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Docket No. EPA–HQ–OW–2022–0128

August 8, 2022

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: EPA's Proposed CWA Section 401 Water Quality Certification Improvement Rule

The Interstate Natural Gas Association of America ("INGAA") and the American Gas Association ("AGA") respectfully submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposal to revise and replace the Clean Water Act ("CWA") Section 401 Certification Rule ("Proposed Rule").[1]

INGAA is a non-profit trade association that advocates for regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 member companies transport the vast majority of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity, and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 76 million residential, commercial, and industrial natural gas customers in the United States, of which 95 percent—more than 72 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than thirty percent of the United States' energy needs. AGA members rely on interstate natural gas pipelines for the natural gas supply they need in order to provide affordable, reliable natural gas distribution service to homes and businesses.

Natural gas plays an important role in American society, both as a foundational fuel and with respect to the nation's ongoing transition to clean energy. INGAA members build pipelines in response to demonstrated public need for the delivery of natural gas, typically requiring

[1] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35,318 (June 9, 2022) ("Proposed Rule").

infrastructure that spans multiple state boundaries. The Federal Energy Regulatory Commission ("FERC") must issue a certificate of "public convenience and necessity" based on this demonstrated need before INGAA members may construct and operate a pipeline.[2] This review is complex and comprehensive, often spanning years, and ensures that interstate natural gas pipeline projects *only* proceed if they serve the public interest. In addition, both INGAA and AGA members undertake a wide range of activities to maintain and develop the United States' modern and reliable pipeline system, which complements the growing number of renewable energy resources and displaces higher emitting fuels. These activities often require authorization from the U.S. Army Corps of Engineers ("Army Corps") under CWA Section 404 as well as compliance with multiple federal statutes designed to protect the environment, such as the Clean Air Act and the Endangered Species Act.

Section 401 requires applicants for a federal license or permit anticipated to result in discharges to navigable waters to obtain certification from the relevant state that the discharge will comply with applicable state water quality standards. Review under Section 401 must be efficient and predictable both to ensure that project proponents have the certainty needed to complete these critical infrastructure projects and to afford states the opportunity to manage the quality of their waters without undermining important national objectives. For those interstate natural gas pipelines that cross state lines and therefore require multiple Section 401 certifications, consistent implementation of Section 401 across states is necessary to prevent political local interests from obstructing development of infrastructure that furthers national priorities, such as energy security, and the wider public interest and to keep energy prices from overburdening all Americans and especially lower income communities.

INGAA and AGA support the effective implementation of the CWA and the protection of water quality. Our members frequently apply for Section 401 certifications and continue to be significantly affected by the implementation of Section 401.[3] INGAA and AGA strongly encourage EPA to provide the following clear directions to ensure that implementation of Section 401 protects water quality in a manner consistent with the CWA:[4]

- Consistent application of Section 401 requires a binding, uniform federal definition of "certification request," and, accordingly, certifying authorities should continue to define "certification request" as set forth in Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Certification

[2] 15 U.S.C. § 717f(c).

[3] INGAA's and AGA's prior comments on how the Section 401 Rule can support the effective implementation of Section 401 are attached for EPA's reference. *See* Attachments 1, 2, 3.

[4] INGAA and AGA urge the EPA not to implement any changes to its Section 401 regulations until Congress passes its anticipated permitting reform legislation. *See* Press Release, *Manchin Supports Inflation Reduction Act of 2022* (July 27, 2022), ("President Biden, Leader Schumer and Speaker Pelosi have committed to advancing a suite of commonsense permitting reforms this fall that will ensure all energy infrastructure, from transmission to pipelines and export facilities, can be efficiently and responsibly built to deliver energy safely around the country and to our allies."), https://tinyurl.com/y4ft4zpw. It would unduly burden project proponents and waste both Agency and industry resources to implement rules based on statutory language that Congress imminently plans to change.

Rule").

- The statutory review period begins upon the certifying authority's receipt of a request for certification, not upon subsequent events like a certifying authority deeming that the request meets its definition of completeness.

- The lead federal agency under the National Environmental Protection Act ("NEPA") determines the "reasonable period of time" and whether that time period has been exceeded.

- The reasonable period of time cannot be extended by the withdrawal and resubmission of a request at the certifying authority's direction.

- The certifying authority's review of a request must focus on a federally-authorized discharge's potential impacts to water quality.

- The lead federal agency has an obligation to make a threshold determination whether the Section 401 action taken was within the scope of Section 401.

- The project proponent must consent to any modifications to the water quality certification.

I. Section 401 Represents a Balanced Approach to Federalism

Congress sought to address interstate water pollution with a national solution: the CWA "authoriz[es] the EPA to create and manage *a uniform system* of interstate water pollution regulation."[5] The EPA has previously recognized that uniformity is critical:

> Regulatory consistency across both federal and state governments with respect to issues like timing, waiver, and scope of section 401 reviews and conditions will substantially contribute towards ensuring that section 401 is implemented in an efficient, effective, transparent, and nationally consistent manner and will reduce the likelihood of protracted litigation over these issues.[6]

Within the context of a uniform federal program, CWA Section 401 provides certifying authorities the opportunity to consider the water quality impacts of discharges from federally-authorized projects. It represents Congress' careful balance of maintaining federal authority over projects in the national interest while recognizing a state's or Tribe's interest in preserving water

[5] *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (emphasis added); *id.* ("[W]e have long recognized that interstate water pollution is controlled by *federal* law.") (emphasis in original).

[6] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,083-84 (Aug. 22, 2019); *see also id.* at 44,098-99 ("Updating the existing certification regulations to clarify expectations, timelines, and deliverables also increases efficiencies. Some aspects of the existing regulations have been implemented differently by different authorities, likely because the scope and timing of review are not clearly addressed by the EPA's existing certification regulations.").

quality. Maintaining this balance is central to the text and purpose of Section 401.

The 2020 Certification Rule was EPA's first update to the Agency's Section 401 regulations in nearly 50 years. The prior regulations were confusing, internally inconsistent, and failed to account both for Congress' changes to the CWA[7] and for the evolution of the scope and complexity of infrastructure projects over the last half century. Worse, they led states to upset the balance of cooperative federalism that Section 401 sought to achieve and to misuse their limited authority over water quality to dictate national energy policy. Under the prior regime, states blocked energy infrastructure projects that were in the public interest of both individual states and the nation as a whole for reasons unrelated to water quality, such as for the project's perceived climate change impacts or general opposition to fossil fuels.[8] Contrary to the plain language of the CWA, states also significantly delayed projects by ignoring the statutory one-year time limit for certification or manipulating the process to exceed this timeframe.[9]

As history demonstrates, prior to the 2020 Certification Rule, the EPA's outdated regulations and inconsistent state practices caused the delay or cancelation of much-needed infrastructure projects, thereby depriving consumers of the projects' benefits, disrupting interstate commerce, and undermining the nation's prosperity and security.

EPA's clear action on Section 401 is necessary to give lead federal agencies and certifying authorities the appropriate direction to implement Section 401 in a manner that aligns with the statute, prevents the misuse of Section 401, and allows for the efficient and predictable review of infrastructure projects, as elaborated below.

II. EPA Cannot and Should Not Permit Certifying Authorities to Define "Request for Certification"

A. EPA cannot delegate its duty to administer the CWA to certifying authorities.

The Proposed Rule argues that, "[b]ecause the [CWA] does not expressly define the term 'request for certification,' EPA *and other certifying authorities* are free to do so."[10] EPA further argues "that the reasonable period of time begins to run after a certifying authority receives a certification request as that request is defined either by EPA *or the certifying authority* in accordance with its applicable submission procedures."[11] But the "Administrator of the Environmental Protection Agency *shall* administer th[e] [CWA]" "[e]xcept as otherwise expressly provided."[12] As the Supreme Court "ha[s] long recognized," "interstate water pollution is

[7] *See* Proposed Rule at 35,323 (EPA's description of the history of the legislation and rulemaking efforts).

[8] *See* Attachment 1, Attachment B at 2-3 (discussing major energy infrastructure projects for which states expressly or implicitly denied for reasons unrelated to water quality).

[9] *See id.* (discussing major energy infrastructure projects for which states delayed development for over one year).

[10] Proposed Rule at 35,331 (emphasis added).

[11] *Id.* (emphasis added).

[12] 33 U.S.C. § 1251(d) (emphasis added).

controlled by federal law" and so "the [CWA's] purpose" is to "authoriz[e] *the EPA* to create and manage a *uniform* system of interstate water pollution regulation."[13] Consistent with Congress' clear directive and purpose, the CWA expressly defines both the circumstances in which certifying authorities would play a role in administering the Act and the specific nature of that role.[14]

The EPA has "recognize[d]" that, "[w]hile . . . states and tribes have broad authority to implement state and tribal law to protect their water quality, [S]ection 401 is a federal regulatory program that contains explicit limitations on when and how states and tribes may exercise this particular authority."[15] Section 401 authorizes certifying authorities to set water quality standards (subject to EPA approval) and certify that "discharge[s] will comply" with those standards,[16] but this authorization cannot be read to extend to each certifying authority the ability to define the words and phrases of the CWA—a *federal* statute. Further, the only "procedures" that Section 401 directs states to "establish" are those "for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."[17] The lack of an express delegation of this to certifying authorities coupled with Congress' charge that "the [EPA] *shall* administer th[e] [CWA]" "[e]xcept as otherwise expressly provided"[18] means that the EPA alone can define "request for certification."

B. The Proposed Rule undermines the CWA's policies of minimizing paperwork and interagency decision procedures and preventing needless duplication and delays.

The CWA's "objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[19] but the Act did not give EPA free rein in implementing the procedures to achieve this objective. Rather, Congress carefully crafted the CWA to reflect a "national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."[20] The Proposed Rule would replace the 2020 Certification Rule's uniform federal definition of "request for certification" with a multi-jurisdictional patchwork of different, potentially conflicting requirements, thereby

[13] *Arkansas v. Oklahoma*, 503 U.S. at 110 (emphasis added).

[14] *See*, *e.g.*, 33 U.S.C. § 1251(b) ("It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title."); 33 U.S.C. § 1251(e) ("The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.").

[15] Updating Regulations on Water Quality Certification, 84 Fed. Reg. at 44,099.

[16] 33 U.S.C. § 1341(a)(1).

[17] *Id.*

[18] 33 U.S.C. § 1251(d) (emphasis added).

[19] *Id.* at § 1251(a).

[20] *Id.* at § 1251(f).

injecting unnecessary delay and undue burden in the Section 401 process and disregarding the CWA's sound policies.

Efficient, effective, and transparent regulation requires a uniform definition of "request for certification." The EPA modified its regulations implementing Section 401 in 2020 in part because "certification request" is "ambiguous" and "susceptible to different interpretations," "which ha[s] resulted in inefficiencies in the certification process, individual certification decisions that have extended beyond the statutory reasonable period of time, and regulatory uncertainty and litigation."[21] By allowing each state, tribe, and federal certifying authority to define "certification request," EPA reintroduces "different interpretations" of the term and reverts to all the problems arising from multiple interpretations across certifying authorities. The Agency has wholly failed to provide any rational reason for its departure from the current regulation or approach. This approach is arbitrary and capricious.[22]

The Proposed Rule also reintroduces the risk of undue burden on project proponents and unnecessary delay of their projects. Under the Proposed Rule, each certifying authority may establish its own requirements for filing a certification request. This approach affords certifying authorities too much latitude in determining what constitutes a certification request, adds confusion to who the final arbiter is in determining sufficiency of the request, and removes the uniformity and certainty that EPA claims it is attempting to establish. Further, project proponents can no longer submit the same certification request to multiple certifying authorities for a project that crosses state lines but rather must prepare multiple requests containing different information about the same project for each certifying authority. This undue burden on project proponents is plainly inconsistent with the CWA's policies.[23] Certifying authorities also might use the ability "to add requirements to EPA's list or develop their own lists of request requirements"[24] to collect unnecessary information or impose other unduly burdensome requirements on developers. Indeed, certifying authorities might view the lack of any restrictions on their ability to impose filing requirements as an end run around EPA's admonition that "certifying authorities may only consider and address potential water quality effects."[25] Any certifying authority that wishes to delay or block a project for reasons unrelated to water quality could do so under the Proposed Rule by imposing onerous filing requirements that cause delay and uncertainty, even in circumstances where FERC has already deemed the project to be in the public interest.

The Proposed Rule injects these risks and uncertainty and reintroduces these problems into the Section 401 process for little, if any, benefit. State-specific definitions of "request for certification" are not needed to "ensur[e] that adequate information is available to initiate and

[21] Updating Regulations on Water Quality Certification, 84 Fed. Reg. at 44,101.

[22] *See infra* note 35.

[23] *See* 33 U.S.C. 1251(f) (announcing national policy of "drastic[ly] minimiz[ing] paperwork").

[24] Proposed Rule at 35,331.

[25] *Id.* at 35,343.

inform the certification review process."[26] Indeed, "concerns" that Section 401's limitations "will force [state agencies] to render premature decisions" are "misplaced."[27] Section 401 already provides certifying authorities recourse if they do not possess "adequate information" to make a decision within a reasonable time: "If a state deems an application incomplete, it can simply deny the application without prejudice."[28] Moreover, the CWA "provide[s] for" and "encourage[s]" "[p]ublic participation in the development, revision, and enforcement of any regulation" promulgated under the CWA.[29] If certifying authorities have concerns with the 2020 Certification Rule's uniform definition of "request for certification," the solution was to voice those concerns during the development of the definition, not for EPA to provide certifying authorities the ability to define the term themselves. Finally, as the Proposed Rule suggests, the "requirement to request a pre-filing meeting will ensure that certifying authorities have an opportunity, should they desire it, to receive early notification and to discuss the project with the project proponent before the statutory timeframe for review begins."[30] This provision—which EPA "inten[ds] . . . to support early engagement and coordination between certifying authorities and project proponents"[31]—provides certifying authorities both an opportunity to discuss any additional information they need from the project proponent and further protection against decisions based on inadequate information.

C. A definition of "certification request" that includes a draft license or permit is unnecessary and unworkable.

Although the Proposed Rule would permit each certifying authority to establish its own definition of "request for certification," EPA also suggests "requirements it views as necessary for an efficient and consistent certification process," including "submission of the relevant draft Federal license or permit for the proposed project."[32] Under the Proposed Rule, "a project proponent would not be able to submit a request for certification *until* a Federal agency develops and provides it with a draft license or permit for the proposed project."[33] The EPA should abandon the requirement to submit a draft license or permit because it is unworkable, will cause delay, and is contrary to the policies underlying the CWA.

Requiring the submission of a draft license or permit creates substantial challenges for project proponents and federal permitting agencies. As an initial matter, many federal agencies—including FERC—do not issue draft licenses or permits for our members' natural gas

[26] *Id.* at 35,332.

[27] *N.Y. State Dep't of Envtl. Conservation v. FERC* ("*NYSDEC v. FERC I*"), 884 F.3d 450, 455-56 (2d Cir. 2018).

[28] *Id.*

[29] 33 U.S.C. § 1251(e).

[30] Proposed Rule at 35,329.

[31] *Id.*

[32] *Id.* at 35,332.

[33] *Id.* (emphasis in original).

infrastructure projects, and it is unclear how they could do so in a manner that is consistent with the CWA's policies. EPA dismisses this significant obstacle by claiming the Agency "is not aware of any regulatory-based reason why Federal licensing or permitting agencies could not manage their internal procedures so that a certifying authority's 'reasonable period of time' did not begin to run until after it had received a copy of the draft license or permit."[34] The EPA proposes not only to depart from its established rules and practice but also to require other federal agencies to change their rules and "internal procedures," which the other agencies developed based on their expertise and an accounting of their available resources. EPA cannot simply say "I don't see why not" and shift the burden to analyze the effects of the EPA's break from precedent. Because the EPA does not (and cannot) justify these significant changes, the Agency should abandon them.[35]

Further, the Proposed Rule requires sequential, rather than concurrent review by the lead federal agency and the certifying authority. This change alone could add up to a year to development timelines for *all* infrastructure projects that require a Section 401 certification. Additionally, the lead agency typically analyzes factors other than water quality when deciding whether to issue a license or permit. FERC, for example, will issue a certificate of public convenience and necessity based on myriad factors, such as whether the project proponent can "financially support the project without relying on subsidization from its existing customers"; whether the project proponent "has made efforts to eliminate or minimize any adverse effects the project might have on the [project proponent's] existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new pipeline facilities"; whether the project's benefits "outweigh the adverse effects on economic interests"; and environmental factors, including the project's effects on soils and geology, cultural resources, land use, visuals, noise levels, air quality, socioeconomics, and environmental justice.[36] FERC does not currently prepare "draft" orders, and doing so presumably would require FERC Staff to collect and analyze a significant amount of data regarding each of these factors. This is an extensive process, and *none of the factors listed have any bearing on water quality*. The EPA's proposed requirement cannot be squared with the "national policy that to the maximum extent possible the procedures utilized for implementing th[e CWA] shall encourage . . . the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."[37]

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[34] *Id.* at 35,333.

[35] *See Nw. Envt. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (holding agency determination was arbitrary and capricious where agency departed from precedent and "the record [did] not indicate that that decision was the output of a rational decision-making process"); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897-99 (D.C. Cir. 1999) (remanding agency determination where agency failed to explain departure from its own precedent and relied only on its own conclusory statement to rebut contrary evidence in the record); *W.Va. Pub. Servs. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 862-63 (D.C. Cir. 1982) (vacating decision where record did not contain "identifiable factual evidence" sufficient to justify "break with precedent and policy").

[36] *See, e.g.*, *Gas Transmission Nw., LLC*, 180 FERC ¶ 61,056, PP 23, 46 (2022).

[37] 33 U.S.C. § 1251(f).

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The Proposed Rule would add uncertainty, delay, burden, and risk of abuse to the Section 401 process contrary to the policies underlying the CWA. For the foregoing reasons, the EPA should abandon its proposed changes and instead maintain the definition of "certification request" that the Agency established in 2020.

III. The Time Period for Review Must Be Reasonable

Section 401 requires action by a certifying authority "within a reasonable period of time (which shall not exceed one year) after receipt of such request."[38] The lead federal agency—not the certifying authority—determines matters of waiver under Section 401, which includes determining when the reasonable period of time for review begins.[39] Upon expiration of the time period, the federal agency's obligation to await the certification is waived and the federal agency may move forward in finalizing its authorization.[40] The reasonable time period for review is fundamental to Section 401's approach to cooperative federalism. It ensures, at Congress' direction, that the state opportunity to consider potential water quality impacts does not frustrate or cause an unreasonable delay to the federal authorization.[41]

A. Defining "Receipt" of Request

Section 401 states clearly that the period for a certifying authority's Section 401 review is initiated upon "*receipt* of such request."[42] In some instances, states have sought to delay the "receipt" of the request by deeming requests to be "incomplete." The U.S. Court of Appeals for the Second Circuit squarely rejected this practice. The court recognized that, by creating a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of review,[43] Congress sought to eliminate the potential for states to stall the clock and prevent federal authorization.

EPA's proposal to define the term "receipt" as "the date that a request for certification,

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[38] 33 U.S.C. § 1341(a)(1).

[39] *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017) (project applicants are to present evidence of waiver to federal agency).

[40] 33 U.S.C. § 1341(a)(1) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.").

[41] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401.").

[42] 33 U.S.C. § 1341(a)(1) (emphasis added).

[43] *NYSDEC v. FERC I*, 884 F.3d at 455. Neither can the applicant and the state agree to delay the start of the review period or otherwise extend the review period. *See N.Y. State Dep't of Env't Conservation v. FERC* ("*NYSDEC v. FERC II*"), 991 F.3d 439, 450 (2d Cir. 2021) ("Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period[.]").

as defined by the certifying authority, is documented as received" is inconsistent with the statute as interpreted by the courts and opens the door to the very practice that the Second Circuit rejected unequivocally. EPA is mistaken in hoping that certifying authority requirements for complete applications "will not necessarily lead to a 'subjective standard.'" The statutory language is clear and does not depend on hopeful expectations of action by certifying authorities. The decision in *NYSDEC v. FERC I* explains why.

In *NYSDEC v. FERC I*, the New York State Department of Environmental Conservation ("DEC") had deemed a Section 401 request for an interstate natural gas pipeline to be "incomplete" twice before finally denying the request nearly two years after the state's initial receipt of the request.[44] When the DEC issued its Second Notice of Incomplete Application to the applicant, it referred to Section 621.3(a)(4) of Title 6 of the New York State regulations as the basis of its finding that the applicant's request was "incomplete."[45] Section 621.3, both at the time and still today, outlines general requirements for certain permit applications, including Section 401 requests.[46] On these facts, the Second Circuit held that allowing states to determine when requests are "complete" could create a "subjective standard" clearly in violation of the bright line requirements of Section 401.[47] EPA's proposal to allow states to dictate the contents of the Section 401 request, even if "defined in regulation," sanctions the type of "subjective standard" explicitly rejected by the Second Circuit.[48]

Moreover, EPA's references to "completeness" determinations in other permitting programs are misplaced. EPA points to its own permitting requirements for Section 402 NPDES applications and the Army Corps' Section 404 permits as examples where agencies have interpreted the term "application" to mean a "*complete* application."[49] However, in the referenced examples, the *permitting agency* interprets the sufficiency of a *permit application* that it is legally required to act upon, whereas under Section 401, the certifying authority is not tasked with issuing a permit, reviewing a permit application, or even responding at all. Section 401 affords the certifying authority the opportunity to review a "request" seeking to confirm that discharges meet applicable water quality standards. This review is not a permitting process. By granting states the authority to treat such requests as state permit applications, EPA's proposal invites states to stall the statutory clock under Section 401 until a request is deemed "complete" and thus interferes with the federal permit process, which relies on the expeditious completion of the state's review. *Congress* set the clock's start under Section 401, and EPA's proposal should

[44] *NYSDEC v. FERC I, 884 F.3d* at 453-54.

[45] *See* Joint Appendix at JA401-02, New York State Department of Environmental Conservation v. FERC, No. 17-3770 (2d. Cir. Dec. 22, 2017).

[46] *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 621.3.

[47] *NYSDEC v. FERC I*, 884 F.3d at 455-56.

[48] *See id.*

[49] Proposed Rule at 35,334.

not invite circumvention of the statutory time limit without oversight.[50]

Certifying authorities do not need the authority to dictate the contents of a Section 401 certification request in order to protect their opportunity for meaningful review of proposed discharges. As noted above, if an applicant fails to provide adequate information during the Section 401 review, the certifying authority may under Section 401 deny the request for certification.[51] Moreover, mandatory pre-filing meeting requests, as proposed by EPA, can spotlight needed information and help ensure an adequate record for a certifying authority to conduct its review.[52]

INGAA and AGA respectfully request that EPA either maintain the 2020 Certification Rule's definition of "receipt," or, in the alternative, clarify that a certifying authority's review of whether a request meets its pre-defined requirements is a purely administrative function and does not defer the start of the review clock defined in the statute and confirmed by federal court precedent.

B. Setting the "Reasonable" Period of Time

Following the "receipt of the request," certifying authorities have a "reasonable period of time (which shall not exceed one year)" to act on a request before waiver occurs.[53] The lead federal agency determines the reasonable period of time.[54] Although the statute provides a full year as the absolute maximum amount of time, the lead federal agency may determine a reasonable period of time to be less than one year.[55]

EPA's proposal would require the federal agency and the certifying authority to determine the reasonable period of time and, when not in agreement, set a default 60-day time period. However, for the time period and waiver concepts to support cooperative federalism as Congress intended, there must be an appropriate division of authority between the federal agency and the states. Recognizing this, the D.C. Circuit held that the lead federal agency decides matters of waiver under Section 401.[56] Since waiver is tied to the lapse of a reasonable time for review, the federal authority to decide waiver inherently includes setting the reasonable period of time.

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[50] *NYSDEC v. FERC I, 884 F.3d* at 456 ("If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

[51] *Id.* ("If a state deems an application incomplete, it can simply deny the application without prejudice.").

[52] Proposed Rule at 35,329.

[53] 33 U.S.C. § 1341(a)(1).

[54] *See Millennium Pipeline,* 860 F.3d at 701 (holding that the lead federal agency decides whether waiver has occurred).

[55] *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-04 (D.C. Cir. 2019).

[56] *Millennium Pipeline*, 860 F.3d at 701.

Notwithstanding the federal agency's authority to determine the reasonable period of time, certifying authorities and project proponents both bring practical insight to the review process. Accordingly, INGAA and AGA encourage EPA to create a process where the lead federal permitting agency alone may establish the reasonable period of time but may do so in consultation with both the certifying authority and the project proponent. INGAA and AGA otherwise support the 60-day default time period. However, if EPA finalizes a regulation that allows certifying authorities to dictate the contents of the request, EPA should clarify that there should be no situation where the reasonable period of time should exceed 60 days. Otherwise, EPA would be allowing the certifying authorities to evade the one-year limit on review by delaying the start of the clock, intentionally failing to avail themselves of opportunities to study water quality impacts during the federal permitting review, and then expecting the maximum statutory time for review to be appended at the end of the federal permit process.

C. Withdrawal and Resubmission of Requests for Certification

The U.S. Court of Appeals for the District of Columbia Circuit has invalidated the practice of withdrawing and refiling the same Section 401 request in a coordinated attempt to restart the review period for the same project.[57] Given the D.C. Circuit's clear holding on this practice, it is not appropriate for EPA to decline to "tak[e] a position on the legality of withdrawing and resubmitting a certification request."[58] EPA's Section 401 regulations must respect the statutorily imposed time limits found within Section 401. Congress was clear that a certifying authority's role is temporally limited to a reasonable period of time, not to exceed one year, from the date of receipt of the certification request. EPA's regulations should be equally clear that certifying authorities cannot require or request a project applicant to withdraw and resubmit a certification request for the purpose of restarting the reasonable period of time.[59]

IV. A Certifying Authority's Scope of Review and Its Conditioning Authority Are Different and Specific, and Neither Is Unbounded

Section 401 provides certifying authorities the opportunity to certify whether a proposed discharge will comply with applicable water quality provisions. Differences between the language of Section 401(a)(1), which focuses on confirming that the "discharge" will comply with water quality requirements, and Section 401(d), which refers to ensuring that the "applicant" will comply, have caused some to question the scope of the project that falls within the certifying

[57] *Hoopa Valley*, 913 F.3d at 1104 (holding that the withdrawal and resubmission scheme "serves to circumvent a congressionally granted authority"). *See also Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1182 (D.C. Cir. 2022) (upholding *Hoopa* and confirming that a state's inaction on request results in waiver regardless of the withdrawal and resubmission).

[58] Proposed Rule at 35,341.

[59] In contrast, a project proponent may at any time withdraw its request for certification by the certifying authority, for example, if it no longer intends to develop the proposed project as described in its original certification request. In such instances, there is no coordinated attempt to restart the review period or extend the review period beyond the one-year maximum set forth in Section 401.

authority's Section 401 review.

EPA proposes to address this issue by specifying that Section 401(a)(1)'s limitation on "discharge" merely provides the "trigger" for Section 401 review. Once that review is triggered, EPA proposes that the certifying authority is authorized to consider, certify, and condition the "activity as a whole." INGAA and AGA disagree with this interpretation, which is not supported by the statute, precedent, or practical application of Section 401. Instead, EPA must affirm that the purpose and focus of Section 401 is to assure that discharges from federally-permitted activities will comply with applicable water quality requirements, an analysis that does not include matters unrelated to water quality or consideration of other environmental impacts from the applicant's entire activity. The final rule should confirm, consistent with Section 401, that a certifying authority's review is properly focused on reviewing the water quality impacts from the potential discharge associated with a proposed project.

Prior to 1972, the certification provisions focused the certifying authority's review on whether the "activity" would violate water quality standards.[60] In the 1972 amendments to the statute, Congress revised this language to focus certifying authorities on the impact of the proposed "discharge."[61] At the same time, Section 401(d) was added to allow certifying authorities to condition certifications to assure compliance from the "applicant." An interpretation that the scope of review under Section 401(a)(1) and Section 401(d) is the "activity as a whole" is inconsistent with the statutory language of both sections.

First and foremost, Section 401(a) does not merely set the trigger for review—it is the most expansive provision in the entire code section, and it is the only part of Section 401 that addresses the scope of the certifying authority's review. The language of Section 401(a)(1) makes clear that the scope of the certification decision is whether the "discharge" will comply with the applicable enumerated provisions of the CWA.[62] In the 1972 amendments, Congress deliberately added the term "discharge" in multiple places, and there is no basis in either the text or the legislative history to authorize EPA to revise this term out of the statute.

Second, Section 401(d) does not address the scope of the certifying authority's review, which is focused on *whether* the discharge will comply with the enumerated water quality standards. Instead, Section 401(d) addresses *how* to assure that the discharge complies—namely through conditions included in the issued water quality certification and incorporated into the federal permit governing the applicant. Referring to the "applicant" in this context is necessary and appropriate, since the focus of Section 401(d) is on conditions incorporated into the

[60] *See* Pub. L. No. 91–224, 21(b)(1), 84 Stat. 108 (1970).

[61] *See* 33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.") (emphases added).

[62] *Id*. ("that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title").

applicant's federal permit. It is not reasonable to read Section 401(d)'s reference to "applicant" as indirectly revising the clear and repeated specificity of Section 401(a)(1) with respect to discharges.

Third, nowhere in Section 401(d) does the statute authorize a certifying authority to set conditions on the "activity as a whole" or even the "activity." EPA purports to premise its "activity as a whole" interpretation of Section 401 on the Supreme Court's decision in *PUD No. 1 of Jefferson County* and *City of Tacoma v. Washington Dep't of Ecology ("PUD")*.[63] *PUD* notes the incongruity in the text of Section 401; however, it does not substantively support EPA's proposed approach that the "activity as a whole" governs a certifying authority's decision to grant or deny a certification and impose conditions. Instead, as decided by the majority of the justices in *PUD*:

> Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.[64]

Here the Court is *distinguishing* Section 401(a)(1) and Section 401(d), explaining that Section 401(a)(1) addresses the scope of the certification while Section 401(d) addresses the scope of conditions. EPA errs in seeking to extend the scope of review to encompass all of the activity from which discharges arise: this proposed interpretation *conflates* the two provisions and superimposes Section 401(d) on Section 401(a)(1), without any basis in the text. Such a construction is suspect and inconsistent with leading principles of statutory interpretation applied by the Supreme Court.[65]

Fourth, the certifying authority's review and conditioning authority under Section 401(d) is limited.[66] In *PUD*, the Supreme Court confirmed that the state's authority under Section 401(d) "is not unbounded."[67] Moreover, the Supreme Court did *not* support applying Section 401(d) conditions beyond what is required to comply with water quality standards: rather, the Supreme Court held that "state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process."[68]

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[63] *PUD No. 1 of Jefferson County* and *City of Tacoma v. Wash. Dep't of Ecology* ("*PUD*"), 511 U.S. 700 (1994).

[64] *Id.* at 711-12.

[65] *See*, *e.g.*, *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (applying "traditional tools of statutory construction" to discern Congressional intent); *Corley v. U.S.*, 556 U.S. 303, 314 (2009) (rejecting federal agency's interpretation "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'") (internal quotation marks and citation omitted); *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) ("we 'generally presum[e] that statutes do not contain surplusage'") (internal citation omitted).

[66] *PUD* at 712.

[67] *Id.*

[68] *Id*. at 713.

To find otherwise—namely, to accept EPA's proposal of unbounded state authority to review and condition the entirety of a federally authorized project—rewrites Congress's balanced legislative language of 1972 and effectively places certifying authorities in control of interstate projects, including those that are determined by federal agencies to be in the public interest, like interstate natural gas pipelines. EPA should not assume that Congress hid such vast state power within Section 401(d) of the CWA. It is neither wise policy nor sound legal thinking. As the Supreme Court recently held, "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[69]

EPA's sweeping interpretation also faces practical challenges that EPA itself identifies. For example, EPA requests comment "whether and how the Federal licensing or permitting agency could effectively implement a certification with conditions addressed to impacts from the 'activity as a whole' if it has authority over only a small part of a larger project."[70] How, indeed. Through its sweeping interpretation, EPA would create a situation where the scope of the certifying authority's Section 401 review is broader than the scope of the federal authorization that triggered the review. This impracticable (and likely unlawful) result belies EPA's interpretation.

These are not idle concerns. In 2019, INGAA and AGA members submitted examples of certifying authorities impermissibly expanding their Section 401 authority by placing conditions unrelated to water quality in Section 401 certifications. Moreover, certifying authorities are requiring submission of information unrelated to water quality as part of the Section 401 certification process, which exceeds the limits of Section 401 even if the certifying authority does not impose conditions based on that information. For example, one AGA member applied for a Section 401 certification and New York State Environmental Conservation Law Article 24 Freshwater Wetlands permit in 2020, and, following the permit comment period, DEC advised the member that an air emissions analysis was required in order for the permitting review to continue. Specifically, the DEC requested a Climate Leadership Community Protection Act ("CLCPA")[71] emissions analysis, allowing the DEC to determine whether issuing the water quality permit and certification would be consistent or interfere with the attainment of statewide greenhouse gas emission limits. This additional, undue burden is inconsistent with the CWA's policy and highlights the continued risk of certain certifying authorities impermissibly expanding the scope of their Section 401 authority.

INGAA and AGA respectfully and urgently request that EPA reaffirm that the purpose and focus of Section 401 is to ensure that discharges from federally-permitted activities can meet

[69] *West Virginia v. EPA*, 597 U.S. __ (2022).

[70] Proposed Rule at 35,346.

[71] The CLCPA became effective in New York State in January 2020 and is codified in New York Environmental Conservation Law Section 75. Among other requirements, the CLCPA directs state agencies to determine if the decisions they make, including issuing permits, are inconsistent with or will interfere with the attainment of statewide greenhouse gas emission limits. The analysis includes upstream, downstream, and indirect emissions and mitigation thereof.

applicable water quality standards. As such, a certifying authority's review should be focused on reviewing the water quality impacts of the federally-authorized discharge. On the basis of its review, the certifying authority may identify such conditions that are necessary for the discharge to achieve compliance with water quality standards, and the lead federal agency will incorporate those conditions into the federal license or permit.

V. Federal Agencies Have an Obligation to Confirm Section 401 Actions

Section 401(a)(1) makes clear that a federal agency must withhold the issuance of a federal license or permit authorizing activities that discharge to navigable water until the applicant obtains the applicable water quality certifications and that, upon denial, a federal agency may not grant the license or permit.[72] By making the issuance of a federal license or permit contingent on obtaining a certification, the statute requires the federal agency to make a threshold determination whether or not the water quality certification has been obtained, waived, or denied.[73]

To support federal agencies in this responsibility, EPA has proposed four factors by which federal agencies should review certification actions:

> (1) whether the decision clearly indicates the nature of the decision (i.e., is it a grant, grant with conditions, denial, or express waiver), (2) whether the proper certifying authority issued the decision, (3) whether public notice was provided, and (4) whether the decision was issued within the reasonable period of time.[74]

INGAA and AGA appreciate that EPA proposes to provide direction to federal agencies on this review. However, we encourage EPA to clarify that these four factors serve the specific responsibility of the federal permitting agency to ensure that the Section 401 action taken was within the scope of Section 401—the review of a federally-authorized discharge for potential impacts to water quality. To that end, EPA should add a fifth factor: "whether the decision, including the proposed conditions, addresses compliance with the certifying authority's water quality standards." This factor does not invite the federal permitting agency to second-guess whether a condition is best suited to achieve such compliance; it only ensures that conditions are not imported into a federal permit via Section 401 if they do not address the certifying authority's water quality standards, which is the central point of Section 401 and is consistent with the

[72] *See* 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been *obtained* or has been *waived* as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.") (emphasis added). Federal agencies may issue "conditional" licenses or permits, but such licenses or permits cannot authorize "activities . . . that may result in [a] discharge [into navigable waters] prior to the state approval." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017).

[73] *See City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (federal agencies have "an obligation to determine that the specific certification required by Section 401 has been obtained") (internal citations omitted).

[74] Proposed Rule at 35,354.

Supreme Court's holding in *PUD*.

Finally, EPA should retain rather than remove the existing requirement that a certifying authority must document, through citation and explanation, the basis for certification conditions (and likewise for the reasons a certification is denied, including specifying any information needed to assure compliance with water quality requirements).[75] Doing so provides appropriate transparency to the public and the permit applicant and helps ensure that the federal permitting agency can fulfill its duty in reviewing the certification action without second-guessing the certifying authority's substantive determinations.

VI. EPA Should Require the Project Proponent's Consent to Any Proposed Modifications of a Water Quality Certification

The Proposed Rule "reintroduce[s] a certification modifications provision," but "the [EPA] is . . . not proposing to require that the project proponent agree to the modification."[76] INGAA and AGA share the desire for "flexibility to adapt to changing circumstances" that some project proponents expressed to the EPA during the Agency's pre-proposal outreach,[77] but the authority to modify certificates without project proponent consent will undermine the regulatory certainty that Congress sought to promote through Section 401.

The EPA rightfully recognizes that "[c]onstraining certifying authorities from fundamentally changing their certification action . . . through a modification process recognizes reliance interests and promotes regulatory certainty" and that "changing the fundamental nature of the certification action . . . may be inconsistent with the Congressional admonition to act on a certification request within the statutory reasonable period of time."[78] However, the Agency defines "modification" so broadly as to remove any meaningful "[c]onstrain[t] on certifying authorities."[79] The Proposed Rule defines "modification" as "a change to an element or portion of a certification or its conditions; it does not mean the wholesale reversal of a certification decision."[80] By defining "modification" to include any change short of a wholesale reversal, the EPA affords certifying authorities with the ability to impose a *de facto* denial through onerous changes well after the project proponent acted in reasonable reliance on the initial certification.

This flaw is not fatal to the EPA's efforts to reintroduce a certification modification provision; a requirement that the project proponent consent to any modification can guard against certifying authorities "flip-flopping" on their initial decision. The EPA's requirement that "a Federal agency and certifying authority agree in writing that the certification should be

[75] *See* 40 C.F.R. §121.7.

[76] *Id.* at 35,361-62.

[77] *Id.* at 35,361.

[78] *Id.* at 35,362.

[79] *Id.*

[80] *Id.* at 35,361-62.

modified" is an important safeguard.[81] But only the project proponent will have unique insight into how belated modifications affect the viability of the project and whether those modifications are a wholesale reversal of the certifying authority's initial decision in all but name. The EPA should not dismiss this insight or the project proponent's reliance interest on the initial certification by affording the proponent only "some part in the modification process."[82] Instead, the EPA should require the project proponent's consent to any modification. If the EPA does not require the project proponent's consent, the Agency at least should clarify that the certifying authority cannot modify its certification after the issuance of the federal license or permit that prompted the request for certification.[83]

VII. Conclusion

INGAA and AGA appreciate the opportunity to engage in this process and your consideration of these comments. We welcome additional dialogue and discussion.

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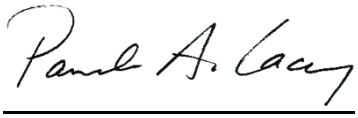

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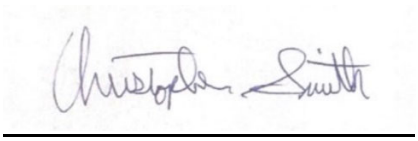

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[81] *Id.* at 35,362.

[82] *Id*.

[83] *See Airport Cmtys. Coal. v. Graves*, 280 F.Supp.2d 1207, 1215 (W.D. Wash. 2003) ("the plain language of the statute . . . reflects clear congressional intent that federal agencies only be bound by state certification conditions issued within one year after notice"); *City of Shoreacres v. Tex. Com. of Env't Quality*, 166 S.W.3d 825, 834-35 (Tex. Ct. App. 2005) ("states are not authorized under the Clean Water Act to unilaterally revoke, modify, or amend a state water quality certification after the certification process for a federal permit is complete").

Attachment 1

Interstate Natural Gas Association of America, EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification, Docket ID No. EPA-HQ-OW-2019-0405, October 21, 2019

Interstate Natural Gas Association of America

Submitted via www.regulations.gov
Docket No. EPA-HQ-OW-2019-0405

October 21, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") respectfully submits these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act ("CWA") Section 401.[1]

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's member companies transport over 95% of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

INGAA supports effective implementation of the CWA and the protection of water quality and respects the important role that states and tribes play in ensuring these shared objectives. Section 401 provides states and tribes an important and distinct role in the environmental review of interstate natural gas pipelines. INGAA's members are frequent participants in Section 401 processes and continue to be significantly affected by the implementation of Section 401. INGAA

[1] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019).

appreciates EPA's efforts to provide clarity, predictability, and uniformity in the implementation of Section 401. INGAA offers the following comments in support of EPA's efforts.

