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## **Clean Water Act Section 401: Balancing States' Rights and the Nation's Need for Energy Infrastructure**

*Deidre Duncan\* & Clare Ellis\*\**

Over the past several decades, significant tension has developed between the federal role in overseeing and authorizing certain types of energy infrastructure projects and states' roles in regulating water quality under the cooperative federalism structure of the Clean Water Act (CWA or the Act).<sup>1</sup> This tension has played itself out in various contexts, but the most pronounced in recent years has been the battle over CWA Section 401 water quality certifications for energy infrastructure projects, in particular interstate natural gas pipelines.

The CWA was enacted with the intent of preserving states' roles in protecting water quality within their borders. The federal government plays the primary role in authorizing large-scale energy and infrastructure projects, however, in recognition of the fact that uniform and streamlined procedures are necessary for the review and approval of such projects and that local oversight and control could impede their development in a manner contrary to the national interest. Congress attempted to balance

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1. See, e.g., Clean Water Act, 33 U.S.C. § 1251(b) (2012) (setting forth congressional policy under the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States" to address pollution and to conduct planning for development and use of land and water resources within their borders).

these state and federal oversight roles by expressly preserving states' authority over water quality and other types of environmental impacts for certain infrastructure construction projects, such as interstate natural gas pipelines built under the Natural Gas Act (NGA), which are otherwise subject to comprehensive and exclusive federal oversight.<sup>2</sup> This overlay of state and federal authority has become fraught with tension in recent years, as pipeline projects have become a symbolic focus for states and activist groups politically opposed to the use of fossil fuels generally. It is increasingly common for states to use their CWA Section 401 water quality certification (WQC) authority to stall or to impede these and other infrastructure projects for reasons unrelated to water quality, such as the state's stance on energy policy, a perceived need to placate local opposition to a project, or other localized political concerns. Even where certification is granted by the state, it can become a focal point for opposition groups seeking to challenge the state's decision in hopes of stopping projects they find objectionable.

Section I of this article provides background on the CWA Section 401 certification process and the statutory framework for interstate natural gas pipeline authorization under NGA Section 7. Section II discusses specific problems with the Section 401 process, explaining several ambiguities that have sparked litigation, causing costly delays or altogether obstructing the development of needed infrastructure and energy projects. Section III evaluates the various avenues for addressing these problems via legislative, administrative, judicial, or executive action. Section IV concludes by advocating for Section 401 reform, starting with congressional efforts to revise the CWA to enhance clarity and to reduce inefficiencies in the WQC process.

## I. Background

Under CWA Section 401(a), any applicant for a federal license or permit to conduct activities that may result in discharges to navigable waters must provide the federal authorizing agency a certification from the state in which the discharge originates that the discharge will comply with specified requirements of the Act, including state water quality standards.<sup>3</sup>

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2. See *Islander E. Pipeline Co. v. Connecticut Dept. of Env'tl Prot.*, 482 F.3d 79, 84 (2d Cir. 2006) (quoting *Islander E. Pipeline Co.*, 102 FERC ¶ 61,054, at P 115 at 61,130 (2003) (order on rehearing) for the proposition that “[w]hile state and local permits are preempted under the NGA, state authorizations required under federal law are not.”).

3. Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012); see also 40 C.F.R. § 131.6 (2018) (providing that State water quality standards are generally comprised of designated uses for waterbodies, water quality criteria sufficient to protect the designated uses, and an anti-degradation policy).

The state's certification must set forth any effluent and other limitations, and monitoring requirements necessary to assure compliance with the Act and with any other appropriate requirement of state law set forth in the certification.<sup>4</sup> These requirements specified in the state's certification become conditions on the federal license or permit.<sup>5</sup>

The CWA places a one-year limit on the amount of time that a state has to respond to a request for Section 401 certification, providing that 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."<sup>6</sup> Congress intended this time limitation to prevent projects from being subjected to unreasonable delays because states failed to act in a timely fashion on requests for certification.<sup>7</sup> Representative Edmondson, who sponsored the amendment, made clear that a state must do more than merely make efforts towards certification within the time allotted: "the State must act, either to *grant* or to *deny* the certification."<sup>8</sup>

The federal license or permit may not be granted until WQC has been obtained or certification waived by the state.<sup>9</sup> Likewise, if a state denies certification, the federal license or permit may not be granted.<sup>10</sup> CWA Section 401 thus provides a powerful tool for states to impose conditions upon federal authorizations for a wide range of activities, or to deny certification altogether—allowing "a single state agency [to] effectively

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4. Clean Water Act, 33 U.S.C. § 1341(d) (2012).

5. *Id.*; see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018) (finding Corps, as federal permitting agency, cannot override or alter state WQC conditions, even where Corps deemed alternative condition more environmentally protective).

6. 33 U.S.C. § 1341(a)(1).

7. See 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson explaining that the amendment intended to "do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" by states). Based upon the legislative history of the provision, the D.C. Circuit has said of CWA Section 401 that, "[i]n imposing 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" and that "this [interpretation] is clear from the plain text" of the CWA. *Alcoa Power Generating Inc. v. FERC*, 643 F. 3d 963, 972 (D.C. Cir. 2011) ("Moreover, the Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'").

8. 115 Cong. Rec. 9,264, *supra* note 7 (emphasis added).

9. 33 U.S.C. § 1341(a)(1).

10. *Id.*

veto[] an energy [project] that has secured approval from a host of other federal and state agencies.”<sup>11</sup>

Interstate natural gas pipelines are also subject to the NGA requirement to obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC) authorizing construction and operation.<sup>12</sup> NGA Section 7 confers upon FERC “exclusive jurisdiction over the transportation . . . of natural gas in interstate commerce,”<sup>13</sup> including via pipeline.<sup>14</sup> In enacting the NGA, Congress “intended to occupy the field to the exclusion of state law by establishing through the NGA a ‘comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce.’”<sup>15</sup> While state laws touching upon topics within FERC’s regulatory purview under NGA Section 7 are preempted, such as the environmental effects of interstate natural gas pipeline construction,<sup>16</sup> the NGA saves from preemption states’ statutory roles under the CWA, Coastal Zone Management Act (CZMA), and the Clean Air Act (CAA).<sup>17</sup>

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11. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008); *see also* H.R. Rep. No. 911 at 122 (1972) (explaining that “[d]enial of certification by a State . . . results in a complete prohibition against the issuance of the Federal license or permit.”).

12. *Natural Gas Act*, 15 U.S.C. § 717f(c)(1)(a) (2012). FERC has long taken the position that issuance of a Certificate of Public Convenience and Necessity under NGA Section 7 does not trigger the CWA Section 401 certification requirement. *See, e.g.*, *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015 at P 23 (Oct. 6, 2010). This is because the Certificate does not in itself authorize activities that will result in a discharge under the CWA, and thus certification is not required. *Id.* The D.C. Circuit affirmed FERC’s position on this issue in *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 398-99 (D.C. Cir. 2017).

13. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).

14. Similarly, under NGA Section 3, the Department of Energy (DOE) and FERC share jurisdiction over various aspects of the export of natural gas from the United States. Specifically, DOE regulates the export of natural gas as a commodity (including LNG). *Natural Gas Act*, 15 U.S.C. § 717b(a) (2012). While FERC has exclusive jurisdiction over the siting, construction, expansion, and operation of LNG import and export facilities. 15 U.S.C. § 717b(e)(1) (2012). As in NGA Section 7, despite the predominantly federal framework for LNG oversight, NGA Section 3 expressly preserves state authority under the CWA, CZMA, and CAA. 15 U.S.C. § 717b(d) (2012).

15. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013).

16. *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F.3d 817 (8th Cir. 2004) (holding that an Iowa regulation of the environmental effects of interstate natural gas pipeline construction was pre-empted by FERC oversight under the NGA).

