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U.S. Environmental Protection Agency
Oceans, Wetlands, and Communities Division
1200 Pennsylvania Avenue NW
Washington, DC  20460

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Attn: Docket ID No. EPA-HQ-OW-2021-0302

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

The American Coal Council (ACC) submits these comments in response to the Environmental Protection Agency’s (EPA) June 2, 2021 Federal Register Notice of Intent to reconsider and revise the Clean Water Act (CWA) Section 401 Certification Rule.

The ACC is a nonprofit trade association in its 39th 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. ACC member companies are involved in every aspect of the vital U.S. coal supply chains for power generation, steelmaking, and producing cement, chemicals, and paper. They strengthen the United States economy by directly contributing to a reliable, affordable supply of electricity and the availability of consumer and industrial products. Our members also contribute to the global supply chains for these same purposes and needs, exporting both thermal and metallurgical coal to countries around the world. Our Association’s broad base of members has first-hand experience with the direct and indirect impacts of coal-related regulations and a unique, “boots on the ground” perspective. 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 efforts for regulatory efficiency, transparency, and certainty by EPA and other federal agencies as revisions to regulations are considered. In that spirit, ACC supported EPA’s 2020 changes 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.

President Biden’s Executive Order (EO) 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis directed EPA to review and take appropriate action to revise or replace the 2020 CWA section 401 certification rule. EPA has indicated it will reconsider whether the 2020 rule appropriately considers cooperative federalism principles and whether some of the procedural components of the rule improve or impede the certification and permitting process.

CWA section 401 is intended be a tool for states and tribes to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies. ACC notes that in announcing its intent to revise the 2020 CWA section 401 certification rule in May 2021, EPA said that it had determined the existing rule erodes state and tribal authority and that EPA intends to strengthen the authority of states and tribes to protect their water resources. However, EPA did not provide any information or evidence to support its determination of the erosion of state and tribal authority under the existing section 401 rule.

ACC’s additional comments about the CWA section 401 certification and permitting process and possible revisions by EPA are contained in the following sections.

**Background**

President Biden’s goals for investments in our nation’s roads, bridges, airports, transportation, energy, water, and broadband infrastructure face delays and barriers in the absence of effective federal infrastructure permitting decisions. Decades of inefficiencies in infrastructure project processes and 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. With his decades of service in the U.S. Congress, the President is familiar with these inefficiencies, which hamper economic development and job opportunities.

Outdated Federal guidance and regulations for section 401 of the CWA had caused confusion and uncertainty and hindered the development of energy infrastructure. The objectives of the 2020 CWA section 401 changes included efficient permitting processes with clear and reasonable timetables and timely action on infrastructure projects. The 2020 changes made will facilitate the Biden administration’s infrastructure goals, including for energy infrastructure projects.

CWA section 401 has been a deterrent to energy projects. Among the most challenging aspects of section 401 have been those concerning the scope of review and action on a certification request, and the amount of time for a certifying authority to act. These are among the elements EPA is now proposing to review and revise.
Challenges of the Section 401 Certification Permitting Process

Over time, coal and other mining projects have been negatively impacted by the many challenging aspects of CWA section 401 certification. Slow processing, inconsistent interpretation, inappropriate expansion of the scope of potential impacts, and broadening of the certification conditions have hampered projects. The CWA section 401 permitting process has been exploited to impede or stop project development through excessive delays and inappropriate expansions of scope and conditions, including imposing conditions unrelated to protecting water quality.

Additionally, despite federal government authority over international trade, some states have inappropriately used their state permitting processes to manipulate federal export policy due to their policy preferences against coal and coal exports. 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.

An example of such state misuse is the Millennium Bulk Terminals (Millennium) coal export facility planned for Longview, Washington. Stymied by delays, the CWA Section 401 permit for the facility was ultimately denied by the state of Washington, not due to a water quality issue but because Washington officials were opposed to coal use, including in Asia where the coal would be consumed. Subsequent litigation included the states of Montana and Wyoming which objected to the state of Washington’s restraint of their states’ economic activity and the prospect that their other non-coal export commodities could be blocked in the future.

There are distressing ripple effects of the circumstances surrounding the permit denial for the Millennium project. The site is a former aluminum smelting facility and clean-up activities and significant environmental improvements there had already been undertaken. Redevelopment of the site as an export terminal would have provided a 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.

Time Period and Scope – Issues of Core Importance

EPA has requested comment on the process of determining and modifying the reasonable period of time that certifying authorities have to act on a CWA section 401 certification request, and whether additional factors should be considered by federal agencies when establishing the reasonable period of time. Additionally, EPA has asked whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time.

CWA section 401 provides for the certifying authority to act on a certification request within a defined time period known as the “reasonable period of time” and that that period is not to
exceed one year. Unfortunately, it has not been 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.

Section 401 of the existing 2020 rule reaffirmed and clarified that certification requests must be acted upon within this “reasonable period of time” not to exceed one year. This “reasonable period of time” and the one year not-to-exceed should be retained. The current rule has a provision that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. Acting in accordance with these aspects of the certification timeframe can provide much-needed certainty to all involved parties.

As to whether it is appropriate for other stakeholders besides federal agencies to have a role in defining and extending the reasonable period of time, it is not appropriate and therefore changes are unnecessary. The public and other stakeholders already have the opportunity to participate in the permitting process – for example, by providing public comment and participating in public hearings.

Regarding the CWA section 401 scope of certification, the scope had been expanded by some certifying authorities to include non-water quality considerations, including the Millennium example described above. The ACC supports the scope of certification as changed and clarified in the 2020 rule. These changes and clarifications improve the prospects for appropriate and timely reviews and decisions, guarding against the inappropriate use of the certification process to delay or halt projects over potential impacts unrelated to water quality.

It should be noted and emphasized that the CWA section 401 certification process is only one part of a comprehensive environmental permitting process, including public engagement, that proposed projects must undergo. CWA section 401 addresses water quality and should be limited to that.

EPA's aforementioned determination that the 2020 rule’s scope of certification erodes state and tribal authority to protect their water resources appears to be unfounded. Expanding the scope of review for states and tribes to have the unconstrained ability to consider any and all possible impacts, including those completely unrelated to water quality, is inappropriate and would needlessly impede the certification review and processes.

**Conclusion**

ACC member companies have been negatively impacted by delays and the inappropriate broadening of scope and conditions in the permit review and decision process. These regulatory roadblocks to projects have resulted in lost time, increased costs, and missed business opportunities.
ACC appreciates the opportunity to provide these comments in response to EPA’s notice of intent to reconsider and revise the CWA Section 401 certification rule. We urge EPA’s reconsideration of the rule to be undertaken from the perspective of an appropriate, rational regulatory framework strictly focused on water quality.

For any questions, please contact me at bmonseu@americancoalcouncil.org or 202.756.4540.

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