INGAA submitted comments in the pre-rulemaking docket on May 24, 2019 (included as Attachment A).

I. EPA's Proposed Rule Resolves Important Ambiguities in Section 401 Whose Divergent Interpretations Have Frustrated the Federal-State Framework of the Clean Water Act and the Operation of Multi-State Pipeline Projects that Have Been Determined to be in the Public Need

INGAA supports EPA in exercising its delegated authority to revise the Section 401 regulations and to provide a much-needed interpretative framework to implement the ambiguous statutory language in Section 401. EPA's revised regulations will reduce the potential for conflicting interpretations of the certifying authority's role and restore a functional process that strengthens permitting and licensing programs within the framework of complementary federal and state responsibilities. For interstate natural gas pipelines, the smooth and predictable functioning of these programs is essential to meeting the public need and realizing America's energy potential.

INGAA members build pipelines in response to demonstrated public need for the delivery of natural gas, typically requiring infrastructure that spans multiple state boundaries. The Federal Energy Regulatory Commission ("FERC") must issue a certificate of "public convenience and necessity" based on this demonstrated need before INGAA members may construct and operate a pipeline.[2] Where a proposed pipeline project may result in a discharge into waters of the United States, CWA Section 401 prohibits federal agencies (such as FERC and the U.S. Army Corps of Engineers) from issuing a license or permit for the pipeline until the state or authorized tribe, where the discharge would originate, has issued a Section 401 certification or the certification requirement is waived.[3]

Section 401 establishes an important balance in the respective roles and responsibilities of federal and state authorities. Like other statutes built on the principle of cooperative federalism, Section 401 defines the state's role within the context of a uniform federal framework. States and tribes have generally fulfilled their statutory role by limiting their Section 401 review to a review of water quality impacts from the potential discharge(s) associated with a proposed federally licensed or permitted project.

The language of Section 401, however, is ambiguous and variable about the scope of the certifying authority's review, determination, and condition-setting. In different places, Section 401

[2] 15 U.S.C. § 717f(c).

[3] 33 U.S.C. § 1341(a)(1). *See Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding FERC's practice of issuing conditional certificates to natural gas pipelines under section 7 of the Natural Gas Act prior to the receipt of a Section 401 certification).

uses varied language for these actions and omits any explanation to harmonize the incongruences.[4] Given the resulting ambiguity, some states and tribes have erroneously expanded their Section 401 review to include considerations unrelated to water quality requirements.[5] The inconsistent implementation of Section 401 frustrates the CWA's federal-state balance and has resulted in delays to interstate natural gas pipeline projects that the federal government has determined to be in the public interest.[6]

How shall these incongruent terms be reconciled? The proposed rule offers the first holistic, coherent reconciliation of the statute, taking into consideration the context and structure of Section 401 and the focus and purposes of the CWA. EPA's proposed rule seeks to clarify the ambiguity with respect to the scope of Section 401. The agency has also defined the terms necessary to facilitate the clear understanding and implementation of Section 401. INGAA fully supports EPA's proposal to create a clear and uniform understanding of these core terms and provisions of Section 401.

II. INGAA's Comments and Feedback on the Proposed Rule[7]

A. EPA's Proposed Definition of "Certification Request" Provides Needed Regulatory Certainty About the Initiation of the Section 401 Review

The statutory time period for Section 401 review begins with the certifying authority's receipt of the "certification request." EPA has proposed a definition of "certification request" that provides a consistent scope of information necessary to initiate the statutory review period.[8] The information contained in the certification request is used by the certifying authority to conduct its Section 401 review within the "reasonable period of time," as established by the federal agency.[9]

INGAA recommends that EPA clarify that the certifying authority is not called to judge compliance with the federal definition of a certification request, nor can the certifying authority prevent the time period from running by judging the information in a certification request to be insufficient to make a determination.[10] Rather, the time period for review starts upon "receipt" of

[4] A comprehensive review of the ambiguity related to the certifying authority's scope of review can be found in the Appendix to these comments.

[5] For example, instead of evaluating the potential impacts of the proposed project and route in the certification request, states have sought information related to alternative routes for the project, despite the fact that the Natural Gas Act gives FERC the exclusive jurisdiction over the siting and routing of interstate natural gas pipelines. *See* 15 U.S.C. § 717f(c).

[6] Inconsistent implementation of the Section 401 process has resulted in significant delays to energy infrastructure projects. *See* INGAA letter to The Honorable Andrew Wheeler, July 1, 2019 (included as Attachment B).

[7] For convenience, INGAA has noted its recommendations to EPA in bold.

[8] *See* proposed 40 C.F.R. § 121.1(c).

[9] *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 698-99 (D.C. Cir. 2017) (holding that the federal agency decides matters of timing and waiver).

[10] *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d. Cir. 2018) ("The plain language of Section 401 outlines a bright-line rule regarding the beginning of review . . . . It does not specify that this time limit

the certification request.[11] If a certifying authority needs additional information to complete its Section 401 review, it can request that information from the project proponent during the reasonable period of time for review.

1. Definition of certification request

The items proposed to be included in the "certification request" provide an appropriate balance between the certifying authority's need for sufficient information to evaluate the request and the permit applicant's ability to obtain and submit the information to initiate the reasonable period of time for review and the review process.[12] The items specified properly include the information needed to describe the basic project and its anticipated location, in addition to providing basic orienting information concerning the anticipated discharges to waters.

INGAA recommends that EPA revise the definition of certification request to clarify that project proponents need to provide sufficient information regarding the anticipated location and type of discharges and location of receiving waters to *initiate* a meaningful review within the reasonable period of time for review. Project proponents should provide certifying authorities with the best information reasonably available at the time the request is made, based upon the proposed route of the project (*e.g.*, information from public databases, collected from flyovers, from surveys on portions of the route where access has been granted, etc.). For interstate natural gas pipelines seeking a certificate of public convenience and necessity under the Natural Gas Act, the Section 401 certification request is typically filed within 30 days of filing a certificate application with FERC, which itself must contain complete resource reports offering extensive analysis of among other things water quality impacts.[13] Thus, at the time of the certification request, there are ample analytical and technical studies to commence review by the certifying authority. Because technical

applies only for 'complete' applications."). In contrast, Maryland took nearly 17 months to issue a Section 401 water quality certification for Columbia Gas Transmission's Line MB Extension Project. This certification was issued 15 months after Maryland purported to determine that it had a "complete application" based on the applicant's submission of its response to a supplemental information request.

[11] Under the proposed rule, the federal agency would record the date of receipt in its written notification of the applicable reasonable period of time. *See* proposed 40 C.F.R. § 121.4(c)(2). This ensures that the date of receipt will be included in the federal record.

[12] **EPA should clarify** that the statute does not permit certifying authorities to require that project proponents have "legal authority" to perform the activities proposed in the certification request. The statute is clear that the start of the certifying authority's review is the "receipt" of the "certification request." 33 U.S.C. § 1341(a)(1). As the federal agency charged with interpreting the CWA, EPA has proposed a reasonable definition of "certification request" that is focused on the information that is useful and meaningful to the certifying authority in assuring that potential discharges will not violate water quality requirements. At the time of the certification request, the project proponent does not need to have (and likely would not have because federal authorizations have yet to be granted) "legal authority" in order to provide the certifying authority with information meaningful to the Section 401 review. *See, e.g.*, New Jersey Department of Environmental Protection Denial of PennEast Pipeline Company Application ("PennEast Denial"), Oct. 8, 2019 (denying a certification request as administratively incomplete due to a lack of "legal authority" for land parcels along the right-of-way; notably, the parcels that PennEast did not have access to were parcels in which the State of New Jersey had an interest and refused to provide consent) (included as Attachment C).

[13] *See, e.g.*, 18 C.F.R. § 380.12 (environmental reports for Natural Gas Act applications).

studies may remain incomplete until a project proponent receives landowner permission to access all properties along the proposed route (which allows the project proponent to verify each and every water crossing), **INGAA recommends** that EPA clarify that identifying each and every "location and type of any discharge that may result from the proposed project" in the certification request is not required under the definition of "certification request" or for the commencement of the reasonable time period for review.[14]

2. Additional information and requests for information

As site access is granted along the proposed route and the environmental review progresses, the project proponent may adjust the route to avoid sensitive species, wetlands or other areas, or to accommodate landowner and stakeholder requests. A project sponsor would update the certifying authority about these developments by identifying any new locations and types of discharges that may result from the revised route and the location of receiving waters.

INGAA recommends that EPA clarify that neither the submission of additional information nor agency requests for additional information during the pendency of the certifying authority's review invalidates the certification request or restarts the reasonable period of time for review.[15] If changes to the project after submission of a certification request significantly alter the mix of information needed to evaluate impacts to water quality, the certifying authority may submit a request to the federal agency to extend the review period. The certifying authority's extension request must provide sufficient explanation for the additional time requested (within the maximum one year). The federal agency then can either grant or deny a certifying authority's request for additional time based upon what it believes is appropriate. When deciding whether to grant or deny the request to extend the reasonable period of time, the federal agency should consider the amount of review that has already occurred and how the changes would affect the review of impacts to water quality.

INGAA recommends that EPA provide regulatory instruction to federal agencies on the type and scope of changes that would necessitate filing a new certification request. Filing a new request should be limited to extraordinary instances where the supplemental information reflects such substantial modification to the proposed project that the existing certification request is no

[14] **EPA should also clarify that** having site access is not required for a certifying authority to act on a certification request. The certifying authority is tasked with evaluating whether the potential discharge will comply with the applicable water quality requirements and can condition appropriately. Whether or not the project proponent has the "legal authority" to comply with the certification or condition is not within the scope of the certifying authority's consideration. *See* PennEast Denial, *supra* n.12 (denying a certification request due to a lack of "legal authority" for land parcels along the right-of-way) (Attachment C).

[15] *See McMahan Hydroelectric, LLC*, Order Issuing Original License, 168 FERC ¶ 61,185, P 38 (2019) ("North Carolina DEQ's request for additional information did not delay the one-year clock. Nor did McMahan Hydro's submittal of information requested by North Carolina DEQ (*i.e.*, a water quality monitoring plan and a copy of Commission staff's EA) during the state's review of the certification request render McMahan Hydro's certification application a 'new' application.").

longer probative of the potential impacts to water quality.[16] For interstate natural gas pipelines, FERC has extensive experience recognizing and addressing major and minor variations in the proposed projects and adjusting its analysis accordingly. For example, it is not unusual for projects seeking a certificate under Section 7(c) of the Natural Gas Act to undergo refinements and revisions in their details during the review process. FERC is experienced and knowledgeable in identifying and addressing such changes within its own review, and can identify when such a change is so substantial in relation to the discharge that it would justify the filing of a new or amended certification request. Therefore, the final regulations and any future regulatory instructions should clarify that FERC will determine based on its expertise whether a new certification request is required due to a "substantial modification" to a proposed interstate pipeline project.

As the review proceeds, the certifying authority may find that additional information is necessary to determine whether the proposed activity will comply with water quality requirements. **INGAA recommends** that EPA clarify to certifying authorities that requests for additional information must be limited to information necessary to evaluate the certification request within the scope of Section 401 – assuring that a discharge will comply with water quality requirements – and must be made within the reasonable period of time.

Delaying action on a certification request until federal environmental reviews are complete, regardless of whether state laws require the consideration of federal environmental reviews, is not within the scope of Section 401.[17] The environmental review required for the federal license or permit is often broader than the scope of Section 401. For example, the FERC's review of applications for the construction and operation of interstate natural gas pipelines under Section 7 of the Natural Gas Act triggers the Commission's consideration of environmental impacts under the National Environmental Policy Act ("NEPA"). FERC's regulations implementing NEPA require project proponents to submit to the Commission resource-specific environmental reports that cover a broad array of potential environmental impacts, including air quality, wildlife, and vegetation.[18] **INGAA recommends** that EPA clarify that insufficient information identified after the determined reasonable period of time or outside the scope of statutorily relevant information, including that the NEPA review is incomplete, is not grounds for denying or conditioning a certification request.

[16] *Cf. id.* (noting that "an applicant's submittal of additional information at a certifying agency's request generally would not rise to the level of a material change to a project's plan of development, such that an application to amend a pending license application, and a new certification request, would be warranted.").

[17] This has been the basis used for denying water quality certification requests. For example, on June 3, 2019, North Carolina denied Mountain Valley Pipeline, LLC's ("MVP") application for a Section 401 certification for the MVP Southgate Project. The MVP Southgate Project is a new pipeline expansion approximately 73 miles in length and will serve growing demand for natural gas in North Carolina. The state's denial was based on the application being deemed incomplete more than six months after the application was filed, ostensibly because (in part) FERC had not yet issued a draft environmental impact statement for the Southgate Project. *See* N.C. Dept. of Environmental Quality letter to MVP, June 3, 2019 (included as Attachment D).

[18] *See* 18 C.F.R. § 380.12.

3. Pre-filing meetings

INGAA recommends that EPA encourage certifying authorities to create formal or informal processes that facilitate early coordination between the certifying authority and the project proponent. Pre-filing meetings can assist with the predictability and efficiency of Section 401 implementation by providing an early opportunity for dialogue to inform agency personnel of the scope and type of proposed impacts and for project applicants to learn of certifying agency needs. Pre-filing meetings can assist in scoping the information to be included in the certification request and reduce the need for the certifying agency to request more information from the permit applicant.

INGAA recommends that EPA encourage certifying authorities to identify during pre-filing meetings commonly requested information to reduce the need to issue information requests after the certification request has been received. Any pre-filing meeting and the information shared, whether formal or informal, should be included in the federal agency's record of agency decision.

INGAA recommends that EPA clarify that a certifying authority cannot prohibit or delay the submission of a certification request following a pre-filing meeting. The trigger for the statutory time period for review is the certifying authority's receipt of the request for certification, as discussed above.

4. The reasonable review period is not restarted by the withdrawal-and-resubmission of the certification request.

EPA has also proposed that certifying authorities be prohibited from requesting that a project proponent withdraw a certification request for the purpose of restarting the reasonable period of time.[19] INGAA supports this prohibition because Congress was clear that the states' and tribes' authority to review certification requests is temporally limited to a reasonable period of time, not to exceed one year, from the date of receipt of the certification request.[20]

INGAA recommends that EPA clarify that the project proponent can withdraw its request for consideration by the certifying authority at any time, for example, if it no longer intends to develop the proposed project as described in its original certification request.

[19] Proposed 40 C.F.R. § 121.4(f).

[20] As the U.S. Court of Appeals for the District of Columbia Circuit has held, Congress established a time limit in Section 401 that cannot be circumvented or avoided. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (invalidating the practice of withdrawing and refiling the same Section 401 request in an attempt to restart the review period for the same project and holding that the withdrawal and resubmission scheme "serves to circumvent a congressionally granted authority"); *see also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (explaining that Congress included a role in the Act for federal agencies to determine waiver "to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401.").

In the same vein, certifying authorities are prohibited from requesting that a project proponent agree to a later receipt date in order to extend the reasonable period of time. Following a recent court decision related to Section 401 water quality certification denials, FERC has held that certifying agencies may not request that an applicant agree to a different receipt date for a water quality certification application in order to extend the time for review.[21] **INGAA recommends** that EPA clarify that any attempt by a certifying authority to delay the commencement of its time period for review on a water quality certification is in violation of its regulations and the Clean Water Act.

INGAA recommends that EPA also clarify that certifying authorities may deny a certification request without prejudice, as long as they provide a statement explaining why the project will not comply with water quality requirements and the specific water quality data or information that would be needed to grant certification.[22]

B. EPA's Proposed Rule Supports Federal Agencies in Setting the Statutory Review Period

The parameters that Congress established for Section 401 balance the states' and tribes' interest in water quality with the federal government's obligation to act promptly on permit applications. Congress imposed a clear time limit for the state's action:

> If the State . . . fails or refuses to act on a request for certification, **within a reasonable period of time (which shall not exceed one year) after receipt of such request**, the certification requirements of this subsection shall be waived with respect to such Federal application.[23]

The statutory language creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of review.[24] Following the receipt of a "certification request," certifying authorities have a "reasonable period of time (which shall not exceed one year)" to act on a request before waiver occurs.[25]

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[21] *See National Fuel Gas Supply Corp.*, 167 FERC ¶ 61,007, at P 9 (Apr. 2, 2019) ("We find that the statute prohibits state agencies and applicants from entering into written agreements to delay water quality certification, an interpretation consistent with *Hoopa Valley Tribe*.").

[22] *See* proposed 40 C.F.R. § 121.5(e)(1)-(3).

[23] 33 U.S.C. § 1341(a)(1) (emphasis added).

[24] *N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 455.

[25] 33 U.S.C. § 1341(a)(1). In the case of the Northern Access Pipeline, the State of New York received the request for water quality certification on March 2, 2016. The applicant and the state later agreed in a letter that April 8, 2016 would serve as the date "on which the application was deemed received" by the state. The state denied the water quality certification request on April 7, 2017. FERC, in its capacity as the federal lead agency, determined that New York failed to act on the water quality certification within the immutable one-year period established by the statute as the maximum period of time for state action on a request for certification—in this case, one year from the request received on March 2, 2016—and that the Section 401 obligation was therefore waived. *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at PP 35, 42 (2018).

The lead federal agency determines the reasonable period of time.[26] Although the statute provides a full year as the absolute maximum amount of time, the lead federal agency may determine that a reasonable period of time is less than one year.[27]

INGAA supports EPA's proposed rule that would guide federal agencies in establishing project-specific or categorical reasonable periods of time.[28]

1. Factors supporting a reasonable period of time should be within the scope of Section 401

INGAA recommends that EPA clarify that the factors a federal agency considers in determining a reasonable period of time should be within the scope of Section 401 certification.[29] For example, in considering "complexity," the focus should not be on the "complexity of the proposed project," the complexity of which may have no bearing on the potential discharge. Instead, the focus should be on the complexity of the potential "discharge" and, therefore, the difficulty of assessing under Section 401 the impact of the potential discharge on water quality requirements. This complexity may arise from technical issues pertaining to the activity leading to the discharge (*e.g.*, methods for stream crossing such as "open-cut" versus horizontal directional drilling), the unique or complex site conditions including the existing quality of the water resources, or the potential magnitude of impacts (*e.g.*, number of stream crossings, significance of stream disturbance).

Further, **INGAA recommends** that EPA eliminate the factor that federal agencies consider the "potential need for additional study or evaluation of water quality effects from the discharge."[30] The potential need for additional study should be driven by the complexity of the discharge and site conditions, factors already considered in setting the reasonable period of time.

In developing the factors by which a federal agency may determine a reasonable period of time, **INGAA recommends** that EPA look to the U.S. Army Corps of Engineers' ("Corps")

[26] *See Millennium Pipeline Co.*, 860 F.3d at 700 (holding that the lead federal agency decides whether waiver has occurred). A similar approach is taken in the Administration's One Federal Decision Implementation Memorandum, which instructs the lead federal agency to coordinates all pertinent schedules. *See* Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018) ("EO 13807").

[27] *See Hoopa Valley Tribe*, 913 F.3d at 1103-04. Both EPA and the Army Corps of Engineers have previously determined that a reasonable period of time should generally be less than one year. *See* 40 C.F.R. § 121.16(b) (6-month time period); 40 C.F.R. § 124.53(c)(3) (60-day time period); 33 C.F.R. § 325.2(b)(ii) (60-day time period).

[28] *See* proposed 40 C.F.R. § 121.4(d).

[29] Actions taken by the certifying authority in support of its broader regulation of water resources are outside the scope of Section 401. For example, the certifying authority's identification or classification of water resources is outside the scope of assuring that a discharge will comply with water quality requirements and should not be considered in the determination nor extension of a reasonable period of time.

[30] *See* proposed 40 C.F.R. § 121.4(d)(3).

regulatory guidance letter on setting timeframes for Section 401 certifications.[31] In addition to complexity, the Corps' letter identifies other factors to consider in setting a reasonable period of time, including the certifying authority's public hearing requirements; whether the activity and discharge are typical for the agency; unique or complex site conditions; and the magnitude of the impact to aquatic resources.[32] The Corps' letter also identifies those factors that generally should not be considered in setting the reasonable period of time, such as the certifying authority's resource constraints.[33]

2. Categorical time periods for review

INGAA does not support adopting a one-size-fits all approach that would categorically apply to all interstate natural gas pipeline projects because the same reasonable period of time may not be appropriate for all pipeline projects.[34] Some pipeline projects may impact hundreds of miles of land with multiple water crossings, whereas other projects may be one (1) mile or less with few potential water impacts. Adopting a one-size-fits all approach for all interstate natural gas pipeline projects may result in providing an inappropriate amount of time for the certifying authority's review of these projects.

Instead, **INGAA recommends** that EPA encourage federal agencies to establish default timelines for different types of projects for which they are commonly the lead federal agency and where doing so would be practicable and would provide instruction on anticipated reasonable periods of time for different federal permit types. Because federal applications for activities subject to Section 401 may deviate from the "default" scenario, federal agencies should retain the flexibility to adjust the default timelines, as necessary, to accommodate the specific details and complexity of a given project while ensuring that the timeline never exceeds the one-year statutory maximum.[35]

[31] *See* Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility, Regulatory Guidance Letter, U.S. Corps of Engineers (Aug. 7, 2019).

[32] *See id*.

[33] *See id*.

[34] *Cf.* 84 Fed. Reg. at 44,109 ("EPA could establish that for interstate pipelines that will cross a certain number of states or transport a certain volume of material, certification must be completed within a specific period of time.").

[35] Section 401 requires that certifying authorities develop public notice procedures. *See* U.S.C. § 1341(a)(1). **INGAA recommends** that EPA remind certifying authorities that the statute allows the federal agency to set a reasonable period of time that is less than one year, and that certifying authorities should ensure that their public notice requirements can be satisfied within the reasonable period of time as determined by the federal agency. For example, the U.S. Army Corps of Engineers has determined that the reasonable period of time should generally be 60 days and that certifying authorities should ensure that public notice requirements can be satisfied during this time. *See* 33 C.F.R. § 325.2(b)(ii); *Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility*, Regulatory Guidance Letter, U.S. Corps of Engineers (Aug. 07, 2019).

3. Milestones within the reasonable period of time

In determining the reasonable period of time, **INGAA recommends** that federal agencies consider identifying interim milestone dates within the reasonable period of time to facilitate shared expectations of the certifying authority's progress in reviewing the certification request and timely certification actions.[36] These milestones could include defining the time, such as 30 days, by which the certifying authority should request from the applicant additional information that is within the scope of Section 401 but beyond that contained in the certification request. EPA has included such a milestone in the proposed rule for when EPA is the certifying authority.[37]

C. The Final Rule Should Clarify the Responsibilities of the Lead Federal Agency

EPA's proposed rule clarifies implementation of Section 401 by federal agencies whose permits and authorizations trigger Section 401. EPA's proposed rule defines "federal agency" as "any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act Section 401."[38] However, neither the proposed rule nor the preamble addresses how this definition should be interpreted where a proposed project requires multiple federal licenses, approvals, or permits. **INGAA recommends** clarifying in the final rule that where a project requires multiple federal authorizations, the "lead" federal agency is responsible for carrying out the Section 401 responsibilities (*i.e.*, setting the reasonable period of time for the certifying agency to make a decision, determining waiver, etc.) and that all other federal agencies should defer accordingly.

Many projects require multiple federal permits or approvals. For example, an interstate natural gas pipeline project proponent seeking project-specific authorization under Section 7(c) of the Natural Gas Act must obtain a certificate of public convenience and necessity from FERC; this certificate authorizes the construction and operation of the pipeline. For most interstate natural gas pipeline projects, FERC also is the lead federal agency for purposes of administering and coordinating NEPA review.[39] A pipeline project proponent also must obtain all other applicable federal permits, such as a permit from the Corps under Section 404 of the CWA. Based on EPA's proposed rule, it is not clear which of these two federal agencies would be responsible for carrying out the responsibilities under Section 401 for such a project. Without clarification, the proposed rule could result in multiple federal agencies individually carrying out the responsibilities under Section 401 without coordination.

[36] Where a project is subject to the One Federal Decisions ("OFD") permitting framework, setting interim milestones would align with the precepts and requirements of OFD. *See* Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

[37] *See* proposed 40 C.F.R. § 121.13.

[38] *Id*. at § 121.1(i).

[39] *See* 15 U.S.C. § 717n(b) (designating FERC "as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq*.)").

The final rule should assign federal responsibility under Section 401 to the "lead" federal agency. **INGAA recommends** revising the definition of "Federal agency" as follows:

> Federal agency means any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act Section 401. Where a project proponent needs more than one federal agency to take action on a license or permit, 'Federal agency' means the lead federal agency for purposes of the National Environmental Policy Act.

The concept of "lead agency" under NEPA is well-established and understood.[40] The agency that is serving as "lead agency" for NEPA will already be established for NEPA purposes and is in a position to make timing and scope determinations. For interstate natural gas pipeline projects seeking project-specific authorization under the Natural Gas Act, FERC will typically be the "lead agency" for NEPA purposes and should likewise be the "lead agency" for purposes of Section 401 under the CWA. We note that, in certain circumstances, FERC retains continuing jurisdictional authority over the project under the Natural Gas Act but is not called upon to take any further action under the Natural Gas Act.[41] Instead, action by other federal agencies (often the U.S. Army Corps of Engineers) may be required for authorization of the project. In this situation, the federal agency required to take action (*e.g.*, the U.S. Army Corps of Engineers) is the lead agency for Section 401 purposes.

INGAA recommends that EPA clarify that where the lead federal agency determines that waiver has occurred the certification requirement "falls out of the equation"[42] and all other federal agencies can and should move forward with processing their reviews and authorizations. EPA should clarify in its regulations that the lead federal agency's written notification of waiver should also be provided to the other federal agencies to which application has been made.[43] These modifications would also be consistent with recent case law.[44]

Without these clarifications, the proposed rule could lead to the situation where multiple federal agencies are determining the reasonable period of time, reviewing the Section 401 action, incorporating conditions into federal licenses or permits, and determining whether waiver has occurred without coordination and with possibly conflicting determinations.

The concept of a lead federal agency is consistent with EO 13807 and the One Federal Decision Memorandum of Understanding ("OFD MOU"). EO 13807 and the OFD MOU commit

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[40] *See* 40 C.F.R. §§ 1501.5 (roles and responsibilities of lead agencies), § 1508.16 (definition of lead agency).

[41] *See, e.g.*, 18 C.F.R. §§ 2.55 (auxiliary installations and replacement facilities); §§ 157.201-157.218 (blanket certificate). Where there has been a third-party objection to a prior-notice blanket activity, FERC is called upon to take action and therefore is the lead federal agency.

[42] *Millennium Pipeline Co.*, 860 F.3d at 700.

[43] *See* proposed 40 C.F.R. § 121.7(b).

[44] *See, e.g., N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 456 (finding that FERC had jurisdiction over an interstate natural gas pipeline project and upholding FERC's finding that the state waived the Section 401 water quality certification requirement).

the Executive Branch to a single, coordinated approach to project reviews on an agreed timetable under the direction of a lead federal agency.[45] Notably, the Corps has already incorporated this concept into its One Federal Decision Implementation Plan.[46] Thus, for projects that require an environmental impact statement and where the Corps is not the lead federal agency, which is the case for interstate natural gas pipelines requiring FERC approval, the Corps has committed to "defer to the determination of the lead agency, determine that the certification has been waived, and proceed accordingly."[47]

D. EPA's Proposed Scope for Section 401 Review Provides Appropriate Direction and Limits

Section 401 provides certifying authorities the opportunity and authority to certify whether a proposed discharge will comply with applicable water quality provisions. Following the certifying authority's review, it can grant the certification request (with or without conditions), it can deny the certification request, or it can take no action.[48]

The certifying authority's review and conditioning authority is not unbounded.[49] Section 401(a)(1) limits the scope of the certifying authority's inquiry to the "applicable provisions" of Sections 301, 302, 303, 306, and 307 of the CWA.[50] Section 401(d) further informs the limitations on scope by focusing the certifying authority on conditions that are necessary to assure that discharges from a federally authorized activity will comply with Sections 301, 302, 303 (as incorporated by Section 301), 306, and 307 of the CWA and "any other appropriate requirements of State law."[51] (A comprehensive review of the ambiguity related to the certifying authority's scope of review can be found in the Appendix to these comments).

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[45] *See* Exec. Order No. 13807, Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure, 82 Fed. Reg. 40,463 (2017); Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

[46] U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance with Executive Order 13807 and One Federal Decision (OFD) within Civil Works Programs (Sept. 26, 2018).

[47] *Id*.

[48] *See* 33 U.S.C. § 1341(a)(1). Specifically, if the certifying authority concludes that the proposed discharge will comply with the applicable water quality provisions, the certifying authority must grant the certification request. Alternatively, if the certifying authority concludes that the proposed discharge will comply with the applicable water quality provisions so long as the project applicant abides by specific conditions within the scope of Section 401, the certifying authority can grant the certification request with those conditions. Alternatively, if the certifying authority concludes that the proposed discharge cannot comply with applicable water quality provisions, the certifying authority can deny the certification request. Finally, the certifying authority can elect not to take action on the certification request.

[49] *See PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology* ("*Jefferson County*"), 511 U.S. 700, 712 (1994).

[50] 33 U.S.C. § 1341(a)(1).

[51] *Id*. at § 1341(d).

Although the statute provides limits on the proper scope for Section 401, **INGAA agrees** that EPA should address important ambiguities and variations in language that continue to lead to divergent legal interpretations by certifying authorities, courts, and applicants.[52]

INGAA agrees that EPA's proposed interpretation of the scope of Section 401 review and its proposed regulatory framework for conducting the review are consistent with the statutory text and principles and will add consistency and predictability in the implementation of Section 401 reviews.

1. The relationship between Section 401(a)(1) and Section 401(d) supports EPA's proposal to create a single scope for Section 401 review.

EPA's proposed rule would create a single scope of review that would define the certifying authority's review of the proposed discharge under Section 401(a)(1) and the scope of appropriate conditions that may be included in a certification under Section 401(d). **INGAA agrees** that EPA's proposal to create a single scope for Section 401 review resolves an important statutory ambiguity, finds support in a holistic reading of the statute, and offers a practical approach for implementing Section 401.

Section 401(a)(1) directs the certifying authority's inquiry into whether to grant or deny the certification. The provision focuses on whether the "discharge" will comply with certain enumerated "applicable provisions" of the CWA: Sections 301, 302, 303, 306, and 307. In turn, Section 401(d) authorizes certifying agencies to include appropriate conditions in the grant of a certification. However, the conditioning authority described in Section 401(d) is expressed differently from the scope to grant or deny a certification request under Section 401(a)(1) – notably, Section 401(d) also refers to "any other appropriate requirements of State law." When read in isolation, Section 401(a) and Section 401(d) exhibit a facial incongruity that has created significant ambiguity in implementing Section 401.

EPA's proposed rule offers necessary clarification by providing a single definition of scope that is based on Section 401 as a whole.[53] Read holistically, the authority to condition a certification under Section 401(d) is in support of the certifying authority's right (and responsibility) to grant or deny a certification request. Together, the certification and any conditions form an integrated whole whose overarching purpose is to assure water quality by affording certifying authorities a reasonable opportunity for review. EPA's proposed rule recognizes the interrelation of these provisions by establishing a single, clear articulation of the scope of review. This scope reflects both Section 401(a)(1) and Section 401(d), giving meaning to and effectuating each.

Not only is this approach supported by the statute, but this approach is also consistent with the practical implementation of Section 401. In evaluating a certification request, the certifying

[52] 84 Fed. Reg. at 44,103 ("nowhere in Section 401 did Congress provide a single, clear, and unambiguous definition of the section's scope").

[53] *See* proposed 40 C.F.R. § 121.3 ("The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."); s*ee also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd*., 484 U.S. 365, 371 (1988) (explaining statutory interpretation is a "holistic endeavor").

authority assesses whether the proposed discharge will comply with applicable water quality provisions and whether appropriate conditions are necessary to ensure such compliance. It is a comprehensive evaluation with a single determination. Had EPA established two different scopes of review – one for the grant or denial of a certification request and one for conditioning certifications – EPA would be requiring certifying agencies to bifurcate their reviews and sequentially consider the question of whether to grant or deny and then the question of conditioning, which would lead to further uncertainties about the reach of conditioning authority apart from certification authority. Such uncertainties retard efficient review of certification requests, invite divergent approaches by tribes and states (even on the same multi-state development project), and confound efforts by project proponents to develop an appropriate record upon which certifying agencies can confidently take action within the prescribed reasonable time.

2. EPA's proposed scope of certification and definition of "water quality requirements" is a reasonable interpretation of the statutory language.

As noted elsewhere in these comments, nowhere does Section 401 provide a single, clear, and unambiguous definition of the certifying authority's scope of review and conditioning authority. EPA's proposed statement on the "scope of certification" together with its proposed definition of "water quality requirements" properly focus a certifying authority's review on the statutory principles and purpose of Section 401.

a) Section 401 is focused on water quality.

INGAA agrees that the scope of Section 401 action must be limited to water quality considerations. The statutory language throughout Section 401 – and the CWA generally – is focused on water quality.[54] Section 401(a)(1) limits the scope of the certifying authority's actions to enumerated provisions of the CWA.[55] Other sections are similarly focused on water quality and provide no suggestion that non-water quality considerations or conditions are appropriate under Section 401.[56]

Errant attempts to expand the scope of Section 401 beyond water quality are rooted in the language of Section 401(d), which refers to – but does not explain – "any other appropriate

[54] *See* 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[55] *See id.* at § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.").

[56] *See, e.g., id.* at § 1341(a)(2) ("Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters").

requirement of state law."[57] This single phrase must be read in the context in which it is found.[58] **INGAA agrees** with EPA that this phrase should not be read to expand beyond water quality. Arguments to the contrary would attribute outsized meaning to the phrase, ignoring all other clear statutory signals that Section 401 is focused on water quality.

There is no evidence that Congress intended this phrase to convey broader conditioning authority under Section 401(d) than necessary to support the authority to certify compliance with water quality under Section 401(a). The statutory provisions enumerated in Section 401(a) all focus on protecting water quality. At the core of the programs implemented under these enumerated provisions is a partnership in which the federal government sets minimum standards for protecting water quality from discharges, while states carry out day-to-day activities of implementation under EPA-approved state law provisions. EPA's proposed interpretation that the scope of Section 401 review and conditions is limited to water quality is both reasonable and obvious. EPA's proposed interpretation of "appropriate requirements" supports this partnership by including in the certifying authority's scope of certification those state law provisions that have been approved to support the enumerated CWA sections.[59]

b) Section 401 is focused on the potential discharge.

Inconsistencies between the language of Section 401(a)(1), which focuses on confirming that the "discharge" will comply with water quality requirements, and Section 401(d), which refers to ensuring that the "applicant" will comply, have created ambiguity in the statute and have been interpreted as allowing conditions that address water quality impacts from any aspect of the proposed activity as a whole.[60]

INGAA agrees with EPA that the scope of review under Section 401 is properly focused on water quality impacts from the potential *discharge* associated with a proposed project. Prior to 1972, the certification provisions focused the review on whether the "activity" would not violate water quality standards.[61] In the 1972 amendments to the statute, this language was revised to focus certifying authorities on the impact of the proposed *discharge*.[62] At the same time, Section 401(d) was added to allow certifying authorities to condition certifications to assure compliance from the applicant. An interpretation that Section 401(d) supports conditions on the activity as a

[57] *See id.* at § 1341(d). States have used this phrase to include conditions in Section 401 certifications related to the odorization of gas and mitigation measures to address past contamination and construction at the site.

[58] *See King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (internal citations omitted) (noting the "fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

[59] It is the practice of some states to condition the Section 401 certification on the issuance of future regulatory authorizations or permits. Such practice cannot be used to expand the scope of Section 401 review (or the statutory time period for review).

[60] *See Jefferson County*, 511 U.S. at 712.

[61] *See* Pub. L. No. 91–224, 21(b)(1), 84 Stat. 91 (1970).

[62] *See* 33 U.S.C. § 1341(a)(1).

whole is inconsistent with the statutory language of Section 401(a)(1), which Congress specifically revised to focus on discharge. Further, nowhere in Section 401(d) does the statute authorize conditions on the "activity." Section 401(d) uses the term "applicant," which EPA has reasonably interpreted as referring to the person or entity responsible for obtaining and complying with the certification, the need for which depends on a discharge to navigable waters.[63]

INGAA agrees with EPA that the scope of Section 401 review is properly focused on water quality impacts resulting from potential *point source* discharges associated with proposed federally licensed projects.[64] **INGAA recommends** that EPA clarify to certifying authorities and federal agencies the types of activities that are considered "point source discharges" under Section 401.

EPA's interpretation differs from the majority opinion in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology* ("*Jefferson County"*), which addressed the scope of authority provided in subsections 401(a) and 401(d).[65] Specifically, the Court in *Jefferson County* concluded that subsection 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[66] Although this interpretation differs from EPA's proposed interpretation, the agency correctly notes that the *Jefferson County* opinion does not deprive EPA of its authority to interpret ambiguous statutes.[67] As discussed, there are multiple statutory gaps concerning certifying authority reviews, determinations, and condition-setting. The principle of delegated authority reserves for administrative agencies the presumptive right to resolve statutory ambiguity.[68] This is true regardless of whether a court has previously interpreted the ambiguous statute.[69] Thus, to the extent the *Jefferson County* opinion conflicts with EPA's interpretation of the ambiguous provisions of Section 401, it does not preclude the interpretation in EPA's proposed rule.

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[63] **INGAA agrees** with EPA that potential discharges into state or tribal waters that are not waters of the United States do not trigger the requirement to obtain a Section 401 certification. *See* 84 Fed. Reg. at 44,100; *see also* 33 U.S.C. § 1341(a)(1); Comments of Attorneys General of New York, *et al*. on the proposed revised definition of "waters of the United States" (Apr. 15, 2019) (recognizing that Section 401 is limited to discharges into federal waters), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467. **INGAA recommends** that EPA clarify that where a discharge does not directly discharge to a navigable water, any secondary impacts cannot trigger Section 401.

[64] *See* proposed 40 C.F.R. § 121.1(g) (definition of discharge).

[65] 511 U.S. 700 (1994).

[66] *Id*. at 712.

[67] *See* 84 Fed. Reg. at 44,097 (discussing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*. ("*Brand X*"), 545 U.S. 967, 982-83 (2005)).

[68] *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–741 (1996) (stating deference is due to agencies because of a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

[69] *See Brand X*, 545 U.S. at 982-83.

3. The Section 401 review is inherently predictive in nature.

Section 401 provides certifying agencies the opportunity to review the potential discharges associated with proposed development projects. The language of Section 401(a) sets out the predictive nature of the Section 401 review and requires the certification to ensure that a potential discharge "will comply" with the applicable water quality standards.[70] By using the future tense "will comply," Congress explicitly recognized that the certifying authority's Section 401 review evaluates the compliance of a *future* discharge with applicable water quality standards, necessarily based on *present* information. Thus, the certifying authority's review is inherently predictive in nature.

As EPA recognizes, the trigger for Section 401 is the "potential" for a discharge to occur, rather than an "actual" discharge.[71] **INGAA recommends** that EPA further clarify that because of the predictive nature of Section 401, certifying authorities cannot and should not be seeking absolute certainty when determining whether a discharge will comply with applicable water quality standards. Instead, the appropriate inquiry should be whether there is a reasonable basis in the record upon which the certifying authority can determine that the proposed discharge will comply with the applicable water quality standards. The permitting authority must size up the relevant facts and determine whether and under what conditions future construction and operation will comply with applicable legal standards. Congress has long acknowledged the state and federal interest in protecting water quality under Section 401 lies in a reasonable assurance of compliance.[72]

4. By resolving key statutory ambiguities, EPA is fulfilling its obligation and delegation of authority to formulate policy and promulgate clarifying regulations.

The divergent statutory language in Sections 401(a) and 401(d) create a statutory framework that lacks clarity on essential points, notably the scope of the certifying authority's review of requests under Section 401, leading to inconsistent interpretations by certifying authorities and courts. Where Congress has left a gap in a statutory framework, the administrative agency responsible for implementing the statute has a responsibility to formulate policy and to make rules to fill those gaps.[73] The ambiguity of Section 401 is evident not only in the statutory language and structure, but also in the practical challenges that have arisen because of the incomplete statutory language. EPA, as the federal agency responsible for administering the CWA

[70] 33 U.S.C. § 1341(a)(1).

[71] 84 Fed. Reg. at 44,100.

[72] *See, e.g.*, 33 U.S.C. § 1341(a)(4) (providing authority to the federal agency to suspend a permit until notification from the certifying authority "that there is *reasonable assurance* that such facility or activity will not violate the applicable [CWA provisions]") (emphasis added).