17. 15 U.S.C. § 717b(d).

## II. The Problem

States have on several occasions used their Section 401 authority to veto projects sited in their jurisdictions for a variety of reasons, often unrelated to water quality.<sup>18</sup> Even where the state issues certification, WQC issues are commonly the subject of litigation, particularly where opponents of a specific project use water quality-related objections as a proxy for their objections to other aspects of the project.<sup>19</sup> Such litigation significantly impedes the ability of proponents to deliver needed energy projects in a timely manner and on a schedule that is predictable enough to encourage investment.<sup>20</sup>

Judicial oversight of the Section 401 process through litigation also creates a patchwork of precedent on the scope and timing of certifications, making the process even more unpredictable for future projects. In this section, we survey the principal issues to arise in recent years in the Section 401 context and the manner in which courts and agencies have attempted to address these issues, which include: (1) the limitations on the one-year period for state WQC review; (2) the proper scope of such review and the types of conditions that states may impose upon certification; and (3) finality and reviewability of the certification once issued.

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18. See, e.g., Letter from John Ferguson, Chief Permit Adm’r, N.Y. State Dep’t of Env’tl. Conservation, Re: Joint Application: DEC Permit # 0-9999-00181/00024 Water Quality Certification/Notice of Denial, to Lynda Schubring, Env’tl. Project Manager, Constitution Pipeline Co. (Apr. 22, 2016); Letter from John Ferguson, Chief Permit Adm’r, N.Y. State Dep’t of Env’tl. Conservation, Re: Joint Application: NYSDEC Permit Nos. 9-9909-00123/00004 (Water Quality Certification) et al. Notice of Denial, to Ronald Kraemer, Nat’l Fuel Gas Supply Co. (Apr. 7 2017); Letter from Thomas S. Berkman, Deputy Comm’r and Gen. Counsel, N.Y. State Dep’t of Env’tl. Conservation, Re: 3-3399-0071/00001 – Valley Lateral Project Notice of Decision, to Georgia Carter, Vice President and Gen. Counsel, Millennium Pipeline Co. (Aug. 30, 2017); Letter from Maia D. Bellon, Dir., Dep’t of Ecology, Wash. Dep’t of Env’tl. Conservation, Section 401 Water Quality Certification Denial (Order No. 15417), to Kristin Gaines, Millennium Bulk Terminals-Longview (Sept. 26, 2017).

19. See, e.g., Joint Petition for Review, Appalachian Voices et al. v. State Water Control Bd. et al., No. 18-1077 (4th Cir. Jan. 18, 2018); Petition for Review, Sierra Club et al. v. State Water Control Bd. et al., No. 17-2406 (4th Cir. Dec. 8, 2017).

20. New England states are already feeling the effects of constraints on new natural gas pipeline infrastructure, as has been widely reported and explained in report published last year by ISO New England. See ISO NEW ENGLAND, OPERATIONAL FUEL-SECURITY ANALYSIS, 16 (2018), <https://perma.cc/F4MM-RDHQ> (explaining that “during the coldest weeks of the year,” New England’s natural gas pipeline infrastructure “can’t meet all the demand for natural gas for both home heating and power generation” and that, as a result, natural-gas-fired power plants in New England “may not be able to access natural gas”).

## A. One-Year Waiver Period

Timely and predictable issuance of certification is crucial for energy and infrastructure construction projects, which are subject to tight and highly-prescribed schedules. Delays and uncertainty can be costly and, depending upon the circumstances, can kill a project.<sup>21</sup> Section 401 certification has historically been of the most common causes of delay in project execution and delivery.<sup>22</sup> In the past few decades, the problem has become more pronounced—with state agencies taking a liberal view of when the one-year clock for acting on a certification request begins. Further, state agencies have adopted certain tactics to extend their time for review, such as asking that a project withdraw and re-submit its application so as to restart the waiver clock, or requesting that project sponsors specify by agreement a particular date that the clock is deemed to have begun (regardless of when the project’s application was actually submitted). Finally, project sponsors have received mixed messages on who ultimately determines whether the one-year waiver period has run. These issues have been the subject of recent agency and judicial pronouncements, as summarized below.

***When does the one-year clock start?*** Under the plain language of CWA Section 401, the one-year<sup>23</sup> waiver period begins to run “after receipt

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21. Delays or impediments to natural gas infrastructure project construction can also result in unintended consequences such as requiring end users to employ more costly alternative energy supplies, prohibiting new hookups that would deliver needed energy to certain parts of the country (particularly in states subject to high energy demands over cold winters, such as the New England states), and forcing increased reliance on higher-emitting fuels such as coal and oil.

22. See FED. ENERGY REGULATORY COMM’N STAFF, HYDROELECTRIC LICENSING POLICIES, PROCEDURES, AND REGULATIONS, COMPREHENSIVE REVIEW AND RECOMMENDATIONS, 40 (2001), <https://perma.cc/8JB7-AB87> (noting untimely receipt of Section 401 WQC as one of the most common causes of delays in the authorization of hydroelectric projects).

23. Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012). While the CWA sets one year as the outside timeframe considered “reasonable” for a state to act on a WQC request, certain agencies implementing Section 401 have designated shorter amounts of time by regulation. For example, the U.S. Environmental Protection Agency (EPA) regulations provide that six months shall “generally be considered” to be a reasonable timeframe for issuing certification, “but in any event [this time period] shall not exceed one year.” 40 C.F.R. § 121.16 (2012). The U.S. Army Corps of Engineers (USACE or the Corps) regulations governing the Section 404 dredge-and-fill permitting process specify that a state waives certification if it fails or refuses to act on a “valid request” for certification “within sixty days after receipt of such a request,” unless the District Engineer determines a shorter or longer period is reasonable for the state to act. 33 C.F.R. § 325.2(b)(1)(ii) (2012). The Assistant Secretary of the Army recently issued an internal memorandum explaining that the six-month period specified in the Corps regulations begins with *receipt* of a request for

of [a] request.”<sup>24</sup> While the CWA is clear on the one-year deadline, several states, such as New York and New Jersey, have historically taken the position that the one-year waiver period does not begin to run until the state deems a project’s application “complete.”<sup>25</sup> The CWA Section 401 handbook published by the U.S. Environmental Protection Agency (EPA) adopts this view, stating that “the certifying agency determines what constitutes a ‘complete application’ that starts the timeframe clock.”<sup>26</sup> By engaging in a subjective, case-by-case inquiry as to whether a WQC request is “complete,” states have been able to manipulate the timing of the Section 401 certification process, often putting off consideration of a project’s application well beyond the one-year statutory deadline.

This practice was recently rejected, however, by the Second Circuit, in the context of an application submitted by Millennium Pipeline Company LLC (Millennium Pipeline) to the New York State Department of Environmental Conservation (NYSDEC) for WQC for the Valley

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certification, and that District Engineers should determine that a longer timeframe is appropriate “only in special circumstances.” Memorandum from R.D. James, Ass’t Sec’y of the Army, to the Chief of Eng’rs (Dec. 13, 2018). According to the memorandum, giving states an entire year to act on a Section 401 request “is inconsistent with . . . existing Army regulations.” *Id.* at 3. The memorandum also directs the Corps to issue draft guidance based on this directive within forty-five days, establishing criteria to provide District Engineers for identifying reasonable timeframes for requiring states to provide WQC decisions. *Id.* at 4.

24. 33 U.S.C. § 1341(a)(1).

