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Re: Updating Regulations on Water Quality Certification

The American Coal Council (ACC) submits these comments in response to the Environmental Protection Agency’s (EPA) August 22, 2019 Federal Register Notice of its proposed rule (Proposed Rule) providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA) section 401.

The ACC is a nonprofit trade association in its 37th year representing the collective business interests of the American coal industry. Our members include coal suppliers and energy traders, utilities and independent power providers, industrial consumers, transportation companies, terminals, and support services suppliers. Since our member companies touch every aspect of turning one of America’s most abundant energy resources into reliable and affordable electricity for the United States economy, our Association has first-hand knowledge of the direct and indirect impacts of coal-related regulations and a unique, "boots on the ground" perspective. Coal is also integral to the steel-making process and the industrial production of cement, chemicals, and paper. Our members also participate in markets outside of the United States, exporting both steam and metallurgical coal to countries around the world. Our diverse membership base encompasses the entire coal supply chain, and it is from this broad perspective that we assess the impacts of coal-related regulations. While ACC provides these comments from that broad perspective, individual member companies of ACC may submit separate comments on their own behalf that offer additional or other views.
The ACC supports EPA’s Proposed Rule to update processes for CWA section 401 reviews to clarify timeframes for certification, the scope of certification review and conditions, and other related certification procedures.

**Background**

Previously, President Trump signed Executive Order (EO) 13807 *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* in August 2017. That EO recognizes the need for more efficient and effective federal infrastructure decisions. Inefficiencies in current infrastructure project decisions by government, including management of environmental reviews and permit decisions, have delayed infrastructure investments, increased project costs, and blocked the benefits of improved infrastructure. The EO directs various federal agency goals, accountability, best practices, and process enhancements in order for environmental review and authorization processes to be streamlined and accomplished in a coordinated, consistent, predictable, and timely manner.

In April 2019, President Trump signed Executive Order (EO) 13868, *Promoting Energy Infrastructure and Economic Growth* to promote the realization of benefits of investment in energy infrastructure, and which includes the statement “To enable the timely construction of the infrastructure needed to move our energy resources through domestic and international commerce, the Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment. Enhancing our Nation’s energy infrastructure, including facilities for the transmission, distribution, storage, and processing of energy resources, will ensure that our Nation’s vast reserves of these resources can reach vital markets.”¹ The EO addresses CWA section 401 regulatory concerns, stating “Outdated Federal guidance and regulations regarding section 401 of the Clean Water Act, however, are causing confusion and uncertainty and are hindering the development of energy infrastructure.”² The policy stated in the EO is to promote private investment in the Nation’s energy infrastructure. Among other things, this includes the use of efficient permitting processes with clear and reasonable timetables and timely action on infrastructure projects that advance America’s interests and facilitate participation in global energy markets.

EO 13868 directs EPA in various ways to review CWA section 401 and EPA’s certifications regulations, which have not been updated since CWA promulgation in 1971. As part of its review, the EO directed EPA to take into account the federalism considerations underlying section 401 and focus on the scope of water quality reviews and conditions, the scope of information needed to act on a certification request in a reasonable time period, and expectations for certification review times.

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² *Id* at Section 3.
ACC appreciates the Trump administration’s recognition of the importance of energy infrastructure projects, the need for improving the review and authorization processes, and that CWA section 401 has been a deterrent to energy projects. We are encouraged by EPA’s recent actions to issue guidance, engage with stakeholders, and ultimately set forth this proposal. EPA’s stated intent of the proposal is to modernize regulations, align them with the current text and structure of the CWA, and provide additional procedures to promote consistent implementation of section 401 and to streamline federal license and permit processes. EPA identifies the most challenging aspects of section 401 as those concerning the scope of review and action on a certification request, and the amount of time for a certifying authority to act.

***Importance of EPA’s Proposed Rule to Coal and Coal Exports***

Coal mining projects have been negatively impacted by many challenging aspects of CWA section 401 certification. Slow processing, inconsistent interpretation, inappropriate expansion of the scope of potential impacts, and broadening the certification conditions have hampered projects. These regulatory challenges increase project costs and are a disincentive to capital investments for mine development and expansion. Removing regulatory obstacles is important for coal. The inappropriate use of the CWA section 401 permitting process to impede or thwart project development through excessive delays and inappropriate expansions of scope and conditions is a major obstacle. EPA’s Proposed Rule brings a much-needed focus to this obstacle and the need for addressing it.