[73] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. ("Chevron")*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

Section 401 framework, has proposed to mitigate these practical challenges through a reasonable construction of the statutory scheme that provides a functional, coherent framework in which all parts of Section 401 have meaning.

It is important that EPA has proposed to exercise its authority to fill statutory gaps only where the statute fails to speak unambiguously to an issue. Where the statute unambiguously speaks to an issue, EPA has proposed to promulgate corresponding regulations that implement the statute's plain language.[74]

Where the statutory language is ambiguous, however, EPA proposes to fulfill its responsibility by providing the clarity needed to give uniform effect to the legislation. EPA identified in its proposed rule where it views the statute to be ambiguous and unambiguous.[75] The agency's interpretation is based on its expert reading of the statute, informed by judicial interpretations. The proposed rule defines key terms[76] that the statute fails to unambiguously classify in support of a unified framework for implementation and regulatory compliance.[77] It also prescribes procedures to guide federal agencies, certifying authorities, and project proponents in carrying out their statutory responsibilities. These procedures provide much-needed clarity to the Section 401 program.

The proposed rule follows sound principles of statutory construction and the dictates of administrative law. The proposed rule reflects EPA's reasoned analysis to "consider varying interpretations and the wisdom of its policy on a continuing basis."[78] EPA has recognized that its existing certification regulations at 40 C.F.R. Part 121 are outdated and do not reflect a holistic analysis of the statute.[79] The agency is appropriately clarifying the provisions of the statute necessary to fill the gaps left by Congress.[80] In doing so, EPA is adapting its rules to "the demands of changing circumstances."[81] In particular, there are two circumstances since the existing rules were promulgated that warrant EPA's action. First, EPA's existing regulations were promulgated prior to the 1972 CWA amendments. Second, the Section 401 scheme has been undermined by increasingly costly and prevalent conflicting interpretations that demonstrate practical challenges with the current regulations. Hence, in addition to EPA's continuing responsibility to consider the

[74] *See, e.g.*, 84 Fed. Reg. at 44,099 (citing *Hoopa Valley Tribe*, 913 F.3d at 1104) (EPA's conclusion, based on the plain statutory language and case law, that the Section 401 requirement is waived by the federal permitting agency if the certifying authority does not act for certification within the reasonable period of time.).

[75] *See* 84 Fed. Reg. at 44,093-99.

[76] *See id.* at 44,119-20 (defining key terms in proposed § 121.1, including "certification," "condition," "discharge," and "water quality requirement.").

[77] *See Brand X*, 545 U.S. at 992 (finding that a term that "the statute fails unambiguously to classify" is to be defined by the administering agency).

[78] *Chevron*, 467 U.S. at 863.

[79] *See* 84 Fed. Reg. at 44,084.

[80] *See Chevron*, 467 U.S. at 843.

[81] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (*quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

interpretation and policy contained in its regulations, there are other strong reasons why EPA should revise its regulations.

E. Federal Agencies Have the Authority to Evaluate the Validity of Section 401 Certifications

Section 401(a)(1) makes clear that a federal agency must withhold the issuance of a federal license or permit until the applicant obtains the applicable water quality certifications and that, upon denial, a federal agency may not grant the license or permit.[82] By making the issuance of a federal license or permit contingent on obtaining a certification, the statue requires that the federal agency make a threshold determination whether or not the water quality certification has been obtained, waived, or denied.[83]

In order to make this determination, federal agencies look to federal law – the provisions of Section 401 – to fulfill their duty to assure that a certifying authority's action has facially satisfied the express requirements of Section 401.[84] The nuances and application of state law are not part of this inquiry and lie outside the authority of the federal agency to evaluate in detail.[85] However, the federal statute leaves undefined several key terms, creating ambiguity around how the federal agency should fulfill its responsibility of assuring whether the certifying authority has complied with the federal statute.

EPA, as the federal agency charged with interpreting the CWA, has proposed additional clarity around these terms to resolve the ambiguities. As discussed below, EPA's proposed rule helpfully and properly interprets critical undefined terms related to scope in order to guide federal agencies in their threshold determination of whether the water quality certification has been obtained, waived, or denied.

INGAA recommends that EPA encourage the federal agency to consult, where appropriate, other federal agencies with permitting responsibilities and expertise for the discharge for which the certification request is sought, including EPA.[86] In particular, where a proposed project requires multiple federal licenses and the review and coordination of multiple federal agencies, the lead federal agency review may not be as focused on the discharge and the potential

[82] *See* 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been *obtained* or has been *waived* as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.") (emphasis added).

[83] *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (federal agencies have "an obligation to determine that the specific certification required by Section 401 has been obtained") (internal citations omitted).

[84] *See id*.

[85] *See id*. ("This obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards."); *see also Am. Rivers v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997) (FERC may not "second-guess the imposition of conditions") (relying on *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians*, 466 U.S. 765 (1984)).

[86] *See* proposed 40 C.F.R. § 121.15.

impacts of the discharge as other federal agencies involved in the review. **INGAA recommends** that EPA encourage lead federal agencies to consult with other federal agencies that have expertise over the proposed discharge or activity on whether the certifying authority's action – including conditions and denials – facially complies with Section 401.

1. Section 401 obliges federal agencies to confirm that certification actions comply with Section 401.

Federal agencies are responsible for confirming that a certifying authority's action under Section 401 facially satisfies the requirements of Section 401.[87] To support federal agencies in this responsibility, EPA has proposed clarifying that any action to grant or deny a certification request must be within the scope of certification and within the established reasonable period of time.[88] EPA has further proposed to clarify the appropriate scope of certification review as well as key elements of a certifying authority's grant or denial of a certification. For example, in the context of a denial, EPA's proposed rule would require that a certifying authority identify the specific water quality requirements with which the proposed project will not comply.[89] This requirement assists federal agencies when making a facial determination whether a certification action comports with Section 401, avoiding the need for the federal agency to delve deeply into the state's action or the application of state law.[90]

EPA's proposed rule properly explains that where the federal agency confirms that the certification action does not comport with the requirements of Section 401 as proposed by EPA and the reasonable period of time has expired, waiver of the Section 401 obligation occurs.[91] Section 401 requires that the federal agency "waive" the certification requirement when the certifying authority "fails or refuses to act" within a reasonable period of time.[92] EPA has interpreted "fails or refuses to act" to include the situation where the "certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time."[93] With this definition, EPA has clarified that the authority to act under Section 401 is limited to actions

[87] *See City of Tacoma*, 460 F.3d at 68.

[88] *See* proposed 40 C.F.R. § 121.5(a).

[89] *See, e.g., id.* at § 121.5(e)(1).

[90] *See City of Tacoma*, 460 F.3d at 68 (recognizing the federal agency obligation to confirm whether a certification action complies with Section 401, without inquiring into every nuance of state law).

[91] *See* proposed 40 C.F.R. § 121.6(c)(2).

[92] 33 U.S.C. § 1341(a)(1) ("If the [certifying authority] fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application.").

[93] Proposed 40 C.F.R. § 121.1(h). A certifying authority is under no obligation to act under Section 401. Its refusal to act can be express or implicit. When its refusal to act is express (*e.g.*, through a letter declining to act on a certification request), the writing should go into the federal record as sufficient basis for the federal agencies to proceed with permitting, without further determinations needed by any federal agency. Where its refusal to act is implicit, the lead federal agency should provide written notification of its determination that the certifying authority has failed to act and that waiver has occurred.

that comport with the terms of Section 401, as determined by the lead federal agency in a facial review of the certifying authority's action on the certification request.

2. Federal agencies should review conditions when called upon to do so.

EPA's proposed rule also provides federal agencies with clarity about the responsibility, when called upon, to confirm that conditions included in certifications have "facially satisfied the express requirements of Section 401."[94] The proposed rule clarifies that, for purposes of Section 401, a condition must fall within the "scope of certification" and must be accompanied by specific information in the certification.[95]

These regulatory provisions will assist federal agencies in making the facial determination of whether, when called upon by the project proponent, a condition complies with Section 401 by reviewing the certifying authority's action and determining whether the action includes the requisite elements of a condition.[96] This review does not require the federal agency to delve into the nuances of the state law authorizing the condition through second-guessing the certifying authority's legal or technical application of the state law, nor does it require the federal agency to evaluate public policy reasons supporting the condition.[97] **INGAA recommends** that the final regulatory language expressly recognize that the federal agency's review of certification conditions is focused on conditions that are called into question by the project proponent.[98]

F. Section 401 Provides Clear Roles on Inspection and Incorporation of Conditions

Section 401 recognizes that, after state certification, there may be a need to review whether the proposed facility or activity will continue to comply with the certification or conditions. The proposed rule provides a regulatory framework for post-certification compliance, through the certifying authority's review of pre-operational activities and the federal agency's incorporation of conditions into the federal permit.[99] **INGAA recommends** that EPA clarify in the regulatory text that these activities are separate and distinct from one another, as explained below. Further, **INGAA recommends** that EPA revise its regulations to more accurately describe these activities as "certification review and incorporation of conditions," rather than enforcement.

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[94] *City of Tacoma*, 460 F.3d at 68.

[95] *See* proposed 40 C.F.R. §§ 121.1(f), 121.5(d).

[96] *See id.* at § 121.8(a)(1) ("If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f) and meet the requirements of § 121.5(d).").

[97] *See Am. Rivers*, 129 F.3d at 110-11 (prohibiting federal agencies from deciding "the substantive aspects of state-imposed conditions").

[98] *See City of Tacoma*, 460 F.3d at 68 ("where public notice has been called into question, we think FERC has a role to play in verifying compliance with state public notice procedures").

[99] *See* proposed 40 C.F.R. § 121.9.

1. Certifying authorities have the authority to "review" the proposed facility or activity prior to initial operation.

Pursuant to Section 401(a)(4), EPA's proposed rule addresses when and to what end a certifying authority may inspect a proposed discharge location after issuance of the water quality certification but prior to receiving federal approval for initial operation. The inspection is appropriately limited to determining whether during operation the discharge will comply with the certification already issued.[100] Section 401(a)(4) applies to the operation of a facility which may result in a discharge to navigable waters, and proposed Section 121.9(a) states that the certifying authority shall be afforded the opportunity to inspect the "proposed discharge" before operation. The interstate natural gas pipeline industry knows of no circumstance where the initial operation of an interstate pipeline resulted in a discharge to navigable waters. Thus, INGAA concludes that Section 401(a)(4) and proposed Section 121.9(a) do not apply to the operation of an interstate pipeline, unless that operation involves a discharge. **INGAA recommends** that EPA clarify that if the initial operation of the facility would not result in a discharge (*e.g.*, the initial operation of interstate natural gas pipelines), then the certifying authority shall not be afforded an opportunity to inspect the facility, pursuant to Section 401, prior to operation.

2. EPA should clarify that the federal agency has the authority to enforce certification conditions contained in a federal permit or license and that certifying authorities may retain independent enforcement authority.

EPA's proposed rule would require an explicit role for federal agencies in the enforcement of certification conditions incorporated into a federal license or permit. **INGAA recommends** that EPA clarify the limits within which the federal agency must act and should recognize that state certifying authorities may retain independent authority to enforce states' legal requirements to the extent incorporated into the federal permit.

When a certifying authority conditions the grant of a certification, those conditions ''shall become a condition on any Federal license or permit'' subject to Section 401.[101] EPA's proposed rule takes the next step and declares that federal agencies would be responsible for enforcing conditions included in a certification that are incorporated into a federal permit or license. However, **INGAA recommends** that EPA clarify that Section 401 does not provide federal agencies with independent authority to enforce those conditions.[102] Rather, a federal agency draws on its own licensing or permitting authority to enforce any provision of the federal license or permit.[103] Moreover, **INGAA recommends** that EPA recognize that, where the condition is

[100] *See id*. at §§ 121.9(a)-(b).

[101] 33 U.S.C. § 1341(d).

[102] Section 401 limits the enforcement authority conferred to the federal agency to suspend or revoke the federal license or permit after the "entering of a judgment" under the CWA that the licensed facility or activity "has been operated in violation of" the enumerated provisions of the Clean Water Act. *See* 33 U.S.C. § 1341(a)(5).

[103] In the case of proposed interstate natural gas pipelines, the federal agency (FERC) draws on its authority under the Natural Gas Act to enforce the provisions of its certificate authorizations. *See, e.g.*, 15 U.S.C. § 717f(c).

predicated on an EPA-approved state water quality law, the certifying authority, which would have the requisite expertise to apply the state law, may have independent authority to enforce the applicable water quality requirements upon which the condition is based.[104] EPA should limit the regulatory text to recognizing that certification conditions shall become conditions of the federal permit or license.

G. The Issuance of General Permits by Federal Agencies Is Supported by an Alternative Definition of "Certification Request"

The proposed rule recognizes that in some cases federal agencies may be project proponents for purposes of submitting a certification request under Section 401. In particular, this can occur when the federal agency issues general permits that provide advance authorization for categories of similar activities with minimal impacts. General permits are a particularly useful tool for ensuring that federal agency resources are focused on authorizations with the greatest potential impact.[105]

When issuing general permits, the federal agency may not have available the same type of information that would be available to a project proponent of an individual project in support of a certification request, nor would the same information be relevant or meaningful to the certifying authority's Section 401 review. For these reasons, EPA has appropriately provided an alternative definition of "certification request" to be used by federal agencies that issue general permits.

INGAA supports EPA's proposal of an alternative approach to the certification request definition for federal agencies that are project proponents of general permits. **INGAA recommends** that EPA consider revisions to the alternative definition of "certification request" to provide federal agencies flexibility regarding the information that is included in the "certification request." For example, the number of discharges expected to be authorized under a general permit may not be available to the federal agency because the permit authorizes a specific activity as opposed to a specific discharge, or because the impact is measured not by discharge, but by acreage of impacts. Similarly, the type, means, and methods used to monitor the future discharges may not be available when a federal agency submits a certification request for a general permit authorizing numerous future activities. **INGAA encourages** EPA to revise the elements of the certification request to provide this flexibility in the context of general permits.

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[104] **INGAA recommends** that EPA clarify that neither Section 401 nor anything in its proposed regulations creates any enforcement authority for states independent from the authority states may otherwise have under other applicable law.

[105] The U.S. Army Corps of Engineers issues several types of general permits, including the Nationwide Permits ("NWP"). *See, e.g.*, Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860 (Jan. 6, 2017). The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects. They authorize a variety of activities, such as utility line crossings, erosion control activities, and stream and wetland restoration activities. INGAA members regularly make use of NWPs whenever and wherever possible to streamline permitting for their construction and maintenance projects. The impacts created by these linear facilities are usually only temporary, do not generally result in a loss of waters of the United States, and involve only minor impacts to the aquatic environment, making these projects suitable for the use of NWPs.

H. EPA Should Include a Modification Provision in the Final Rule

EPA proposes to remove the existing modification provision found at 40 C.F.R. § 121.2(b)[106] because it is "inconsistent with the Agency's role for new certifications," and requests comment on this approach.[107] In the alternative, EPA also solicits comment on whether and to what extent certifying agencies should be able to modify a previously issued certification, for example, to correct an aspect of a certification remanded or found unlawful by a federal or state court.[108] As discussed below, while **INGAA agrees** that EPA should not have an oversight role in the modification process, **INGAA recommends** that EPA retain the modification provision in the final rule, but clarify that modification may only occur in such a manner as may be agreed upon by the project proponent and the federal agency.

1. EPA should clarify that states and tribes may modify a previously-issued certification under certain circumstances.

State and tribal certifying authorities have the necessary authority under the CWA to modify water quality certifications. Although Section 401 does not expressly provide such authority, the CWA also does not provide express authority for EPA to modify permits issued under Section 402 or for the Corps to modify Section 404 permits. Nonetheless, both agencies assume substantial authority to modify the permits they issue so long as they follow their own notification and process procedures. Thus, it is reasonable to conclude that inherent within the power to issue CWA authorizations (such as a water quality certification) is the authority to later modify such authorizations under circumstances established by EPA, the agency charged with administering the CWA.

Section 401, unlike Sections 402 and 404, restricts the time that certifying authorities have to act on certification requests. Thus, certifying authorities that seek to add burdensome certification conditions after the review period has ended and without the project proponent's agreement, should be prevented from taking such action. The reasonable period of time in Section 401(a)(1) was adopted to prevent project-killing delays.[109] That is, it was intended only to force prompt action which, if otherwise delayed, could doom new projects. It was never intended to

[106] 40 C.F.R. § 121.2(b) ("The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.").

[107] 84 Fed. Reg. at 44,117.

[108] *See id*.

[109] The waiver language first appeared in an amendment offered by Congressman Edmondson and approved by the House of Representatives in 1969. *See* 115 Cong. Rec. at 9,259 (starting debate on H.R. 4148, Water Quality Improvement Act of 1969), 9,264-65 (amendment offered and discussed), and 9,269 (amendment accepted) (Apr. 16, 1969). Congressman Edmondson observed that the purpose of the amendment was "to do away with dalliance or unreasonable delay and require a 'yes' or 'no,'" from affected states. *Id.* at 9,264. The only other speaker to address this language observed that it "guards against a situation where the water pollution control authority in the State in which the activity is to be located … simply sits on its hands and does nothing. Any such dalliance could kill a project just effectively as an outright determination on the merits not to issue the required certification." *Id.* at 9,265 (remarks by Congressman Holifield).

prevent certifying agencies from later modifying certifications in order to accommodate project proponents.

Accordingly, changes to certifications offered after the waiver period has expired that do not significantly burden the permittee or project proponent and that adhere to the certifying authority's and federal agency's procedural requirements should not be barred by the reasonable period of time established in Section 401. Thus, modifications that are agreed to by the project proponent and the federal agency – generally, modifications that reduce the burden on the project proponent or facilitate the project – should not be construed as violating or circumventing Section 401(a)(1)'s waiver provision.

2. EPA should not play an oversight role in the modification process.

INGAA supports EPA's proposal to remove the requirement that a certifying agency obtain EPA's agreement to modify certifications. EPA correctly observes in the preamble to the proposed rule that Section 401 does not provide EPA with an express oversight role regarding modifications to Section 401 certifications.[110] Yet, EPA's existing provision includes language mandating that a certifying agency may only modify the certification in such manner as may be agreed upon by the "Regional Administrator." This requirement is unnecessary.

Providing EPA with a decision-making role in the Section 401 process creates practical problems for certifying agencies, permitting agencies, and project proponents. Neither the CWA nor EPA's rules establishes criteria for or the scope of EPA's review of modifications. Likewise, neither the rule nor the Act specifies whether EPA's decision to agree or to withhold agreement constitutes final agency action subject to independent judicial review. It would make little sense that such an action would create a decision potentially subject to review separate from the decisions by the certifying authority or federal licensing or permitting agencies – especially since EPA has no role in overseeing initial Section 401 certifications. EPA can and should eliminate this confusion by removing itself from any role in reviewing Section 401 modifications.

To meet EPA's obligation under Section 401(a)(2) and to determine whether the discharge may affect the quality of the waters of a neighboring state, EPA could follow the same process described in proposed Section 121.10. For example, upon receipt of a request to modify a certification, the federal agency would notify the Administrator. Then, EPA, at its discretion, may determine whether the discharge subject to the proposed modification would affect water quality in a neighboring jurisdiction. If the Administrator determines that the discharge may affect water quality in a neighboring jurisdiction, the Administrator would follow the process outlined in proposed Sections 121.10(c) and (d), and the modification could not be issued until that process concludes.

[110] *See* 84 Fed. Reg. at 44,117.

3. EPA should incorporate the following regulatory text into the final rule.

INGAA recommends that EPA incorporate the existing modification provision at 40 C.F.R. § 121.2(b) into the final rule with the following adjustments noted in bold and stricken language:

> "The certifying ~~agency~~ **authority** may modify the certification in such manner as may be agreed upon by the certifying ~~agency~~ **authority**, **the project proponent, and the federal agency**~~, and the Regional Administrator~~. **The certifying authority may modify the certification for a general permit in such a manner as may be agreed upon by the certifying authority and the federal agency that issued the general permit**."

III. Conclusion

INGAA appreciates your consideration of these comments, and we welcome additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,

Sandra Y. Snyder
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Interstate Natural Gas Association of America

Appendix: Ambiguities in Subsections 401(a) and 401(d)

The central ambiguity of Section 401 arises from the subsections' divergent expressions of the certifying authority's scope of review. The divergence is apparent from the face of subsection 401(a), which uses inconsistent language in its subparts to describe certifying authority reviews and determinations. The ambiguity is exacerbated by yet another formulation in subsection 401(d). Together, these provisions offer related but different formulations that EPA should reconcile – and has reconciled in the proposed rule – according to sound principles of statutory construction and administrative law.

Subsection 401(a)

Congress prescribed in subsection 401(a) the reviews and determinations to be carried out by the certifying authority and, where applicable, the neighboring states. The scope of these reviews and determinations is not uniformly defined, as demonstrated below, and instead creates confusion on what information is subject to review and may be considered in the certifying authority's determination. The competing provisions cannot be harmonized on the plain language of the statute alone.

The paragraphs of Subsection 401(a) discuss the certifying authority's review under Section 401 in at least four different ways.

Paragraph 401(a)(1)

The plain language of paragraph 401(a)(1) provides the certifying authority the ability to grant or deny an applicant's request to certify that the applicant's potential discharges "will comply with the applicable provisions of section 1311, 1312, 1313, 1316, and 1317" of the CWA.[1] If the certifying authority "fails or refuses to act" on a request for certification within a reasonable time, the requirement to obtain a certification is waived.[2] The paragraph enumerates the specific CWA provisions for which the state must certify compliance for the applicant's potential discharges. In short, certifying agencies have the opportunity to review discharges from a project proponent's activity for compliance with these specific enumerated provisions and to make a determination of compliance.

Paragraph 401(a)(3)

Paragraph 401(a)(3) requires that a single certification cover both the construction and the operation of the proposed project whose discharges trigger Section 401. There is an exception where the certifying authority notifies the federal permitting agency that "there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" because of intervening changes in "(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or

[1] 33 U.S.C. § 1341(a)(1).

[2] *Id.*

other requirements."[3] That is, paragraph 401(a)(3) recognizes that certain changes could affect the continuing sufficiency of the certification for purposes of operating discharges.[4] While consistent with paragraph 401(a)(1) in that it refers to the same enumerated provisions (sections 1311, etc.), paragraph 401(a)(3) also requires "reasonable assurance" of compliance rather than using the phrase "will comply," as used in paragraph 401(a)(1).

Paragraph 401(a)(2)

Paragraph 401(a)(2) addresses the role of states that EPA determines may be affected by a discharge from the federal applicant's activity ("Neighboring State"). This paragraph grants a Neighboring State the right to review proposed discharges associated with the federal application and determine if "such discharge will affect the quality of its waters so as to violate any water quality requirements in such State. . . ."[5] The plain language of this paragraph departs from the language in paragraphs 401(a)(1) and 401(a)(3), which both limit the certifying authority's review and determination to the enumerated CWA provisions of sections 1311, 1312, 1313, 1316, and 1317 addressing water quality.

Instead, paragraph 401(a)(2) authorizes the Neighboring State to make a determination whether "<u>any</u> water quality requirements" will be violated.[6] The paragraph does not explain how this phrase relates to the enumerated provisions in paragraph 401(a)(1) or paragraph 401(a)(3). Taken out of context, paragraph 401(a)(2) might be read to give the Neighboring State a broader scope of review than the state (or other certifying authority) from which the discharge originated. A more coherent reading of the three paragraphs together, however, would be that Congress intended "any water quality requirements" to refer to any water quality requirement *within* the enumerated CWA provisions included in paragraphs 401(a)(1) and 401(a)(3).

Paragraph 401(a)(4)

Paragraph 401(a)(4) further confuses the scope of Section 401 review. It provides the certifying authority the opportunity and authority to review, prior to the initial operation of a previously certified facility or activity, "the manner in which the facility or activity shall be operated or conducted."[7] The certifying authority is granted the opportunity to conduct this review to determine whether the "facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements. . . ."[8] This formulation has none of the specificity of the enumerated provisions in paragraph 401(a)(1) and paragraph 401(a)(3), nor does it track the alternative language in paragraph 401(a)(2). Moreover, the language does not explain why the

[3] *Id*. at § 1341(a)(3).

[4] We note that, in the context of interstate natural gas pipeline projects, discharges to navigable waters typically stem from construction activity rather than from regular operation of the constructed pipeline.

[5] 33 U.S.C. § 1341(a)(2).

[6] *Id.* (emphasis added).

[7] *Id*. at § 1341(a)(4).

[8] *Id*.

certifying authority whose certification must match the scope of paragraph 401(a)(1) should review the related facility or activity according to a different scope.

In short, the alternative formulations in various parts of subsection 401(a) create ambiguities concerning a central point: the scope of the certifying authority's review. The competing provisions cannot be harmonized on the plain language of the statute alone.

Subsection 401(d)

Subsection 401(d) authorizes the certifying authority to include, in the certification, limitations and monitoring requirements that become conditions in the federal permit or license subject to Section 401. It introduces additional statutory ambiguity, since it contains yet another formulation of the scope of a certifying authority's review. It requires that certifying authorities include conditions in their Section 401(a)(1) certification that are "necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification."[9] This phrase in subsection 401(d) refers to most – but not all – of the sections enumerated in paragraph 401(a)(1) and paragraph 401(a)(3), uses the "will comply" phrase in contrast to the use of "reasonable assurance" in paragraph 401(a)(3), and adds a wholly new phrase without explanation, namely, "any other appropriate requirement of State law."

[9] *Id*. at § 1341(d).

Attachment A

Interstate Natural Gas Association of America, Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations, Docket No. EPA-HQ-OW-2018-0855, May 24, 2019

Interstate Natural Gas Association of America

Submitted via www.regulations.gov
Docket No. EPA-HQ-OW-2018-0855

May 24, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Constitution Ave., N.W.
Washington, D.C. 20460

Re: Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") respectfully submits these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") request for pre-proposal recommendations on EPA's forthcoming Clean Water Act Section 401 Water Quality Certification rulemaking and guidance efforts, in accordance with Executive Order 13868.[1]

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's member companies transport over 95% of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

INGAA supports effective implementation of the Clean Water Act and the protection of water quality and respects the important role that states and tribes play in ensuring these shared objectives. Section 401 provides states an important and distinct role in the environmental review

[1] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15495 Apr. 15, 2019, https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf.

of interstate natural gas pipelines by federal agencies. INGAA's members are frequent participants in Section 401 processes and continue to be significantly affected by the implementation of Section 401. Accordingly, INGAA and its members can provide concrete input to inform the Agency's efforts pursuant to Executive Order 13868. EPA's work to clarify and guide the administration of Section 401 can materially support the integrity and effectiveness of the Section 401 program.

I. EPA Needs to Take Action to Improve the Efficiency and Consistency of Section 401 Reviews of Interstate Pipeline Projects

Cooperative federalism is best served by clear and harmonious federal and state roles. Section 401 embodies the principle of cooperative federalism, where federal and state governments have distinctive roles appropriate to each. Congress charged EPA with administering the Clean Water Act, including overseeing implementation of the Section 401 program by federal agencies whose permits or authorizations of interstate natural gas pipelines trigger Section 401.[2] States have the opportunity to certify whether discharges from interstate pipelines will comply with federally approved state water quality standards and in doing so can condition the activity to ensure that the discharge will comply with applicable water quality standards.[3]

Recently the federal-state balance has been altered where some states have viewed Section 401 as means of determining which interstate pipeline projects are in the public interest and which are not. This in effect interferes with federal jurisdiction over projects in interstate commerce. For example:

- The State of New York denied water quality certification for the $683 million Constitution Pipeline, nearly three years after receiving the project's initial application, and after Constitution withdrew and resubmitted its request for certification twice.

- The state of New Jersey denied certification for the PennEast pipeline, deeming the application incomplete until the company provided surveys of the entire pipeline route. Landowners and the state itself, however, denied the company access to their property to conduct the required surveys, which forced the company to begin eminent domain proceedings.

- New York denied certification for the Millennium Valley Lateral pipeline project, based on the lack of an analysis by FERC of the downstream greenhouse gas emissions, not water quality concerns.

[2] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.). The Agency, therefore, has a responsibility to define a common framework for Section 401 reviews; *see also* 40 C.F.R. Part 121 (EPA's regulations addressing federal agency implementation of water quality certifications).

[3] Courts have consistently recognized that state participation in the Section 401 process is important, yet bounded. *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (recognizing that the state participation in Section 401 is essential to a scheme of cooperative federalism); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

- The State of Oregon denied water quality certification for the Jordan Cove liquefied natural gas export terminal and its feeder pipeline following the company's responses to multiple requests for additional information.

In other instances, stakeholders opposed to energy infrastructure have pointed to EPA's outdated regulations[4] and guidance that is not consistent with the statute[5] in their litigation, thus adding further confusion to the regulatory process.

Therefore, clarification is needed to provide more predictable and efficient permitting for these vital infrastructure projects.

II. EPA Should Ensure That Implementation of Section 401 Is Consistent With the Statutory Principles and Purpose of Section 401

The language of Section 401 dictates EPA's approach towards critical aspects of the Section 401 program, including the time period for a state's review, the proper scope of review for acting on a Section 401 request, and how the Section 401 certification requirement is waived. EPA's new guidance and rulemaking should address the following points based on the statutory language of Section 401. As EPA leads its upcoming interagency review on Section 401, EPA should work with the other federal agencies to ensure their regulations, guidance, and implementation of Section 401 are consistent with these statutory principles.[6]

[4] In 1970, Congress enacted Section 21 of the Federal Water Pollution Control Act ("FWPCA"), which contained a state certification requirement that predated Section 401. In 1971, EPA promulgated 40 C.F.R. Part 121 to implement Section 21 of FWPCA. 36 Fed. Reg. 2516 (Feb. 5, 1971) (proposed rule); 36 Fed. Reg. 8563 (May 8, 1971) (final rule). In a rulemaking to revise EPA's Section 401 procedures related to Section 402 of the Clean Water Act, EPA recognized that the regulations now found in Part 121 needed revision because the "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and has never been updated." 44 Fed. Reg. 3265, 32880 (June 7, 1979).

[5] For example, EPA's Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (April 2010 Interim) suggests that the time period for review begins with the state's determination that the request is "complete," a concept that is not supported by the statute and that was recently rejected by the courts. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

[6] For example, the Assistant Secretary of the Army (Civil Works) recently confirmed that when the U.S. Army Corps of Engineers is the lead federal agency, the Corps determines the time period for review and that time period begins upon receipt of the request. *See* Memorandum for the Chief of Engineers, USAGE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines (Dec. 13, 2018) (attached as Exhibit 1).

A. The time period for review begins with the "receipt" of the request and runs for a reasonable period of time (at most up to one year).

Section 401 balances the state's interest in a thorough evaluation of potential water quality impacts with the federal government's obligation to act promptly on permit applications. It does so in part by imposing a clear time limit for the state's action:

> If the State . . . fails or refuses to act on a request for certification, **within a reasonable period of time (which shall not exceed one year) after receipt of such request**, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. § 1341(a)(1) (emphasis added). "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

The statutory language creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of review. *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018). Events subsequent to the state's receipt, such as the state's validation of the completeness of the request, cannot delay the start of the time period for review. *See id*. Neither can the applicant and the state agree to delay the start of the review period. *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at P 41 (2018) ("The execution of an agreement between an applicant and a certifying agency does not entail a 'receipt' by the agency.").[7]

Following the "receipt of the request," states have a "reasonable period of time (which shall not exceed one year)" to act on a request before waiver occurs. 33 U.S.C. § 1341(a)(1). The lead federal agency determines the reasonable period of time.[8] *See Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017) (holding that the lead federal agency decides whether waiver has occurred). Although the statute provides a full year as the absolute maximum amount of time, the lead federal agency could determine a reasonable period of time to be less than one year.[9] *See Hoopa Valley Tribe v. FERC,* 913 F.3d 1099, 1103-04 (D.C. Cir. 2019).

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[7] In the case of the Northern Access Pipeline, the State of New York received the request for water quality certification on March 2, 2016. The applicant and the state later agreed in a letter that April 8, 2016 would serve as the date "on which the application was deemed received" by the state. The state denied the water quality certification request on April 7, 2017. FERC, in its capacity as the federal lead agency, determined that New York failed to act on the water quality certification within the immutable one-year period established by the statute as the maximum period of time for state action on a request for certification—in this case, one year from the request received on March 2, 2016—and that the Section 401 obligation was therefore waived. *See Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at PP 35, 42 (2018).

[8] A similar approach is taken in the Administration's One Federal Decision Implementation Memorandum, which instructs the lead federal agency to coordinates all pertinent schedules. *See* Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

[9] Both EPA and the Army Corps of Engineers have determined that a reasonable period of time should generally be less than one year. *See* 40 C.F.R. § 121.16(b) (6 month time period); 40 C.F.R. § 124.53(c)(3) (60 day time period); 33 C.F.R. § 325.2(b)(ii) (60 day time period).

The statutory review period begins with a state's receipt of the request and ends when the lead federal agency determines a reasonable period of time has occurred—a time limit that cannot be circumvented or avoided. Just recently, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the practice of withdrawing and refiling the same Section 401 request in an attempt to restart the review period for the same project. *See Hoopa Valley*, 913 F.3d at 1104 (holding that the withdrawal and resubmission scheme "serves to circumvent a congressionally granted authority"). Imposing pre-consultation or pre-filing requirements before a state will consider an application is similarly flawed, since it purports to control when the review period begins, rather than following the statute's direction.

In providing the states a role during the federal permitting process, Congress was clear that the states' role was temporally limited to a reasonable period of time, not to exceed one year, from the date of receipt of the certification request. EPA should provide clear direction on this point.

B. A state's review under Section 401 is properly focused on whether the discharge will comply with applicable water quality standards.

Section 401 focuses the state's role on protecting water quality under the Clean Water Act. Specifically, under Section 401(a)(1), the scope of the state's inquiry into whether to grant or deny the certification is whether the "discharge" will comply with the "applicable provisions" of Sections 301, 302, 303, 306, and 307 of the Clean Water Act:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . **that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title**.

33 U.S.C. § 1341(a)(1) (emphasis added). The statutory text limits the state's inquiry on whether to grant (or deny) the certification request to the question of whether the *discharge* will comply with the applicable provisions. *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711-12 (1994) ("Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges.").

C. When imposing conditions, a state may look to the applicable provisions of the Clean Water Act or any other appropriate requirement of state law related to water quality.

Once the state determines that a certification can be granted under Section 401(a)(1), Section 401(d) of the statute requires that a certification set forth limitations and monitoring requirements necessary to assure that discharges from a federally authorized activity will comply with Sections 301, 302, 303 (as incorporated by Section 301), 306, and 307 of the Clean Water Act, as well as "any other appropriate requirements of State law." *Id*. at § 1341(d). Given the overall focus of the Section 401 statutory program, the phrase "requirements of state law" should be interpreted as referring to a state water quality law that provides a standard or requirement to be met, not a prohibition on action, such as a prohibition on interstate natural gas pipelines. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("This is plainly true. Section 401(d),

reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another.").

D. EPA should clarify that the lead federal agency has the authority and obligation to make waiver determinations.

The statutory language of Section 401 prohibits states from indefinitely delaying issuance of a federal permit by requiring a state to act within a reasonable period of time following the receipt of the request:

> **If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time** (which shall not exceed one year) after receipt of such request, **the certification requirements of this subsection shall be waived** with respect to such Federal application. **No license or permit shall be granted until the certification required by this section has been obtained or has been waived** as provided in the preceding sentence.

33 U.S.C. § 1341(a)(1) (emphasis added); *see also Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 698-99 (D.C. Cir. 2017) ("If the State fails to act within that period, the Act's 'certification requirements' are deemed 'waived,' such that the pipeline no longer needs a water-quality certificate to begin construction.").

When a state has not acted upon a request for certification pursuant to its authority under Section 401, the lead federal agency is the entity called to find that the requirement for certification has been waived. *See Millennium Pipeline*, 860 F.3d 696, 700 (D.C. Cir. 2017) (instructing project applicants to "present evidence of waiver" directly to the lead federal agency). A state is considered to have acted upon a request for certification only where it has complied with the terms of Section 401. *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (quoting 33 U.S.C. § 1341(a)(1)) ("FERC . . . may not act based on any certification the state might submit; rather, it has an obligation to determine that the specific certification 'required by [section 401] has been obtained,' and without that certification, FERC lacks authority to issue a license."). Because a federal agency must withhold its license or permit until the state has acted within a reasonable period of time, the lead federal agency must confirm whether the state action has satisfied the express requirements of Section 401—by issuing a decision within a reasonable period of time that focuses on whether the discharge complies with applicable water quality standards. *See City of Tacoma, Washington,* 460 F.3d at 68 (federal agency is required "at least to confirm that the state has facially satisfied the express requirements of section 401").[10]

[10] The obligation to determine whether the state has facially satisfied the express requirements of Section 401 can be contrasted against a federal agency's review of the substantive aspects of a certification. *See Am. Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) ("While [a Federal agency] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the [agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401").

Once the lead federal agency determines that waiver has occurred the certification requirement "falls out of the equation," *Millennium Pipeline Co.,* 860 F.3d at 700, and all other federal agencies can and should move forward with processing their reviews and authorizations.

This approach is consistent with Executive Order 13807 and the One Federal Decision Memorandum of Understanding, which commit the Executive Branch to a single, coordinated approach to project reviews on an agreed timetable under direction of a lead federal agency.[11] The U.S. Army Corps of Engineers has already incorporated this concept into its One Federal Decision Implementation Plan. Thus, where the Army Corps of Engineers is not the lead federal agency, which is the case for interstate natural gas pipelines requiring FERC approval, the Army Corps will "defer to the determination of the lead agency, determine that the certification has been waived, and proceed accordingly." U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance With Executive Order 13807, page 8, Sept. 26, 2018 (attached as Exhibit 2).

III. Conclusion

Following the direction of the statute itself, EPA should set clear guideposts for federal, state and tribal authorities to implement Section 401 in a manner that respects and supports the important and distinctive roles of each participant in the balance of cooperative federalism. Each of the points noted above merits specific inclusion in EPA's efforts under Executive Order 13868 and will inure to the benefit of the nation's waterways as well as the public's vital interest in interstate natural gas pipelines.

INGAA appreciates your consideration of these comments and we welcome additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,

Sandra Y. Snyder
Senior Regulatory Attorney, EH&S
Interstate Natural Gas Association of America

[11] *See* Executive Order 13807, *Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*, Aug. 15, 2017, 82 Fed. Reg. 40463 (Aug. 24, 2017); Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018).

Exhibit 1

Memorandum for the Chief of Engineers, USAGE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines (Dec. 13, 2018)

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

DEC 13 2013

MEMORANDUM FOR THE CHIEF OF ENGINEERS

SUBJECT: USACE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines

1. **BACKGROUND:** I am conducting a thorough review of the Army's Civil Works Program, in coordination with my staff and the Office of the Army General Counsel, to ensure that the Army is executing its program consistent with existing policies and legal authorities. Section 10 of the Rivers and Harbors Act of 1899 (RHA) (33 USC § 403) requires authorization from the Secretary of the Army, acting through the Chief of Engineers, for work in and the construction of any structure in or over any navigable water of the United States. Section 404 of the Clean Water Act (CWA) (33 USC § 1344) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into navigable waters. The Secretary of the Army, acting through the Chief of Engineers, works closely with the Administrator of the Environmental Protection Agency (EPA) in developing policy and guidelines to effectuate the Section 404 program. The Army and EPA work together to provide certainty for the general public in the process.

As part of reviewing the Army's program, I have identified three areas in which guidance to United States Army Corps of Engineers (USACE) districts and divisions can help achieve nationwide consistency and adherence to our existing regulations, policy, and guidance: (i) the duration of permits and jurisdictional determinations; (ii) setting reasonable timeframes for states issuing water quality certifications under section 401 of the CWA; and (iii) the application of the 404(b)(1) guidelines (Guidelines) to proposed development projects.

2. **DISCUSSION**

a. Duration of permits and jurisdictional determinations

I understand that there are situations in which USACE districts have issued individual permits with expiration dates that did not coincide with the proposed dredged and fill activity being authorized. An example would be if the proposed single and complete development project would take fifteen years to construct, yet the proffered permit is only for a five-year period. The expiration of a permit prior to the completion of the proposed activity may be inconsistent with our existing regulations and can cause undue hardship on permittees by requiring them to submit a request for a time extension or in some cases a new application prior to the completion of the authorized project.