25. 6 NYCRR § 621.4(e); N.J.A.C. 7:7A-19.2. For a recent project proposed by PennEast Pipeline Company, LLC, the New Jersey Department of Environmental Protection (NJDEP) deemed the project’s WQC application incomplete (and eventually denied certification in February 2018) on the basis that the project had not provided NJDEP with surveys of the entire pipeline route. Letter from Virginia Kop’Kash, Assistant Comm’r, N.J. Dep’t of Env’tl. Prot., Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FWW170001, PennEast Pipeline Project – Statewide, to Michael Mara (Feb. 1, 2018). For pipeline WQC applications, NJDEP thus appears to require that pipeline project proponents provide survey information for the entirety of a proposed route before it will deem the WQC application “complete.” Because many landowners deny project proponents access to perform surveys in the initial stages of a proposal, NJDEP’s standard for completeness effectively requires companies to have been issued a FERC Certificate of Public Convenience and Necessity (and thus vested with the power of eminent domain) in order to have access to sufficient information for their application to be deemed “complete.” See 15 U.S. Code § 717f(h) (conferring upon the holder of an NGA Certificate the power of eminent domain).

26. EPA OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, 11 (2010), <https://perma.cc/N3H7-ZPHE> (citing *City of Fredericksburg v. Fed. Energy Regulatory Comm’n*, 876 F.2d 1109, 1112 (4th Cir. 1989); 33 USC § 1341(a)(1); CWA §401(a)(1); *Del Ackels v. U.S. EPA*, 7 F.3d 862, 867 (9th Cir. 1993).



Lateral natural gas pipeline project.<sup>27</sup> In that case, Millennium Pipeline’s initial application for WQC was deemed received by NYSDEC on November 23, 2015.<sup>28</sup> Nonetheless, over the course of the next several months, NYSDEC notified the project that it considered its application “incomplete,” requesting further information in the project’s potential environmental impacts.<sup>29</sup> After several additional information submittals to NYSDEC, Millennium Pipeline petitioned the D.C. Circuit Court of Appeals in December 2016 for a finding that NYSDEC had waived its Section 401 authority by failing to act on the project’s application within one year.<sup>30</sup> The D.C. Circuit dismissed the company’s petition for lack of standing, holding that Millennium Pipeline could seek a remedy for the delay only from FERC.<sup>31</sup>

The project thus approached FERC, requesting authorization to proceed with construction on the basis that NYSDEC had waived its certification authority.<sup>32</sup> While that request was pending, on August 30, 2017, NYSDEC denied Millennium’s application for certification, on the basis that FERC’s environmental analysis of the project was deficient in “fail[ing] to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project.”<sup>33</sup> On September 15, 2017, FERC issued an order (the Waiver Order) finding that NYSDEC had waived its certification authority by not acting on Millennium’s application by November 23, 2016, one year from the date that the Department first received Millennium’s formal written application.<sup>34</sup> FERC subsequently issued a notice to proceed with construction, which the project did, and the Valley Lateral Project was placed into service on July 9, 2018.<sup>35</sup>

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27 N.Y. State Dep’t of Env’tl. Conservation v. FERC 884 F.3d 450, 455-56 (2nd Cir. 2018).

28 *Id.* at 453.

29 *Id.*

30 *Id.*

31. Millennium Pipeline Co. v. Seggos, 860 F.3d 696 (D.C. Cir. 2017).

32. Letter from Barbara Deathe, Paralegal, Millennium Pipeline Co., Request for Notice to Proceed with Construction, Millennium Pipeline Company LLC, Docket No. CP16-17-000, to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (July 21, 2017).

33. Letter from Thomas S. Berkman to Ronald Kraemer, *supra* note 18, at 2.

34. Millennium Pipeline Co., 160 FERC ¶ 61,065 (2017).

35. Letter from George Flugrad, Counsel, Millennium Pipeline Co., Re: *Valley Lateral Project In-Service Notification, Millennium Valley Pipeline LLC*, Docket No. CP16-17-000 to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (July 16, 2018).

NYSDEC challenged FERC's Waiver Order in the Second Circuit, which upheld the Waiver Order and agreed with FERC that NYSDEC had waived certification authority for the project. According to the Second Circuit,

[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.' It does not specify that this time limit applies only for 'complete' applications. 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.<sup>36</sup>

With this ruling, the Court affirmed FERC's long-held position that the one-year waiver period begins upon receipt of a request for certification and is not tied to any subjective determination of the application's completeness.<sup>37</sup> This interpretation has been enshrined in FERC regulations governing applications for hydropower licenses since 1987,<sup>38</sup> and FERC has long recognized the "substantial benefits" flowing from its interpretation, including that it "provides the maximum allowable time prescribed by the [CWA]," but also serves the public interest by "avoiding uncertainty associated with open-ended certification deadlines."<sup>39</sup> It also prevents states from "delay[ing] indefinitely"—via case-by-case assessments of whether a project's request is deemed acceptable for processing—"their acceptance of a certification request, in contravention

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36. N.Y. State Dep't of Env'tl. Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018).

37. Constitution Pipeline Co., 162 FERC ¶ 61,014 at P 16 (2018) (citing Millennium Pipeline Co., 160 FERC ¶ 61,065, at P 13 (2017); Millennium Pipeline Co., 161 FERC ¶ 61,186 at PP 1, 9, 40-41 (2017) (order denying reh'g); Georgia Strait Crossing Pipeline LP, 107 FERC ¶ 61,065 at P 7 (2004); AES Sparrows Point LNG, 129 FERC ¶ 61,245 at P 63 (2009).

38. See 18 C.F.R. § 4.34(b)(5)(iii) (2018) ("A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification."); see also Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. 5446 (Feb. 23, 1987). Note that there is no corresponding FERC regulation under the NGA.

39. Constitution Pipeline Co., 162 FERC ¶ 61,014 at P 16 (2018).

of the Congress' intent, through the waiver provision, to prevent unreasonable delays (i.e., of more than one year).<sup>40</sup>

While the issue of when the waiver period begins has been judicially resolved in the Second Circuit, the question remains for projects being built in other regions of the country. The Second Circuit opinion also does not clear up the patchwork of interpretations by various state and federal agencies memorialized in their regulations and guidance. FERC's interpretation appears to have been cited favorably on occasion in other circuits,<sup>41</sup> yet it is generally accepted that FERC's CWA interpretations are not authoritative, given that "FERC is not charged in any manner with administering the [CWA]."<sup>42</sup>

*May a state restart the statutory clock by asking an applicant to withdraw and resubmit its WQC request?* State agencies needing more time for their WQC review often request that applicants withdraw and resubmit their applications, taking the position that the waiver clock starts anew with each resubmittal. This tactic was used most recently by NYSDEC in the context of an interstate natural gas pipeline project proposed by Constitution Pipeline Company, LLC (Constitution). NYSDEC denied WQC for that project on April 22, 2016, nearly three years after receiving the project's initial application.<sup>43</sup> The NYSDEC denial came after years of back-and-forth and agency delays, including two requests by NYSDEC that the project withdraw and resubmit its application to restart the one-year waiver clock.

Constitution appealed the April 2016 WQC denial to the Second Circuit, on the grounds that NYSDEC had exceeded the statutory one-year

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40. Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. at 5446.

41. See, e.g., State of California ex. rel. State Water Resources Control Bd. v. FERC, 966 F.2d 1541, 1553-54 (9th Cir. 1992) (discussing FERC's approach).

42. AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 730 (4th Cir. 2009) (citing Alabama Rivers Alliance v. FERC, 325 F.3d 290, 297 (D.C. Cir. 2003)); see also Hoopa Valley Tribe v. FERC, 913 F.3d 1099, 1102 (D.C. Cir. Jan. 25, 2019) ("because FERC is not the agency charged with administering the CWA, the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states' waiver."); Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 972 (D.C. Cir. 2011) ("the Commission concedes that its interpretation of Section 401 is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the [CWA].").