In addition to mining projects, other coal-related energy infrastructure projects have been affected. EPA discusses one of these, the Millennium Bulk Terminals (Millennium) project, as a section 401 “case study” in the Economic Analysis accompanying this Proposed Rule. The Millennium project is a coal export terminal that would receive western U.S. coal by rail, and blend and load it into ocean-going vessels to serve growing Asian coal demand. While environmental groups have opposed Millennium, their opposition is misguided. The site is a former aluminum smelting facility in Longview, Washington, and Millennium’s owners have already undertaken clean up and made significant environmental improvements there. Redevelopment of the site as an export terminal would provide a needed boost to local jobs and the economy. Additionally, the shipment of coal mined, transported, and loaded under the stringent environmental laws, regulations, and reliable practices of the U.S. coal supply chain is an environmentally superior alternative for supplying coal to Asia, a large and important demand region.

Coal exports have become increasingly important with the decline in domestic power sector coal demand. The decline is heightened by the twin dynamics of existing coal power plant closures and no new capacity being built. About 40 percent of the U.S. coal power plant fleet has been closed or announced to close or convert fuels since 2010, and many of the
closures are attributed to EPA regulations.\(^3\) Coal exports reached a record high level of 15 percent of U.S. coal production in 2018. It is critically important that coal exports be facilitated by projects that will enable their competitiveness and growth. This includes terminal development, expansion, or upgrades, and dredging of key shipping channels to accommodate larger and more efficient vessels. Such projects will support coal production and employment levels, and also jobs elsewhere in the supply chain including in transportation and at terminals.

The promotion of energy exports including coal has been a strong policy focus of the current administration. Despite federal government authority over international trade, some states, due to policy preferences against coal and coal exports, have misused their state permitting processes to manipulate federal export policy. This is a serious Commerce Clause concern and not limited to coal or other energy projects, since misuse may also affect the export of other products.

**Time Period and Scope Issues Support CWA Section 401 Update**

CWA section 401 is intended be a tool for states and tribes to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies. It provides for states or tribes to act on a certification request within a reasonable period of time not to exceed one year. Unfortunately, it is not uncommon for such requests to take many years. Sometimes the certifying authority will pause the timeline or even re-start the clock by forcing the project proponent to pull the application and reapply. The reasons given for delays and re-starts are often shrouded in ambiguity.

CWA section 401 addresses water quality and quite simply should be limited to that. However, the scope has been expanded to include non-water quality considerations by some certifying authorities. EPA’s preamble for this Proposed Rule mentions some of these non-water related considerations including requiring construction of hiking and biking trails, and requiring payments for improvements or enhancements that are not related to the proposed project. Additionally, there have been attempts to address all potential impacts from the operation or subsequent use of products generated by a proposed federally licensed or permitted project that may be identified in an environmental impact statement or environmental assessment done pursuant to NEPA or a similar state law. This includes, as EPA states in the preamble, "considerations of impacts associated with air emissions and transportation effects”.

EPA further states in the Proposed Rule’s preamble, "If Congress intended section 401 of the CWA to authorize considerations or the imposition of certification conditions based on

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air quality concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts, it would have provided a clear statement to that effect.”

EPA’s Proposed Rule will reaffirm the maximum one year time period for a section 401 certification decision and will appropriately clarify the scope of water quality discharge impacts and conditions necessary for compliance.

**Conclusion**

ACC member companies have been negatively impacted by inordinate delays and the inappropriate broadening of scope and conditions in the permit review and decision process. These regulatory roadblocks mean lost time, increased costs, and lost business opportunities.

ACC endorses EPA’s Proposed Rule to update processes for CWA section 401 reviews to clarify timeframes for certification, the scope of certification review and conditions, and other related certification procedures. The necessity of EPA proceeding with this update is clearly supported. We also urge EPA to consider every regulatory mechanism to strengthen protections against states misusing the CWA section 401 permitting process to block coal export projects and foreign commerce.