granted certificate authorization for National Fuel's Northern Access project in February 2017, conditioned upon compliance with 27 multi-part environmental conditions (Weiler and Stanford, 2018).

9.3.1 Water Quality Certification Denial

National Fuel filed requests with NYSDEC for section 401 certification and other New York environmental permits in February 2016 (Weiler and Stanford, 2018). After NYSDEC did not notify

³⁴ 164 FERC ¶ 61,084 (2018)

³⁵ NYSDEC (April 7, 2017). *National Fuel Denial Letter*.

National Fuel about whether the request was complete, National Fuel agreed to suspend interim procedural deadlines in return for NYSDEC acknowledging that the request was received on March 2, 2016 and issuing a decision within the next year (Weiler and Stanford, 2018). In January 2017, NYSDEC asked National Fuel to amend the prior agreement so that April 8, 2016 would be the deemed receipt date instead of March 2, and National Fuel executed the amendment “to preserve its long-standing relationship with [NYSDEC].”³⁶ Shortly after receiving the amendment, NYSDEC determined that National Fuel’s request was complete. In April 2017, NYSDEC denied National Fuel’s section 401 certification request, stating that the request failed to demonstrate compliance with New York State WQS because the project did not adequately mitigate impacts to water quality and would jeopardize biological integrity of affected waterbodies (Weiler and Stanford, 2018). NYSDEC also stated that the project would impede the best usages of many affected waterbodies by degrading the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon these waters.³⁷

9.3.2 NYSDEC Decision Overturned

On August 6, 2018, FERC ruled that NYSDEC waived its section 401 certification authority by exceeding the maximum one-year period allowed to make a section 401 certification determination.³⁸ NYSDEC asked FERC to reconsider the decision. On April 2, 2019, FERC upheld its prior decision that NYSDEC waived its section 401 review and stated that the recent Hoopa Valley decision (see Section II.F.4.b of the preamble) reinforced their determination (Marcellus Drilling News, 2019).

³⁶ Comments of National Fuel Gas Supply Corp. and Empire Pipeline, Inc. in Support of Petition for Declaratory Order of Constitution Pipeline Co. at 10 n. 41, Constitution Pipeline Co., Docket No. CP18-5-000 (Nov. 9, 2017).

³⁷ NYSDEC (April 7, 2017). *National Fuel Denial Letter*.

³⁸ 164 FERC ¶ 61,084 (2018)