43. Letter from John Ferguson to Lynda Schubring, *supra* note 18, at 1. NYSDEC cited as reasons for its denial that "the Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards." *Id.*

time limit for review and that the denial was arbitrary and capricious.<sup>44</sup> The Second Circuit dismissed the first claim regarding the timeliness of the NYSDEC decision for lack of jurisdiction under the NGA.<sup>45</sup> The Court also denied the petition on the merits, deferring to the agency's expertise in determining that it lacked sufficient information to issue WQC for the project.<sup>46</sup> Constitution also petitioned FERC for a declaratory order finding that NYSDEC had waived its WQC authority. FERC denied the petition on January 11, 2018, finding that the one-year waiver period had re-started each time that Constitution, at NYSDEC's request, withdrew and resubmitted its application.<sup>47</sup> According to FERC's January 2018 order denying Constitution's petition, "once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1)."<sup>48</sup>

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44. Petition for Review, *Constitution Pipeline Co. v. NYSDEC et al.*, No. 16-1568 (2d Cir. May 16, 2016).

45. *Constitution Pipeline Co. v. NYSDEC et al.*, 868 F.3d 87, 100 (2d Cir. 2017). The Court considered whether it had jurisdiction over Constitution's argument that NYSDEC had waived Section 401 authority under the NGA exclusive jurisdiction provision at 15 U.S.C. § 717r(d)(1), which provides in relevant part that "[t]he United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed . . . shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to federal law to . . . deny any . . . approval . . . required under Federal law . . ." (emphasis added). *Id.* at 99. By contrast, 15 U.S.C. § 717r(d)(2) (2012) provides that "The [D.C. Circuit Court of Appeals] shall have original and exclusive jurisdiction over any civil action for the review of an alleged *failure to act* by a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law . . ." (emphasis added). The Second Circuit interpreted the latter provision to apply to Constitution's argument that NYSDEC failed to act within a mandated time period. *Constitution Pipeline Co. v. NYSDEC et al.*, 868 F.3d at 99. It thus found that the D.C. Circuit Court of Appeals had "exclusive" jurisdiction over this claim pursuant to 15 U.S.C. § 717r(d)(2) and dismissed Constitution's timeliness argument for lack of jurisdiction. *Id.* at 100.

46. *Constitution Pipeline Co. v. NYSDEC et al.*, 868 F.3d at 103. The United States Supreme Court subsequently denied Constitution's petition for a writ of certiorari to review the Second Circuit ruling. *See Constitution Pipeline Co. v. NYSDEC et al.*, 868 F.3d 87, 100 (2d Cir. 2017), *cert. denied*, 584 U.S. (U.S. Apr. 30, 2018) (No. 17-1009).

47. *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 at P 23 (2018) (explaining that "once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1)").

48. *Id.* The Second Circuit took a similar position in the context of the Millennium Pipeline Valley Lateral (albeit in *dicta* in its 2018 order upholding FERC's Waiver Order), explaining that where a state deems an application to be incomplete and needs more time

Constitution sought review of the FERC decision in the D.C. Circuit in September 2018.<sup>49</sup> The case was held in abeyance, however, pending the outcome of *Hoopa Valley Tribe v. FERC*, which also presented the question of whether a state agency may manipulate the one-year waiver period by requesting that an applicant repeatedly withdraw and resubmit their application.<sup>50</sup> The D.C. Circuit issued a decision in *Hoopa Valley* in January 2019, staking out a contrary position to the one taken by FERC in its January 2018 order.

In *Hoopa Valley*, the Court considered whether California and Oregon had waived Section 401 certification for the relicensing of the Klamath Hydroelectric Project located on the Klamath River in both states.<sup>51</sup> As part of negotiations over the project with several stakeholders, the project proponent and the state agencies had agreed to defer the one-year statutory limitation for Section 401 certification by annual withdrawal and re-submittal of the project's request for certification.<sup>52</sup> After petitioning FERC unsuccessfully, the Hoopa Valley Tribe sued in the D.C. Circuit, alleging that the states had waived their Section 401 authority and that the project sponsor had correspondingly failed to diligently prosecute its licensing application for the project.<sup>53</sup>

In resolving the case, the Court in *Hoopa Valley* addressed a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for WQC over a period of time greater than one year. According to the Court, “[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401’s text is clear,” requiring action from the state within one year of “a request.”<sup>54</sup> The Court thus rejected the notion that applicants and state reviewing agencies may circumvent the congressionally prescribed one year period for review by repeatedly withdrawing and resubmitting the same WQC application in a way that could indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to

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for information-gathering, one available option is to “request that the applicant withdraw and resubmit the application,” presumably starting a new period for review. *NYSDEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

49. Petition for Review, *Constitution Pipeline Co. v. FERC*, No. 18-1251 (D.C. Cir. Sept. 14, 2018).

50. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. Jan. 25, 2019).

51. *Id.* at 1103.

52. *Id.* at 1101.

53. *Id.*

54. *Id.*

regulate such matters.<sup>55</sup> The Court emphasized that while a year was the “absolute maximum” amount of time for the state’s certification, this “does not preclude a finding of waiver prior to the passage of a full year.”<sup>56</sup> The D.C. Circuit’s decision would thus appear to prohibit the withdrawal-and-resubmission practice commonly requested by states (and used by NYSDEC in the Constitution pipeline project) to prolong the statutory review period, at least in instances where the applicant repeatedly withdraws and resubmits the same application, with no “new” request justifying additional time for review.<sup>57</sup> In light of this decision, FERC filed a motion requesting that the D.C. Circuit remand its January 2018 decision denying Constitution’s request for a declaratory order that NYSDEC had waived its WQC authority, in light of *Hoopa Valley*.<sup>58</sup> The Court granted FERC’s request on February 28, 2019.<sup>59, 60</sup>

***May a state extend the one-year review period by agreement with the applicant?*** *Hoopa Valley* also casts doubt on a state agency’s ability to extend its review time by agreement with the applicant, as done for the

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55. *Hoopa Valley Tribe*, 913 F.3d at 1104.

56. *Id.*

57. *Id.* *Hoopa Valley* has been read to apply narrowly to only the circumstances reviewed in that case, where a project repeatedly withdraws and resubmits *the same application*, without any new information included in any of the re-submittals. It is unclear, for instance, whether the D.C. Circuit would reach a similar decision in a case where the resubmittals contained *new* information at the request of the state reviewing agency. The Court did not provide any guidance in its decision as to how much new information included in a resubmittal would be enough to make a refiled application sufficiently “new” so as to restart the statutory clock. On March 11, 2019, several nongovernmental organizations who were intervenors in the case (American Rivers, California Trout, and Trout Unlimited) requested panel hearing or rehearing en banc. Petition for Panel Rehearing or Rehearing En Banc, *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. Mar. 11, 2019). Numerous states and other parties filed amicus briefs in support of this request.

58. FERC Unopposed Motion for Voluntary Remand, *Constitution Pipeline Co. v. FERC*, No. 18-1251 (D.C. Cir. Feb. 22, 2019).

59. Order, *Constitution Pipeline Co. v. FERC*, No. 18-1251 (D.C. Cir. Feb. 28, 2019).

60. The D.C. Circuit decision in *Hoopa Valley* could also have potential implications for the currently pending WQC application for the Jordan Cove liquefied natural gas (LNG) export terminal project proposed to be located in Coos County, Oregon. In October 2017, the sponsor of that project—Jordan Cove LNG—applied for WQC from the Oregon Department of Environmental Quality (ODEQ) for a liquefied natural gas (LNG) export terminal proposed to be located in Coos County, Oregon. On September 25, 2018, however, Jordan Cove withdrew and re-submitted its request for WQC “to allow [ODEQ] additional time to consider Jordan Cove’s certification request.” Letter from Christopher Stine, Water Quality Engineer, to Tony Diocee, Vice President of LNG Projects, Jordan Cove Energy Project L.P., Oregon Dep’t of Env’tl Quality (Sept. 25, 2018), <https://perma.cc/V5HV-FNX5>. The request remains pending before ODEQ.