District Engineers or their designees (all such persons referred to hereinafter as "District Engineer") are authorized and required to issue or deny permits in accordance with the requirements of the relevant statutory authorities and USACE regulations. This authority includes the ability to determine the duration of the permit based on the proposed activity being authorized (33 CFR § 325.6). Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration...will specify time limits for completing the work or activity (33 CFR § 325.6(c)), thereby limiting the duration for which a permit is valid. The regulation also states that the date established by the issuing official will be for a reasonable time based on the scope and nature of the work involved. Considerations under this guidance may include the overall impacts associated with the project, ease of accessibility and construction methods, work type, and other factors. Pursuant to this guidance, the District Engineer, shall ensure that each permit is granted for a time period sufficient for the permittee to complete the work specified in the application. In making this determination, District Engineers shall ensure they consider the materials provided by the applicant and any request by the applicant for a permit timeframe. This guidance does not apply to general permits, which are limited by the Clean Water Act to a five-year duration (33 USC § 1344(e)). Additionally, this directive does not apply to permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters.

Pursuant to existing guidance and policy, jurisdictional determinations and delineations shall remain valid for the duration of a permit (including any time extensions). Regulatory Guidance Letter (RGL) 16-01 states, among other things, that approved jurisdictional determinations will remain valid for a period of five years (RGL 16-01 ¶ 3(b)). However, Paragraph 3(g) of RGL 05-02 instructs that "jurisdictional delineations associated with issued permits and/or authorization are valid until the expiration date of the authorization/permit." Therefore, District Engineers shall align the duration of all jurisdictional determinations and delineations with the duration of the issued authorization or permit. In the event an extension is requested for a permit pursuant to 33 CFR § 325.6(d), any previously granted jurisdictional determination or delineation concurrence associated with the issued permit shall remain valid for the duration of any subsequent permit time extension and no new jurisdictional determination or delineation will be required unless the permittee fails to obtain an extension before expiration of the permit. This policy shall apply to all permit extension requests pending when the final USACE guidance is issued. USACE shall immediately draft guidance based on this directive. Such draft guidance shall be submitted to this office for review within 45 days from the date of this issuance.

USACE shall also immediately begin evaluating the five-year period for which stand-alone approved jurisdictional determinations remain valid as stated in RGL 16-01 ¶ 3(b)(3). Specifically, USACE shall evaluate and provide an analysis based upon the best available science and its recommendation as to whether it would be appropriate to extend the five-year period and, if an extension is determined to not be appropriate, what the reasons are for such a conclusion. Such analysis could include a consideration for how long a change in site conditions may take to modify the extent of wetlands, timeframe practices used by Regulatory for other purposes, and other agency delineation practices for timeframes, such as USDA. Such recommendation shall be submitted to this office for review within 45 days from the date of this issuance.

b. Timeframes for CWA Section 401 Water Quality Certifications

Section 401 of the CWA requires any applicant for a license or permit to conduct any activity that will result in any discharge into navigable waters provide the permitting agency a certification for the state in which the proposed activity will take place. The certification should state that the proposed discharge will comply with certain provisions of the CWA related to state water quality effluent limitations (CWA Sections 301, 302, 303, 306, and 307). If the state fails or refuses to act on such a request for certification within a reasonable period of time (not to exceed one year), after receipt of such request, the certification requirements of Section 401 shall be waived. With regard to the Army's issuance of CWA Section 404 permits, no permit shall be issued unless the required certification has been obtained or waived.

33 CFR § 325.2 sets forth procedures for incorporating this requirement into the Army's permitting process. If a CWA Section 401 certification is required, the District Engineer shall notify the applicant and obtain from the applicant or the certifying agency a copy of such certification, unless the requirement is waived. Section (b)(ii) provides that a waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty (60) days after receipt of such a request unless the District Engineer determines a shorter or longer period is reasonable for the state to act. I emphasize the fact that, absent special circumstances identified by the District Engineer, Army regulations provide that the certifying agency has sixty (60) days to act on a request for a Section 401 water quality certification upon *receipt* of such request. Only in special circumstances should a District Engineer determine a longer timeframe than sixty (60) days is reasonable (but not to exceed one year).

I understand that it has been standard practice in some USACE districts to give states an entire year to act on a Section 401 request. Such an approach is inconsistent with our existing Army regulations. The one-year period set forth in the CWA sets forth the

outer bounds of a time period on a decision by the state and should not be used as a default timeframe for a state's decision. Additionally, District Engineers are reminded that under Section 401, the time period for a state's review begins upon receipt of the request by the applicant.

The default time period will be sixty (60) days unless the District Engineer establishes that circumstances reasonably require a period of time longer than sixty (60) days. USACE shall immediately draft guidance based on this directive establishing criteria to provide District Engineers for identifying reasonable timeframes for requiring states to provide Section 401 water quality certification decisions. The reasonableness of the timeframe may be based on the type of proposed activity, complexity of the site that will be impacted, or other factors as determined by the District Engineer. I note that the regulation states that the District Engineer will base the determination of a longer reasonable period of time on information provided by the certifying agency. However, that does not require the District Engineer to automatically accept such information and approve a longer timeframe. The District Engineer will take the information provided by the certifying agency into consideration, along with the other factors identified under this effort, but the ultimate decision on timeframe rests with the District Engineer. A certifying agency's request for additional time that is based on workload or resource issues or that they do not have enough information to proceed would not be valid reasons for consideration. Such draft guidance shall be submitted to this office for review within 45 days from the date of this issuance.

c. Application of 404(b)1 Guidelines

Section 404(b)(1) of the CWA requires the EPA Administrator to, in conjunction with the Secretary of the Army, develop guidelines for evaluating the specification of disposal sites associated with discharges of dredged or fill material into jurisdictional waters. These guidelines, set forth in 40 CFR § 230, are designed to avoid the unnecessary filling of wetlands and other aquatic resources and prohibit discharges where less environmentally damaging practicable alternatives exist. The Guidelines specifically provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem" (33 CFR § 230.10(a)). Part 230.1(c) provides that "[f]undamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." Based on these criteria, USACE is required to conduct an alternatives analysis on permit applications.

To accomplish this, the applicant must establish the project purpose and need from which the overall project purpose will be identified by USACE. The overall project purpose should be defined specifically enough to address the applicant's needs and geographic area of consideration for the proposed project, but not so narrow as to preclude a proper evaluation of alternatives. USACE uses a sequential approach in evaluating alternatives, including off-site and on-site alternatives to avoid aquatic impacts to the extent practicable; alternatives and modifications to minimize remaining impacts; and then compensatory mitigation to replace the functions and values of aquatic resources that are unavoidably impacted. USACE must identify and evaluate practicable alternatives to the proposed project that achieves the overall project purpose while avoiding/minimizing impacts to waters of the United States. This approach and the application of this criteria can be challenging in situations where the project purpose is not clearly defined because a proposed development activity may not have all relevant information identified yet.

Joint EPA and Army guidance makes clear that although the Guidelines are regulatory in nature, a certain amount of flexibility is reserved for the decision-maker in applying these Guidelines and making a determination to whether the requirements have been satisfied.[1] Therefore, a certain level of unknown regarding proposed project specifics may be acceptable based on such flexibility, as long as an appropriate alternatives analysis may be accomplished.

There is inconsistency between districts as to whether a proposed project is considered "speculative" in nature. I understand that various USACE districts take differing approaches to performing the required alternatives analysis for proposed projects and require varying levels of specificity. In some instances, once a project purpose has been identified, districts may require additional information that may be unnecessary to complete an alternatives analysis. The absence of such additional information, which an applicant may reasonably not yet have during the review process, should not preclude the district's review if such information is unnecessary for completing an adequate alternatives analysis pursuant to the Guidelines. For example, knowing that a proposed project is for construction of a department store should be sufficient without needing to know which company's store it would be.

Consistent with this guidance, District Engineers shall ensure that in performing required alternatives analyses under the Guidelines that they are using the flexibility envisioned in the Guidelines in making determinations on the scope of alternatives that

[1] EPA and Army Memorandum: Appropriate Level of analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements.

should be considered and the specificity of information required in performing the analysis. Additionally, the amount and detail of information in an alternatives analysis and the level of scrutiny required by the Guidelines is commensurate with the severity of the environmental impact and the scope/cost of the project. Analysis of projects proposing greater adverse environmental effects need to be more detailed and explore a wider range of alternatives than projects proposing lesser effects.

USACE shall immediately draft guidance based on this directive. Such draft guidance shall ensure consistency across the districts on application of the Guidelines and be submitted to this office for review within 45 days from the date of this issuance.

3. I look forward to receiving your draft guidance on each of these issues and after this office performs its review and approval, issuance of the guidance to ensure continued consistency and predictability as we perform our vital mission to protect our nation's waters.

Questions regarding this delegation may be directed to Stacey M. Jensen, Office of the Assistant Secretary of the Army for Civil Works at stacey.m.jensen.civ@mail.mil or 703-695-6791.

Sincerely,

R.D. James
Assistant Secretary of the Army
(Civil Works)

Exhibit 2

U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance With Executive Order 13807, Sep. 26, 2018

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-ZB

26 September 2018

DIRECTOR'S POLICY MEMORANDUM 2018-12

SUBJECT: Implementation of Executive Order (EO) 13807 and One Federal Decision (OFD) within Civil Works Programs

1. References.

a. Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807* (MOU), 9 April 2018.

2. Background. Executive Order 13807 requires federal agencies to process environmental reviews and authorization decisions for "major infrastructure projects" as One Federal Decision. One of the criteria for a "major infrastructure project" is that the lead agency has determined the need to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The goals of One Federal Decision are to:

a. Reduce average time for environmental reviews, authorization decisions and consultations to an average of two years for all federal agencies;

b. Achieve One Federal Decision through preparation of a single EIS and single ROD for covered projects; and

c. Provide greater transparency, predictability and timeliness for federal review and authorization processes for major infrastructure projects.

3. Purpose. To establish policy pertaining to EO 13807 and "One Federal Decision" across all Civil Works functional areas, and direct broad implementation of the EO's concepts.

4. Applicability. This memorandum is applicable to all HQUSACE, Major Subordinate Commands (MSC), districts, and field operating activities with Civil Works functions which may include, but are not limited to feasibility studies, dam safety modification

studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects.

5. Policy. EO 13807 applies to a variety of Civil Works actions which may include, but are not limited to, feasibility studies, dam safety modification studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects. The EO applies to those actions that require the preparation of an EIS under NEPA, and for which a Notice of Intent was issued after 15 August 2017. USACE Civil Works will comply with EO 13807 across its functional areas and responsibilities.

a. Ongoing Civil Works lines of effort such as embracing and operationalizing risk-informed decision making; justifying, and documenting decisions at the most appropriate levels; and synchronizing Headquarters functions to support MSC and district project delivery further advance the goals of EO 13807.

b. EO 13807 is directed at improving accountability within environmental reviews for major infrastructure projects, its effects are broad reaching across multiple disciplines. All Civil Works functional areas including Planning, Engineering and Construction, Operations, and Programs and Project Management will coordinate and apply risk-informed decision making in order to better integrate environmental requirements and conduct environmental reviews to achieve the two-year timeline goal in EO 13807.

c. One of the foundational concepts behind EO 13807 is early, frequent, and meaningful coordination with federal agencies, state agencies, and tribes that may have special expertise or authority for review of major infrastructure projects. Meaningful engagement is an important tenet within SMART Planning and within the Regulatory Program and will be implemented broadly, including for those infrastructure projects requiring preparation of an Environmental Assessment.

6. Direction. USACE will pursue a variety of specific actions to fully implement EO 13807. Guidance attached to this memorandum will be aligned and conducted concurrently with the implementation plan developed for risk-informed decision making per the Director's Policy Memorandum issued on 3 May 2018.

a. Implementation guidance has been prepared for EO 13807 specific to Civil Works Programs, including the Regulatory Program. A memorandum providing guidance for Regulatory permit actions is attached to this memorandum as enclosure 1. Implementation guidance specific to feasibility and other planning studies is attached to this memorandum as enclosure 2.

b. EO 13807 directs the Chief Environmental Review and Permitting Officer (CERPO) to serve as the agency official responsible for compliance with EO 13807. To facilitate implementation and compliance for Regulatory Permit actions, each MSC will designate a Senior Environmental Review Officer for the respective USACE MSC (i.e.,

senior agency official) for the purposes of elevation procedures, functional understanding and oversight of the application of this guidance, and interaction with the USACE CERPO.

c. Districts are responsible for identifying which Civil Works actions are "major infrastructure projects" in the context of EO 13807 and then notifying the MSC and HQUSACE of the determination. Districts are also primarily responsible for monitoring and executing project schedules consistent with EO 13807 requirements and reporting the status of milestones through the appropriate MSC to HQUSACE. Further guidance will be forthcoming from the Office of Management and Budget on how agencies will track major infrastructure projects on the Federal Agency Portal of the Permitting Dashboard and how OMB will review agency performance on a quarterly basis.

7. Proponent. The proponents for this memorandum are Thomas P. Smith, P.E., Chief, Operations and Regulatory Division, at (202) 761-1983 and Joseph Redican, Acting Chief of Planning and Policy Division, at 202-761-4523.

Encls

JAMES C. DALTON, P.E.
Director of Civil Works

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-CO-R

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (MOU), 9 April 2018.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

2. Purpose

This memorandum provides guidance to MSCs and districts on implementing EO 13807 for projects where USACE District Regulatory is a lead or cooperating agency involved in preparing an EIS and ROD for a covered major infrastructure project. This guidance does not replace or contradict requirements of the National Environmental Policy Act (NEPA) or USACE regulations.

3. USACE Involvement

Districts will be involved in projects subject to EO 13807 in two ways: 1) as a cooperating agency when another federal agency has determined to the applicability of EO 13807 for a project that includes regulated work in waters of the U.S., and 2) where USACE is the lead agency for the preparation of an EIS subject to EO 13807 for a major infrastructure project. Lead agencies make the determination whether to prepare an EIS, as well as whether a proposed project is a "major infrastructure project." Districts must carefully consider whether infrastructure projects will be subject to EO 13807, including a two-year Permitting Timetable and/or One Federal Decision that includes a single ROD prepared jointly by all involved Federal agencies. Note that when an infrastructure project has been determined subject to EO

13807 the two-year Permitting Timetable applies. One Federal Decision will also apply[1], unless the required permit type is a Nationwide or Regional General Permit where the USACE NEPA obligation has already been met. USACE involvement and role will be based on the criteria below for lead and cooperating agency status.

Pre-application discussions with prospective applicants are likely and appropriate prior to a formal determination that a project is subject to EO 13807. For this reason, the pre-application phase is specifically identified below as an important environmental review process activity.

A. **USACE as lead agency:** Only major infrastructure projects are subject to EO 13807. To determine whether a project meets the definition of major infrastructure project, the criteria below must be met:

   (1) USACE as lead agency has received, or expects to receive, a complete permit application for an infrastructure project (see Definitions section) and determined that an EIS will be prepared;

   (2) USACE as lead agency has determined that multiple federal agency authorizations are required. Required Federal agency consultations to comply with ESA and EFH meet the definition of authorization;

   (3) USACE as lead agency has determined the permit applicant/project sponsor has identified the reasonable availability of funds to prepare the EIS and to construct the project. The burden of demonstrating the reasonable availability of funds is on the project sponsor. Project sponsors may meet this burden by submitting a finance plan showing the estimated costs of the project and the available sources[2] from which the project sponsor anticipates meeting the costs.

B. **USACE as cooperating agency:** When another federal agency has made a determination to prepare an EIS, has identified itself as the lead agency, has determined the project is subject to EO 13807, has requested USACE serve as a cooperating agency[3], and when USACE has jurisdiction and/or special expertise:

   (1) USACE will agree to serve as a cooperating agency[4], regardless of whether a complete application has been received;

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[1] Exceptions to the single ROD for multiple agencies are described in Section XIII of the MOU.

[2] Districts will accept at face value project sponsors' demonstration of the reasonable availability of funds, including consideration of sponsors' information regarding any 'specific' funds for construction as well as 'fund sources' likely to be available for construction.

[3] In the event that a district receives an application for a major infrastructure project that will require an Individual Permit, but for which the lead agency has not requested USACE to serve as a cooperating agency, districts must consult with the lead agency pursuant to the MOU (Section VI. Determination of Lead and Cooperating Agencies).

[4] The EO and MOU reference "participating" agency as established in surface transportation law (P.L. 6002 §139) and referenced in FAST-41. The Corps will be involved in preparation of an EIS only when the agency has jurisdiction by law and/or special expertise (40 CFR §1501.5 and §1501.6). On this basis, USACE will serve as lead or cooperating, but not participating agency.

(2) Districts will recognize that the lead federal agency has already considered criteria to determine the project represents a major infrastructure project subject to EO 13807;

(3) The level of engagement as a cooperating agency should be commensurate with the scope of impacts subject to USACE authorities. When the applicant's proposed impacts to Waters of the U.S. will qualify for an existing Nationwide or Regional General Permit, USACE Regulatory obligations under NEPA have already been satisfied. On this basis, USACE contributions as a cooperating agency on the preparation of the EIS should be sufficient to assist the lead agency with accurate information concerning Waters of the U.S. to be presented in the EIS.

As described in the MOU and as applicable to requests from all Federal agencies, USACE will serve as a cooperating agency for Federal Energy Regulatory Commission (FERC) proceedings when requested, and may only decline a request when USACE has no jurisdiction by law.

For major infrastructure projects where Federal Highway Administration (FHWA) is the lead agency, USACE will serve as a cooperating agency pursuant to NEPA, the EO, and the MOU. On February 15, 2018, USACE entered in a Working Agreement[5] with FHWA which included a coordination process designed to meet the requirements of EO 13807. For such projects, USACE will cooperate with FHWA according to the process outlined in the Working Agreement.

4. Environmental Review Process Activities: Define and Control Scope to Support Risk-Informed Decision Making

One of the fundamental goals of EO 13807 is to reduce average time for environmental reviews and authorization decisions to an average of two years for all Federal agencies involved. To consistently achieve this goal, districts will incorporate risk-informed decision making processes in all phases of environmental review, including pre-application preparation, scoping, impact analyses and permit decisions. Risk-informed decision making does not mean simply accepting heightened legal risk as a way to hasten the overall process without careful consideration of agency obligation. Rather, it means critically considering the portions of a proposal that are within USACE authority, determining information needs and requesting information relevant to agency authority(s), and performing sufficient and timely analyses directly relevant to required USACE decisions. Importantly, this means making decisions not to undertake detailed analyses[6] that do not affect or relate to USACE permit decision

[5] Working Agreement Among The United States Coast Guard, The United States Army Corps of Engineers, The United States Environmental Protection Agency, The United States Fish and Wildlife Service, The National Oceanic and Atmospheric Administration and The Federal Highway Administration To Coordinate and Improve Planning, Project Development, and the National Environmental Policy Act Review and Permitting for Major Infrastructure Projects Requiring the Preparation of an Environmental Impact Statement.

[6] Consistent with requirements in NEPA, the EIS must fulfill the obligation to identify and disclose any significant effects that are likely to result from the proposed project. However, identification and disclosure of likely effects

processes. Therefore, even when the "single EIS" scope of analysis for all combined cooperating agencies extends to the applicant's entire project, USACE will focus on addressing scoping items relevant to agency responsibility.

The environmental review process activities in this section are broadly applicable when the applicant's proposed work will require an Individual Permit, and specifically when USACE is the lead agency. When acting in a cooperating agency role, districts will defer to the lead agency to accomplish NEPA process activities, while USACE-specific requirements for General and Individual Permits will remain district responsibilities.

A. Pre-application phase – the pre-application phase is the appropriate time to consider whether the prospective project is likely to require an EIS, require multiple federal authorization decisions, and will have the reasonable availability of funds to be constructed should a favorable permit decision result. If these criteria are likely to be met, USACE should consider requesting relevant Federal agencies to be included in further pre-application meetings to facilitate the environmental review.

   As part of pre-application meetings with the prospective applicant, district Regulatory will indicate USACE authorities based on the prospective applicant's description of the work to be proposed. After establishing a mutual project-specific understanding of the agency's authority and environmental review responsibilities, USACE should advise the prospective applicant of the type of information and level of detail required to fully inform the USACE evaluation. This important phase of information sharing will lead to applications being complete upon receipt, fewer information requests, and more efficient Permitting Timetables. Regulatory project managers will advise prospective applicants that proposed alterations or temporary or permanent occupation or use of any USACE federally authorized Civil Works project will require review and permission pursuant to Section 14 of the Rivers and Harbors Act (a.k.a. Section 408 review), and must engage district Section 408 counterparts to ensure their involvement in project review[7]. Similarly, if a project will involve Federal property owned or managed by USACE, review and approval for encroachment/ involvement will be required by the USACE Real Estate Division.

B. Initial application review and scoping preparation phase – a public notice must be issued within 15 days after receipt of a complete permit application. The public notice does not have to state whether USACE has made a determination to prepare a Draft EIS. Rather, the public notice may state that the district engineer is considering whether an EIS should be prepared and will consider public comments in making the determination.

   When USACE has agreed to serve as a cooperating agency on the preparation of an EIS and a complete application is received at the district, the public notice for an

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outside agency authority should be only briefly summarized, with no further detailed studies or analyses performed or included in the EIS.

[7] Regulatory and 408 Program coordination is required pursuant to the Director's Policy Memo #2018-10, "Strategy for Synchronization of the Regulatory and 408 Programs", dated 17 August 2018.

Individual Permit can identify the lead agency and state that USACE is already cooperating. If the proposed work will qualify for a General Permit, Districts will review the application and finalize qualifying authorizations according to existing timeline requirements for Nationwide and Regional General Permits.

C. Determination to Prepare an EIS – this determination will be made consistent with NEPA regulations at 40 CFR 1501.4 and USACE regulations at 33 CFR 325 Appendix B. After a determination has been made to prepare an EIS as the lead agency, USACE must notify the applicant in writing, including notification that the project is subject to EO 13807 and establishing that third party contract procedures described at 33 CFR 325 Appendix B apply[8].

When USACE is a cooperating agency, the decision to prepare an EIS is a lead agency responsibility.

D. Select Third Party Contractor – USACE regulations[9] provide for use of third party contractor assistance for the preparation of an EIS. Districts must work closely with applicants to identify candidate contractors and then must fulfill the agency responsibility of solely selecting the contractor to avoid any conflict of interest.

When USACE is a cooperating agency, USACE does not have a role in selecting the third party contractor.

E. Prepare Draft Permitting Timetable – A draft Permitting Timetable will be prepared for use in coordinating cooperating agency requests and preparing for scoping, as well as for identifying and scheduling additional information needs. An example two-year Permitting Timetable with required milestones is attached.

When USACE is a cooperating agency, the lead agency will be responsible for preparing and distributing the Permitting Timetable.

F. Request cooperating agency involvement – USACE will request other federal agencies with required authorization decisions and/or special expertise to serve as cooperating agencies. This request will be in writing and should include the draft Permitting Timetable for cooperating agency use. Districts will allow cooperating agencies reasonable time to review the draft Permitting Timetable and attach their respective agency tasks with required timelines. This will allow the lead agency (USACE) to complete the draft Permitting Timetable for use in scoping[10].

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[8] Districts should consider whether project-specific MOAs will be executed with the applicant to clearly establish communication/coordination protocols that maximize information exchanges and preserve the third party contract arrangement.

[9] 33 CFR 325 Appendix B; 40 CFR 1506.5(c).

[10] Pursuant to Section VII A.2. of the MOU, lead agencies must initially consult cooperating agencies for input to the Permitting Timetable. After the Permitting Timetable includes the tasks and timelines for each Federal agency with a required authorization decision, cooperating agencies must respond within 10 days.

When USACE is a cooperating agency, USACE will receive the lead agency's request to contribute USACE environmental review tasks and timelines to the draft Permitting Timetable prepared by the lead agency.

G. Perform Data Gap Analysis – Following selection of a third party contractor, a data gap analysis should be conducted to identify and request additional applicant information to inform the environmental review[11]. Upon receipt of requested information directly relevant to agency decision authority(s), the draft Permitting Timetable will be revised as necessary to include any additional tasks identified in the data gap analysis.

When USACE is a cooperating agency, USACE will contribute to lead agency efforts for identification of information needs to inform the EIS. The USACE contribution should be confined to the area of USACE jurisdiction and authority.

H. Prepare Purpose and Need statement – As the foundation for the development and analysis of alternatives under NEPA, the Purpose and Need statement will be prepared prior to issuing the NOI and undertaking scoping. This will assist the public in providing scoping comments that focus on likely impacts of the proposed project as well as identifying alternatives to the proposed project that may result in fewer impacts. The Purpose and Need statement is Concurrence Point #1 (see Concurrence Points and Permitting Timetable below).

When USACE is a cooperating agency, USACE will review and respond to the lead agency request on this concurrence point, considering the Purpose and Need based on regulatory requirements.

I. Issue Notice of Intent to prepare the Draft EIS – the NOI should be issued after receipt of complete application, receipt of applicant response(s) to requested additional information, selection of third party contractor, designation of cooperating agencies, preparation of Permitting Timetable, and concurrence on Project Purpose and Need statement. The NOI will clearly indicate the permit authority(s) and the portions of the proposed project subject to Corps permit authority(s), as well as project elements subject to relevant cooperating agency authorities. The NOI will advise the public that comments are most helpful to the lead and cooperating agencies with Federal authorization decisions when the comments focus on issues (impacts and alternatives) relevant to agency authorities. Completion of these process steps will best inform the NOI and thus best assist the public in providing relevant and focused scoping comments, particularly important for meaningful scoping in the targeted 30-day timeframe.

When USACE is a cooperating agency, USACE does not have a role as the NOI is a lead agency responsibility.

[11] Pursuant to 33 CFR 325.1(d)(10) and 33 CFR 325.1(e).

J. NEPA scoping phase – the scoping period should be 30 days. If a district commander determines that an extension of the scoping period is warranted based on project complexity or controversy, an extension of up to an additional 30 days may be granted. These timeframes also apply to cooperating agency requests to extend the scoping period. Note that extending the scoping period cannot result in extending any major milestone in the Permitting Timetable, particularly the 14 months scheduled to prepare the Draft EIS.

When USACE is a cooperating agency, USACE districts will limit their project involvement to scoping issues directly relevant to agency authorities.

K. Complete the Permitting Timetable – the draft Permitting Timetable prepared prior to issuing the NOI may need to be revised based on issues raised during scoping. Revisions required to finalize the Permitting Timetable should include any additional information needs brought to the attention of the lead or cooperating agencies as a result of scoping. Information needs that require the lead agency to request additional information from the applicant may affect the timing of milestones in the Permitting Timetable. ['Pauses' outside agency control, such as delayed applicant information, are described below in Reporting and Accountability, Item 3.] If revised, the draft Permitting Timetable must be provided to cooperating agencies for comment[12]. If a cooperating agency with Federal authorization responsibility objects, that agency must include an alternative proposed milestone consistent with the two-year timeline. If no objections are received in writing within 10 business days, the lead agency will finalize the Permitting Timetable.

When USACE is a cooperating agency, the lead agency will be responsible for completing and distributing the Permitting Timetable.

L. Impact analysis phase – analyses for all alternatives to be carried through the Draft EIS must address impacts and issues related to agency authorities (see Concurrence Point #2 below). These include likely impacts to waters subject to CWA Section 404 and RHA Section 10, including impacts related to public interest factors. Note that additional analyses required to satisfy the NEPA obligations of cooperating agencies must also be included; however, it will be the responsibility of the respective cooperating agencies to identify and perform those impact/issue analyses[13].

When USACE is a cooperating agency: USACE will be responsible for identifying and performing impact analyses directly related to agency authorities and obligations (and that will enable USACE to determine whether the applicant's proposed alternative represents the least environmentally damaging practicable alternative (LEDPA) for permit application decision purposes.

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[12] Section VII A.2. of the MOU.

[13] When a cooperating agency requests assistance with impact analyses, USACE can direct the Third Party Contractor to assist with such analyses provided the contract Statement of Work includes or is amended to include such efforts.

M. Permit decision phase – permit application decisions must be based on careful consideration of environmental information in project NEPA documents; the USACE public interest review; the proposed project's compliance with the 404(b)(1) Guidelines; and all other relevant laws and regulations. Likely impacts outside USACE regulatory authority, and particularly impacts which are clearly within another agency's authority, should be described as such as part of the public interest review where appropriate. The USACE permit decision will address those activities subject to USACE authority and the determination of whether the applicant's proposed alternative represents the LEDPA, as well as attaching any permit conditions intended to avoid, minimize and/or compensate for USACE-regulated project impacts. Districts may include identification of the LEDPA in the Final EIS, and must identify the LEDPA in the ROD. Balancing the need to make timely permit decisions while minimizing legal risk is the essence of risk-informed decision making, and will be most effective when USACE carefully and strategically pursues a scope of analysis clearly based on agency authorities.

When USACE is a cooperating agency and an Individual Permit is required, the USACE decision will be made as described above.

N. Water Quality Certification – In certain instances, a project sponsor (applicant) must apply for certification pursuant to Section 401(a)(1) of the Clean Water Act from the certifying agency. Federal agencies cannot issue federal licenses or permits unless such certification has been granted or waived. For the purposes of EO 13807 and consistent with all other projects, in instances where the lead agency determines that certification requirements have been waived, e.g. the certifying agency has not acted within the time period allowed by law, USACE will defer to the determination of the lead agency, determine that the certification requirement has been waived, and proceed accordingly.

O. Record of Decision – the lead agency is responsible for preparing and publishing a single ROD for all Federal agencies with required authorization decisions. The ROD will incorporate the independent decisions of each cooperating agency, and will necessarily be prepared in consultation with the relevant cooperating agencies. While the EO and MOU allow for agency authorization decisions to be completed as much as 90 days after the ROD is completed, districts must note that the Record of Decision must be completed within 60 days after the Notice of Availability (NOA) for the Final EIS. Therefore, cooperating agencies will be responsible for providing their authorization decision information to the lead agency in a timeframe that supports timely preparation of the ROD.

When USACE is a cooperating agency and an Individual Permit is required, USACE will contribute text relevant to the USACE permit decision to the lead agency for incorporation into the single ROD.

P. Consolidated Project File and Administrative Record – the consolidated project file is all of the information assembled and utilized by the lead and cooperating Federal agencies during the environmental review and Federal authorization decision processes.

Pursuant to Section VII A.8. and B.7. of the MOU, the lead agency will maintain the consolidated project file. Cooperating agencies will independently maintain their respective administrative records in support of their authorization decision(s), and then will provide such information as the lead agency may request to complete the consolidated project file.

Q. Best Practices – The EO and the MOU each require implementation of best practices (see Definitions) as part of project-specific process techniques and strategies, as appropriate. The environmental review process activities and chronology described above should assist districts in utilizing best practices, particularly when USACE is the lead agency. Current versions of *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* can be found at https://www.permits.performance.gov/tools.

5. Transparency

Efficient timelines for major infrastructure projects as reflected in the two-year Permitting Timetable, measured from NOI to ROD, will rely on enhanced transparency to maximize effective public involvement. When USACE is the lead agency, web pages, project-specific web sites, social media, and other means of disseminating information must be used to inform the public about the process and status of the environmental review. This may include establishing and periodically updating project news, milestones, Permitting Timetables, upcoming public forum events via:

A. District web pages,
B. Project-specific web pages maintained by USACE Regulatory and/or the third party contractor. This transparency is strongly encouraged as a best practice because it can be dedicated solely to the project under review and it can make virtually all publicly accessible documents readily available. Permitting Timetables should be maintained on the site throughout the environmental review,
C. District Twitter and Facebook accounts, in coordination with and physically posted by district Public Affairs/Corporate Communications Offices.

6. Concurrence Points

Concurrence points are opportunities for lead and cooperating agencies to assess mutual understanding and agreement on fundamental elements of the EIS. Concurrence among lead and cooperating agencies establishes that agencies agree to a given decision described in the concurrence point, and to abide by the decision as analyses and EIS preparation progress. Three specific concurrence points are required per Section XI of the MOU, and are milestones that must be included in the Permitting Timetable. Non-concurrence issues should be identified as early as possible and resolved either before a dispute arises, or resolved via the Dispute Resolution process described in this guidance.

The District Commander is the regulatory decisionmaker for permit decisions that are not elevated to the Division Commander. On this basis, the District Commander retains the

responsibility and authority for concurrence point decisions. Authority to concur with a required concurrence point may be delegated to the Regulatory Chief at the District Commander's discretion. Authority to non-concur with a required concurrence point cannot be delegated. A District Commander intending to provide written non-concurrence will inform the USACE CERPO (Chief Environmental Review and Permitting Officer), through MSC SERO (Senior Environmental Review Officer) and HQ environmental review POC of the intent to non-concur.

When acting as the lead agency, the District will provide cooperating agencies with written requests for concurrence, including any information necessary for cooperating agencies to consider in providing their concurrence and/or resolving any points of disagreement that may affect concurrence. As a cooperating agency, the District must receive written requests for concurrence and must respond to such requests in writing. Note that the MOU establishes that cooperating agencies will respond to lead agency requests within 10 business days, and that failure to respond may be treated as concurrence, at the discretion of the lead agency.

A. Concurrence Point #1 – Purpose and Need

As discussed above in the context of risk-informed decision making, the Purpose and Need statement serves as the basis for developing and evaluating alternatives. For this reason, all cooperating agencies with required authorization decisions must review and concur on the Purpose and Need statement drafted by the lead agency, indicating their concurrence in writing. For lead or cooperating agency roles, respectively, districts must draft or concur with a Purpose and Need that reasonably and objectively describes the proposal without inappropriately constraining the range of alternatives that ultimately must be considered. Districts should consider whether to seek additional written agreement/concurrence with lead/cooperating agencies regarding the preliminary scope of analysis for the proposed project. The scope of analysis for the EIS will be defined following scoping, will ultimately reflect the cumulative control and responsibility of all Federal agencies with required authorization decisions, and may be the subject of a separate concurrence point in addition to the three concurrence points required by the MOU.

B. Concurrence Point #2 – Alternatives to be Carried Forward for Evaluation

This concurrence point will occur after completion of scoping and consideration of alternatives screening criteria, ultimately identifying the range of reasonable alternatives to be evaluated in the Draft EIS. The lead agency must gain cooperating agency concurrence(s) on this point prior to making results of alternatives screening available to the public (i.e. via newsletters or public meetings). Lead agency requests for concurrence must include a description of alternatives screening criteria and alternatives considered as part of screening, as well as a description of all alternatives to be further evaluated in the Draft EIS. In a lead agency role, districts are encouraged to present this information in Technical Memorandum format to support the Administrative Record.

C. Concurrence Point #3 – Preferred Alternative

NEPA requires agencies to identify the preferred alternative(s), if one exists, in the Draft and Final EIS[14]. The MOU recommends identifying the preferred alternative in the Draft EIS and requires it in the Final EIS. Corps regulations at 33 CFR 325 Appendix B clarify that the Corps is neither an opponent nor proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the "applicant's preferred alternative." To comply with NEPA, Corps regulations, and the MOU, when the Corps is lead agency, the Draft and Final EIS will identify the Applicant's Preferred Alternative, and will include text identifying the Preferred Alternative of any cooperating agency (with a required federal authorization) with regulations that prevent their concurrence with "applicant's preferred alternative."

When the Corps is a cooperating agency, the Corps will respond to lead agency request stating the Corps does not have a preferred alternative, and the Draft and Final EIS should identify the lead agency's Preferred Alternative as well as the Applicant's Preferred Alternative, including when these are the same alternative. Coordination among agencies on this concurrence point must be written, including lead agency request and cooperating agency response/concurrence, in support of the Administrative Record.

7. Permitting Timetable

The Permitting Timetable is the schedule for Federal agency environmental reviews, consultations and authorization decisions for major infrastructure projects. The lead agency is responsible for preparing the Permitting Timetable with required input from cooperating agencies and in consultation with participating agencies according to their agency roles and involvement. The Permitting Timetable should be drafted[15] by the lead agency prior to the NOI, and must include milestones critical to the completion of the environmental review and issuance of a single EIS and single ROD that meet the needs and obligations of each agency with a required authorization decision. The Permitting Timetable should include and account for:

A. required Federal decisions and authorizations;

B. required Federal decisions and authorizations delegated to state, tribal, or local agencies (when these are pre-requisite to issuance of a decision or authorization by a Federal agency);

C. a complete inclusion of the environmental review and authorization requirements for a project (see attached example Permitting Timetable);

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[14] 40 CFR 1502.14(a).

[15] The Permitting Timetable should be drafted as soon as practicable for use in cooperating agency requests, applicant information requests, and for informing the public regarding the overall project timeline. An example two-year Permitting Timetable is attached to this Appendix.

D. specific focus to those reviews and authorizations that are complex, require extensive coordination, or might significantly extend the overall project review schedule;

E. cooperating agencies that are required by law to develop schedules for environmental review or authorization processes should provide such schedules to the lead agency for integration into the Permitting Timetable;

F. estimated milestones for any review or authorization decision processes for which the project design has not sufficiently advanced to more accurately determine dates to inform the Permitting Timetable;

G. Times for completion of environmental review and authorization decision subtasks are:

(1) Formal scoping and preparation of a Draft EIS within 14 months, beginning on the date of publication of the NOI to publish an EIS and ending on the date of the NOA for the Draft EIS;

(2) Completion of the formal public comment period and development of the Final EIS within eight (8) months of the date of the NOA for the Draft EIS;

(3) Publication of the ROD within two (2) months of the publication of the NOA for the Final EIS, noting that USACE regulations at 33 CFR 325 Appendix B require that no ROD can be signed until at least 30 days following the NOA for the Final EIS.

A Permitting Timetable shall be prepared in a suitable format to identify project tasks, durations and dependencies to maximize effectiveness in managing and meeting the EO 13807 goal of two years on average for covered major infrastructure projects.

Permitting Timetable milestones are listed in the table below. These are milestones that must be included in the lead agency's Permitting Timetable. Additional project-specific tasks and milestones may also be necessary depending on the type of project proposed and the cooperating agencies that are involved.

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

Milestone*	**Target Date**	**Actual Date**
Pre-application meeting(s)		Date of 1st agency involvement
Initial Application Received		Date received
Complete Application Received		Date received
Public Notice for application		Within 15 days of complete application
Notify applicant EIS is required and subject to EO 13807		Within 7 days of determination
3rd Party Contractor selection		Date of selection
SOW approval/3rd party contract executed		Date of approval
Cooperating agency requests and agreements		Date(s) as applicable
Determine additional required information (e.g. 404(b)(1) compliance, alternatives, Public Interest Review)		Date of information request
Concurrence Point #1: Purpose & Need preliminary scope of analysis can also be addressed		Date of concurrence must precede NOI
Publish NOI / Initiate Scoping / Public Notice		**Date initiates 2-year timeline**
Scoping Meeting		Date(s) of meeting(s) held
Revise SOW (as necessary)		Date as applicable
Concurrence Point #2: Alternatives to be Analyzed Review project scope of analysis, EIS Table of Contents (issues to be analyzed)		Date of concurrence
Concurrence Point #3: (Applicant's) Preferred Alternative		Date of concurrence
NOA DEIS/Supplemental		**Date of NOI + 14 months**
Public Hearing/Meeting		Date of event
NOA FEIS/Supplemental		**Date of DEIS NOA + 8 months**
ESA Section 7 process begin/end**		Date(s) determined in coordination with Services
EFH process begin/end**		Date(s) determined in coordination with NMFS
NHPA Section 106 process begin/end**		Date(s) determined in coordination with ACHP/SHPO
Tribal consultation**		Date(s) determined/estimated
Government-to-Government consultation**		Dates(s) as applicable
ROD/Amended ROD		**Date of FEIS NOA + 2 months**
Permit Issuance/Denial		**Date of ROD**

*Major milestones required by the MOU are shown in bold type. Target Dates and Actual Dates must be reported in ORM for use in populating the Federal Agency Portal.

**Milestone to begin this process would occur during or near the timing of scoping.
Milestone to end this process would occur near the timing of FEIS NOA, prior to ROD.

8. Elevation Procedures for Dispute Resolution and Prevention of Delays

The USACE CERPO will serve as the USACE senior agency official and will be made aware of disputes that have the potential to result in a missed Permitting Timetable milestone or delay, including elevated issues or disputes brought by cooperating or participating agencies.

Concurrence points are intended to promote process efficiency and minimize disputes between cooperating agencies, particularly cooperating agencies for which authorization decisions are required. As required by the MOU, three specific concurrence points must be included in the Permitting Timetable to facilitate major milestones: 1) Purpose and Need; 2) Alternatives to be Carried Forward for Evaluation, and; 3) Preferred Alternative (Applicant's Preferred Alternative). Per the MOU, lead and cooperating agencies may choose to include additional concurrence points in the Permitting Timetable to accommodate specific project circumstances.

Districts should strive to resolve all issues and disputes at the earliest time and lowest level possible, including issues and disputes raised by other agencies. Should agency staff identify an issue or dispute that, if not resolved, may result in missing a milestone (delay) and/or a decision inconsistent with law, regulation or agency policy, the district regulatory project manager must notify the District Commander, or designee, via the district Regulatory supervisory chain of command. This written notice should clearly state in detail the specific issue or dispute; the consequence, including potential delay, of failing to resolve the issue or dispute; and the recommended resolution.

A. When the Corps of Engineers is the lead federal agency (the elevation and resolution process is shown in flow diagram format in Figure 1): The District Commander or designee should coordinate with the cooperating or participating agency's locally-responsible senior official (e.g. DOI Regional Administrator) or designee, and decide whether the issue can be expeditiously resolved. Coordinating the dispute with the cooperating or participating agency shall consist of a written notice describing in detail the specific issue or dispute, the consequence(s) to the project timeline of failing to resolve the issue or dispute, and the recommended resolution. If the issue or dispute is not resolved within 15 days from the written coordination, the District Commander will notify the SERO. Depending on the nature of the dispute, the District Commander may notify the SERO of an issue or dispute prior to 15 days, particularly important if a milestone or concurrence point is near. If a dispute is not resolved within 15 days following notification of the SERO, the USACE CERPO will be notified to facilitate interagency coordination at the HQ level.

B. When the Corps of Engineers is a cooperating agency: The same procedure described for Corps as lead agency should be used, unless the Corps has agreed with the lead agency on a project-specific dispute resolution that achieves the same goal. The District Commander will notify and coordinate with the SERO and CERPO prior to signing and transmitting a non-concurrence to the lead agency.

C. Elevation information package: Upon a decision to elevate an issue or dispute, the responsible district senior official shall transmit an elevation package. The elevation package must contain a fact sheet with project details and nature of dispute, timeline and milestones, the initial dispute notification, any subsequent formal written correspondence between the disputing agency and the lead federal agency, and recommended resolution.

D. Disputes Related to Developing the Permitting Timetable: Section VII. A.2. of the MOU describes the specific process that will apply if any dispute arises regarding the lead agency's proposed Permitting Timetable.

E. Unresolved Non-Concurrence (USACE as a cooperating agency): If a dispute associated with a required concurrence point cannot be resolved, including through additional meetings intended to seek resolution, USACE districts must follow one of the following approaches:

(1) incorporate additional necessary information into the USACE section of the ROD (in coordination with the lead agency) to satisfy decision-making needs;

(2) CERPO requests CEQ to mediate the unresolved dispute pursuant to the MOU (Section 5(e)(ii)).

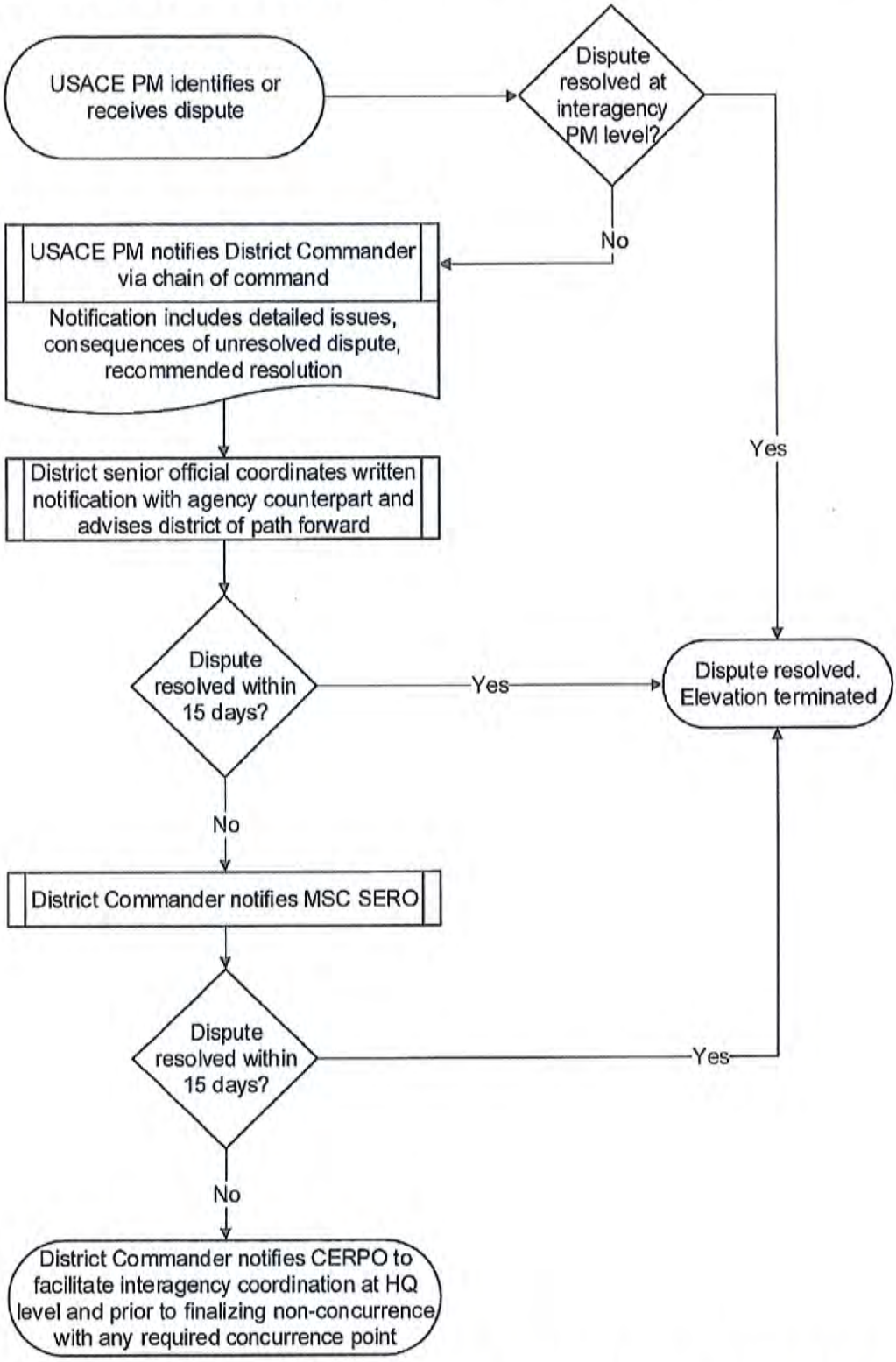

Figure 1. Flow diagram of the USACE Regulatory Elevation and Resolution Process.

9. Reporting and Accountability

The Office of Management and Budget will establish a Federal Agency Portal where project information will be posted and used to track agency compliance via the Permitting Dashboard[16]. The OMB will review accountability system performance at least once per quarter, and will produce a scorecard of agency performance. Therefore, districts must update and maintain current project information to reflect progress and any revisions from the previous quarter. Districts will enter project information into ORM at the EIS data entry screen, including all lead and cooperating agency EIS efforts subject to EO 13807. Data prompts on the ORM EIS screen are designed to report the information required. Subject to future revised procedures, when USACE is the lead agency HQUSACE will use ORM Reports to populate the Federal Agency Portal in six information areas.

A. **Whether major infrastructure projects are processed as OFD.** Lead agencies are required to verify on the Federal Agency Portal whether each major infrastructure project is being processed in accordance with One Federal Decision, and if not, specify the reason the project should not be processed using OFD.

   The lead agency should update these entries at least quarterly, to ensure that each entry corresponds to an active environmental review process and accurately indicates whether each such project is being processed using OFD. Additionally, lead agencies must submit a quarterly report of all infrastructure projects that published an NOI to prepare an EIS under NEPA in the previous quarter to OMB. OMB will use this information to assess the extent to which the agency is processing major infrastructure projects under OFD as appropriate.

   Guidance note: this information will be collected from the ORM EIS screen when USACE is the lead agency. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

B. **Whether major infrastructure projects have a Permitting Timetable.** Lead agencies are responsible for uploading to the Federal Agency Portal the content of each Permitting Timetable. The lead agency, in consultation with cooperating and participating agencies, should enter target dates in the milestone fields for all applicable agency actions as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones. Permitting Timetables for major infrastructure projects must be uploaded onto the Federal Agency Portal no later than 30 days after the publication of the NOI. The Federal Agency Portal is pre-populated with the major milestones for each kind of major agency action. The major milestones correspond to the milestones set forth in the most current version of Appendix B of the OMB/CEQ "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects" (M-17-14). To have a complete Permitting Timetable, agencies must enter the target completion dates of the milestones (and

[16] The Permitting Dashboard was established to track infrastructure projects subject to FAST-41. The Permitting Dashboard will be expanded to include reporting and accountability for major infrastructure projects subject to EO 13807.

actual completion dates for already completed milestones) for each of the relevant agency actions. OMB will use this information to assess the extent to which major infrastructure projects have complete Permitting Timetables.

Guidance note: When USACE is the lead agency, Permitting Timetables must be provided to HQUSACE along with notification that the NOI has been published in the Federal Register. HQUSACE will use the Permitting Timetable along with the ORM Report to update the Federal Agency Portal. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

C. **Whether agencies are meeting major milestones.** Lead agencies, in consultation with cooperating and participating agencies, are responsible for updating the status of major milestones for all applicable agency actions. Lead agencies may delegate the responsibility of updating milestones for specific environmental reviews and authorization decisions to the cooperating or participating agencies, but will be responsible for approving any changes to the Permitting Timetable. Any changes in milestone target dates should be notated in the entry for that milestone, along with the reason(s) for the change in target date. The Federal Agency Portal allows the agency to select from among the following reasons: (a) ahead of schedule, (b) data entry error, (c) dependency delay, (d) interagency coordination issue, and (e) internal agency factor. Additionally, in the event of delays outside of the Federal government's control, agencies can list the status of an environmental review or authorization decision as "paused." For example, if an agency is waiting on the project sponsor to submit additional information to complete an authorization decision, the agency can mark the status of the action as "paused." Once the additional information is received, the agency can change the status of the action back to "in progress" and update the relevant milestone target dates.[17] OMB will use this information to track each agency's progress in meeting milestones for each action.[18]

Guidance note: Districts must maintain current and accurate data on the ORM EIS screen for milestones (refer to table above), including providing relevant reasons for any changes in milestone target dates as described above, as well as any applicant-dependent pauses that may affect interim and/or final milestones. Changes to the Permitting Timetable must be documented via MFRs in the project's Administrative Record. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

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[17] On the Federal Agency Portal, agencies will be able to indicate whether the status of an environmental review or authorization decision is "Planned," "In Progress," "Paused," "Cancelled," or "Complete." OMB will only apply this performance indicator to milestones in which the action status is "In Progress." OMB will not consider the milestone missed for this performance indicator, if the reason for moving the milestone to a later date is outside of the agency's control (e.g. project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met).

[18] Agencies will have up to five business days to update a milestone target date that has passed (e.g. mark the milestone as complete, change the target completion date) before it is considered a missed milestone.

D. **Whether delays follow a process of elevation to senior agency officials.** This information will be used by OMB to determine the extent to which agencies have established and are following, as necessary, a process that elevates to senior agency officials, instances in which Permitting Timetable milestones are missed or extended, or are anticipated to be missed or extended.

For major infrastructure projects, agencies are required to establish and implement a process that elevates to senior agency officials instances in which they anticipate missing or needing to extend a Permitting Timetable major milestone or when a major milestone is missed or extended to a date more than 30 days after the final target completion date[19].

For each such delay or extension, agencies will be required to indicate in the Federal Agency Portal whether the agency used its elevation process to refer the matter to a senior agency official. The entry should be made in the relevant milestone field. OMB will use this information to assess agency performance on elevation procedures.

Guidance note: When USACE is the lead agency, HQUSACE will use the elevation information package prepared by the district to enter 'Notes' in the Federal Agency Portal for any Permitting Timetable milestones subject to dispute. If any dispute results in a missed/delayed milestone that would require changes in subsequent milestone Target Dates, the district must identify these to HQUSACE before making changes (in coordination with cooperating and participating agencies) to the Permitting Timetable and the ORM database. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

E. **Time required to complete processing of environmental reviews and authorizations for major infrastructure projects.** Agencies will not be required to report any additional information in order to comply with this criteria. OMB will track completion times on the basis of the data reported quarterly for other assessment areas, including the number of days from the NOI to the ROD, and the number of days from the ROD to the date of issuance of the final authorization decisions for the project. OMB will use this information to assess agency performance on completion times.

F. **Costs of environmental reviews and authorizations for each major infrastructure project.** At project completion, the lead agency should report the estimated cost to the government for the environmental review and authorization process. Agencies should report the cost of their Full-Time Equivalent (FTE) hours and contractor costs related to the project.

[19] Agencies will not be required to use the elevation procedure when the missed or extended date is caused by reasons outside of the agency's control (e.g., project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met) or if the milestone is associated with an Action that is in "Planned" or "Paused" status.

When calculating costs, agencies should include subject-matter experts who participate in a portion of the review, managers or supervisors who have direct or indirect oversight of major infrastructure projects, and attorneys who review documents pertaining to the review. Agencies should also include contractors that are directly funded by the agency and third-party contractors that are supervised by the agency, but funded by another party. Agencies will not be required to track and report non-direct staff hours (e.g., administrative support staff, human resources) or other indirect costs (e.g., overhead).

(1) USACE as lead agency: Districts must report agency costs to HQUSACE as described above, including costs provided to districts for inclusion of all Federal cooperating and participating agencies with required authorization decisions. Upon receipt of required cost information at project completion, HQUSACE will post to the Federal Agency Portal.

(2) USACE as cooperating agency: Districts must report agency costs to the lead agency for input to the Federal Agency Portal.

(3) Guidance note: Districts will establish a unique cost code for each subject major infrastructure project for use in cost tracking and reporting. Required staff (as described above) will track time spent on each major infrastructure project such that accounting units (Resource Management) can calculate the total cost based on staff time spent after each major infrastructure project is completed. No reporting is required for projects that do not receive USACE authorization.

10. Definitions

The following definitions (A – F) provided in EO 13807 should be applied as part of the implementation of this guidance and EO 13807. Other defintions applicable to NEPA can be found in 40 CFR 1508, 33 CFR 230, and 33 CFR 325, Appendix B.

A. Authorization means any license, permit, approval, finding[20], determination, or other administrative decision issued by a Federal department or agency (agency) that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3).

B. CAP Goals means Federal Government Priority Goals established by the Government Performance and Results Act (GPRA) Modernization Act of 2010, Public Law 111-352, 124 Stat. 3866, and commonly referred to as Cross-Agency Priority (CAP) Goals.

[20] Required consultations with Federal agencies such as U.S. Fish and Wildlife Service and National Marine Fisheries Service meet the definition of authorization and thus apply to determinations of multiple federal authorizations.

C. **Federal Permitting Improvement Steering Council** or "FPISC" means the entity established under 42 U.S.C. 4370m.

D. **Infrastructure project** means a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC.

E. **Major infrastructure project** means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

F. **Permitting Timetable** means an environmental review and authorization schedule, or other equivalent schedule, for a project or group of projects that identifies milestones--including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a project or group of projects--that is prepared by the lead Federal agency in consultation with all cooperating and participating agencies.

G. **Additional definitions**

(1) **Best Practices** means the techniques and strategies published and updated annually by the Federal Permitting Improvement Steering Council (FPISC) pursuant to 42 U.S.C. 4370m-1(c)(2)(B)[21], and identified in *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018*, or subsequent revisions, as best practices.

(2) **Environmental review** means agency effort toward evaluation of an application from initial receipt until the date of the issuance of the Final EIS.

(3) **Multiple authorizations**, as one of the three criteria defining a major infrastructure project, means 'more than one' Federal agency authorization by 'more than one' Federal agency. When two or more Federal agencies will be required to make authorization decisions to proceed with construction the criterion is met.

[21] Fixing America's Surface Transportation Act, Title 41 (FAST-41)

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

(4) Senior agency official means the USACE Chief Environmental Review and Permitting Officer (CERPO) and/or a USACE Division Commander's designated Senior Environmental Review Officer (SERO).

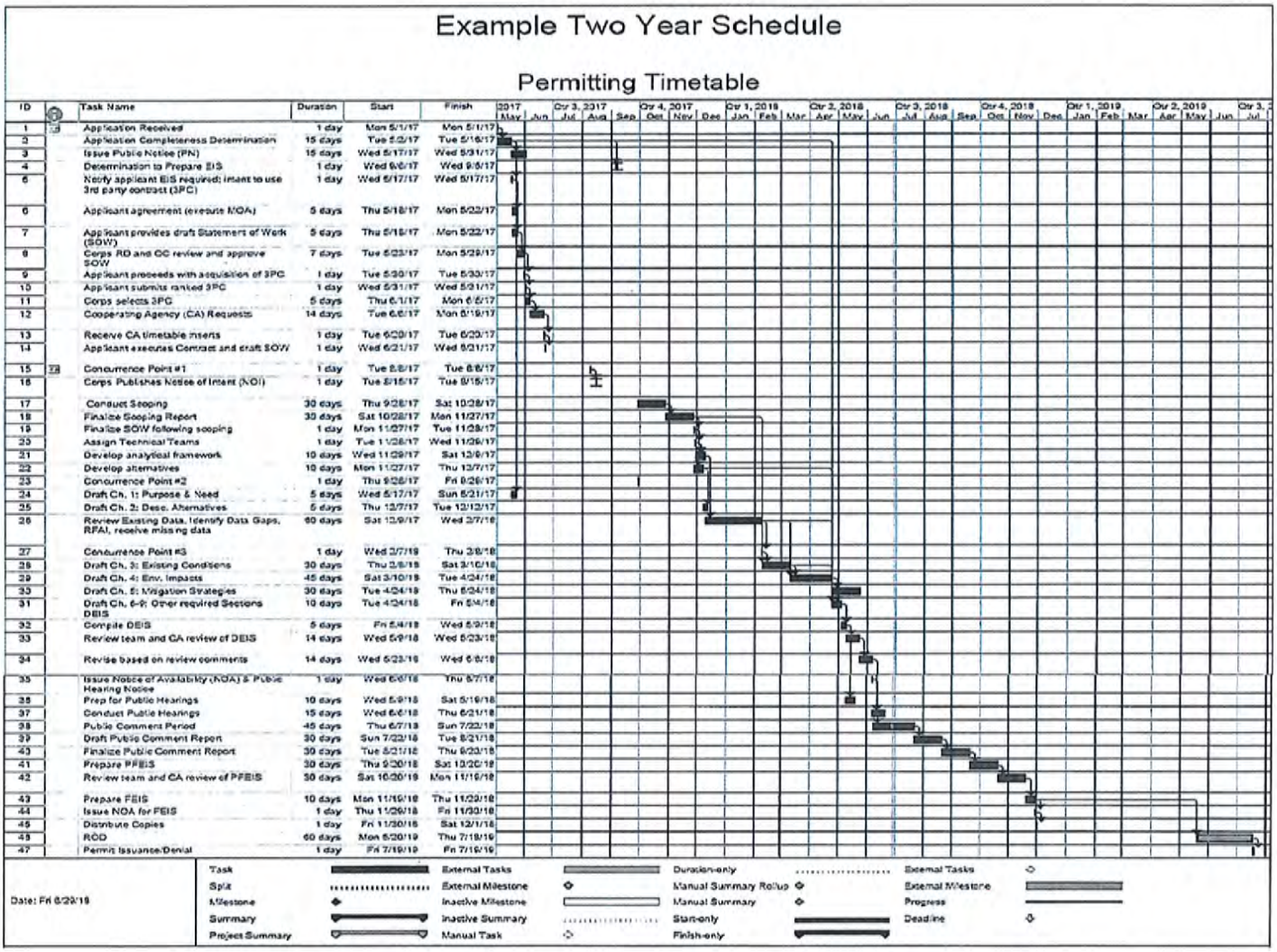
Attachment: Example Two Year Schedule

THOMAS P. SMITH, P.E., SES
Chief, Operations and Regulatory Division
Directorate of Civil Works

DISTRIBUTION:
COMMANDERS,
GREAT LAKES AND OHIO RIVER DIVISION, CELRD
MISSISSIPPI VALLEY DIVISION, CEMVD
NORTH ATLANTIC DIVISION, CENAD
NORTHWESTERN DIVISION, CENWD
PACIFIC OCEAN DIVISION, CEPOD
SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD

Example Two Year Schedule

Permitting Timetable



ID	Task Name	Duration	Start	Finish
1	Application Received	1 day	Mon 5/1/17	Mon 5/1/17
2	Application Completeness Determination	15 days	Tue 5/2/17	Tue 5/16/17
3	Issue Public Notice (PN)	15 days	Wed 5/17/17	Wed 5/31/17
4	Determination to Prepare EIS	1 day	Wed 9/6/17	Wed 9/6/17
5	Notify applicant EIS required; intent to use 3rd party contract (3PC)	1 day	Wed 5/17/17	Wed 5/17/17
6	Applicant agreement (execute MOA)	5 days	Thu 5/18/17	Mon 5/22/17
7	Applicant provides draft Statement of Work (SOW)	5 days	Thu 5/18/17	Mon 5/22/17
8	Corps RD and CC review and approve SOW	7 days	Tue 5/23/17	Mon 5/29/17
9	Applicant proceeds with acquisition of 3PC	1 day	Tue 5/30/17	Tue 5/30/17
10	Applicant submits ranked 3PC	1 day	Wed 5/31/17	Wed 5/31/17
11	Corps selects 3PC	5 days	Thu 6/1/17	Mon 6/5/17
12	Cooperating Agency (CA) Requests	14 days	Tue 6/6/17	Mon 6/19/17
13	Receive CA timetable inserts	1 day	Tue 6/20/17	Tue 6/20/17
14	Applicant executes Contract and draft SOW	1 day	Wed 6/21/17	Wed 6/21/17
15	Concurrence Point #1	1 day	Tue 8/8/17	Tue 8/8/17
16	Corps Publishes Notice of Intent (NOI)	1 day	Tue 8/15/17	Tue 8/15/17
17	Conduct Scoping	30 days	Thu 9/28/17	Sat 10/28/17
18	Finalize Scoping Report	30 days	Sat 10/28/17	Mon 11/27/17
19	Finalize SOW following scoping	1 day	Mon 11/27/17	Tue 11/28/17
20	Assign Technical Teams	1 day	Tue 11/28/17	Wed 11/29/17
21	Develop analytical framework	10 days	Wed 11/29/17	Sat 12/9/17
22	Develop alternatives	10 days	Mon 11/27/17	Thu 12/7/17
23	Concurrence Point #2	1 day	Thu 9/28/17	Fri 9/29/17
24	Draft Ch. 1: Purpose & Need	5 days	Wed 5/17/17	Sun 5/21/17
25	Draft Ch. 2: Desc. Alternatives	5 days	Thu 12/7/17	Tue 12/12/17
26	Review Existing Data, Identify Data Gaps, RFAI, receive missing data	60 days	Sat 12/9/17	Wed 2/7/18
27	Concurrence Point #3	1 day	Wed 2/7/18	Thu 2/8/18
28	Draft Ch. 3: Existing Conditions	30 days	Thu 2/8/18	Sat 3/10/18
29	Draft Ch. 4: Env. Impacts	45 days	Sat 3/10/18	Tue 4/24/18
30	Draft Ch. 5: Mitigation Strategies	30 days	Tue 4/24/18	Thu 5/24/18
31	Draft Ch. 6-9: Other required Sections DEIS	10 days	Tue 4/24/18	Fri 5/4/18
32	Compile DEIS	5 days	Fri 5/4/18	Wed 5/9/18
33	Review team and CA review of DEIS	14 days	Wed 5/9/18	Wed 5/23/18
34	Revise based on review comments	14 days	Wed 5/23/18	Wed 6/6/18
35	Issue Notice of Availability (NOA) & Public Hearing Notice	1 day	Wed 6/6/18	Thu 6/7/18
36	Prep for Public Hearings	10 days	Wed 5/9/18	Sat 5/19/18
37	Conduct Public Hearings	15 days	Wed 6/6/18	Thu 6/21/18
38	Public Comment Period	45 days	Thu 6/7/18	Sun 7/22/18
39	Draft Public Comment Report	30 days	Sun 7/22/18	Tue 8/21/18
40	Finalize Public Comment Report	30 days	Tue 8/21/18	Thu 9/20/18
41	Prepare PFEIS	30 days	Thu 9/20/18	Sat 10/20/18
42	Review team and CA review of PFEIS	30 days	Sat 10/20/18	Mon 11/19/18
43	Prepare FEIS	10 days	Mon 11/19/18	Thu 11/29/18
44	Issue NOA for FEIS	1 day	Thu 11/29/18	Fri 11/30/18
45	Distribute Copies	1 day	Fri 11/30/18	Sat 12/1/18
46	ROD	60 days	Mon 5/20/19	Thu 7/18/19
47	Permit Issuance/Denial	1 day	Fri 7/19/19	Fri 7/19/19

Date: Fri 6/29/18

Task · Split · Milestone · Summary · Project Summary · External Tasks · External Milestone · Inactive Milestone · Inactive Summary · Manual Task · Duration-only · Manual Summary Rollup · Manual Summary · Start-only · Finish-only · Deadline · Progress

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-P

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Feasibility Studies for Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. ER 200-2-2, Procedures for Implementing NEPA, 4 March 1988.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

e. Implementation Guidance for Section 1005 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Project Acceleration, 20 March 2018.

f. SMART Planning Feasibility Studies: A Guide to Coordination and Engagement with the Services, September 2015.

2. Applicability. EO 13807 applies a number of concepts to environmental review and permitting associated with "infrastructure projects," as defined in the EO. Sections 4 and 5 of Executive Order (EO) 13807 also apply specific performance accountability measures and process enhancements to projects meeting the EO's definition of "major infrastructure projects." This guidance applies to feasibility studies where the USACE planning decision document could lead to a recommendation for project authorization or modification to a project authorization, including general re-evaluation studies, post authorization change reports, and other reports supporting project authorization or budget decisions that result in a Chief's Report or Director's Report.

a. Section 3.(d) of EO 13807 defines "infrastructure project" as "a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation,

including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC [Federal Permitting Improvement Steering Council]."

b. Section 3.(e) defines "major infrastructure project" (a subclass of infrastructure project as defined above) as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project."

c. Section 3.(a) of EO 13807 defines "authorization" as "any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3)." As so defined in the EO, this term is not synonymous with Congressional authorization, or any other approval, finding, determination, or decision issued by Congress or any other entity or organization that is not a Federal department or agency.

d. Districts should apply the concepts applicable to "infrastructure projects," as well as future process improvements, to planning studies that don't otherwise meet the definition of "major infrastructure projects," particularly those feasibility studies with Environmental Assessments (EAs).

3. Purpose. The EO sets out several policies of the Federal Government related to infrastructure projects including, but not limited to, a policy to develop environmentally sensitive infrastructure; a policy to conduct coordinated, consistent, predictable, and timely environmental reviews; and a policy to make timely decisions with the goal of completing all federal environmental reviews and authorization decisions for "major infrastructure projects" within two years. The purpose of this guidance is to clarify and reinforce those Civil Works project development processes and procedures that will provide for compliance with the EO.

4. Environmental Stewardship. The Federal objective for water resources planning is to contribute to national economic development, consistent with protecting the Nation's environment, pursuant to national environmental statutes, applicable executive orders,

and other Federal planning requirements. Provisions for environmental considerations are integrated throughout the Principles & Guidelines and are specifically addressed in discussion of the Environmental Quality (EQ) Account and the EQ procedures. The EQ procedures should be applied early in the planning process so that significant natural and cultural resources of the study area can be identified and inventoried, used in developing planning objectives, and accommodated in a reasonable set of alternative plans, which achieve the planning objectives. Further, USACE's Environmental Operating Principles were developed to ensure that USACE missions include totally integrated sustainable environmental practices. The Environmental Operating Principles provide corporate direction to ensure that the workforce recognizes the USACE role in, and responsibility for, sustainable use, stewardship, and restoration of natural resources across the Nation.

5. Coordinated Environmental Reviews. The EO states it is the policy of the Federal Government to conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner. 33 U.S.C. 2348(c)(2) and (e)(8) require agencies to conduct environmental reviews of water resource development projects concurrently to the extent practicable for feasibility studies, providing compliance with this policy. References 1.e. and 1.f. provide detailed guidance on conducting concurrent and coordinated environmental reviews for feasibility studies.

a. All Federal, Tribal, and State agencies required to conduct or issue a review for the study should be invited to serve as either a cooperating agency or a participating agency for the environmental review process. The coordinated environmental review process stresses promoting transparency, including of the analyses and data used in the environmental review process, the treatment of any deferred issues raised by Federal, State, and local governmental agencies, Tribes, or the public, and the temporal and spatial scales to be used to analyze those issues.

b. Districts will use principles of risk-informed decision making to conduct environmental compliance concurrently with the feasibility study process. Risk-informed decision making within the environmental discipline does not mean deferring environmental compliance until later during the study or during preconstruction engineering and design (PED) solely to avoid data gathering early in the study. Each iteration of the planning process progresses in level of detail for environmental analysis and review. Consistent with Reference 1.c., study teams should focus on issues which are significant to decision making and reduce emphasis on information which is not. Study teams should use readily available information, and proxies when appropriate, to gather only the information necessary for the next planning decision based on feedback from

coordinating with cooperating and participating agencies and to manage decision risks. Study teams should utilize public and agency coordination to assist in focusing on those most significant issues for decision making and better characterize what key uncertainties exist within the environmental discipline. Study teams can manage those associated instrumental risks using a risk register. The point of risk-informed planning is not to focus on those universal risks that would apply across the portfolio, such as the risk that a cooperating agency will not support a recommended plan, but instead to focus on those critical risks that are unique to a given study and have the potential to significantly affect decision making.

6. Permitting Timetable. Section 5.a.(ii) of the EO requires agencies to develop and follow a permitting timetable for "major infrastructure projects." The permitting timetable is an environmental review and authorization schedule, or other equivalent schedule, for a major infrastructure project or group of major infrastructure projects that identifies milestones, including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a major infrastructure project or group of major infrastructure projects. Study teams will use the schedule developed in accordance with Paragraph 5.d. of Reference 1.e., conducting the required coordination and concurrence with the cooperating and participating agencies, as the permitting timetable for major water resources infrastructure projects under the EO. Study schedules must have sufficient detail to demonstrate utilization of a coordinated review.

7. Notice of Intent. References 1.b. and 1.c. indicate that as soon as practicable after a decision is made to prepare an EIS or supplement, the scoping process for the draft EIS or supplement will be announced in a NOI. Changes in WRRDA 2014 included elimination of the reconnaissance phase, but added a requirement for a meeting within 90 days of the start of the study with all Federal, Tribal, and State agencies (see Reference 1.e.). Without the reconnaissance phase and much of the early information obtained during that phase, the decision regarding the appropriate NEPA document (categorical exclusion, EA, or EIS) would be better informed by the interagency meeting within 90 days of the study start in Reference 1.e. Therefore, the NOI may be issued between the Alternatives Milestone Meeting (AMM), which typically occurs within the first 90 days of the study, and before the Tentatively Selected Plan (TSP) Milestone, allowing the interagency meeting and one or more iterations of the six step planning process to occur, in order to make a risk-informed decision on the appropriate NEPA document (categorical exclusion, EA, or EIS) for the study. Consistent with References 1.b. and 1.c., districts will issue the NOI as soon as practicable after making the determination of the need to prepare an EIS, which is likely to occur close to the AMM.

8. NEPA Scoping. Reference 1.c. directs that the NEPA scoping process be announced in a NOI. However, CEQ guidance in Reference 1.d. does not prohibit early scoping prior to a NOI. Scoping may be initiated early in the feasibility study, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively. However, early scoping cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered. Any information received from the public or other agencies during this early scoping is expected to help reduce uncertainty regarding the appropriate type of NEPA document for the feasibility study.

9. One Federal Decision. Civil Works studies and proposed projects are required to be in compliance with all applicable Federal environmental statutes and regulations and with applicable State laws and regulations where the Federal government has clearly waived sovereign immunity. It is also expected that project recommendations made by district commanders within a final integrated feasibility report/NEPA document are informed by the results of a coordinated and transparent environmental review process. Lastly, under Reference 1.b., the Assistant Secretary of the Army for Civil Works [ASA(CW)] retains authority for signature of the Record of Decision (ROD), after completion of a Chief's Report. Therefore, for water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the district commander's transmittal of a final feasibility report will also include the findings of all applicable environmental compliance requirements to comply with One Federal Decision in Section 5.(b) of the EO. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, requests to defer an environmental requirement after the district commander's transmittal of the final feasibility report must describe the risk and uncertainty of the request and must be endorsed by the policy and legal compliance review team at the Agency Decision Milestone in order to comply with Section 5(b)(ii) of the EO.

10. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the length of the environmental review process for determining compliance with the EO will be calculated from the date of the NOI to the date of the district commander's transmittal of the final feasibility report or other decision document.

11. Issue Resolution. To comply with Section 5.(a)(iii) of the EO, study teams will inform the vertical team of any instances where a permitting timetable milestone for a water resources development project meeting the definition of "major infrastructure project" under EO 13807 is missed or extended, or is anticipated to be missed or extended. In

addition, study teams should keep the vertical team informed of any issues in the environmental review process that may affect the team's ability to meet a feasibility study milestone.

12. Questions regarding this implementation guidance should be directed to Lauren Diaz, Office of Water Project Review, at (202) 761-4663 or Lauren.B.Diaz@usace.army.mil.

JOSEPH H. REDICAN
Acting Chief, Planning and Policy Division
Directorate of Civil Works

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SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD

Attachment B

Interstate Natural Gas Association of America, Letter to The Honorable Andrew Wheeler, Clean Water Act Section 401 Guidance For Federal Agencies, States, and Authorized Tribes, July 1, 2019

Interstate Natural Gas Association of America

July 1, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Constitution Ave., N.W.
Washington, D.C. 20460

Re: Clean Water Act Section 401 Guidance For Federal Agencies, States and Authorized Tribes

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") appreciates your efforts to promote effective implementation of Clean Water Act Section 401 and welcomes the release of new Section 401 guidance.[1]

Section 401 is a critical component of the Clean Water Act's framework for protecting water quality. By providing states and tribes an important and distinct role in the environmental review of projects requiring federal approval, Congress recognized the value of cooperative federalism in protecting water resources. EPA's new Section 401 guidance is a critical first step in ensuring that Section 401 continues to play this vital role. By aligning implementation of Section 401 with statutory principles and restoring the federal-state balance of authority, EPA has taken meaningful steps to ensure that Section 401 is implemented as Congress intended. EPA should consider codifying concepts from the guidance as it considers revisions to its regulations.[2] Codification of these concepts will support durability and the continued alignment of Section 401 implementation with the statute.

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's member companies transport over 95% of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

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[1] U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*, June 7, 2019.
[2] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15945, Apr. 15, 2019.

I. EPA Action is Necessary to Clarify and Improve the Implementation of Section 401

INGAA supports the protection of water quality and respects the important role that states and tribes play in ensuring shared objectives through the Section 401 process, which is meant to be implemented in the spirit of cooperative federalism that Congress intended. Section 401 implementation recently has become strained for energy projects that some stakeholders believe are not in the public interest. However, when projects are delayed or even halted from misuse of Section 401, consumers are denied the benefit of these projects and interstate commerce is disrupted resulting in significant regional and national impacts.

The following projects are major energy infrastructure projects that over the past several years have experienced delays resulting from the Section 401 process:

- On May 15, 2019, New York denied the Section 401 certification for the Northeast Supply Enhancement Project. This is a $1 billion project intended to displace the use of fuel oil in New York City. New Jersey denied the Section 401 certification on June 5, 2019.

- On June 3, 2019, North Carolina denied Mountain Valley Pipeline, LLC's ("MVP") application for a Section 401 certification for the MVP Southgate Project. The MVP Southgate Project is a new pipeline expansion approximately 73 miles in length that will serve the growing demand for natural gas in North Carolina. The state's denial was based on the application being deemed incomplete more than six months after the application was filed because FERC has not issued a draft environmental impact statement for the Southgate Project.

- The State of New York denied water quality certification for the $683 million Constitution Pipeline, nearly three years after receiving the project's initial application, and after Constitution withdrew and resubmitted its request for certification twice at the request of the state agency.

- The state of New Jersey denied certification for the $1 million PennEast pipeline, deeming the application incomplete until the company provided surveys of the entire pipeline route. Landowners and the state itself, however, denied the company access to their property to conduct the required surveys, which forced the company to begin eminent domain proceedings.

- Two years after submitting a Section 401 request to the state, New York denied certification for the $40 million Millennium Valley Lateral pipeline project, based on the lack of an analysis by FERC of the downstream greenhouse gas emissions, not water quality concerns.

- The State of Oregon denied water quality certification for the $7.5 billion Jordan Cove liquefied natural gas export terminal and its feeder pipeline following the company's responses to multiple requests for additional information.

- The state of New York denied certification for the $500 million Northern Access project without providing sufficient rationale and record citations for the denial more than two years after the initial request for certification was submitted to the state.

- In July 2016, the Millennium Bulk Terminal, a $680 million coal export facility, requested a certification from the State of Washington. On September 26, 2017, just 3 business days after submitting 240 pages of additional information in response to the state's requests and questions, the state denied "with prejudice" the certification request.

- On December 8, 2015, Algonquin Gas Transmission Co. submitted a certification request for a compressor station in Massachusetts, a key part of the larger $450 million Atlantic Bridge project. FERC approved the Atlantic Bridge project in January 2017. On May 17, 2017, the state issued a draft permit indicating its intent to approve the compressor station subject to special conditions. An administrative appeal of the draft permit is ongoing.

Although many of Section 401 requests are processed in a timely and collaborative process, the delays associated with these projects demonstrate that EPA action to improve the implementation of Section 401 is warranted.

II. Concepts Contained In The Guidance That Should Be Codified

EPA can best ensure the continued effective implementation of Section 401 by codifying the statutory principles contained in its Section 401 guidance. As EPA recognized in the guidance document and on prior occasions, EPA's existing regulations on Section 401 implementation are outdated and ripe for modernization.[3] INGAA suggests that EPA incorporate the following concepts from the guidance document into its modernization of its regulations:

- The timeline for action on a Section 401 certification begins upon receipt of a certification request. Federal agencies should have a procedure in place to ensure they are properly notified of the date a certification request is received by the state or tribe.

- The lead federal permitting agency has the authority and discretion to establish certification timelines so long as they are reasonable and do not exceed one year. The lead federal agency may modify its established reasonable timeline, provided

[3] *See* Section 401 Guidance at 2. EPA's existing regulations implementing Section 401, 40 C.F.R. Part 121, were promulgated to implement Section 21 of the Federal Water Pollution Control Act, which contained a precursor state certification program to Section 401. *See* 36 Fed. Reg. 2516 (Feb. 5, 1971) (proposed rule); 36 Fed. Reg. 8563 (May 8, 1971) (final rule). In a rulemaking to revise EPA's Section 401 procedures related to Section 402 of the Clean Water Act, EPA recognized that the regulations now found in Part 121 needed revision because "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and ha[d] never been updated." 44 Fed. Reg. 3265, 3280 (June 7, 1979).

the modified timeline remains reasonable and does not exceed one year from receipt of the request.

- If a state or tribe does not act on a Section 401 request within the established reasonable timeline, the lead federal permitting agency is authorized to determine that the Section 401 certification requirement has been waived so that federal permits or license can be issued. The lead federal permitting agency should notify states or tribes in writing of waiver determinations once made, with sufficient explanation to support the determination

- If a state or tribe intends to deny a Section 401 certification, the notice of denial should be in writing and identify with specificity the reasons related to water quality and any outstanding data or information gaps that preclude achieving reasonable assurance of compliance with applicable water quality requirements.

- States and tribes should identify conditions that are clear, specific, and directly related to a state or tribal water quality requirement and should include citations to such relevant state or tribal law requirement.

- Federal permitting agencies should notify states and tribes of projects that may require Section 401 certification as soon as possible.

III. EPA Should Provide Additional Clarity in the Regulations on Other Challenging Aspects of Section 401 Implementation

In addition to the clear principles described above, the Section 401 Guidance also provides instruction on aspects of Section 401 implementation related to the appropriate scope of Section 401 review and conditions and triggers for the time period for review. EPA recognizes that it may provide further clarity on some of these topics through the regulatory process. INGAA encourages EPA to provide such additional clarity on the topics identified below and include these clarifications when modernizing the regulations:

- Clarification that the timeline for action begins when a state receives a certification request accompanied by the materials submitted in support of the federal permit.

- Clarification on what it means to be the "same request," such that the withdrawal and submission of the same Section 401 request does not restart the time period for review.

- The types of water quality impacts that states and tribes can consider in determining whether to issue or deny a water quality certification.

- The standard by which states and tribes evaluate information or data gaps.