Northern Access natural gas pipeline project proposed by National Fuel Supply Corporation and Empire Pipeline, Inc. (together, “National Fuel”). National Fuel originally submitted a request for WQC to NYSDEC for that project on March 2, 2016. However, it signed a letter on January 20, 2017, at the request of NYSDEC, agreeing that for the purposes of CWA Section 401, that the project’s application would be deemed received on April 6, 2016, thereby extending the date for NYSDEC to make a final determination to April 7, 2017.<sup>61</sup>

Nonetheless, when FERC approved the project on February 3, 2017, conditioned on receipt of authorizations required under federal law (including the WQC), National Fuel sought rehearing of the FERC order—claiming that it was not required to obtain a WQC from NYSDEC because the agency had waived certification. This request was still pending when NYSDEC denied the project’s request for certification on April 7, 2017, on the basis that the project’s application “fail[ed] to demonstrate compliance with New York State water quality standards.”<sup>62</sup> On August 8, 2018, FERC issued an order on National Fuel’s request for rehearing, determining that NYSDEC had waived certification by failing to act within one year, and that the agreement between NYSDEC and the project sponsors was an invalid attempt to override the one-year statutory deadline in the CWA.<sup>63</sup> NYSDEC and others requested rehearing of FERC’s August 8, 2018 order. FERC granted the requests for rehearing on September 12, 2018. While FERC rehearing proceedings on this order are still pending, it seems likely that FERC will stand by its original ruling in light of *Hoopa Valley*.

Meanwhile, National Fuel challenged the NYSDEC April 2017 denial in the Second Circuit, alleging that NYSDEC relied on improper considerations and applied a heightened standard of proof in its WQC decision, and that the decision was arbitrary and capricious.<sup>64</sup> On February 5, 2019, the Court vacated the denial, remanding it to NYSDEC “for the limited purpose of giving the Department and opportunity to explain more clearly—should it choose to do so—the basis for its decision.”<sup>65</sup> With respect to whether NYSDEC had waived certification by exceeding the

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61. Letter from John Ferguson, Chief Permit Administrator, NYSDEC, to Ronald Kramer, Nat’l Fuel Gas Supply Corporation and Empire Pipeline, Inc. (Apr. 7, 2017) at n.1, <https://perma.cc/SEG3-TGWU> (quoting the relevant portion of the agreement).

62. *Id.* at 1.

63. FERC, Order on Rehearing and Motion for Waiver Determination under Section 401 of the Clean Water Act, 164 FERC ¶ 61,084 (Aug. 6, 2018) at P 42.

64. Final Br. for Pet’rs, Nat’l Fuel Gas Supply Corp. v. NYSDEC, No. 17-1164 (Sept. 1, 2017).

65. Nat’l Fuel Gas Supply Corp. v. NYSDEC, No. 17-1164 (2d Cir. Feb. 5, 2019).

one-year statutory timeframe, the Court explained that such a “failure-to-act claim is one over which the District of Columbia Circuit would have ‘exclusive’ jurisdiction.”<sup>66</sup> It also explained that “Petitioners are free to present any evidence of waiver to FERC in the first instance.”<sup>67</sup> The Court failed to acknowledge that FERC had in fact already deemed the certification waived in its August 2018 order and that, because rehearing on FERC’s order is still pending, it is not ripe for review. The ruling thus creates a situation where NYSDEC, at the direction of the Second Circuit, will be undertaking review and reissuance of its WQC decision, despite a determination from FERC that it waived its Section 401 authority.

***Who determines if time is up and a state has waived certification?***

There has also been ambiguity in the Section 401 process as to *who* a project may turn to for a definitive determination that a state has waived its certification authority. In its 2017 decision regarding the Millennium Pipeline Valley Lateral project, the D.C. Circuit ruled that—in the context of projects requiring FERC authorization under the NGA—if a project proponent thinks the state has delayed beyond one year (i.e., waived certification) the project must make its case for waiver to FERC and request a Notice to Proceed rather than petitioning a court for a waiver determination.<sup>68</sup>

According to the Court, “[e]ven if [NYSDEC] ha[d] unlawfully delayed acting on Millennium’s application, its inaction would operate as a waiver, enabling Millennium to bypass the Department and proceed to obtain approval from FERC,” thus NYSDEC’s delay “cause[d] Millennium no cognizable injury” and the company “lack[ed] standing to proceed with its petition” in court.<sup>69</sup> The Court reasoned that even if NYSDEC had delayed for more than a year, the delay could not injure Millennium; rather, the delay would trigger the Act’s waiver provision, and Millennium could then present evidence of waiver directly to FERC to obtain the agency’s go-ahead to begin construction.<sup>70</sup> In accordance with the Court’s instruction, the project thus went directly to FERC and presented evidence of NYSDEC’s waiver.<sup>71</sup> FERC issued its Waiver Order in September 2017

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66. *Nat’l Fuel Gas Supply Corp.*, No. 17-1164 at 7 (citing *Constitution Pipeline Co. LLC v. NYSDEC et al.*, 868 F.3d 87, 100 (2d Cir. 2017); *supra* note 45).

67. *Nat’l Fuel Gas Supply Corp.*, No. 17-1164, at 7. (citing *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017)).

68. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017).

69. *Id.*

70. *Id.* at 700.

71. *Id.* at 701. The U.S. Army Corps of Engineers (USACE or the Corps) has recently issued guidance to the effect that it will acknowledge and defer to the waiver decisions of



and subsequently a notice to proceed, allowing construction to commence.<sup>72</sup>

The D.C. Circuit's decision on the Valley Lateral project is in tension with previous authority on this issue, apparently reflecting a circuit split as to who has the final say on waiver. In *AES Sparrows Point v. Wilson*, for example, the Fourth Circuit deferred to the waiver period as it was interpreted by the U.S. Army Corps of Engineers (USACE or the Corps).<sup>73</sup> Rather than directing the project to present evidence of waiver to FERC (the lead agency for the project at issue in that case) for a waiver determination, the Court held that the state agency had not, in fact, waived certification.<sup>74</sup> Given the existence of contrary authority from different circuits, there is thus some ambiguity with respect to a project's remedies for delayed certification decisions and the proper procedures for seeking a definitive determination of waiver at the conclusion of the one-year period.

### **B. Proper Scope of States' Review**

Under the plain language of Section 401, a state's WQC review is limited to whether a "discharge into . . . navigable waters" will comply with the applicable provisions of the CWA.<sup>75</sup> While this language would seem to limit the scope of a state's WQC review to water quality impacts from the "discharge" in question, over time some states have adopted a much broader scope. In other states where review has been limited (in accordance

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the lead agency on a project, which for energy project is often FERC. *See* USACE, Guidance, Implementation of EO 13807 and One Federal Decision within Civil Works Programs (Sept. 26, 2018) at 8 ("[I]n 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.").

72. *Millennium Pipeline Co., L.L.C.*, 860 F.3d at 701. As explained above, NYSDEC subsequently challenged the Waiver Order in the Second Circuit, but that Court upheld FERC's determination that NYSDEC waived its Section 401 authority by failing to act on the request within one year. *NYSDEC v. FERC*, 884 F.3d 450, 452 (2d Cir. 2018).

73. *AES Sparrows Point v. Wilson*, 589 F.3d 721, 729–30 (4th Cir. 2009).