- The definition of "any other appropriate requirement of state law" for which conditions can be imposed in a certification.

- The process by which federal permitting agencies evaluate whether actions are beyond the scope of Section 401 and the impact of actions that are determined to be beyond the scope of Section 401.

- The process by which a certification is modified.

Congress charged EPA with administering the Clean Water Act, including overseeing implementation of the Section 401 program by federal agencies whose permits or authorizations trigger Section 401.[4] By providing further guidance on these topics, EPA will be taking meaningful steps to ensure implementation of Section 401 is effective and consistent across federal agencies.

IV. Conclusion

EPA's 401 Guidance set clear guideposts for federal, state and tribal authorities to implement Section 401 in a manner that respects and supports the important and distinctive roles of each participant in the balance of cooperative federalism. Codification of each of the points noted above merits specific inclusion in EPA's efforts to update its Section 401 regulations.

INGAA appreciates your consideration of these comments and we welcome additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,

Sandra Y. Snyder
Senior Regulatory Attorney, EH&S
Interstate Natural Gas Association of America

[4] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.). The Agency, therefore, has a responsibility to define a common framework for Section 401 reviews; *see also* 40 C.F.R. Part 121 (EPA's regulations addressing federal agency implementation of water quality certifications).

Attachment C

New Jersey Department of Environmental Protection, Denial of PennEast Pipeline Company Application, October 8, 2019

State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Division of Land Use Regulation
Mail Code 501-02A
P.O. Box 420
Trenton, New Jersey 08625-0420
www.nj.gov/dep/landuse

CATHERINE R. McCABE
Commissioner

October 8, 2019

Anthony C. Cox, V.P.
PennEast Pipeline Company, LLC
835 Knitting Mills Way
Wyomissing, PA 19610

RE: File and Activity No.: 0000-17-0007.5 LUP190001, FWW190001
Applicant: PennEast Pipeline Company, LLC
Project: Construction of approximately 37.8 miles of natural gas pipeline
Hunterdon & Mercer Counties

Dear Mr. Cox:

On August 8, 2019, PennEast Pipeline Company, LLC (PennEast) applied to NJDEP for a Freshwater Wetlands Individual Permit, Flood Hazard Area Individual Permit, Flood Hazard Area Verification and Letter of Interpretation and a request for a Water Quality Certificate for the portion of its proposed natural gas pipeline project in New Jersey ("Application")). Based upon the initial review by NJDEP, on September 4, 2019, NJDEP requested additional information from PennEast. On September 11, 2019, PennEast submitted information in response to the NJDEP's September 4, 2019 administrative deficiency letter. NJDEP has determined that the deficient items identified in the September 4, 2019 letter have been sufficiently addressed.

However, on September 10, 2019 the United States Court of Appeals for the Third Circuit vacated the orders of condemnation impacting New Jersey's property interests associated with the above-referenced project. See, In re: PennEast Pipeline Company, LLC (3rd Cir. Sept. 10, 2019). Therefore, the applicant no longer has the legal authority to perform activities on forty-nine (49) properties along the proposed pipeline alignment, and to carry out all requirements of N.J.A.C. 7:7A et seq. and N.J.A.C. 7:13 et seq. for the full length of the project right-of-way.

Based upon the above, PennEast's Application cannot be deemed "administratively complete," because the applicant has not demonstrated that it has the authority, as required by N.J.A.C. 7:7A-16.2(c) and N.J.A.C. 7:13-18.2(c), to submit the application. Given this fundamental deficiency, the NJDEP hereby rejects and administratively closes the Application. PennEast's Application is denied without prejudice, and as a result, no application for a Freshwater Wetlands Individual Permit and Water Quality Certificate is currently pending in any form before NJDEP.

Please be advised, in response to a request from you received by the Division of Land Use Regulation on September 11, 2019, the Freshwater Wetlands Transition Area Waiver Application is hereby considered withdrawn. The Department shall take no further action on this application.

If you have any questions regarding this letter, please contact by email at patricia.cluelow@dep.nj.gov. Please reference the Division's file number in all communication.

Sincerely,

Diane Dow, Director
Division of Land Use Regulation

c: Peter J. Fontaine, Esq.
Cozen O'Connor
One Liberty Place - 1650 Market Street
Philadelphia, PA 19103

Walter F. Judge, PE, PP, PMP
PS&S
Central Monmouth Business Park
1433 Highway 34, Suite A-4
Wall, NJ 07727

Attachment D

North Carolina Department of Environmental Quality, Letter to Mountain Valley Pipeline, LLC, Denial of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application, June 3, 2019

ROY COOPER
Governor
MICHAEL S. REGAN
Secretary
LINDA CULPEPPER
Director

NORTH CAROLINA
Environmental Quality

June 3, 2019

DWR # 20181638 v1
Alamance & Rockingham Counties

CERTIFIED MAIL: 7017 2680 0000 2219 4025
RETURN RECEIPT REQUESTED

Mountain Valley LLC
Attn: Mr. Matthew Raffenberg
700 Universe Blvd
Juno Beach, FL 33408

Subject: **DENIAL of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application**
MVP Southgate

Dear Mr. Raffenberg:

On November 30, 2018, the Division of Water Resources (Division) received your application, requesting a 401 Certification and Buffer Authorization from the Division for the subject project. On January 10, 2019, the Division requested additional information on the project and received a partial response to that request on February 12, 2019. On March 25, 2019, the Division returned your application as incomplete.

Your response to the Division on February 12, as well as your recent response to the U.S. Army Corps of Engineers, stated "*Mountain Valley is currently completing route evaluations and will be providing updated impact tables at a later date*" and "*Mountain Valley will provide final plan and profile view for all proposed permanent fills of aquatic resources in North Carolina…once all surveys have been completed and Project design is finalized*".

On March 15, 2019, the Federal Energy Regulatory Commission (FERC) provided notice of the schedule for environmental review of the subject project. In the notice, FERC states that the draft EIS will be issued in July 2019. Based on the response provided to the Division and follow up phone conversations with MVP contacts, the updated impact tables, final plan and profile views for proposed impacts will not be available until after July 2019.

The Division's March 25th letter is hereby rescinded and, in accordance with 15A NCAC 02H .0507(e) and 15A NCAC 02B .0267, your application for a 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization is hereby denied. Once a Draft EIS has been issued and a preferred route is identified by FERC, you may reapply to the Division.

This decision can be contested as provided in General Statute 150B by filing a written petition for an administrative hearing to the Office of Administrative Hearings (OAH) within sixty (60) calendar days.

A petition form may be obtained from the OAH at http://www.ncoah.com/ or by calling the OAH Clerk's Office at (919) 431-3000 for information. A petition is considered filed when the original and one (1) copy along with any applicable OAH filing fee is received in the OAH during normal office hours (Monday through Friday between 8:00am and 5:00pm, excluding official State holidays). The petition may be faxed to the OAH at (919) 431-3100, provided the original and one copy of the petition along with any applicable OAH filing fee is received by the OAH within five (5) business days following the faxed transmission.

Mailing address for the OAH:

If sending via US Postal Service:
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714

If sending via delivery service (UPS, FedEx, etc):
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285

One (1) copy of the petition must also be served to DEQ:

William F. Lane, General Counsel
Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Please be aware that you have no authorization under Section 401 of the Clean Water Act or the Jordan Lake Riparian Buffer Rules for this activity and any work done within waters of the State or riparian buffers may be a violation of North Carolina General Statutes and Administrative Code.

Please contact Karen Higgins at 919-791-4252 or karen.higgins@ncdenr.gov, or Sue Homewood at 336-776-9693 or sue.homewood@ncdenr.gov if you have any questions or concerns.

Sincerely,

Linda Culpepper, Director
Division of Water Resources

cc: Alex Miller, MVP Southgate (via email)
Heather Patti, TRC Environmental Corp (via email)
Kevin Martin, S&EC (via email)
David Bailey, Raleigh Regulatory Field Office (via email)
Todd Bowers, EPA (via email)
DWR WSRO 401 files

Filename: 20181638v1MVPSouthgate(RockinghamAlamance)_401_IC_DENIAL

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Attachment 2

American Gas Association, Proposed Rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket No. EPA-HQ-OW-2019-0405, RIN 2040-AF86, October 21, 2019

American Gas Association

October 21, 2019

Electronic Filing via: www.regulations.gov
Docket No. EPA-HQ-OW-2019-0405

Environmental Protection Agency
Office of Water
Oceans, Wetlands, and Communities Division
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Proposed Rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket No. EPA-HQ-OW-2019-0405, RIN 2040-AF86

Dear Administrator Wheeler,

The American Gas Association (AGA) respectfully submits these comments in response to Environmental Protection Agency's ("EPA" or "the Agency") proposed rule, "Updating Regulations on Water Quality Certification", published in the Federal Register on August 22, 2019.[1] In this proposed rule, the EPA is proposing to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act ("CWA") Section 401. AGA appreciates the opportunity to comment on this proposal and strongly supports EPA's efforts to restore predictability, reasonableness, and regulatory certainty to the 401certification process. AGA strongly supports the protection of water quality through the effective implementation of the CWA and respects the important role that states and tribes play in these objectives. If implemented, the Proposed Rule will provide a common framework for implementing Section 401 that will offer project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty. Providing clear and consistent guidance regarding the implementation of section 401 is critical to the development and construction of natural gas infrastructure. AGA commends EPA for properly balancing its important environmental protection objectives with regulatory predictability and efficiency.

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 71 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines,

[1] 84 Fed. Reg. 44080 (Jun. 13, 2019) (hereinafter, "Proposed Rule").

marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.

Natural gas utilities nationwide add, on average, nearly 630,000 customers each year, or one customer every minute. More homes and business in the United States use natural gas today than ever before, and the numbers continue to increase. In order to meet this increasing demand, AGA members require regulatory certainty to maintain existing infrastructure and develop new infrastructure. Providing clarity and balance to the 401 certification process will help facilitate the environmentally-responsible construction and maintenance of natural gas infrastructure and help AGA members provide timely, safe, reliable and affordable service to the 178 million Americans that enjoy the benefits of natural gas and the millions more that want it, but do not yet have access.

CWA Section 401[2] provides that a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the state or authorized tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with existing water quality requirements, or waives the certification requirement.[3] As the agency charged with administering the CWA, EPA is responsible for developing a common framework for certifying authorities to follow when carrying out the requirements of section 401. However, EPA has not updated its certification regulations in over 50 years.[4] In April 2019, the President issued Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," which directed EPA to review the CWA Section 401 process and EPA's existing certification regulations and interim guidance, issue new guidance to states, tribes, and federal agencies, and propose new section 401 regulations within 120 days of the Order.[5] The Executive Order also directed EPA to "take into account the federalism considerations underlying section 401 and to focus its attention on the appropriate scope of water quality reviews and conditions, the scope of information needed to act on a certification request in a reasonable period of time, and expectations for certification review times."[6]

During the development of the Proposed Rule, EPA engaged in extensive stakeholder outreach with states, tribes, other federal agencies, and interested stakeholders to solicit input regarding the section 401 certification process and recommendations regarding how that process could be improved. During this pre-publication outreach period, AGA submitted comments supporting comments filed by the Interstate Natural Gas Association of America (INGAA) and urging EPA to "take appropriate action to ensure that state water

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[2] 33 U.S.C. § 1341

[3] *Id.; see also* Proposed Rule at 44081.

[4] Proposed Rule at 44099.

[5] Exec. Order No. 13,868, 84 Fed. Reg. 15496 (Apr. 15, 2019).

[6] *Id.* at section 3.a.

quality reviews under Clean Water Act section 401 are effective, efficient and consistent with the scope and timeline prescribed by the statute."[7] Specifically, AGA recommended that EPA clarify that state section 401 certifications are statutorily limited in scope to address whether a project's discharge will comply with the applicable provisions of the Act specified in section 401, and that states or tribes reviewing section 401 applications act within a reasonable period of time, not to exceed one year.[8]

AGA supports the extensive comments submitted by IGNAA in this docket on October 21, 2019. AGA is pleased that EPA, in its Proposed Rule, seeks to implement the section 401 certification process in a manner that would be applied consistently for project proponents across the country and in accordance with the clear limits provided in the statutory text of the CWA. Specifically, AGA commends EPA for confirming that certifying authorities are required to act on a request for certification "within a reasonable period of time, which shall not exceed a year."[9]

AGA believes that EPA's proposed rule appropriately recognizes the importance of cooperative federalism and clearly balances the important role of the federal and state governments in implementing the CWA and preserving the quality of our nation's waters. Congress explicitly provided in section 401(a)(1), 33 U.S.C. §1341(a)(1), that the federal government would not issue a license or permit for a project with potential discharges without providing a reasonable opportunity for an affected state to evaluate water quality impacts. However, that opportunity is not unlimited. The state certification is limited in scope to evaluating whether discharges from a project are in compliance with specific sections of the CWA.[10] The Proposed Rule, if implemented, would establish a process that maintains the important role that states play in protecting water quality while adhering to the plain language of the CWA.

In our members' experience, most states conduct their 401 certification reviews within the appropriate bounds of the statute, focusing their reviews on water quality issues and completing their reviews to provide a 401 certification decision within far less than one year – often within 90 days or less after receiving the initial request. This has been their experience in most states for intrastate natural gas utility projects that require federal permits, for example from the U.S. Army Corps of Engineers. However, a few states have exceeded the statutory limits on the scope or timeline for their 401 certification in order to

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[7] *See* AGA letter to the Hon. Andrew Wheeler on May 24, 2019, submitted to Docket No. EPA-HQ-OW-2018-0855.

[8] *Id*.

[9] *See* Proposed Rule, 40 C.F.R. §121.4(d)(3)

[10] *See* 33 U.S.C. §1341(a)(1), providing that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State…that any such discharge will comply with the applicable provisions of section 1311, 1312, 1313, 1316, and 1317 of this title." See also, Proposed Rule, 40 C.F.R. § 121.3.

block interstate natural gas pipelines.[11] These state actions significantly affect AGA member natural gas utilities and their customers by restricting the availability of supply and restrain the ability of affected utilities to extend service to convert customers from heating oil to natural gas, which would reduce energy costs to those customers and significantly improve air quality and reduce greenhouse gas emissions.

AGA believes EPA's proposed definition of "certification request"[12] provides much needed regulatory certainty and clarity as to what information is required to initiate a 401 certification request and should help make the 401 certification process more efficient. This proposed definition effectively responds to concerns from certifying agencies that certification requests are incomplete or inadequate by establishing a clear baseline of what information is required to initiate a request. In our view, the proposed definition strikes an appropriate balance between the certifying authority's need for sufficient information to evaluate a request and the permit applicant's ability to obtain and provide the requested information.

AGA also supports the recommendation that EPA strongly encourage certifying authorities to create agency-specific, formal or informal processes that help facilitate meaningful early coordination between the certifying authority and the project proponent. Pre-filing meetings and coordination can help provide increased predictability and efficiency in the section 401 process by providing an early opportunity for dialogue that will help inform agency personnel of the scope and nature of proposed impacts and allow project applicants to better understand the needs of the certifying agency. AGA also supports INGAA's recommendation that EPA clarify that requests from certifying agencies for additional information should be limited to information within the scope of section 401 (i.e., information that is necessary in order to evaluate a project's impact on water quality). Finally, AGA also supports EPA's proposal prohibiting certifying authorities from requesting that a project proponent withdraw a certification request for the purpose of restarting the reasonable period of time.[13]

AGA agrees with INGAA's recommendation that EPA should clarify in the final rule that where a project requires multiple federal authorizations, the "lead" federal agency is responsible for carrying out section 401 responsibilities. Without clarification, the Proposed Rule could result in a scenario where multiple federal agencies are

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[11] *See* INGAA Comments on EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification dated Oct. 21, 2019, footnotes 17 and 24. *See also* Attachment B to INGAA's Comments of Oct. 21, 2019.

[12] *See* Proposed Rule, 40 C.F.R. § 121.1(c)

[13] Proposed Rule, 40 C.F.R. § 121.4(f). Of note, this proposal is consistent with several U.S. Court of Appeals for the District of Columbia Circuit rulings holding that Congress has established a time limit in section 401 that cannot be circumvented or avoided. *See, e.g., Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir, 2019).

implementing section 401 without proper coordination. As stated in INGAA's comments, the concept of "lead agency" is well established under existing NEPA regulations and is consistent with Executive Order 13807. The U.S. Army Corps of Engineers will typically be the lead federal agency for intrastate pipeline projects.

Additionally, AGA also supports EPA's proposal to provide an alternative definition "certification request" for federal agencies that issues general permits. Many AGA members frequently make use of Nationwide Permits (NWPs) for activities that have minimal individual and cumulative environmental effects (e.g., utility line crossings, erosion control, and stream and wetland restoration activities). AGA agrees with INGAA's recommendation that EPA consider additional revisions to the alternative "definition of certification request" in order to provide appropriate flexibility to federal agencies regarding the information that is required to be submitted with a certification request related to a NWP.

Our member companies rely on timely, transparent federal permits and reviews to meet their construction, maintenance, emergency repair, replacement, and pipeline safety goals. AGA appreciates EPA's efforts to improve and modernize the section 401 process and believes that the Proposed Rule, subject to the recommended changes noted above, strikes an appropriate balance between regulatory efficiency and environmental stewardship.

AGA appreciates the opportunity to comment. If you have any questions, please contact me or Pam Lacey, AGA's Chief Regulatory Counsel, at placey@aga.org.

Respectfully Submitted,

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Attachment 3

Interstate Natural Gas Association of America, American Gas Association, Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29541 (June 2, 2021), Docket No. EPA-HQ-OW-2021-0302-0001, RIN 2040-AF86, August 2, 2021

Submitted via www.regulations.gov
Docket No. EPA–HQ–OW–2021–0302

August 2, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule

The Interstate Natural Gas Association of America ("INGAA") and the American Gas Association ("AGA") respectfully submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") notice of intention to reconsider and revise the Clean Water Act Section 401 Certification Rule.

INGAA is a non-profit trade association that advocates for regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 26 member companies transport the vast majority of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity, and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 76 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent — more than 72 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than thirty percent of the United States' energy needs. AGA members rely on interstate natural gas pipelines for the natural gas supply they need in order to provide affordable, reliable natural gas distribution service to homes and businesses.

Natural gas plays an important role in American society, particularly with respect to the nation's ongoing transition to clean energy. But in order to maintain the United States' modern and reliable pipeline system, to complement the growing number of renewable energy resources, and to displace higher emitting fuels, EPA must establish an effective and uniform

approach to state reviews of consistency with water quality standards.[1] To ensure that any revised rule will be legally durable and consistent with the Clean Water Act's cooperative federalism scheme, however, EPA must limit any revisions to the 2020 Certification Rule to minor clarifications until EPA has sufficient data to determine the effectiveness of the current rule.

I. An Effective and Consistent Section 401 Process Is Critical to Advancing Infrastructure Projects

The environmental review and permitting of interstate natural gas pipelines is complex and comprehensive, often spanning years and requiring authorizations from multiple federal, state, and local entities, each with unique and sometimes competing authorities and processes. Comprehensive permitting reviews ensure that agencies evaluate potential impacts under the proper statutory standards set forth by Congress and minimize or mitigate those impacts where appropriate.

Clean Water Act Section 401 provides states and tribes an important role in connection with federal permitting of the construction, modernization, and maintenance of infrastructure, including roads, bridges, transmission lines carrying electricity from renewable generators, natural gas pipelines, and the wide range of activities authorized pursuant to the Army Corps of Engineers' Clean Water Act Section 404 and/or Nationwide Permits. Review under Section 401 must be efficient and predictable both to ensure that developers have the certainty needed to develop these critical infrastructure projects and that states have the ability to oversee the quality of their waters without undermining important national objectives. For infrastructure projects that cross state lines and require multiple Section 401 certifications, like interstate natural gas pipelines, hydrogen pipelines, and electric transmission lines, consistent implementation of Section 401 across states is necessary to prevent local interests from obstructing development of infrastructure that furthers national priorities and the wider public interest and keeping energy prices from overburdening lower income communities.

Prior to the EPA's issuance of the 2020 Certification Rule,[2] the Section 401 regulations were nearly 50 years old and promulgated in response to a prior version of the Section 401 statute.[3] These outdated regulations not only failed to account for the evolution of the scope

[1] President Biden has recognized the value of "coordinated infrastructure permitting to expedite federal decisions." The White House, The American Jobs Plan, Mar. 31, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

[2] Clean Water Act Section 401, Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) ("2020 Certification Rule") (codified at 40 C.F.R. pt 121).

[3] In 1970, Congress enacted Section 21 of the Federal Water Pollution Control Act ("FWPCA"), which contained a state certification requirement that predated Section 401. In 1971, EPA promulgated 40 C.F.R. Part 121 to implement Section 21 of FWPCA. 36 Fed. Reg. 2516 (Feb. 5, 1971) (proposed rule); 36 Fed. Reg. 8563 (May 8, 1971) (final rule). In a rulemaking to revise EPA's Section 401 procedures related to Section 402 of the Clean Water Act, EPA recognized that the regulations now found in Part 121 needed revision because the "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and has never been updated." 44 Fed. Reg. 32880 (June 7, 1979).

and complexity of infrastructure projects over the last half century but also enabled states to misuse of EPA's Section 401 program as a means of dictating federal energy policy. These deficiencies led to the delay or cancelation of much-needed infrastructure projects,[4] thereby depriving consumers of the projects' benefits, disrupting interstate commerce, and undermining the nation's prosperity and security.

The 2020 Certification Rule aligned EPA's Section 401 program with the statutory text of Section 401 and appellate courts' interpretation of that text. The result is a workable process that should—and, based on some INGAA and AGA members' experience, did—reduce the potential for conflicting interpretations of the certifying authority's role in the implementation of Section 401 and strengthen permitting and licensing programs within the framework of complementary federal and state responsibilities.

It will take time for federal agencies and certifying authorities to implement the 2020 Certification Rule and to gather the data necessary to evaluate the 2020 Certification Rule's effectiveness. Absent this data, there is no justification for the EPA's conclusions about the effectiveness of the 2020 Certification Rule in protecting water quality. Refinement of the rule is appropriate only *after* EPA and regulated entities have had sufficient time for the rule to be in effect and applied. If EPA chooses now to make revisions, they should be minimal until federal agencies have had adequate time to adjust their regulatory frameworks and EPA, states, tribes, and developers have a sound record of experience with the rule on which to base any further revisions.[5]

In the meantime, EPA's clear and consistent action on Section 401 is necessary to give federal agencies the appropriate direction to implement Section 401 in a manner that aligns with the statute and allows for the efficient and predictable review of infrastructure projects. Consistency in the permitting process is essential for investing capital to support major infrastructure projects that serve national needs.

II. Response to Notice of Intention

As EPA considers the 2020 Certification Rule and potential revisions, INGAA and AGA appreciate the opportunity to provide EPA with the following comments for consideration, organized by EPA's questions in the NOI. Our comments are informed directly by Section 401's statutory language, recent appellate case law interpreting that statutory language, and its

[4] *See* July 1, 2019 Letter from INGAA to U.S. EPA at 2-3, listing major energy infrastructure projects that have experienced delays resulting from the Section 401 process (Attached).

[5] Federal agencies like the Federal Energy Regulatory Commission ("FERC") and the Army Corps of Engineers have already made adjustments to their regulatory process to incorporate the 2020 Certification Rule. *See* FERC, Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, Docket No. RM20-18-000, 174 FERC ¶ 61,196 (2021); Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2852 (Jan. 13, 2021) ("For this issuance of these NWPs, the Corps complied with EPA's final rule, which was published in the Federal Register on July 13, 2020, and went into effect on September 11, 2020.").

members' experience with the Section 401 process.

A. Response to Question 2: The Definition of Certification Request Must Provide Certainty as to When the Statutory Review Period Has Been Initiated

Section 401 states clearly that the period for the certifying authority to act on a Section 401 request begins upon receipt of the "certification request."[6] The 2020 Certification Rule defines "certification request" appropriately, balancing the certifying authority's need for sufficient information to initiate a meaningful review and the permit applicant's ability to obtain and submit additional information as it becomes available. Any changes to the current definition would need to maintain this balance and continue to provide certainty as to when the Section 401 review begins, as discussed further below.

The current definition of certification request effectuates the time limits imposed by Congress—"within a reasonable period of time (which shall not exceed one year) after receipt of such request"[7]—and prevents certifying authorities from exceeding the one year maximum time limitation and using Section 401 to delay projects.[8] The lead federal agency—not the certifying authority—determines matters of waiver under Section 401, which includes determining when the reasonable period of time for review begins.[9] Events subsequent to the certifying authority's receipt, such as the state's validation of the completeness of the request, cannot delay the start of the time period for review.[10] Neither can the applicant and the certifying authority agree to

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[6] 33 U.S.C. § 1341(a)(1) ("If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.") (emphasis added).

[7] *Id*.

[8] National Fuel Gas Supply Corporation and Empire Pipeline, Inc.'s (collectively, "National Fuel") experience with its Northern Access 2016 Project is illustrative of the significant delays caused by certifying authorities attempting to extend the statutory one-year deadline. On March 2, 2016, the New York State Department of Environmental Quality ("NYSDEC") received National Fuel's Section 401 request. *NY Dep't of Envtl. Conservation v. FERC*, 991 F.3d 439, 443 (2d Cir. 2021). In January 2017, the NYSDEC asked National Fuel to agree to revise the date on which the application was "deemed received" by the NYSDEC to April 8, 2016; this was memorialized in a letter agreement. *Id.* at 443, 447-48. On April 7, 2017, NYSDEC denied National Fuel's certification request, which led to litigation related to the timeliness of the denial. *Id*. at 444. FERC concluded that the denial came too late, because it occurred more than one year after the NYSDEC received the Section 401 request. *National Fuel Gas Supply Corp*., 167 FERC ¶ 61,007, at P 9 (Apr. 2, 2019). On March 23, 2021, the U.S. Court of Appeals for the Second Circuit upheld that decision. *NY Dep't of Envtl. Conservation,* 991 F.3d at 450.

[9] *See Millennium Pipeline v. Seggos*, 860 F.3d 696, 699 (D.C. Cir. 2017) (project applicants are to present evidence of waiver to federal agency).

[10] *NY Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) ("If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

delay the start of the review period or otherwise extend the review period.[11]

It is appropriate for EPA, as the federal agency charged with administering the Clean Water Act,[12] to define "certification request" and the information to be contained within. Allowing the certifying authority to decide what information must be included in the certification request would be tantamount to determining whether a request is "complete"—thereby starting the maximum one-year period for review—and an end-run on the statutory time limit.[13]

INGAA and AGA recommend that EPA clarify that a "certification request"—and the commencement of the reasonable time period for review—only requires the best information reasonably available to the project proponent at the time the request is made. For example, project proponents may rely on remote sensing and database information to determine the "location and nature of any potential discharge that may result from the proposed project"[14] at the time of the request and confirm these locations through field verification once the proponent landowner permission to access all properties along the proposed route. The proponent's use of the best information reasonably available in this manner need not delay the certifying agency's review of the request.

This clarification will not frustrate a certifying agency's ability to review the certification request. For interstate natural gas pipelines seeking a certificate of public convenience and necessity under the Natural Gas Act, the Section 401 certification request is typically filed within 30 days of filing a certificate application with the FERC, which itself must contain complete resource reports offering extensive analysis of water quality impacts and other impacts.[15] Thus, at the time of the certification request, there are ample analytical and technical studies available for the certifying authority's review. If a certifying authority needs additional information to complete its Section 401 review, it can request that information from the project proponent during the reasonable period of time for review.

INGAA and AGA members have found the pre-filing meetings with the certifying agencies helpful to discuss the proposed project and identify what information the pipeline shall provide and what additional information the certifying agency may be seeking. Although helpful, scheduling difficulties can frustrate the certifying agency's and the developer's efforts to hold the meeting. INGAA and AGA recommend that EPA clarify that the occurrence of a pre-filing meeting is not a prerequisite for filing a certification request.

Neither the submission of additional information nor agency requests for additional information during the pendency of the certifying authority's review invalidates the certification

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[11] *See NY Dep't of Envtl. Conservation*, 991 F.3d at 450 ("Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period[.]").

[12] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

[13] *See NY Dep't of Envtl. Conservation*, 884 F.3d at 455.

[14] 40 C.F.R. § 121.5(b)(4).

[15] *See, e.g.*, 18 C.F.R. § 380.12 (Environmental reports for Natural Gas Act applications).

request or restarts or extends the reasonable period of time for review. Section 401 provides no exception for such matters. Rather, the statute adopts a practical approach towards balancing the interests of federal authorities, certifying authorities, and developers of national infrastructure that does not require developers to possess complete and total information at the time of its request.

Attempts by a certifying authority to delay the commencement of its time period for review or extend the time period of review beyond one year is in violation of the Clean Water Act.[16] Instead, if a certifying authority determines that it cannot issue the requested certification based on the available information, "it can simply deny the application without prejudice."[17] EPA should clarify that such denial without prejudice shall include a statement explaining why the project will not comply with water quality requirements and the specific water quality data or information that would be needed to grant certification. This clarification will help ensure that the state's decision has a sound basis in fact and law and is not the product of abuse of the Section 401 program.

B. Response to Question 3: The Lead Federal Agency Has the Authority to Set the "Reasonable Period of Time"

Section 401 balances the certifying authority's interest in a thorough evaluation of potential water quality impacts with the federal government's obligation to act promptly on permit applications by imposing a clear time limit on the certifying authority's action before waiver occurs.[18] As set out in the 2020 Certification Rule, it is the lead federal agency's responsibility and obligation to determine whether waiver has occurred,[19] a determination that must include setting the reasonable period of time.[20]

The statute provides a full year as the absolute maximum amount of time.[21] The lead federal agency may determine a reasonable period of time to be less than one year.[22] Certifying authorities and project proponents may and should provide input to the lead federal agency in setting or modifying the reasonable period of time, but they have no authority to set the reasonable period of time under Section 401. The review period begins with a state's receipt of

[16] *Hoopa Valley*, 913 F.3d at 1104.

[17] *NY Dep't of Envtl. Conservation*, 884 F.3d at 456.

[18] 33 U.S.C. § 1341(a)(1) ("If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.") (emphasis added).

[19] *See Millennium Pipeline*, 860 F.3d at 696 (holding that the lead federal agency decides whether waiver has occurred as a result of exceeding the statutory review period).

[20] Both EPA and the Army Corps of Engineers have defined the reasonable period by regulations. *See* 40 C.F.R. § 124.53(c)(3) (60 day time period); 33 C.F.R. § 325.2(b)(ii) (60 day time period).

[21] 33 U.S.C. § 1341(a)(1).

[22] *See Hoopa Valley*, 913 F.3d at 1103-04.

the request and ends at the point in time designated by the lead federal agency as a reasonable period of time for the state's review. Under no circumstances can the reasonable period of time exceed one year from the date of receipt of the certification request.[23]

Many projects require multiple federal permits or approvals of some form. For example, an interstate natural gas pipeline project proponent seeking project-specific authorization under Section 7(c) of the Natural Gas Act must obtain a certificate of public convenience and necessity from FERC; this certificate authorizes the construction and operation of the pipeline. Where a project requires multiple federal authorizations, the "lead" federal agency is responsible for carrying out Section 401 responsibilities (i.e., setting the reasonable period of time for the certifying agency to make a decision, determining waiver, etc.)—and all other federal agencies should defer accordingly.[24] Otherwise, as recognized by EPA, a situation could arise where multiple federal agencies are determining the reasonable period of time, reviewing the certifying authority's Section 401 action, incorporating conditions into federal licenses or permits, and determining whether waiver has occurred without coordination and with possibly conflicting determinations.[25]

The Army Corps of Engineers has recognized this potential for conflict and has incorporated the lead federal agency concept into its policies.[26] Thus, for projects that require an environmental assessment or environmental impact statement under National Environmental Policy Act ("NEPA"), and where the Corps is not the lead federal agency, which is the case for interstate natural gas pipelines requiring FERC approval, the Corps has committed to "defer to the determination of the lead agency, determine that the certification has been waived, and proceed accordingly."[27]

C. Response Question 4: The Scope of Section 401 Review by Certifying Agencies is Properly Limited to Water Quality

Section 401 provides certifying authorities the opportunity to certify whether a proposed discharge will comply with applicable water quality provisions. The certifying authority's review

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[23] *See Millennium Pipeline*, 860 F.3d at 700 ("waiver occurs after one year of agency inaction" and "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation").

[24] *See id.* at 698 (D.C. Cir. 2017) ("For any company desiring to construct a natural gas pipeline, all roads lead to FERC.").

[25] Clean Water Act Section 401 Certification Rule Response to Comments, May 28, 2020 at 48 ("Although not required in the final rule, the EPA encourages non-lead federal agencies to coordinate with and, where appropriate, defer to lead federal agencies on decisions concerning the reasonable period of time for a particular project, and whether waiver has occurred. Close coordination on these important procedural issues will provide greater clarity and reduce confusion and uncertainty for all participants in the certification process.").

[26] U.S. Army Corps of Engineers, Memorandum, Implementation Guidance for Regulatory Compliance with Executive Order (EO) 13807 and One Federal Decision (OFD) within Civil Works Programs (Sept. 26, 2018). (Attached).

[27] *Id*. at 8.

and conditioning authority is not unbounded and is instead limited by the text of Section 401.[28] The statute, however, contains variations in language related to the scope of review that have led to divergent legal interpretations related to two key points: (a) the relationship between Section 401(a)(1) and 401(d), and (b) the meaning of the phrase "any other appropriate requirement of state law." The 2020 Certification Rule resolves these divergent interpretations through a holistic reading of the statute and offers a practical approach for implementing Section 401. Given the practical importance of the 2020 Certification Rule's changes, EPA should continue to apply the 2020 Certification Rule, and gather data and information to assess the impacts of the rule, across multiple projects and states before considering any adjustments to the Rule.

1. The relationship between Section 401(a)(1) and Section 401(d) supports a single scope for Section 401 review.

Section 401(a)(1) directs the certifying authority's inquiry into whether to grant or deny the certification. The provision focuses on whether the "discharge" will comply with certain enumerated "applicable provisions" of the Clean Water Act.[29] Section 401(d) authorizes certifying agencies to include appropriate conditions in the grant of a certification. The conditioning authority described in Section 401(d) is expressed in somewhat different terms than the scope to grant or deny a certification request under Section 401(a)(1).[30] When read in isolation, Section 401(a) and Section 401(d) exhibit a facial incongruity that has created significant challenges in implementing Section 401 uniformly and fairly across the nation.[31]

Critically, Section 401(a)(1) and Section 401(d) are not isolated provisions of Section 401, like pebbles on the sand. The Supreme Court has explained:

> [T]he cardinal rule is that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .[32]

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[28] *See PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994).

[29] 33 U.S.C. § 1341(a)(1) (enumerating Sections 301, 302, 303, 306, and 307 of the Clean Water Act as the "applicable provisions").

[30] 33 U.S.C. § 1341(d) (enumerating Sections 301, 302, 306, and 307 of the Clean Water Act and "any other appropriate requirement of State law").

[31] The Supreme Court's decision in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dep't of Ecology* exemplifies the incongruity in the text, with some Justices concluding that Section 401(d) must be read in support of Section 401(a) and others concluding that Section 401(d) expands the authority. 511 U.S. 700, 711 and 726-27. The Court's interpretation of Section 401(d) does not bind EPA, however, and does not require revision of the 2020 Certification Rule. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*, 545 U.S. 967, 982-83 (2005).

[32] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted).

In Section 401, the authority to condition a certification under Section 401(d) is in support of the certifying authority's right (and responsibility) to grant or deny a certification request under Section 401(a)(1). Together, the certification and any conditions form an integrated whole whose overarching purpose is to assure water quality by affording certifying authorities a reasonable opportunity for review. The 2020 Certification Rule recognizes the interrelation of these provisions by establishing a single, clear articulation of the scope of review. This scope reflects both Section 401(a)(1) and Section 401(d), giving meaning to and effectuating each.

Not only is this approach supported by the statute, it is also consistent with the practical implementation of Section 401. In evaluating a certification request, the certifying authority assesses whether the proposed discharge will comply with applicable water quality provisions and whether appropriate conditions are necessary to ensure such compliance. It is a comprehensive evaluation with a single determination. Had EPA established two different scopes of review—one for the grant or denial of a certification request and one for conditioning certifications—EPA would be requiring certifying authorities to bifurcate their reviews and sequentially consider the question of whether to grant or deny and then the question of conditioning. This would lead to further uncertainties about the reach of conditioning authority apart from certification authority. Such uncertainties frustrate efficient review of certification requests, invite divergent approaches by tribes and states (even on the same multi-state development project), and confound efforts by project proponents to develop an appropriate record upon which certifying agencies can confidently act within the prescribed reasonable time.

2. "Any other requirement of state law" is properly limited to water quality.

Section 401(d) authorizes the certifying authority to condition the grant of a certification to ensure compliance with enumerated provisions of the Clean Water Act and "with any other appropriate requirement of State law set forth in such certification."[33] Certifying authorities have attempted to expand the scope of Section 401 beyond water quality based on an erroneous interpretation of the phrase "any other appropriate requirement of state law" that is untethered to the Clean Water Act. For example, certifying authorities have used this phrase to include conditions in Section 401 certifications related to the odorization of gas, mitigation measures to address past contamination, construction at the site, and requirements to adjust herbaceous stratum at the site. EPA itself has found that certifying authorities have included conditions not related to water quality, including requiring construction of biking and hiking trails.[34] States have also inappropriately denied Section 401 certifications on grounds unrelated to clean water.[35]

[33] 33 U.S.C. § 1341(d).

[34] 84 Fed. Reg. 44,080, 44,081 (Aug. 22, 2019).

[35] *See* e.g., Millennium Pipeline Co., LLC, Notice of Decision, NYSDEC, Permit ID 3-3399-00071/00001, August 30, 2017, which denied Millennium's certification request because "FERC failed to consider or quantify the downstream greenhouse gas from the combustion of the natural gas transported by the Project as part of [its] NEPA [environmental] review".

This single phrase must be read in the context in which it is found.[36] The statutory language throughout Section 401—and the Clean Water Act generally—is focused on water quality.[37] Section 401(a)(1) limits the scope of the certifying authority's actions to enumerated provisions of the Clean Water Act.[38] Other sections are similarly focused on water quality and provide no suggestion that non-water quality considerations or conditions are appropriate under Section 401.[39] There is no evidence that Congress intended this phrase to convey broader conditioning authority under Section 401(d) than necessary to support the focus of the state's review stated in Section 401(a).

D. Response to Question 5: Federal Agencies Have the Authority to Evaluate Certification Actions

Section 401(a)(1) makes clear that a federal agency must withhold the authorization of activities that affect water quality until the applicant obtains the applicable water quality certifications or the obligation is waived and that, upon denial, a federal agency may not grant the license or permit.[40] By making the issuance of a federal license contingent on action from the certifying authority, the statute requires that the federal agency make a threshold determination as to whether or not the water quality certification has been obtained or denied or whether waiver has occurred.[41] This includes setting the reasonable period of time and the date by which a state needs to act to avoid waiver.

In order to make this determination, federal agencies look to federal law—the provisions of Section 401—to fulfill their duty to assure that a certifying authority's action has facially satisfied the express requirements of Section 401.[42] The nuances and application of state law are not part of this inquiry and lie outside the authority of the federal agency to evaluate in

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[36] *See King v. Burwell*, 576 U.S. 473, 475 (2015) (internal citations omitted) (noting the "fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

[37] *See* 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[38] *See id*. at § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.").

[39] *See*, *e.g., id.* at § 1341(a)(2) ("Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters").

[40] *See id.* at § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.").

[41] *See City of Tacoma, Washington v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (federal agencies have "an obligation to determine that the specific certification required by Section 401 has been obtained") (internal citations omitted).

[42] *See id.*

detail.[43]

Similarly, to avoid waiver, a certifying authority must take timely final action on a certification request—grant, grant with conditions, or deny. The U.S. Court of Appeals for the Fourth Circuit recently suggested in dicta that a certifying authority could avoid waiver by taking "significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year."[44] This suggestion is incorrect and should not be adopted for multiple reasons.

First, by including a "one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding *without making a decision on the certification request*."[45] The Fourth Circuit's dicta suggesting that partial action is sufficient contradicts what "is clear from the plain text": Section 401 requires states to take final action within a reasonable period of time, not to exceed one year.[46]

Second, an interpretation of Section 401 that permits states to take only partial action within a reasonable period of time contravenes Congress' intent in passing Section 401. "Congress intended Section 401 to curb a state's dalliance or unreasonable delay," and, as a result, courts have "repeatedly recognized that the waiver provision was created to prevent a State from indefinitely delaying a federal licensing proceeding."[47] By allowing certifying authorities to take less than final action on a certification request, certifying authorities would be able to extend the reasonable period of time indefinitely, "blur[ring] the bright-line rule into a subjective standard" and frustrating Congress' intent to protect against state inaction.[48] Moreover, if a certifying authority can avoid the Clean Water Act's outer statutory deadline of one year and can continue to act on its own timeline, it would also run afoul of the goal of Congress' revisions to the Natural Gas Act that require FERC to establish a schedule for all federal

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[43] *See id*. ("This obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards."); *see also Am. Rivers v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997) (FERC may not "second-guess the imposition of conditions") (relying on *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians*, 466 U.S. 765 (1984)).

[44] *N.C. Dep't of Envtl. Quality v. FERC*, __ F.4th ___; 2021 U.S. App. LEXIS 19841 *28-30 (4th Cir. July 2, 2021 Nos 20-1655, 20-1671).

[45] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (emphasis added).

[46] *Id*.; *see also Hoopa Valley*, 913 F.3d at 1104 ("Now, more than a decade later, the states still have not rendered *certification decisions*.") (emphasis added); *N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 456 (rejecting argument that "requiring state agencies to act on a request within one year will force it to render premature decisions").

[47] *Hoopa Valley Tribe* 913 F.3d at 1105-06; *see also N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 456 (rejecting interpretation of Section 401 under which "state agencies could . . . theoretically request supplemental information indefinitely").

[48] *NY Dep't of Envtl. Conservation*, 991 F.3d at 448.

authorizations[49] and the Commission's own regulations, which state that it shall deem waiver if the state certifying authority has not acted within one year of the receipt of the certification request.[50]

Third, the Fourth Circuit's suggested interpretation of Section 401 needlessly replaces a clear term—"act"—with an ambiguous standard. Under this standard, federal agencies and project developers must determine whether the certifying authority's action was "significant and meaningful" enough to satisfy Section 401's requirement "to act." As a threshold matter, courts have rejected federal agencies making this type of substantive inquiry of a certification action.[51] More fundamentally, this interpretation will force federal agencies and developers to waste significant resources evaluating the "significance" of the certifying authority's actions and needlessly introduce substantial uncertainty into the Section 401 review process.

Fourth, the Fourth Circuit's interpretation of "act" is dicta and not binding. Although the Court expressed "reservations about FERC's reading of [Section 401] and its approach to the waiver question," the Court held that it "need not definitively resolve those questions in this appeal" because it could resolve the case based a review of "FERC's key factual findings."[52] Accordingly, the Court "le[ft] the statutory-interpretation question for resolution in a case where the outcome depends on the precise meaning of the statute."[53] Because the Fourth Circuit did not "definitely resolve" questions regarding the "precise meaning" of Section 401, the Court's discussion of that provision should not serve as a basis for revisions to the Section 401 Certification Rule.

Pursuant to Section 401, certifying authorities may grant certifications with conditions, which then become a condition on any federal license or permit.[54] Inherent in the authority to condition a certification is the limitation that the certifying authority's action must be in compliance with Section 401.[55] The 2020 Certification Rule provides certifying authorities with clear procedures for documenting and including conditions in their grants of certifications. This clarity is necessary to prevent certifying authorities from imposing conditions that are untethered to the Clean Water Act.[56]

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[49] 15 U.S.C. § 717n(c)(1).

[50] 48 C.F.R. § 157.22(b).

[51] *See City of Tacoma*, 460 F.3d at 68 (federal agencies are not to judge the substance of the certifying authority's actions).

[52] *N.C. Dep't of Envtl. Quality v. FERC,* Nos. 20-1655, 20-1671, 2021 U.S. App. LEXIS 19841, at *30 (4th Cir. July 2, 2021).

[53] *Id.* at 31.

[54] 33 U.S.C. §1341(d).

[55] *PUD No. 1*, 511 U.S. at 712 ("Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded.").

[56] *See supra* Section II.C.2.

E. Response to Question 6: Section 401 Does Not Provide Independent Enforcement Authority

When a certifying authority conditions the grant of a certification, those conditions ''shall become a condition on any Federal license or permit'' subject to Section 401.[57] The 2020 Certification Rule takes the next step and declares that federal agencies are responsible for enforcing conditions included in a certification that are incorporated into a federal permit or license.

INGAA and AGA recommend that EPA clarify that Section 401 does not provide federal agencies with independent authority to enforce those conditions.[58] Rather, federal agencies have only their customary authority to enforce permits, which contain conditions arising from the Section 401 certification conditions. A federal agency draws on its own licensing or permitting authority to enforce any provision of the federal license or permit.[59] Moreover, where a condition is predicated on state or tribal regulatory requirement, the certifying authority, which would have the requisite expertise to apply the state law, may have independent authority to enforce the applicable water quality requirements upon which the condition is based.

F. Response to Question 7: Modification of Certifications Should be Limited

INGAA and AGA agree with EPA that the 2020 Certification Rule's prohibition on modifications limits the flexibility of permits and certifications to adapt to changing circumstances. INGAA and AGA recommend that EPA reinstate the modification provision, but clarify that modification may only occur in such a manner as may be agreed upon by the project proponent and the federal agency.

Certifying authorities have the necessary authority under the Clean Water Act to modify water quality certifications. Although Section 401 does not expressly provide such authority, federal agencies have modified permits issued under other sections of the Clean Water Act that similarly lack an express grant of authority so long as the agencies provide notice and follows their procedures.[60] Section 401, however, restricts the time that certifying authorities have to act on certification requests. Thus, certifying authorities that seek to add certification conditions after the review period has ended and without the project proponent's agreement—like a "reopener" condition—should be prevented from taking such action.

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[57] 33 U.S.C. § 1341(d).

[58] Section 401 limits the enforcement authority conferred to the federal agency to suspend or revoke the federal license or permit after the "entering of a judgment" under the Clean Water Act that the licensed facility or activity "has been operated in violation of" the enumerated provisions of the Clean Water Act. *See* 33 U.S.C. § 1341(a)(5).

[59] In the case of proposed interstate natural gas pipelines, the federal agency (FERC) draws on its authority under the Natural Gas Act to enforce the provisions of its certificate authorizations. *See, e.g.*, 15 U.S.C. § 717f(c).

[60] For example, the Clean Water Act also does not provide express authority for EPA to modify permits issued under Section 402 or for the Corps to modify Section 404 permits. However, both agencies assume the authority to modify permits issued under these sections.

III. Conclusion

INGAA and AGA appreciate your consideration of these comments, and we welcome additional dialogue.

Sincerely,

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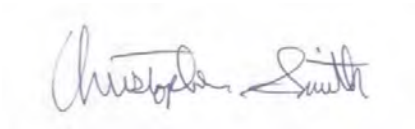

Christopher Smith
Regulatory Attorney
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Interstate Natural Gas Association of America

July 1, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Constitution Ave., N.W.
Washington, D.C. 20460

Re: Clean Water Act Section 401 Guidance For Federal Agencies, States and Authorized Tribes

Dear Administrator Wheeler:

The Interstate Natural Gas Association of America ("INGAA") appreciates your efforts to promote effective implementation of Clean Water Act Section 401 and welcomes the release of new Section 401 guidance.[1]

Section 401 is a critical component of the Clean Water Act's framework for protecting water quality. By providing states and tribes an important and distinct role in the environmental review of projects requiring federal approval, Congress recognized the value of cooperative federalism in protecting water resources. EPA's new Section 401 guidance is a critical first step in ensuring that Section 401 continues to play this vital role. By aligning implementation of Section 401 with statutory principles and restoring the federal-state balance of authority, EPA has taken meaningful steps to ensure that Section 401 is implemented as Congress intended. EPA should consider codifying concepts from the guidance as it considers revisions to its regulations.[2] Codification of these concepts will support durability and the continued alignment of Section 401 implementation with the statute.

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's member companies transport over 95% of the nation's natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

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[1] U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*, June 7, 2019.
[2] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, Sec. 3, Apr. 10, 2019, 84 Fed. Reg. 15945, Apr. 15, 2019.

I. EPA Action is Necessary to Clarify and Improve the Implementation of Section 401

INGAA supports the protection of water quality and respects the important role that states and tribes play in ensuring shared objectives through the Section 401 process, which is meant to be implemented in the spirit of cooperative federalism that Congress intended. Section 401 implementation recently has become strained for energy projects that some stakeholders believe are not in the public interest. However, when projects are delayed or even halted from misuse of Section 401, consumers are denied the benefit of these projects and interstate commerce is disrupted resulting in significant regional and national impacts.

The following projects are major energy infrastructure projects that over the past several years have experienced delays resulting from the Section 401 process:

- On May 15, 2019, New York denied the Section 401 certification for the Northeast Supply Enhancement Project. This is a $1 billion project intended to displace the use of fuel oil in New York City. New Jersey denied the Section 401 certification on June 5, 2019.

- On June 3, 2019, North Carolina denied Mountain Valley Pipeline, LLC's ("MVP") application for a Section 401 certification for the MVP Southgate Project. The MVP Southgate Project is a new pipeline expansion approximately 73 miles in length that will serve the growing demand for natural gas in North Carolina. The state's denial was based on the application being deemed incomplete more than six months after the application was filed because FERC has not issued a draft environmental impact statement for the Southgate Project.

- The State of New York denied water quality certification for the $683 million Constitution Pipeline, nearly three years after receiving the project's initial application, and after Constitution withdrew and resubmitted its request for certification twice at the request of the state agency.

- The state of New Jersey denied certification for the $1 million PennEast pipeline, deeming the application incomplete until the company provided surveys of the entire pipeline route. Landowners and the state itself, however, denied the company access to their property to conduct the required surveys, which forced the company to begin eminent domain proceedings.

- Two years after submitting a Section 401 request to the state, New York denied certification for the $40 million Millennium Valley Lateral pipeline project, based on the lack of an analysis by FERC of the downstream greenhouse gas emissions, not water quality concerns.

- The State of Oregon denied water quality certification for the $7.5 billion Jordan Cove liquefied natural gas export terminal and its feeder pipeline following the company's responses to multiple requests for additional information.

- The state of New York denied certification for the $500 million Northern Access project without providing sufficient rationale and record citations for the denial more than two years after the initial request for certification was submitted to the state.

- In July 2016, the Millennium Bulk Terminal, a $680 million coal export facility, requested a certification from the State of Washington. On September 26, 2017, just 3 business days after submitting 240 pages of additional information in response to the state's requests and questions, the state denied "with prejudice" the certification request.

- On December 8, 2015, Algonquin Gas Transmission Co. submitted a certification request for a compressor station in Massachusetts, a key part of the larger $450 million Atlantic Bridge project. FERC approved the Atlantic Bridge project in January 2017. On May 17, 2017, the state issued a draft permit indicating its intent to approve the compressor station subject to special conditions. An administrative appeal of the draft permit is ongoing.

Although many of Section 401 requests are processed in a timely and collaborative process, the delays associated with these projects demonstrate that EPA action to improve the implementation of Section 401 is warranted.

II. Concepts Contained In The Guidance That Should Be Codified

EPA can best ensure the continued effective implementation of Section 401 by codifying the statutory principles contained in its Section 401 guidance. As EPA recognized in the guidance document and on prior occasions, EPA's existing regulations on Section 401 implementation are outdated and ripe for modernization.[3] INGAA suggests that EPA incorporate the following concepts from the guidance document into its modernization of its regulations:

- The timeline for action on a Section 401 certification begins upon receipt of a certification request. Federal agencies should have a procedure in place to ensure they are properly notified of the date a certification request is received by the state or tribe.

- The lead federal permitting agency has the authority and discretion to establish certification timelines so long as they are reasonable and do not exceed one year. The lead federal agency may modify its established reasonable timeline, provided

[3] *See* Section 401 Guidance at 2. EPA's existing regulations implementing Section 401, 40 C.F.R. Part 121, were promulgated to implement Section 21 of the Federal Water Pollution Control Act, which contained a precursor state certification program to Section 401. *See* 36 Fed. Reg. 2516 (Feb. 5, 1971) (proposed rule); 36 Fed. Reg. 8563 (May 8, 1971) (final rule). In a rulemaking to revise EPA's Section 401 procedures related to Section 402 of the Clean Water Act, EPA recognized that the regulations now found in Part 121 needed revision because "[t]he substance of these regulations predates the 1972 amendments to the Clean Water Act and ha[d] never been updated." 44 Fed. Reg. 3265, 3280 (June 7, 1979).

the modified timeline remains reasonable and does not exceed one year from receipt of the request.

- If a state or tribe does not act on a Section 401 request within the established reasonable timeline, the lead federal permitting agency is authorized to determine that the Section 401 certification requirement has been waived so that federal permits or license can be issued. The lead federal permitting agency should notify states or tribes in writing of waiver determinations once made, with sufficient explanation to support the determination

- If a state or tribe intends to deny a Section 401 certification, the notice of denial should be in writing and identify with specificity the reasons related to water quality and any outstanding data or information gaps that preclude achieving reasonable assurance of compliance with applicable water quality requirements.

- States and tribes should identify conditions that are clear, specific, and directly related to a state or tribal water quality requirement and should include citations to such relevant state or tribal law requirement.

- Federal permitting agencies should notify states and tribes of projects that may require Section 401 certification as soon as possible.

III. EPA Should Provide Additional Clarity in the Regulations on Other Challenging Aspects of Section 401 Implementation

In addition to the clear principles described above, the Section 401 Guidance also provides instruction on aspects of Section 401 implementation related to the appropriate scope of Section 401 review and conditions and triggers for the time period for review. EPA recognizes that it may provide further clarity on some of these topics through the regulatory process. INGAA encourages EPA to provide such additional clarity on the topics identified below and include these clarifications when modernizing the regulations:

- Clarification that the timeline for action begins when a state receives a certification request accompanied by the materials submitted in support of the federal permit.

- Clarification on what it means to be the "same request," such that the withdrawal and submission of the same Section 401 request does not restart the time period for review.

- The types of water quality impacts that states and tribes can consider in determining whether to issue or deny a water quality certification.

- The standard by which states and tribes evaluate information or data gaps.

- The definition of "any other appropriate requirement of state law" for which conditions can be imposed in a certification.

- The process by which federal permitting agencies evaluate whether actions are beyond the scope of Section 401 and the impact of actions that are determined to be beyond the scope of Section 401.

- The process by which a certification is modified.

Congress charged EPA with administering the Clean Water Act, including overseeing implementation of the Section 401 program by federal agencies whose permits or authorizations trigger Section 401.[4] By providing further guidance on these topics, EPA will be taking meaningful steps to ensure implementation of Section 401 is effective and consistent across federal agencies.

IV. Conclusion

EPA's 401 Guidance set clear guideposts for federal, state and tribal authorities to implement Section 401 in a manner that respects and supports the important and distinctive roles of each participant in the balance of cooperative federalism. Codification of each of the points noted above merits specific inclusion in EPA's efforts to update its Section 401 regulations.

INGAA appreciates your consideration of these comments and we welcome additional dialogue. Please contact me at 202-216-5955 or ssnyder@ingaa.org if you have any questions. Thank you.

Sincerely,

Sandra Y. Snyder
Senior Regulatory Attorney, EH&S
Interstate Natural Gas Association of America

[4] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter."). The Agency, therefore, has a responsibility to define a common framework for Section 401 reviews; *see also* 40 C.F.R. Part 121 (EPA's regulations addressing federal agency implementation of water quality certifications).

DEPARTMENT OF THE ARMY
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SEP 26 2018

CECW-ZB

26 September 2018

DIRECTOR'S POLICY MEMORANDUM 2018-12

SUBJECT: Implementation of Executive Order (EO) 13807 and One Federal Decision (OFD) within Civil Works Programs

1. References.

a. Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807* (MOU), 9 April 2018.

2. Background. Executive Order 13807 requires federal agencies to process environmental reviews and authorization decisions for "major infrastructure projects" as One Federal Decision. One of the criteria for a "major infrastructure project" is that the lead agency has determined the need to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The goals of One Federal Decision are to:

a. Reduce average time for environmental reviews, authorization decisions and consultations to an average of two years for all federal agencies;

b. Achieve One Federal Decision through preparation of a single EIS and single ROD for covered projects; and

c. Provide greater transparency, predictability and timeliness for federal review and authorization processes for major infrastructure projects.

3. Purpose. To establish policy pertaining to EO 13807 and "One Federal Decision" across all Civil Works functional areas, and direct broad implementation of the EO's concepts.

4. Applicability. This memorandum is applicable to all HQUSACE, Major Subordinate Commands (MSC), districts, and field operating activities with Civil Works functions which may include, but are not limited to feasibility studies, dam safety modification

studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects.

5. Policy. EO 13807 applies to a variety of Civil Works actions which may include, but are not limited to, feasibility studies, dam safety modification studies, Section 408 permissions, and Regulatory permit decisions associated with major infrastructure projects. The EO applies to those actions that require the preparation of an EIS under NEPA, and for which a Notice of Intent was issued after 15 August 2017. USACE Civil Works will comply with EO 13807 across its functional areas and responsibilities.

a. Ongoing Civil Works lines of effort such as embracing and operationalizing risk-informed decision making; justifying, and documenting decisions at the most appropriate levels; and synchronizing Headquarters functions to support MSC and district project delivery further advance the goals of EO 13807.

b. EO 13807 is directed at improving accountability within environmental reviews for major infrastructure projects, its effects are broad reaching across multiple disciplines. All Civil Works functional areas including Planning, Engineering and Construction, Operations, and Programs and Project Management will coordinate and apply risk-informed decision making in order to better integrate environmental requirements and conduct environmental reviews to achieve the two-year timeline goal in EO 13807.

c. One of the foundational concepts behind EO 13807 is early, frequent, and meaningful coordination with federal agencies, state agencies, and tribes that may have special expertise or authority for review of major infrastructure projects. Meaningful engagement is an important tenet within SMART Planning and within the Regulatory Program and will be implemented broadly, including for those infrastructure projects requiring preparation of an Environmental Assessment.

6. Direction. USACE will pursue a variety of specific actions to fully implement EO 13807. Guidance attached to this memorandum will be aligned and conducted concurrently with the implementation plan developed for risk-informed decision making per the Director's Policy Memorandum issued on 3 May 2018.

a. Implementation guidance has been prepared for EO 13807 specific to Civil Works Programs, including the Regulatory Program. A memorandum providing guidance for Regulatory permit actions is attached to this memorandum as enclosure 1. Implementation guidance specific to feasibility and other planning studies is attached to this memorandum as enclosure 2.

b. EO 13807 directs the Chief Environmental Review and Permitting Officer (CERPO) to serve as the agency official responsible for compliance with EO 13807. To facilitate implementation and compliance for Regulatory Permit actions, each MSC will designate a Senior Environmental Review Officer for the respective USACE MSC (i.e.,

senior agency official) for the purposes of elevation procedures, functional understanding and oversight of the application of this guidance, and interaction with the USACE CERPO.

c. Districts are responsible for identifying which Civil Works actions are "major infrastructure projects" in the context of EO 13807 and then notifying the MSC and HQUSACE of the determination. Districts are also primarily responsible for monitoring and executing project schedules consistent with EO 13807 requirements and reporting the status of milestones through the appropriate MSC to HQUSACE. Further guidance will be forthcoming from the Office of Management and Budget on how agencies will track major infrastructure projects on the Federal Agency Portal of the Permitting Dashboard and how OMB will review agency performance on a quarterly basis.

7. Proponent. The proponents for this memorandum are Thomas P. Smith, P.E., Chief, Operations and Regulatory Division, at (202) 761-1983 and Joseph Redican, Acting Chief of Planning and Policy Division, at 202-761-4523.

Encls

JAMES C. DALTON, P.E.
Director of Civil Works

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SEP 26 2018

CECW-CO-R

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (MOU), 9 April 2018.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

2. Purpose

This memorandum provides guidance to MSCs and districts on implementing EO 13807 for projects where USACE District Regulatory is a lead or cooperating agency involved in preparing an EIS and ROD for a covered major infrastructure project. This guidance does not replace or contradict requirements of the National Environmental Policy Act (NEPA) or USACE regulations.

3. USACE Involvement

Districts will be involved in projects subject to EO 13807 in two ways: 1) as a cooperating agency when another federal agency has determined to the applicability of EO 13807 for a project that includes regulated work in waters of the U.S., and 2) where USACE is the lead agency for the preparation of an EIS subject to EO 13807 for a major infrastructure project. Lead agencies make the determination whether to prepare an EIS, as well as whether a proposed project is a "major infrastructure project." Districts must carefully consider whether infrastructure projects will be subject to EO 13807, including a two-year Permitting Timetable and/or One Federal Decision that includes a single ROD prepared jointly by all involved Federal agencies. Note that when an infrastructure project has been determined subject to EO

13807 the two-year Permitting Timetable applies. One Federal Decision will also apply[1], unless the required permit type is a Nationwide or Regional General Permit where the USACE NEPA obligation has already been met. USACE involvement and role will be based on the criteria below for lead and cooperating agency status.

Pre-application discussions with prospective applicants are likely and appropriate prior to a formal determination that a project is subject to EO 13807. For this reason, the pre-application phase is specifically identified below as an important environmental review process activity.

A. **USACE as lead agency:** Only major infrastructure projects are subject to EO 13807. To determine whether a project meets the definition of major infrastructure project, the criteria below must be met:

   (1) USACE as lead agency has received, or expects to receive, a complete permit application for an infrastructure project (see Definitions section) and determined that an EIS will be prepared;

   (2) USACE as lead agency has determined that multiple federal agency authorizations are required. Required Federal agency consultations to comply with ESA and EFH meet the definition of authorization;

   (3) USACE as lead agency has determined the permit applicant/project sponsor has identified the reasonable availability of funds to prepare the EIS and to construct the project. The burden of demonstrating the reasonable availability of funds is on the project sponsor. Project sponsors may meet this burden by submitting a finance plan showing the estimated costs of the project and the available sources[2] from which the project sponsor anticipates meeting the costs.

B. **USACE as cooperating agency:** When another federal agency has made a determination to prepare an EIS, has identified itself as the lead agency, has determined the project is subject to EO 13807, has requested USACE serve as a cooperating agency[3], and when USACE has jurisdiction and/or special expertise:

   (1) USACE will agree to serve as a cooperating agency[4], regardless of whether a complete application has been received;

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[1] Exceptions to the single ROD for multiple agencies are described in Section XIII of the MOU.

[2] Districts will accept at face value project sponsors' demonstration of the reasonable availability of funds, including consideration of sponsors' information regarding any 'specific' funds for construction as well as 'fund sources' likely to be available for construction.

[3] In the event that a district receives an application for a major infrastructure project that will require an Individual Permit, but for which the lead agency has not requested USACE to serve as a cooperating agency, districts must consult with the lead agency pursuant to the MOU (Section VI. Determination of Lead and Cooperating Agencies).

[4] The EO and MOU reference "participating" agency as established in surface transportation law (P.L. 6002 §139) and referenced in FAST-41. The Corps will be involved in preparation of an EIS only when the agency has jurisdiction by law and/or special expertise (40 CFR §1501.5 and §1501.6). On this basis, USACE will serve as lead or cooperating, but not participating agency.

(2) Districts will recognize that the lead federal agency has already considered criteria to determine the project represents a major infrastructure project subject to EO 13807;

(3) The level of engagement as a cooperating agency should be commensurate with the scope of impacts subject to USACE authorities. When the applicant's proposed impacts to Waters of the U.S. will qualify for an existing Nationwide or Regional General Permit, USACE Regulatory obligations under NEPA have already been satisfied. On this basis, USACE contributions as a cooperating agency on the preparation of the EIS should be sufficient to assist the lead agency with accurate information concerning Waters of the U.S. to be presented in the EIS.

As described in the MOU and as applicable to requests from all Federal agencies, USACE will serve as a cooperating agency for Federal Energy Regulatory Commission (FERC) proceedings when requested, and may only decline a request when USACE has no jurisdiction by law.

For major infrastructure projects where Federal Highway Administration (FHWA) is the lead agency, USACE will serve as a cooperating agency pursuant to NEPA, the EO, and the MOU. On February 15, 2018, USACE entered in a Working Agreement[5] with FHWA which included a coordination process designed to meet the requirements of EO 13807. For such projects, USACE will cooperate with FHWA according to the process outlined in the Working Agreement.

4. Environmental Review Process Activities: Define and Control Scope to Support Risk-Informed Decision Making

One of the fundamental goals of EO 13807 is to reduce average time for environmental reviews and authorization decisions to an average of two years for all Federal agencies involved. To consistently achieve this goal, districts will incorporate risk-informed decision making processes in all phases of environmental review, including pre-application preparation, scoping, impact analyses and permit decisions. Risk-informed decision making does not mean simply accepting heightened legal risk as a way to hasten the overall process without careful consideration of agency obligation. Rather, it means critically considering the portions of a proposal that are within USACE authority, determining information needs and requesting information relevant to agency authority(s), and performing sufficient and timely analyses directly relevant to required USACE decisions. Importantly, this means making decisions not to undertake detailed analyses[6] that do not affect or relate to USACE permit decision

[5] Working Agreement Among The United States Coast Guard, The United States Army Corps of Engineers, The United States Environmental Protection Agency, The United States Fish and Wildlife Service, The National Oceanic and Atmospheric Administration and The Federal Highway Administration To Coordinate and Improve Planning, Project Development, and the National Environmental Policy Act Review and Permitting for Major Infrastructure Projects Requiring the Preparation of an Environmental Impact Statement.

[6] Consistent with requirements in NEPA, the EIS must fulfill the obligation to identify and disclose any significant effects that are likely to result from the proposed project. However, identification and disclosure of likely effects

processes. Therefore, even when the "single EIS" scope of analysis for all combined cooperating agencies extends to the applicant's entire project, USACE will focus on addressing scoping items relevant to agency responsibility.

The environmental review process activities in this section are broadly applicable when the applicant's proposed work will require an Individual Permit, and specifically when USACE is the lead agency. When acting in a cooperating agency role, districts will defer to the lead agency to accomplish NEPA process activities, while USACE-specific requirements for General and Individual Permits will remain district responsibilities.

A. Pre-application phase – the pre-application phase is the appropriate time to consider whether the prospective project is likely to require an EIS, require multiple federal authorization decisions, and will have the reasonable availability of funds to be constructed should a favorable permit decision result. If these criteria are likely to be met, USACE should consider requesting relevant Federal agencies to be included in further pre-application meetings to facilitate the environmental review.

   As part of pre-application meetings with the prospective applicant, district Regulatory will indicate USACE authorities based on the prospective applicant's description of the work to be proposed. After establishing a mutual project-specific understanding of the agency's authority and environmental review responsibilities, USACE should advise the prospective applicant of the type of information and level of detail required to fully inform the USACE evaluation. This important phase of information sharing will lead to applications being complete upon receipt, fewer information requests, and more efficient Permitting Timetables. Regulatory project managers will advise prospective applicants that proposed alterations or temporary or permanent occupation or use of any USACE federally authorized Civil Works project will require review and permission pursuant to Section 14 of the Rivers and Harbors Act (a.k.a. Section 408 review), and must engage district Section 408 counterparts to ensure their involvement in project review[7]. Similarly, if a project will involve Federal property owned or managed by USACE, review and approval for encroachment/ involvement will be required by the USACE Real Estate Division.

B. Initial application review and scoping preparation phase – a public notice must be issued within 15 days after receipt of a complete permit application. The public notice does not have to state whether USACE has made a determination to prepare a Draft EIS. Rather, the public notice may state that the district engineer is considering whether an EIS should be prepared and will consider public comments in making the determination.

   When USACE has agreed to serve as a cooperating agency on the preparation of an EIS and a complete application is received at the district, the public notice for an

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outside agency authority should be only briefly summarized, with no further detailed studies or analyses performed or included in the EIS.

[7] Regulatory and 408 Program coordination is required pursuant to the Director's Policy Memo #2018-10, "Strategy for Synchronization of the Regulatory and 408 Programs", dated 17 August 2018.

Individual Permit can identify the lead agency and state that USACE is already cooperating. If the proposed work will qualify for a General Permit, Districts will review the application and finalize qualifying authorizations according to existing timeline requirements for Nationwide and Regional General Permits.

C. Determination to Prepare an EIS – this determination will be made consistent with NEPA regulations at 40 CFR 1501.4 and USACE regulations at 33 CFR 325 Appendix B. After a determination has been made to prepare an EIS as the lead agency, USACE must notify the applicant in writing, including notification that the project is subject to EO 13807 and establishing that third party contract procedures described at 33 CFR 325 Appendix B apply[8].

When USACE is a cooperating agency, the decision to prepare an EIS is a lead agency responsibility.

D. Select Third Party Contractor – USACE regulations[9] provide for use of third party contractor assistance for the preparation of an EIS. Districts must work closely with applicants to identify candidate contractors and then must fulfill the agency responsibility of solely selecting the contractor to avoid any conflict of interest.

When USACE is a cooperating agency, USACE does not have a role in selecting the third party contractor.

E. Prepare Draft Permitting Timetable – A draft Permitting Timetable will be prepared for use in coordinating cooperating agency requests and preparing for scoping, as well as for identifying and scheduling additional information needs. An example two-year Permitting Timetable with required milestones is attached.

When USACE is a cooperating agency, the lead agency will be responsible for preparing and distributing the Permitting Timetable.

F. Request cooperating agency involvement – USACE will request other federal agencies with required authorization decisions and/or special expertise to serve as cooperating agencies. This request will be in writing and should include the draft Permitting Timetable for cooperating agency use. Districts will allow cooperating agencies reasonable time to review the draft Permitting Timetable and attach their respective agency tasks with required timelines. This will allow the lead agency (USACE) to complete the draft Permitting Timetable for use in scoping[10].

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[8] Districts should consider whether project-specific MOAs will be executed with the applicant to clearly establish communication/coordination protocols that maximize information exchanges and preserve the third party contract arrangement.

[9] 33 CFR 325 Appendix B; 40 CFR 1506.5(c).

[10] Pursuant to Section VII A.2. of the MOU, lead agencies must initially consult cooperating agencies for input to the Permitting Timetable. After the Permitting Timetable includes the tasks and timelines for each Federal agency with a required authorization decision, cooperating agencies must respond within 10 days.

When USACE is a cooperating agency, USACE will receive the lead agency's request to contribute USACE environmental review tasks and timelines to the draft Permitting Timetable prepared by the lead agency.

G. Perform Data Gap Analysis – Following selection of a third party contractor, a data gap analysis should be conducted to identify and request additional applicant information to inform the environmental review[11]. Upon receipt of requested information directly relevant to agency decision authority(s), the draft Permitting Timetable will be revised as necessary to include any additional tasks identified in the data gap analysis.

When USACE is a cooperating agency, USACE will contribute to lead agency efforts for identification of information needs to inform the EIS. The USACE contribution should be confined to the area of USACE jurisdiction and authority.

H. Prepare Purpose and Need statement – As the foundation for the development and analysis of alternatives under NEPA, the Purpose and Need statement will be prepared prior to issuing the NOI and undertaking scoping. This will assist the public in providing scoping comments that focus on likely impacts of the proposed project as well as identifying alternatives to the proposed project that may result in fewer impacts. The Purpose and Need statement is Concurrence Point #1 (see Concurrence Points and Permitting Timetable below).

When USACE is a cooperating agency, USACE will review and respond to the lead agency request on this concurrence point, considering the Purpose and Need based on regulatory requirements.

I. Issue Notice of Intent to prepare the Draft EIS – the NOI should be issued after receipt of complete application, receipt of applicant response(s) to requested additional information, selection of third party contractor, designation of cooperating agencies, preparation of Permitting Timetable, and concurrence on Project Purpose and Need statement. The NOI will clearly indicate the permit authority(s) and the portions of the proposed project subject to Corps permit authority(s), as well as project elements subject to relevant cooperating agency authorities. The NOI will advise the public that comments are most helpful to the lead and cooperating agencies with Federal authorization decisions when the comments focus on issues (impacts and alternatives) relevant to agency authorities. Completion of these process steps will best inform the NOI and thus best assist the public in providing relevant and focused scoping comments, particularly important for meaningful scoping in the targeted 30-day timeframe.

When USACE is a cooperating agency, USACE does not have a role as the NOI is a lead agency responsibility.

[11] Pursuant to 33 CFR 325.1(d)(10) and 33 CFR 325.1(e).

J. NEPA scoping phase – the scoping period should be 30 days. If a district commander determines that an extension of the scoping period is warranted based on project complexity or controversy, an extension of up to an additional 30 days may be granted. These timeframes also apply to cooperating agency requests to extend the scoping period. Note that extending the scoping period cannot result in extending any major milestone in the Permitting Timetable, particularly the 14 months scheduled to prepare the Draft EIS.

When USACE is a cooperating agency, USACE districts will limit their project involvement to scoping issues directly relevant to agency authorities.

K. Complete the Permitting Timetable – the draft Permitting Timetable prepared prior to issuing the NOI may need to be revised based on issues raised during scoping. Revisions required to finalize the Permitting Timetable should include any additional information needs brought to the attention of the lead or cooperating agencies as a result of scoping. Information needs that require the lead agency to request additional information from the applicant may affect the timing of milestones in the Permitting Timetable. ['Pauses' outside agency control, such as delayed applicant information, are described below in Reporting and Accountability, Item 3.] If revised, the draft Permitting Timetable must be provided to cooperating agencies for comment[12]. If a cooperating agency with Federal authorization responsibility objects, that agency must include an alternative proposed milestone consistent with the two-year timeline. If no objections are received in writing within 10 business days, the lead agency will finalize the Permitting Timetable.

When USACE is a cooperating agency, the lead agency will be responsible for completing and distributing the Permitting Timetable.

L. Impact analysis phase – analyses for all alternatives to be carried through the Draft EIS must address impacts and issues related to agency authorities (see Concurrence Point #2 below). These include likely impacts to waters subject to CWA Section 404 and RHA Section 10, including impacts related to public interest factors. Note that additional analyses required to satisfy the NEPA obligations of cooperating agencies must also be included; however, it will be the responsibility of the respective cooperating agencies to identify and perform those impact/issue analyses[13].

When USACE is a cooperating agency: USACE will be responsible for identifying and performing impact analyses directly related to agency authorities and obligations (and that will enable USACE to determine whether the applicant's proposed alternative represents the least environmentally damaging practicable alternative (LEDPA) for permit application decision purposes.

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[12] Section VII A.2. of the MOU.

[13] When a cooperating agency requests assistance with impact analyses, USACE can direct the Third Party Contractor to assist with such analyses provided the contract Statement of Work includes or is amended to include such efforts.

M. Permit decision phase – permit application decisions must be based on careful consideration of environmental information in project NEPA documents; the USACE public interest review; the proposed project's compliance with the 404(b)(1) Guidelines; and all other relevant laws and regulations. Likely impacts outside USACE regulatory authority, and particularly impacts which are clearly within another agency's authority, should be described as such as part of the public interest review where appropriate. The USACE permit decision will address those activities subject to USACE authority and the determination of whether the applicant's proposed alternative represents the LEDPA, as well as attaching any permit conditions intended to avoid, minimize and/or compensate for USACE-regulated project impacts. Districts may include identification of the LEDPA in the Final EIS, and must identify the LEDPA in the ROD. Balancing the need to make timely permit decisions while minimizing legal risk is the essence of risk-informed decision making, and will be most effective when USACE carefully and strategically pursues a scope of analysis clearly based on agency authorities.

When USACE is a cooperating agency and an Individual Permit is required, the USACE decision will be made as described above.

N. Water Quality Certification – In certain instances, a project sponsor (applicant) must apply for certification pursuant to Section 401(a)(1) of the Clean Water Act from the certifying agency. Federal agencies cannot issue federal licenses or permits unless such certification has been granted or waived. For the purposes of EO 13807 and consistent with all other projects, in instances where the lead agency determines that certification requirements have been waived, e.g. the certifying agency has not acted within the time period allowed by law, USACE will defer to the determination of the lead agency, determine that the certification requirement has been waived, and proceed accordingly.

O. Record of Decision – the lead agency is responsible for preparing and publishing a single ROD for all Federal agencies with required authorization decisions. The ROD will incorporate the independent decisions of each cooperating agency, and will necessarily be prepared in consultation with the relevant cooperating agencies. While the EO and MOU allow for agency authorization decisions to be completed as much as 90 days after the ROD is completed, districts must note that the Record of Decision must be completed within 60 days after the Notice of Availability (NOA) for the Final EIS. Therefore, cooperating agencies will be responsible for providing their authorization decision information to the lead agency in a timeframe that supports timely preparation of the ROD.

When USACE is a cooperating agency and an Individual Permit is required, USACE will contribute text relevant to the USACE permit decision to the lead agency for incorporation into the single ROD.

P. Consolidated Project File and Administrative Record – the consolidated project file is all of the information assembled and utilized by the lead and cooperating Federal agencies during the environmental review and Federal authorization decision processes.

Pursuant to Section VII A.8. and B.7. of the MOU, the lead agency will maintain the consolidated project file. Cooperating agencies will independently maintain their respective administrative records in support of their authorization decision(s), and then will provide such information as the lead agency may request to complete the consolidated project file.

Q. Best Practices – The EO and the MOU each require implementation of best practices (see Definitions) as part of project-specific process techniques and strategies, as appropriate. The environmental review process activities and chronology described above should assist districts in utilizing best practices, particularly when USACE is the lead agency. Current versions of *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* can be found at https://www.permits.performance.gov/tools.

5. Transparency

Efficient timelines for major infrastructure projects as reflected in the two-year Permitting Timetable, measured from NOI to ROD, will rely on enhanced transparency to maximize effective public involvement. When USACE is the lead agency, web pages, project-specific web sites, social media, and other means of disseminating information must be used to inform the public about the process and status of the environmental review. This may include establishing and periodically updating project news, milestones, Permitting Timetables, upcoming public forum events via:

A. District web pages,
B. Project-specific web pages maintained by USACE Regulatory and/or the third party contractor. This transparency is strongly encouraged as a best practice because it can be dedicated solely to the project under review and it can make virtually all publicly accessible documents readily available. Permitting Timetables should be maintained on the site throughout the environmental review,
C. District Twitter and Facebook accounts, in coordination with and physically posted by district Public Affairs/Corporate Communications Offices.

6. Concurrence Points

Concurrence points are opportunities for lead and cooperating agencies to assess mutual understanding and agreement on fundamental elements of the EIS. Concurrence among lead and cooperating agencies establishes that agencies agree to a given decision described in the concurrence point, and to abide by the decision as analyses and EIS preparation progress. Three specific concurrence points are required per Section XI of the MOU, and are milestones that must be included in the Permitting Timetable. Non-concurrence issues should be identified as early as possible and resolved either before a dispute arises, or resolved via the Dispute Resolution process described in this guidance.

The District Commander is the regulatory decisionmaker for permit decisions that are not elevated to the Division Commander. On this basis, the District Commander retains the

responsibility and authority for concurrence point decisions. Authority to concur with a required concurrence point may be delegated to the Regulatory Chief at the District Commander's discretion. Authority to non-concur with a required concurrence point cannot be delegated. A District Commander intending to provide written non-concurrence will inform the USACE CERPO (Chief Environmental Review and Permitting Officer), through MSC SERO (Senior Environmental Review Officer) and HQ environmental review POC of the intent to non-concur.

When acting as the lead agency, the District will provide cooperating agencies with written requests for concurrence, including any information necessary for cooperating agencies to consider in providing their concurrence and/or resolving any points of disagreement that may affect concurrence. As a cooperating agency, the District must receive written requests for concurrence and must respond to such requests in writing. Note that the MOU establishes that cooperating agencies will respond to lead agency requests within 10 business days, and that failure to respond may be treated as concurrence, at the discretion of the lead agency.

A. Concurrence Point #1 – Purpose and Need

As discussed above in the context of risk-informed decision making, the Purpose and Need statement serves as the basis for developing and evaluating alternatives. For this reason, all cooperating agencies with required authorization decisions must review and concur on the Purpose and Need statement drafted by the lead agency, indicating their concurrence in writing. For lead or cooperating agency roles, respectively, districts must draft or concur with a Purpose and Need that reasonably and objectively describes the proposal without inappropriately constraining the range of alternatives that ultimately must be considered. Districts should consider whether to seek additional written agreement/concurrence with lead/cooperating agencies regarding the preliminary scope of analysis for the proposed project. The scope of analysis for the EIS will be defined following scoping, will ultimately reflect the cumulative control and responsibility of all Federal agencies with required authorization decisions, and may be the subject of a separate concurrence point in addition to the three concurrence points required by the MOU.