74. *Id.* (deferring to Corps regulations on waiver at 33 C.F.R. § 325.2(b)(1)(ii) and applying Chevron deference to the Corps' interpretation of when the one-year waiver period had run).

75. 33 U.S.C. § 1341(a)(1) (emphasis added). Notably, however, EPA regulations implementing Section 401 take a somewhat broader view, stating that the state's certification must contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (emphasis added). *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994) (holding that that "[Section] 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").

with the statute) to the direct effects of the proposed “discharge,” third parties have challenged certifications alleging that the state’s analysis did not sweep broadly enough. Thus, the question of the proper scope of a state’s WQC review—and the related question of what types of conditions a state may impose in issuing certification—has been the subject of recent litigation.

***What kinds of impacts may a state reviewing authority consider?***

States are increasingly using the WQC process to evaluate the broader environmental impacts of a proposed project, even those that are unrelated or only indirectly related to water quality. For instance, NYSDEC denied WQC for the Millennium Valley Lateral natural gas pipeline project, on the basis that FERC’s environmental analysis of the project was deficient in failing “to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project.”<sup>76</sup> In doing so, NYSDEC cited a state regulation allowing the denial environmental permits for failure to meet the requirements of the state’s environmental review procedures, which NYSDEC deemed applicable even though FERC’s environmental review under the National Environmental Policy Act (NEPA) took the place of environmental review conducted under the state’s environmental quality review act.<sup>77</sup> NYSDEC’s denial was never challenged, as NYSDEC was subsequently deemed to have waived its certification authority by exceeding the one-year statutory deadline.<sup>78</sup>

Other states have seen their certifications challenged on the basis that the scope of their Section 401 review was too *narrow*, with challengers alleging that states should evaluate not just impacts to waters and wetlands, but also “upland” impacts, i.e., terrestrial areas that are not covered by the CWA.<sup>79</sup> The Fourth Circuit recently considered such arguments in a challenge to the WQC issued by the Virginia State Water Control Board (the Board) for the Atlantic Coast Pipeline project, a proposed interstate natural gas pipeline project in North Carolina and Virginia. The Board’s WQC actually contained two types of certification—one certification for the project’s use of Corps Nationwide Permit (NWP) 12, which applied to

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76. NYSDEC, *Re: 3-3399-0071/00001 – Valley Lateral Project Notice of Decision* at 2 (Aug. 30, 2017) (“Valley Lateral Notice of Decision”).

77. *Id.* at 1 (citing 6 NYCRR § 621.10(f)).

78. NYSDEC v. FERC, 884 F.3d 450, 452 (2d Cir. 2018).

79. *See, e.g.*, Va. Code § 62.1–44.15:80 (allowing the Virginia State Water Control Board, in making a WQC decision, to consider activities of a proposed project that impact upland areas that have the potential to affect water quality where a proposed pipeline project is greater than 36 inches in diameter).

the pipeline’s wetland, river, and stream crossings; and another “upland certification,” which covered the project’s proposed upland activities associated with construction, operation, maintenance, and repair of the pipeline as well as certain project-related surface water withdrawals.<sup>80</sup>

The upland certification was challenged by third party groups who alleged that it should be vacated because, among other things, the Board failed to assess “combined impacts” on water quality that would result from multiple areas of construction within individual watershed areas and because the Board failed to conduct an adequate anti-degradation review.<sup>81</sup> The Court upheld the Board’s analysis, however, refusing to impose a requirement that the state agency conduct a separate review of the cumulative effects of pipeline construction in upland areas. As the Court explained, the Corps had already conducted such an analysis of the individual and cumulative impacts of linear utility projects using NWP 12 and concluded that such impacts would be “no more than minimal.”<sup>82</sup> There was thus no reason for the state to duplicate the Corp’s review.

Additionally, the Court affirmed state expert agencies’ “broad discretion when developing the criteria for their Section 401 Certification” and the fact that “Section 401 does not require states to undertake a single cumulative review of all possible impacts in a single certification.”<sup>83</sup> The Court also rejected the notion that the state was required to explicitly consider in its WQC review “the combined effects of multiple areas of construction within individual watersheds.”<sup>84</sup> Finally, the Court rejected the argument that the upland certification was deficient because the state failed to conduct a separate anti-degradation review.<sup>85</sup> Because application of the state’s technical standards and specifications for the project would prevent any degradation in water quality, and because the project’s sediment impacts on water would only be temporary, there was no need for the Board to conduct an individualized anti-degradation review.<sup>86</sup>

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80. Appalachian Voices et al. v. State Water Control Board et al., 2019 WL 177928 at \*2 (4th Cir. 2019).

81. *Id.* at \*3.

82. *Id.* at \*5.

83. *Id.*

84. *Id.* at \*3.

85. *Id.* at \*7.

86. *Id.* at \*7–\*8; *see also* Sierra Club et al. v. State Water Control Board et al., 898 F.3d 383, 405 (4th Cir. 2018) (rejecting the notion that individual anti-degradation review is triggered by minor and temporary exceedances of the state’s water quality criteria).

### C. Finality and Reviewability

#### *When is the certification “final” and reviewable under the NGA?*

The question of when a WQC is “final” is important not only in terms of its effectiveness and a project’s ability to rely upon the certification, but also in terms of the availability of judicial and/or state administrative review of the certification decision. The issue of finality has been of particular concern for projects subject to FERC oversight under NGA Section 7, which provides for “original and exclusive jurisdiction” in the federal courts of appeals over any civil action for review of a state administrative agency order or action issuing, conditioning, or denying a permit or other authorization required under federal law for interstate natural gas pipeline projects subject to Section 7 certification.<sup>87</sup>

Many state laws *also* provide for review of such agency orders or actions via the state’s administrative appeals process. Some states issue WQC as a preliminary authorization that is not “final” until the period for seeking state-level administrative review of the certification has concluded. Other states make administrative review of a permitting decision available but not mandatory. In those states, a permit is final as issued but may be subject to further administrative review by the issuing agency or other reviewing body. State laws also vary on who has standing to invoke the review process, whether the permit is stayed pending review, and other procedural matters.

Until recently, there was little case law on whether conclusion of the state administrative appeal process is a prerequisite to judicial review under the NGA exclusive jurisdiction provision and how these avenues for review of state permitting decisions relate to each other. Recent decisions from the First and Third Circuit Courts of Appeals have attempted to “clarify” these issues but have, in practical effect, created more confusion than certainty.

In *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, the First Circuit considered whether the Court’s “exclusive” jurisdiction under NGA Section 7 to review issuance of a WQC by the Massachusetts Department of Environmental Protection (MDEP) could be invoked even though the certification was undergoing review in the state administrative appeals process.<sup>88</sup> Applying the “strong presumption that judicial review is available only following final agency action” and the principle that “[a]n agency action is ‘final’ only where it ‘represents the culmination of the agency’s decision-making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue,’” the Court concluded that the certification as

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87. 15 U.S.C. § 717(r)(d)(1).

88. *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline*, 851 F.3d 105, 108 (1st Cir. 2017).

issued was not final agency action reviewable under NGA Section 7. Three aspects of Massachusetts law contributed to this conclusion: (1) that the project's WQC request "initiated a single, unitary proceeding, an essential part of which . . . is the opportunity . . . to have an adjudicatory hearing; (2) that the review provided under state law was *de novo*, i.e., its focus was the project's application to MDEP and not the agency's decision on certification; and (3) the state's procedures bore the hallmarks of internal decision-making by the agency, rather than of the type of judicial review that would be preempted under the NGA.<sup>89</sup> Thus, because the WQC was not yet "final" action by MDEP, the Court dismissed the petition for review for lack of jurisdiction under the NGA.<sup>90</sup>

In *Delaware Riverkeeper et al. v. Sec PA Dept. Env. Protection, et al.*, the Third Circuit also concluded—as the First Circuit had—that only "final" state agency actions are reviewable under the NGA's exclusive jurisdiction provision.<sup>91</sup> The Court determined, however, that the state-issued water quality certification at issue was reviewable "final" action even though it was subject to further state-level administrative review because, under the relevant state law of Pennsylvania, the certification had legal effect as issued and was the final action of the agency that issued it.<sup>92</sup> In so holding, the Third Circuit distinguished *Berkshire Environmental*, finding that under the Massachusetts procedures at issue there, a WQC was issued as a "provisional order that could become final in the absence of an appeal."<sup>93</sup> By contrast, the Pennsylvania WQC was final action by the Pennsylvania Department of Environmental Protection (PADEP) and was thus reviewable by the Court as issued despite the availability under state law of further administrative review by a separate environmental hearings board.<sup>94</sup>

One day after issuing its decision in *Delaware Riverkeeper*, the Third Circuit issued its ruling in *Township of Bordentown, New Jersey et al. v. FERC et al.*,<sup>95</sup> in which it also considered whether state administrative processes for the review of environmental permits were preempted by the NGA exclusive jurisdiction provisions. In *Township of Bordentown*, the

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89. *Berkshire Environmental Action Team, Inc.*, 851 F.3d at 112.

90. *Id.*

91. *Delaware Riverkeeper et al. v. Sec PA Dept. Env. Protection, et al.*, 903 F.3d 65 (3d Cir. 2018).

92. *Id.* at 72.

93. *Id.* at 73.

94. *Id.*

95. *Township of Bordentown, New Jersey et al. v. FERC et al.*, 903 F.3d 234 (3d Cir. 2018).

New Jersey Department of Environmental Protection (NJDEP) issued certain water permits required under the CWA (including WQC) and New Jersey law.<sup>96</sup> Third parties requested that NJDEP grant an administrative adjudicatory hearing, as provided under state law, to contest issuance of the permits. NJDEP denied the hearing request, stating as the sole basis for its denial its belief that the Third Circuit has “exclusive jurisdiction to review the issuance of permits regarding interstate natural gas pipeline projects” and that, accordingly, by operation of the NGA, the state administrative hearing process was preempted.<sup>97</sup> The third parties challenged this determination in the Third Circuit.

In analyzing their petition, the Court evaluated whether the term “civil action” in the NGA exclusive jurisdiction provision encompasses a state administrative proceeding and ultimately concluded that it does not.<sup>98</sup> The Court explained that the term “civil action” applies exclusively to judicial cases and that state administrative review of interstate gas permitting decisions is not preempted by the NGA.<sup>99</sup> The purpose of the NGA’s exclusive review provision therefore is “only [to remove] from states the right for their courts to hear civil actions seeking review of interstate pipeline-related state agency orders” made pursuant to federal law.<sup>100</sup>

While these cases help to define the contours of federal appellate jurisdiction under NGA Section 717r(d)(1), they leave open several questions on the timing and effect of state administrative appeals of pipeline project permits, specifically whether such appeals may proceed concurrently with federal appellate review and whether and under what circumstances the state administrative process must be exhausted before seeking federal appellate review. These open questions are of significant consequence to the timing and progression of pipeline construction projects that rely on state authorizations issued pursuant to federal laws such as the CWA, CAA, and other statutes that delegate permitting authority to the

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96. *Township of Bordentown, New Jersey et al.*, 903 F.3d at 245.

97. *Id.* at 246.

98. *Id.* at 267.

99. *Id.* at 268.

100. *Id.* Having concluded that the NGA did not preempt the regular operation of New Jersey’s administrative review process, the court then analyzed whether the NJDEP’s erroneous interpretation violated New Jersey law—which, while it applies a deferential standard of review of state agency action akin to the federal standard, explicitly provides for no deference to the agency’s interpretation of a statute or its determination of a strictly legal issue. Finding that NJDEP’s interpretation of the NGA exclusive jurisdiction provision was unreasonable, the court remanded to NJDEP with instructions to reconsider the petitioners’ hearing request.

states. The cases also indicate that the resolution of these questions will ultimately turn on the particulars of the state administrative process.

The questions left open by the Third Circuit cases, at least, may ultimately be answered by the United States Supreme Court, before which a Petition for Writ of Certiorari requesting review of these decisions is currently pending.<sup>101</sup>

### III. Possible Solutions

There are numerous avenues—legislative, administrative, judicial and/or executive—that could be taken to remedy some of the issues of uncertainty, unpredictability, and lack of finality discussed above.

#### A. Legislative

Legislation has been proposed on numerous occasions over the years in an attempt to clarify and refine the provisions of CWA Section 401, but unfortunately none have gained enough traction to become law.<sup>102</sup> The latest attempt was the introduction of S. 3303, the “Water Quality Certification Improvement Act of 2018,” by Senator John Barrasso (R-WY) on July 31, 2018.<sup>103</sup> This bill would, among other things: (1) require

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101. Petition for Writ of Certiorari, Delaware Riverkeeper et al. v. Sec PA Dept. Env. Protection, et al. (Jan. 9, 2019).

102. Claudia Copeland, *Clean Water Act Section 401: Background and Issues*, Congressional Research Service Report, July 2, 2015, at 5–7 (summarizing the various legislative proposals).

103. S.3303 was proposed in response to the recent denial of WQC by the Washington State Department of Ecology (WDEC) for the Millennium Bulk Terminals Project, a \$680 million coal export facility planned to be constructed on a former industrial site near the Columbia River in western Washington State. In its September 2017 decision denying certification, WDEC noted “significant unavoidable adverse impacts” identified in the environmental review conducted for the project, such as air quality, increased vehicle traffic, noise and vibration, construction impacts on minority and low-income populations, cultural and tribal resource issues, etc. WDEC, *In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC*, Order # 15417 (Sept. 26, 2017). WDEC also stated that the Project’s WQC application failed to demonstrate “reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law.” *Id.* at 13. The project appealed the denial to State superior court and the Washington State Pollution Control Hearings Board. The Superior Court dismissed the appeal, while the Board upheld WDEC’s decision in August 2018. The project also appealed the denial in federal District Court for the Western District of Washington, claiming among other things that WDEC’s WQC denial was preempted by various federal statutes governing rail and vessel transportation. The Court granted summary dismissal of the project’s preemption claims in December 11, 2018, on standing grounds and finding no preemption of the WDEC decision. Order on Defendants’

states to identify in writing within 90 days of receiving a request for certification all specific additional materials or information that will be necessary for the state to make a final decision on a request for certification; (2) make changes to the statutory text to clarify that the state's review is limited to the impact of the "discharge" and not the activity as a whole and that the proper scope of review is limited to water quality concerns; (3) require states to publish their requirements for certification; and (4) require states to set forth the grounds for their decisions granting or denying WQC in writing to the applicant.<sup>104</sup>

S. 3303, if enacted, would make measurable improvements to the WQC process—but the bill's provisions could be enhanced to provide even greater certainty to applicants by incorporating a clear avenue for federal-level appeals (and a means for federal override) of a state's decision on a project's WQC application or to adjudicate claims that the state waived its authority by exceeding the one-year time limit for review. Such a process could be modeled off of the process specified under CZMA Section 307, which requires applicants for federal licenses or permits to conduct activities affecting the coastal zone of a particular state to provide a certification that the proposed activity complies with the state's coastal zone management plan.<sup>105</sup> Such certifications are subject to state review and, within six months, a determination by the state whether it objects or concurs with the applicant's certification.<sup>106</sup> Like CWA Section 401, CZMA Section 307 provides that the federal license or permit may not be granted until the state has either concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed.<sup>107</sup> But unlike CWA Section 401, the CZMA provides a mechanism for an applicant to appeal a state's objection to the Secretary of Commerce.<sup>108</sup> The National Oceanic and Atmospheric Administration (NOAA), located in the Department of Commerce, has developed detailed regulations governing such appeals, which allow the Secretary to approve the activity seeking a federal license or permit over the state's objection

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and Intervenor-Defendants' Motions for Partial Summary Judgment, *Lightsources Resources Inc. et al. v. Inslee et al.*, Case No. 3:18-cv-05005 (W.D. Wash. Dec. 11, 2018).