B. Concurrence Point #2 – Alternatives to be Carried Forward for Evaluation

This concurrence point will occur after completion of scoping and consideration of alternatives screening criteria, ultimately identifying the range of reasonable alternatives to be evaluated in the Draft EIS. The lead agency must gain cooperating agency concurrence(s) on this point prior to making results of alternatives screening available to the public (i.e. via newsletters or public meetings). Lead agency requests for concurrence must include a description of alternatives screening criteria and alternatives considered as part of screening, as well as a description of all alternatives to be further evaluated in the Draft EIS. In a lead agency role, districts are encouraged to present this information in Technical Memorandum format to support the Administrative Record.

C. Concurrence Point #3 – Preferred Alternative

NEPA requires agencies to identify the preferred alternative(s), if one exists, in the Draft and Final EIS[14]. The MOU recommends identifying the preferred alternative in the Draft EIS and requires it in the Final EIS. Corps regulations at 33 CFR 325 Appendix B clarify that the Corps is neither an opponent nor proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the "applicant's preferred alternative." To comply with NEPA, Corps regulations, and the MOU, when the Corps is lead agency, the Draft and Final EIS will identify the Applicant's Preferred Alternative, and will include text identifying the Preferred Alternative of any cooperating agency (with a required federal authorization) with regulations that prevent their concurrence with "applicant's preferred alternative."

When the Corps is a cooperating agency, the Corps will respond to lead agency request stating the Corps does not have a preferred alternative, and the Draft and Final EIS should identify the lead agency's Preferred Alternative as well as the Applicant's Preferred Alternative, including when these are the same alternative. Coordination among agencies on this concurrence point must be written, including lead agency request and cooperating agency response/concurrence, in support of the Administrative Record.

7. Permitting Timetable

The Permitting Timetable is the schedule for Federal agency environmental reviews, consultations and authorization decisions for major infrastructure projects. The lead agency is responsible for preparing the Permitting Timetable with required input from cooperating agencies and in consultation with participating agencies according to their agency roles and involvement. The Permitting Timetable should be drafted[15] by the lead agency prior to the NOI, and must include milestones critical to the completion of the environmental review and issuance of a single EIS and single ROD that meet the needs and obligations of each agency with a required authorization decision. The Permitting Timetable should include and account for:

A. required Federal decisions and authorizations;

B. required Federal decisions and authorizations delegated to state, tribal, or local agencies (when these are pre-requisite to issuance of a decision or authorization by a Federal agency);

C. a complete inclusion of the environmental review and authorization requirements for a project (see attached example Permitting Timetable);

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[14] 40 CFR 1502.14(a).

[15] The Permitting Timetable should be drafted as soon as practicable for use in cooperating agency requests, applicant information requests, and for informing the public regarding the overall project timeline. An example two-year Permitting Timetable is attached to this Appendix.

D. specific focus to those reviews and authorizations that are complex, require extensive coordination, or might significantly extend the overall project review schedule;

E. cooperating agencies that are required by law to develop schedules for environmental review or authorization processes should provide such schedules to the lead agency for integration into the Permitting Timetable;

F. estimated milestones for any review or authorization decision processes for which the project design has not sufficiently advanced to more accurately determine dates to inform the Permitting Timetable;

G. Times for completion of environmental review and authorization decision subtasks are:

(1) Formal scoping and preparation of a Draft EIS within 14 months, beginning on the date of publication of the NOI to publish an EIS and ending on the date of the NOA for the Draft EIS;

(2) Completion of the formal public comment period and development of the Final EIS within eight (8) months of the date of the NOA for the Draft EIS;

(3) Publication of the ROD within two (2) months of the publication of the NOA for the Final EIS, noting that USACE regulations at 33 CFR 325 Appendix B require that no ROD can be signed until at least 30 days following the NOA for the Final EIS.

A Permitting Timetable shall be prepared in a suitable format to identify project tasks, durations and dependencies to maximize effectiveness in managing and meeting the EO 13807 goal of two years on average for covered major infrastructure projects.

Permitting Timetable milestones are listed in the table below. These are milestones that must be included in the lead agency's Permitting Timetable. Additional project-specific tasks and milestones may also be necessary depending on the type of project proposed and the cooperating agencies that are involved.

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

Milestone*	**Target Date**	**Actual Date**
Pre-application meeting(s)		Date of 1st agency involvement
Initial Application Received		Date received
Complete Application Received		Date received
Public Notice for application		Within 15 days of complete application
Notify applicant EIS is required and subject to EO 13807		Within 7 days of determination
3rd Party Contractor selection		Date of selection
SOW approval/3rd party contract executed		Date of approval
Cooperating agency requests and agreements		Date(s) as applicable
Determine additional required information (e.g. 404(b)(1) compliance, alternatives, Public Interest Review)		Date of information request
Concurrence Point #1: Purpose & Need preliminary scope of analysis can also be addressed		Date of concurrence must precede NOI
Publish NOI / Initiate Scoping / Public Notice		**Date initiates 2-year timeline**
Scoping Meeting		Date(s) of meeting(s) held
Revise SOW (as necessary)		Date as applicable
Concurrence Point #2: Alternatives to be Analyzed Review project scope of analysis, EIS Table of Contents (issues to be analyzed)		Date of concurrence
Concurrence Point #3: (Applicant's) Preferred Alternative		Date of concurrence
NOA DEIS/Supplemental		**Date of NOI + 14 months**
Public Hearing/Meeting		Date of event
NOA FEIS/Supplemental		**Date of DEIS NOA + 8 months**
ESA Section 7 process begin/end**		Date(s) determined in coordination with Services
EFH process begin/end**		Date(s) determined in coordination with NMFS
NHPA Section 106 process begin/end**		Date(s) determined in coordination with ACHP/SHPO
Tribal consultation**		Date(s) determined/estimated
Government-to-Government consultation**		Dates(s) as applicable
ROD/Amended ROD		**Date of FEIS NOA + 2 months**
Permit Issuance/Denial		**Date of ROD**

*Major milestones required by the MOU are shown in bold type. Target Dates and Actual Dates must be reported in ORM for use in populating the Federal Agency Portal.

**Milestone to begin this process would occur during or near the timing of scoping.
Milestone to end this process would occur near the timing of FEIS NOA, prior to ROD.

8. Elevation Procedures for Dispute Resolution and Prevention of Delays

The USACE CERPO will serve as the USACE senior agency official and will be made aware of disputes that have the potential to result in a missed Permitting Timetable milestone or delay, including elevated issues or disputes brought by cooperating or participating agencies.

Concurrence points are intended to promote process efficiency and minimize disputes between cooperating agencies, particularly cooperating agencies for which authorization decisions are required. As required by the MOU, three specific concurrence points must be included in the Permitting Timetable to facilitate major milestones: 1) Purpose and Need; 2) Alternatives to be Carried Forward for Evaluation, and; 3) Preferred Alternative (Applicant's Preferred Alternative). Per the MOU, lead and cooperating agencies may choose to include additional concurrence points in the Permitting Timetable to accommodate specific project circumstances.

Districts should strive to resolve all issues and disputes at the earliest time and lowest level possible, including issues and disputes raised by other agencies. Should agency staff identify an issue or dispute that, if not resolved, may result in missing a milestone (delay) and/or a decision inconsistent with law, regulation or agency policy, the district regulatory project manager must notify the District Commander, or designee, via the district Regulatory supervisory chain of command. This written notice should clearly state in detail the specific issue or dispute; the consequence, including potential delay, of failing to resolve the issue or dispute; and the recommended resolution.

A. When the Corps of Engineers is the lead federal agency (the elevation and resolution process is shown in flow diagram format in Figure 1): The District Commander or designee should coordinate with the cooperating or participating agency's locally-responsible senior official (e.g. DOI Regional Administrator) or designee, and decide whether the issue can be expeditiously resolved. Coordinating the dispute with the cooperating or participating agency shall consist of a written notice describing in detail the specific issue or dispute, the consequence(s) to the project timeline of failing to resolve the issue or dispute, and the recommended resolution. If the issue or dispute is not resolved within 15 days from the written coordination, the District Commander will notify the SERO. Depending on the nature of the dispute, the District Commander may notify the SERO of an issue or dispute prior to 15 days, particularly important if a milestone or concurrence point is near. If a dispute is not resolved within 15 days following notification of the SERO, the USACE CERPO will be notified to facilitate interagency coordination at the HQ level.

B. When the Corps of Engineers is a cooperating agency: The same procedure described for Corps as lead agency should be used, unless the Corps has agreed with the lead agency on a project-specific dispute resolution that achieves the same goal. The District Commander will notify and coordinate with the SERO and CERPO prior to signing and transmitting a non-concurrence to the lead agency.

C. Elevation information package: Upon a decision to elevate an issue or dispute, the responsible district senior official shall transmit an elevation package. The elevation package must contain a fact sheet with project details and nature of dispute, timeline and milestones, the initial dispute notification, any subsequent formal written correspondence between the disputing agency and the lead federal agency, and recommended resolution.

D. Disputes Related to Developing the Permitting Timetable: Section VII. A.2. of the MOU describes the specific process that will apply if any dispute arises regarding the lead agency's proposed Permitting Timetable.

E. Unresolved Non-Concurrence (USACE as a cooperating agency): If a dispute associated with a required concurrence point cannot be resolved, including through additional meetings intended to seek resolution, USACE districts must follow one of the following approaches:

(1) incorporate additional necessary information into the USACE section of the ROD (in coordination with the lead agency) to satisfy decision-making needs;

(2) CERPO requests CEQ to mediate the unresolved dispute pursuant to the MOU (Section 5(e)(ii)).

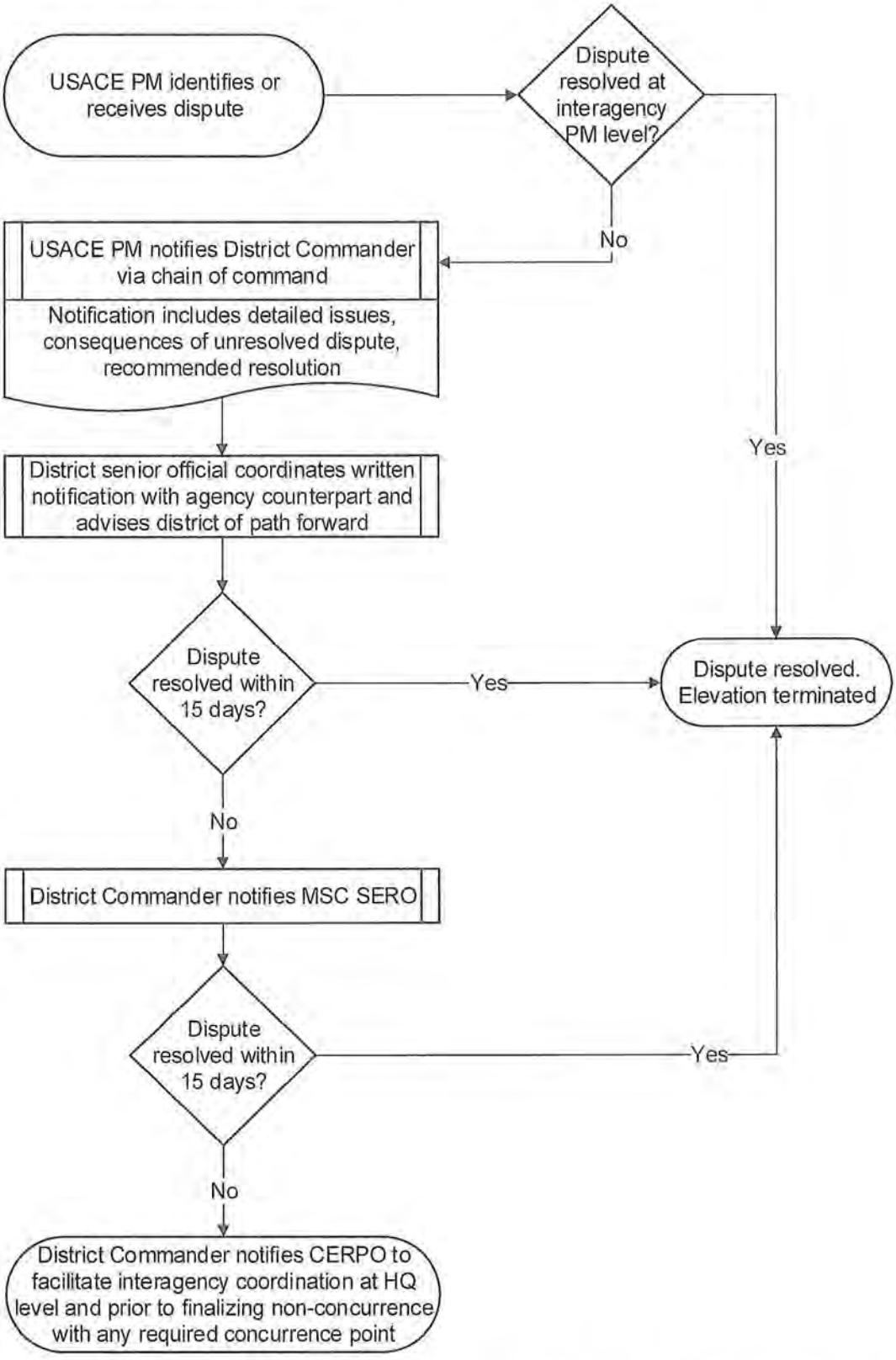

Figure 1. Flow diagram of the USACE Regulatory Elevation and Resolution Process.

9. Reporting and Accountability

The Office of Management and Budget will establish a Federal Agency Portal where project information will be posted and used to track agency compliance via the Permitting Dashboard[16]. The OMB will review accountability system performance at least once per quarter, and will produce a scorecard of agency performance. Therefore, districts must update and maintain current project information to reflect progress and any revisions from the previous quarter. Districts will enter project information into ORM at the EIS data entry screen, including all lead and cooperating agency EIS efforts subject to EO 13807. Data prompts on the ORM EIS screen are designed to report the information required. Subject to future revised procedures, when USACE is the lead agency HQUSACE will use ORM Reports to populate the Federal Agency Portal in six information areas.

A. **Whether major infrastructure projects are processed as OFD.** Lead agencies are required to verify on the Federal Agency Portal whether each major infrastructure project is being processed in accordance with One Federal Decision, and if not, specify the reason the project should not be processed using OFD.

   The lead agency should update these entries at least quarterly, to ensure that each entry corresponds to an active environmental review process and accurately indicates whether each such project is being processed using OFD. Additionally, lead agencies must submit a quarterly report of all infrastructure projects that published an NOI to prepare an EIS under NEPA in the previous quarter to OMB. OMB will use this information to assess the extent to which the agency is processing major infrastructure projects under OFD as appropriate.

   Guidance note: this information will be collected from the ORM EIS screen when USACE is the lead agency. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

B. **Whether major infrastructure projects have a Permitting Timetable.** Lead agencies are responsible for uploading to the Federal Agency Portal the content of each Permitting Timetable. The lead agency, in consultation with cooperating and participating agencies, should enter target dates in the milestone fields for all applicable agency actions as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones. Permitting Timetables for major infrastructure projects must be uploaded onto the Federal Agency Portal no later than 30 days after the publication of the NOI. The Federal Agency Portal is pre-populated with the major milestones for each kind of major agency action. The major milestones correspond to the milestones set forth in the most current version of Appendix B of the OMB/CEQ "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects" (M-17-14). To have a complete Permitting Timetable, agencies must enter the target completion dates of the milestones (and

[16] The Permitting Dashboard was established to track infrastructure projects subject to FAST-41. The Permitting Dashboard will be expanded to include reporting and accountability for major infrastructure projects subject to EO 13807.

actual completion dates for already completed milestones) for each of the relevant agency actions. OMB will use this information to assess the extent to which major infrastructure projects have complete Permitting Timetables.

Guidance note: When USACE is the lead agency, Permitting Timetables must be provided to HQUSACE along with notification that the NOI has been published in the Federal Register. HQUSACE will use the Permitting Timetable along with the ORM Report to update the Federal Agency Portal. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

C. **Whether agencies are meeting major milestones.** Lead agencies, in consultation with cooperating and participating agencies, are responsible for updating the status of major milestones for all applicable agency actions. Lead agencies may delegate the responsibility of updating milestones for specific environmental reviews and authorization decisions to the cooperating or participating agencies, but will be responsible for approving any changes to the Permitting Timetable. Any changes in milestone target dates should be notated in the entry for that milestone, along with the reason(s) for the change in target date. The Federal Agency Portal allows the agency to select from among the following reasons: (a) ahead of schedule, (b) data entry error, (c) dependency delay, (d) interagency coordination issue, and (e) internal agency factor. Additionally, in the event of delays outside of the Federal government's control, agencies can list the status of an environmental review or authorization decision as "paused." For example, if an agency is waiting on the project sponsor to submit additional information to complete an authorization decision, the agency can mark the status of the action as "paused." Once the additional information is received, the agency can change the status of the action back to "in progress" and update the relevant milestone target dates.[17] OMB will use this information to track each agency's progress in meeting milestones for each action.[18]

Guidance note: Districts must maintain current and accurate data on the ORM EIS screen for milestones (refer to table above), including providing relevant reasons for any changes in milestone target dates as described above, as well as any applicant-dependent pauses that may affect interim and/or final milestones. Changes to the Permitting Timetable must be documented via MFRs in the project's Administrative Record. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

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[17] On the Federal Agency Portal, agencies will be able to indicate whether the status of an environmental review or authorization decision is "Planned," "In Progress," "Paused," "Cancelled," or "Complete." OMB will only apply this performance indicator to milestones in which the action status is "In Progress." OMB will not consider the milestone missed for this performance indicator, if the reason for moving the milestone to a later date is outside of the agency's control (e.g. project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met).

[18] Agencies will have up to five business days to update a milestone target date that has passed (e.g. mark the milestone as complete, change the target completion date) before it is considered a missed milestone.

D. **Whether delays follow a process of elevation to senior agency officials.** This information will be used by OMB to determine the extent to which agencies have established and are following, as necessary, a process that elevates to senior agency officials, instances in which Permitting Timetable milestones are missed or extended, or are anticipated to be missed or extended.

   For major infrastructure projects, agencies are required to establish and implement a process that elevates to senior agency officials instances in which they anticipate missing or needing to extend a Permitting Timetable major milestone or when a major milestone is missed or extended to a date more than 30 days after the final target completion date[19].

   For each such delay or extension, agencies will be required to indicate in the Federal Agency Portal whether the agency used its elevation process to refer the matter to a senior agency official. The entry should be made in the relevant milestone field. OMB will use this information to assess agency performance on elevation procedures.

   Guidance note: When USACE is the lead agency, HQUSACE will use the elevation information package prepared by the district to enter 'Notes' in the Federal Agency Portal for any Permitting Timetable milestones subject to dispute. If any dispute results in a missed/delayed milestone that would require changes in subsequent milestone Target Dates, the district must identify these to HQUSACE before making changes (in coordination with cooperating and participating agencies) to the Permitting Timetable and the ORM database. When USACE is a cooperating agency the lead agency will be responsible for reporting this information.

E. **Time required to complete processing of environmental reviews and authorizations for major infrastructure projects.** Agencies will not be required to report any additional information in order to comply with this criteria. OMB will track completion times on the basis of the data reported quarterly for other assessment areas, including the number of days from the NOI to the ROD, and the number of days from the ROD to the date of issuance of the final authorization decisions for the project. OMB will use this information to assess agency performance on completion times.

F. **Costs of environmental reviews and authorizations for each major infrastructure project.** At project completion, the lead agency should report the estimated cost to the government for the environmental review and authorization process. Agencies should report the cost of their Full-Time Equivalent (FTE) hours and contractor costs related to the project.

[19] Agencies will not be required to use the elevation procedure when the missed or extended date is caused by reasons outside of the agency's control (e.g., project sponsor issue, date was dependent on another milestone outside of the agency's control that was not met) or if the milestone is associated with an Action that is in "Planned" or "Paused" status.

When calculating costs, agencies should include subject-matter experts who participate in a portion of the review, managers or supervisors who have direct or indirect oversight of major infrastructure projects, and attorneys who review documents pertaining to the review. Agencies should also include contractors that are directly funded by the agency and third-party contractors that are supervised by the agency, but funded by another party. Agencies will not be required to track and report non-direct staff hours (e.g., administrative support staff, human resources) or other indirect costs (e.g., overhead).

(1) USACE as lead agency: Districts must report agency costs to HQUSACE as described above, including costs provided to districts for inclusion of all Federal cooperating and participating agencies with required authorization decisions. Upon receipt of required cost information at project completion, HQUSACE will post to the Federal Agency Portal.

(2) USACE as cooperating agency: Districts must report agency costs to the lead agency for input to the Federal Agency Portal.

(3) Guidance note: Districts will establish a unique cost code for each subject major infrastructure project for use in cost tracking and reporting. Required staff (as described above) will track time spent on each major infrastructure project such that accounting units (Resource Management) can calculate the total cost based on staff time spent after each major infrastructure project is completed. No reporting is required for projects that do not receive USACE authorization.

10. Definitions

The following definitions (A – F) provided in EO 13807 should be applied as part of the implementation of this guidance and EO 13807. Other defintions applicable to NEPA can be found in 40 CFR 1508, 33 CFR 230, and 33 CFR 325, Appendix B.

A. Authorization means any license, permit, approval, finding[20], determination, or other administrative decision issued by a Federal department or agency (agency) that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3).

B. CAP Goals means Federal Government Priority Goals established by the Government Performance and Results Act (GPRA) Modernization Act of 2010, Public Law 111-352, 124 Stat. 3866, and commonly referred to as Cross-Agency Priority (CAP) Goals.

[20] Required consultations with Federal agencies such as U.S. Fish and Wildlife Service and National Marine Fisheries Service meet the definition of authorization and thus apply to determinations of multiple federal authorizations.

C. **Federal Permitting Improvement Steering Council** or "FPISC" means the entity established under 42 U.S.C. 4370m.

D. **Infrastructure project** means a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC.

E. **Major infrastructure project** means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

F. **Permitting Timetable** means an environmental review and authorization schedule, or other equivalent schedule, for a project or group of projects that identifies milestones--including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a project or group of projects--that is prepared by the lead Federal agency in consultation with all cooperating and participating agencies.

G. **Additional definitions**

(1) **Best Practices** means the techniques and strategies published and updated annually by the Federal Permitting Improvement Steering Council (FPISC) pursuant to 42 U.S.C. 4370m-1(c)(2)(B)[21], and identified in *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018*, or subsequent revisions, as best practices.

(2) **Environmental review** means agency effort toward evaluation of an application from initial receipt until the date of the issuance of the Final EIS.

(3) **Multiple authorizations**, as one of the three criteria defining a major infrastructure project, means 'more than one' Federal agency authorization by 'more than one' Federal agency. When two or more Federal agencies will be required to make authorization decisions to proceed with construction the criterion is met.

[21] Fixing America's Surface Transportation Act, Title 41 (FAST-41)

SUBJECT: IMPLEMENTATION GUIDANCE FOR REGULATORY COMPLIANCE WITH EXECUTIVE ORDER 13807

(4) Senior agency official means the USACE Chief Environmental Review and Permitting Officer (CERPO) and/or a USACE Division Commander's designated Senior Environmental Review Officer (SERO).

Attachment: Example Two Year Schedule

THOMAS P. SMITH, P.E., SES
Chief, Operations and Regulatory Division
Directorate of Civil Works

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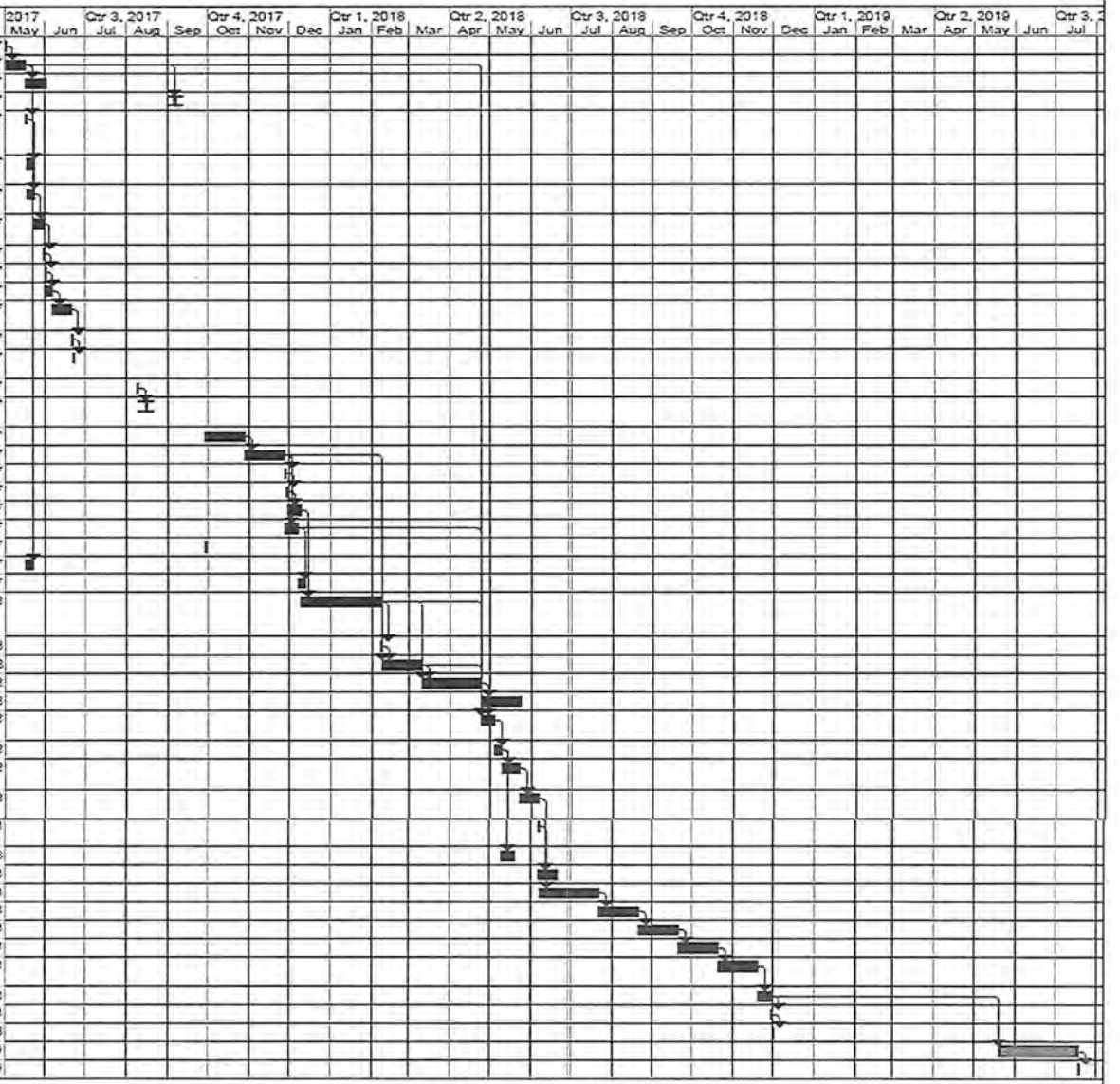
PACIFIC OCEAN DIVISION, CEPOD
SOUTH ATLANTIC DIVISION, CESAD
SOUTH PACIFIC DIVISION, CESPD
SOUTHWESTERN DIVISION, CESWD

Example Two Year Schedule

Permitting Timetable

ID	Task Name	Duration	Start	Finish
1	Application Received	1 day	Mon 5/1/17	Mon 5/1/17
2	Application Completeness Determination	15 days	Tue 5/2/17	Tue 5/16/17
3	Issue Public Notice (PN)	15 days	Wed 5/17/17	Wed 5/31/17
4	Determination to Prepare EIS	1 day	Wed 9/6/17	Wed 9/6/17
5	Notify applicant EIS required; intent to use 3rd party contract (3PC)	1 day	Wed 5/17/17	Wed 5/17/17
6	Applicant agreement (execute MOA)	5 days	Thu 5/18/17	Mon 5/22/17
7	Applicant provides draft Statement of Work (SOW)	5 days	Thu 5/18/17	Mon 5/22/17
8	Corps RD and OC review and approve SOW	7 days	Tue 5/23/17	Mon 5/29/17
9	Applicant proceeds with acquisition of 3PC	1 day	Tue 5/30/17	Tue 5/30/17
10	Applicant submits ranked 3PC	1 day	Wed 5/31/17	Wed 5/31/17
11	Corps selects 3PC	5 days	Thu 6/1/17	Mon 6/5/17
12	Cooperating Agency (CA) Requests	14 days	Tue 6/6/17	Mon 6/19/17
13	Receive CA timetable inserts	1 day	Tue 6/20/17	Tue 6/20/17
14	Applicant executes Contract and draft SOW	1 day	Wed 6/21/17	Wed 6/21/17
15	Concurrence Point #1	1 day	Tue 8/8/17	Tue 8/8/17
16	Corps Publishes Notice of Intent (NOI)	1 day	Tue 8/15/17	Tue 8/15/17
17	Conduct Scoping	30 days	Thu 9/28/17	Sat 10/28/17
18	Finalize Scoping Report	30 days	Sat 10/28/17	Mon 11/27/17
19	Finalize SOW following scoping	1 day	Mon 11/27/17	Tue 11/28/17
20	Assign Technical Teams	1 day	Tue 11/28/17	Wed 11/29/17
21	Develop analytical framework	10 days	Wed 11/29/17	Sat 12/9/17
22	Develop alternatives	10 days	Mon 11/27/17	Thu 12/7/17
23	Concurrence Point #2	1 day	Thu 9/28/17	Fri 9/29/17
24	Draft Ch. 1: Purpose & Need	5 days	Wed 5/17/17	Sun 5/21/17
25	Draft Ch. 2: Desc. Alternatives	5 days	Thu 12/7/17	Tue 12/12/17
26	Review Existing Data, Identify Data Gaps, RFAI, receive missing data	60 days	Sat 12/9/17	Wed 2/7/18
27	Concurrence Point #3	1 day	Wed 2/7/18	Thu 2/8/18
28	Draft Ch. 3: Existing Conditions	30 days	Thu 2/8/18	Sat 3/10/18
29	Draft Ch. 4: Env. Impacts	45 days	Sat 3/10/18	Tue 4/24/18
30	Draft Ch. 5: Mitigation Strategies	30 days	Tue 4/24/18	Thu 5/24/18
31	Draft Ch. 6-9: Other required Sections DEIS	10 days	Tue 4/24/18	Fri 5/4/18
32	Compile DEIS	5 days	Fri 5/4/18	Wed 5/9/18
33	Review team and CA review of DEIS	14 days	Wed 5/9/18	Wed 5/23/18
34	Revise based on review comments	14 days	Wed 5/23/18	Wed 6/6/18
35	Issue Notice of Availability (NOA) & Public Hearing Notice	1 day	Wed 6/6/18	Thu 6/7/18
36	Prep for Public Hearings	10 days	Wed 5/9/18	Sat 5/19/18
37	Conduct Public Hearings	15 days	Wed 6/6/18	Thu 6/21/18
38	Public Comment Period	45 days	Thu 6/7/18	Sun 7/22/18
39	Draft Public Comment Report	30 days	Sun 7/22/18	Tue 8/21/18
40	Finalize Public Comment Report	30 days	Tue 8/21/18	Thu 9/20/18
41	Prepare PFEIS	30 days	Thu 9/20/18	Sat 10/20/18
42	Review team and CA review of PFEIS	30 days	Sat 10/20/18	Mon 11/19/18
43	Prepare FEIS	10 days	Mon 11/19/18	Thu 11/29/18
44	Issue NOA for FEIS	1 day	Thu 11/29/18	Fri 11/30/18
45	Distribute Copies	1 day	Fri 11/30/18	Sat 12/1/18
46	ROD	60 days	Mon 5/20/19	Thu 7/18/19
47	Permit Issuance/Denial	1 day	Fri 7/19/19	Fri 7/19/19



Date: Fri 6/29/18

Task	External Tasks	Duration-only	External Tasks
Split	External Milestone	Manual Summary Rollup	External Milestone
Milestone	Inactive Milestone	Manual Summary	Progress
Summary	Inactive Summary	Start-only	Deadline
Project Summary	Manual Task	Finish-only	

DEPARTMENT OF THE ARMY
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WASHINGTON, DC 20314-1000

SEP 26 2018

CECW-P

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Feasibility Studies for Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

1. References

a. Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 15 August 2017.

b. ER 200-2-2, Procedures for Implementing NEPA, 4 March 1988.

c. 40 CFR 1500-1508, CEQ Regulations for Implementing the Procedural Provisions of NEPA.

d. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (CEQ, 1986).

e. Implementation Guidance for Section 1005 of the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Project Acceleration, 20 March 2018.

f. SMART Planning Feasibility Studies: A Guide to Coordination and Engagement with the Services, September 2015.

2. Applicability. EO 13807 applies a number of concepts to environmental review and permitting associated with "infrastructure projects," as defined in the EO. Sections 4 and 5 of Executive Order (EO) 13807 also apply specific performance accountability measures and process enhancements to projects meeting the EO's definition of "major infrastructure projects." This guidance applies to feasibility studies where the USACE planning decision document could lead to a recommendation for project authorization or modification to a project authorization, including general re-evaluation studies, post authorization change reports, and other reports supporting project authorization or budget decisions that result in a Chief's Report or Director's Report.

a. Section 3.(d) of EO 13807 defines "infrastructure project" as "a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation,

including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC [Federal Permitting Improvement Steering Council]."

b. Section 3.(e) defines "major infrastructure project" (a subclass of infrastructure project as defined above) as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project."

c. Section 3.(a) of EO 13807 defines "authorization" as "any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3)." As so defined in the EO, this term is not synonymous with Congressional authorization, or any other approval, finding, determination, or decision issued by Congress or any other entity or organization that is not a Federal department or agency.

d. Districts should apply the concepts applicable to "infrastructure projects," as well as future process improvements, to planning studies that don't otherwise meet the definition of "major infrastructure projects," particularly those feasibility studies with Environmental Assessments (EAs).

3. Purpose. The EO sets out several policies of the Federal Government related to infrastructure projects including, but not limited to, a policy to develop environmentally sensitive infrastructure; a policy to conduct coordinated, consistent, predictable, and timely environmental reviews; and a policy to make timely decisions with the goal of completing all federal environmental reviews and authorization decisions for "major infrastructure projects" within two years. The purpose of this guidance is to clarify and reinforce those Civil Works project development processes and procedures that will provide for compliance with the EO.

4. Environmental Stewardship. The Federal objective for water resources planning is to contribute to national economic development, consistent with protecting the Nation's environment, pursuant to national environmental statutes, applicable executive orders,

and other Federal planning requirements. Provisions for environmental considerations are integrated throughout the Principles & Guidelines and are specifically addressed in discussion of the Environmental Quality (EQ) Account and the EQ procedures. The EQ procedures should be applied early in the planning process so that significant natural and cultural resources of the study area can be identified and inventoried, used in developing planning objectives, and accommodated in a reasonable set of alternative plans, which achieve the planning objectives. Further, USACE's Environmental Operating Principles were developed to ensure that USACE missions include totally integrated sustainable environmental practices. The Environmental Operating Principles provide corporate direction to ensure that the workforce recognizes the USACE role in, and responsibility for, sustainable use, stewardship, and restoration of natural resources across the Nation.

5. Coordinated Environmental Reviews. The EO states it is the policy of the Federal Government to conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner. 33 U.S.C. 2348(c)(2) and (e)(8) require agencies to conduct environmental reviews of water resource development projects concurrently to the extent practicable for feasibility studies, providing compliance with this policy. References 1.e. and 1.f. provide detailed guidance on conducting concurrent and coordinated environmental reviews for feasibility studies.

a. All Federal, Tribal, and State agencies required to conduct or issue a review for the study should be invited to serve as either a cooperating agency or a participating agency for the environmental review process. The coordinated environmental review process stresses promoting transparency, including of the analyses and data used in the environmental review process, the treatment of any deferred issues raised by Federal, State, and local governmental agencies, Tribes, or the public, and the temporal and spatial scales to be used to analyze those issues.

b. Districts will use principles of risk-informed decision making to conduct environmental compliance concurrently with the feasibility study process. Risk-informed decision making within the environmental discipline does not mean deferring environmental compliance until later during the study or during preconstruction engineering and design (PED) solely to avoid data gathering early in the study. Each iteration of the planning process progresses in level of detail for environmental analysis and review. Consistent with Reference 1.c., study teams should focus on issues which are significant to decision making and reduce emphasis on information which is not. Study teams should use readily available information, and proxies when appropriate, to gather only the information necessary for the next planning decision based on feedback from

coordinating with cooperating and participating agencies and to manage decision risks. Study teams should utilize public and agency coordination to assist in focusing on those most significant issues for decision making and better characterize what key uncertainties exist within the environmental discipline. Study teams can manage those associated instrumental risks using a risk register. The point of risk-informed planning is not to focus on those universal risks that would apply across the portfolio, such as the risk that a cooperating agency will not support a recommended plan, but instead to focus on those critical risks that are unique to a given study and have the potential to significantly affect decision making.

6. Permitting Timetable. Section 5.a.(ii) of the EO requires agencies to develop and follow a permitting timetable for "major infrastructure projects." The permitting timetable is an environmental review and authorization schedule, or other equivalent schedule, for a major infrastructure project or group of major infrastructure projects that identifies milestones, including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a major infrastructure project or group of major infrastructure projects. Study teams will use the schedule developed in accordance with Paragraph 5.d. of Reference 1.e., conducting the required coordination and concurrence with the cooperating and participating agencies, as the permitting timetable for major water resources infrastructure projects under the EO. Study schedules must have sufficient detail to demonstrate utilization of a coordinated review.

7. Notice of Intent. References 1.b. and 1.c. indicate that as soon as practicable after a decision is made to prepare an EIS or supplement, the scoping process for the draft EIS or supplement will be announced in a NOI. Changes in WRRDA 2014 included elimination of the reconnaissance phase, but added a requirement for a meeting within 90 days of the start of the study with all Federal, Tribal, and State agencies (see Reference 1.e.). Without the reconnaissance phase and much of the early information obtained during that phase, the decision regarding the appropriate NEPA document (categorical exclusion, EA, or EIS) would be better informed by the interagency meeting within 90 days of the study start in Reference 1.e. Therefore, the NOI may be issued between the Alternatives Milestone Meeting (AMM), which typically occurs within the first 90 days of the study, and before the Tentatively Selected Plan (TSP) Milestone, allowing the interagency meeting and one or more iterations of the six step planning process to occur, in order to make a risk-informed decision on the appropriate NEPA document (categorical exclusion, EA, or EIS) for the study. Consistent with References 1.b. and 1.c., districts will issue the NOI as soon as practicable after making the determination of the need to prepare an EIS, which is likely to occur close to the AMM.

8. NEPA Scoping. Reference 1.c. directs that the NEPA scoping process be announced in a NOI. However, CEQ guidance in Reference 1.d. does not prohibit early scoping prior to a NOI. Scoping may be initiated early in the feasibility study, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively. However, early scoping cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered. Any information received from the public or other agencies during this early scoping is expected to help reduce uncertainty regarding the appropriate type of NEPA document for the feasibility study.

9. One Federal Decision. Civil Works studies and proposed projects are required to be in compliance with all applicable Federal environmental statutes and regulations and with applicable State laws and regulations where the Federal government has clearly waived sovereign immunity. It is also expected that project recommendations made by district commanders within a final integrated feasibility report/NEPA document are informed by the results of a coordinated and transparent environmental review process. Lastly, under Reference 1.b., the Assistant Secretary of the Army for Civil Works [ASA(CW)] retains authority for signature of the Record of Decision (ROD), after completion of a Chief's Report. Therefore, for water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the district commander's transmittal of a final feasibility report will also include the findings of all applicable environmental compliance requirements to comply with One Federal Decision in Section 5.(b) of the EO. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, requests to defer an environmental requirement after the district commander's transmittal of the final feasibility report must describe the risk and uncertainty of the request and must be endorsed by the policy and legal compliance review team at the Agency Decision Milestone in order to comply with Section 5(b)(ii) of the EO.

10. For water resources development projects meeting the definition of "major infrastructure project" under EO 13807, the length of the environmental review process for determining compliance with the EO will be calculated from the date of the NOI to the date of the district commander's transmittal of the final feasibility report or other decision document.

11. Issue Resolution. To comply with Section 5.(a)(iii) of the EO, study teams will inform the vertical team of any instances where a permitting timetable milestone for a water resources development project meeting the definition of "major infrastructure project" under EO 13807 is missed or extended, or is anticipated to be missed or extended. In

addition, study teams should keep the vertical team informed of any issues in the environmental review process that may affect the team's ability to meet a feasibility study milestone.

12. Questions regarding this implementation guidance should be directed to Lauren Diaz, Office of Water Project Review, at (202) 761-4663 or Lauren.B.Diaz@usace.army.mil.

JOSEPH H. REDICAN
Acting Chief, Planning and Policy Division
Directorate of Civil Works

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