104. S.B. 3303, 115th Cong. 2d Session (July 31, 2018).

105. 16 U.S.C. § 1456(c)(1)(C) (1992).

106. *Id.*

107. *Id.*

108. *Id.* The CZMA also allows the Secretary to override the state's decision, on her own initiative, upon finding that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. *Id.*



upon finding that the “activity is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security.”<sup>109</sup>

Revising the CWA to incorporate a similar appeal and review process could help alleviate the ambiguities and uncertainties in the current Section 401 certification process, particularly if the revision allowed federal-level review of a state’s denial of WQC, and a definitive way to seek a determination that the state had waived certification by failing to act within one year. Congress would have to delegate authority over this process to a federal agency, likely EPA (given its statutory responsibility for implementing the CWA)—but such reviews could also go through FERC for projects under its jurisdiction, given the Commission’s role as lead agency for conducting NEPA review and coordinating federal authorizations for projects subject to NGA Section 7.

## B. Administrative

As the agency charged with CWA implementation, EPA is in the best position to provide clarifying guidance on the Section 401 process via regulation. Unfortunately, EPA regulations implementing CWA Section 401 were promulgated in 1971 and have not been updated since 1979. They provide minimal criteria for states in issuing certifications, and they do little to clarify what constitutes a “request” for certification starting the statutory waiver period.<sup>110</sup> Further, the EPA regulatory provision on “waiver” provides little specificity in describing the timeframe for a state to act on a WQC application before the requirement will be deemed waived.<sup>111</sup> The regulations do not specify what constitutes a “request” for certification, nor do they clarify that one year is the *outside* time limit for certification

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109. 15 C.F.R. Part 940, Subpart H. The NGA specifically accounts for this appeal mechanism by excluding CZMA decisions (or alleged failures to act under the CZMA) from the judicial review provisions in 15 U.S.C. § 717r(d).

110. See 40 C.F.R. § 121.3 (providing, with respect to WQC applications, that “[a] licensing or permitting agency shall require an applicant for a license or permit to include in the form of application *such information relating to water quality considerations as may be agreed upon by the licensing or permitting agency and the Administrator*”) (emphasis added).

111. See 40 C.F.R. § 121.16 (providing that “[t]he certification requirement with respect to an application for a license or permit shall be waived upon . . . [w]ritten notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or . . . [w]ritten notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year)”).

decisions—including the resolution of any state administrative appeals process to review a certification once issued.<sup>112</sup>

To improve certainty in the CWA Section 401 certification process, EPA could modify its regulations to establish more clearly how the CWA one-year statutory deadline will apply to state certification decisions.<sup>113</sup> Short of modifying its WQC regulations, EPA should withdraw its Section 401 Handbook, which was issued as “interim” guidance in 2010 without public comment and has never been updated or revised to reflect recent developments in Section 401 case law. Despite never being finalized, the Handbook is seen as authoritative by many federal agencies and states looking for definitive guidance on the Section 401 process.

In withdrawing the Section 401 Handbook and issuing revised guidance, EPA should clarify basic statutory principles of timing, waiver, and scope of review that are supported by recent developments in the case law. The revision could improve the process by establishing that state’s one-year clock begins to run upon receipt of an initial application and by explaining—in accordance with recent case law—that state agency practices intended to prolong the certification process (such as requiring an applicant to withdraw and resubmit a certification application) are inconsistent with the plain language and purposes of the CWA. It could explain that, in accordance with the D.C. Circuit’s decision in *Millennium Pipeline Co. v. Seggos*, the lead federal agency—not the State—determines whether a “reasonable period of time (not to exceed one year)” has been exceeded. It could also clarify that the state’s review under Section 401 is properly focused on water quality and that matters unrelated to water quality are outside of the intended scope of review.

### C. Judicial

As explained above, judicial decisions interpreting aspects of CWA Section 401 have in some instances created more questions than answers. Judicial resolution of some of the uncertainties in the WQC process is thus perhaps the least desirable avenue to Section 401 reform, because of the *ad hoc* nature in which judicial decisions are handed down and the fact that

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112. *Cf.*, *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) (holding that the Corps, as the federal permitting agency, was required to incorporate into a Section 404 permit only those conditions included in a state’s certification that were issued within the CWA one-year statutory deadline, and that it had no obligation to include those conditions imposed as a result of a state administrative challenge that was not resolved until after the one-year statutory period for certification had concluded).

113. For example, EPA regulations governing the certification of federally issued CWA Section 402 NPDES permits allow states sixty days to issue certification, specifying that the period runs “from the date the draft [federal] permit is mailed to the certifying State agency.” 40 C.F.R. § 124.53(a)(3).

lower courts are not able to prescribe uniform solutions that apply nationwide.

There are, however, current opportunities for the courts to increase clarity in this area. For example, as noted above, there is currently a cert petition pending before the United States Supreme Court, seeking review of Third Circuit decisions that have created some confusion concerning the relationship between the state administrative review process for WQCs and federal appellate courts' exclusive review of state-issued authorizations for interstate natural gas pipeline projects under NGA Section 7. Uniform decisions from the Supreme Court on issues such as this could be helpful in providing guidance on the Section 401 process going forward.

#### **D. Executive**

Finally, it has been recently reported that the current presidential administration is considering an attempt at resolving issues with the CWA Section 401 certification process via executive action.<sup>114</sup> While the contours and timing of such action remain unclear, it would be consistent with other initiatives of the administration to streamline regulatory reviews and permitting for needed energy and infrastructure projects.<sup>115</sup>

#### **IV. Conclusion**

The Section 401 certification requirement is just one example of how the CWA preserves an important role for the states in the oversight of water quality. Congress intended this role, however, to compliment the federal government's role in approving and overseeing interstate energy and infrastructure projects—and never intended for local interests to override the federal interest in developing energy resources and related transportation infrastructure.

Since its original enactment, the implementation of CWA Section 401 has created tensions between state and federal oversight roles for large-scale energy and infrastructure projects. In recent years, this tension has reached a high watermark, with states using their WQC authority to impede projects that have received federal authorization to proceed or, where the

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114. See, e.g., Ari Natter and Jennifer Dlouhy, *Trump Eyes Action to Limit States' Powers to Block Pipelines*, BLOOMBERG (Jan. 24, 2019), <https://perma.cc/NH6V-688H>.

115. See, e.g., Presidential Memorandum, *Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing* (Jan. 24, 2017); Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order 13777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13807, 82 Fed. Reg. 40,463, 40,463 (Aug. 15, 2017). The ability of such an order to reform state agency projects is uncertain, however. The "One Federal Decision" process established under Executive Order 13807, for instance, does not cover state agency authorizations, even where the state agency is acting pursuant to federal law.

state issues certification, with advocacy groups targeting the certification to derail projects already determined to be in the public interest. Clarification of the fundamentals of the WQC process may help to provide clarity and to improve the process for all stakeholders, including the states. The best way to ensure durable reform of the WQC process is for Congress to revise the statute, as recently proposed by the introduction of S. 3303 in the Senate. Further improvements to increase clarity, efficiency, and finality in the Section 401 process could be achieved via administrative, judicial, and possibly executive action.

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