

**PRE-PUBLICATION NOTICE.** The EPA Administrator Andrew R. Wheeler signed the following final rule on June 1, 2020, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the final rule, it is not the official version of the final rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2019-0405. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 121**

**[EPA-HQ-OW-2019-0405; FRL-10009-80-OW]**

**RIN 2040-AF86**

### **Clean Water Act Section 401 Certification Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is publishing this final rule to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to States (and Tribes that have been approved for “treatment as a State” status) to review for compliance with appropriate federal, State, and Tribal water quality requirements any discharge into a water of the United States that may result from a proposed activity that requires a federal license or permit. This final rule is intended to increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.

**DATES:** This rule is effective on *[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2019-0405**, at <https://www.regulations.gov>. All documents in the docket are listed and

available at <https://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g. Confidential Business Information or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Lauren Kasparek, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 564-5700; email address: [cwa401@epa.gov](mailto:cwa401@epa.gov).

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## I. General Information

- A. *How can I get copies of this document and related information?*

1. *Docket*. An official public docket for this action has been established under Docket ID No. EPA–HQ–OW–2019–0405. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access*. You may access this **Federal Register** document electronically under the “**Federal Register**” listings at <https://www.regulations.gov>. An electronic version of the public docket is available through the EPA’s electronic public docket and comment system, the EPA Dockets. You may access the EPA Dockets at <https://www.regulations.gov> to view submitted public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about the EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

*B. What action is the Agency taking?*

In this notice, the Agency is publishing a final rule updating the water quality certification regulations in 40 CFR 121.

*C. Under what legal authority is this final rule issued?*

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 304(h), 401, and 501(a).

## II. Background

### A. Executive Summary

Congress enacted section 401 of the CWA to provide States and authorized Tribes with an important tool to help protect the water quality of federally regulated waters within their borders in collaboration with federal agencies. Under section 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States,<sup>1</sup> unless the State or authorized Tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with applicable water quality requirements or certification is waived. As described in greater detail below, section 401 envisions a robust State and Tribal role in the federal licensing or permitting proceedings, including those in which local authority may otherwise be preempted by federal law. Section 401 also places important limitations on how that role may be implemented to maintain an efficient process, consistent with the overall cooperative federalism construct established by the CWA, as explained below in section II.F.1 of this notice.

Section 401 provides that a State or authorized Tribe must act on a section 401 certification request “within a reasonable period of time (which shall not exceed one year).”<sup>2</sup> Section 401 does not guarantee a State or Tribe a full year to act on a certification request, as the statute only

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<sup>1</sup> The CWA, including section 401, uses “navigable waters,” defined as “waters of the United States, including territorial seas.” 33 U.S.C. 1362(7). This final rule uses “waters of the United States” throughout. In January 2020, the EPA revised the definition of waters of the United States and expects the final definition of the term to control in all CWA contexts. *See* 85 FR 22250 (April 21, 2020).

<sup>2</sup> In some circumstances, the EPA can act as the certifying authority. *See* section III.H of this notice for further discussion. “If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. 1341(a)(1); *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

grants as much time as is reasonable. 33 U.S.C. 1341(a)(1). The CWA provides that the timeline for action on a section 401 certification begins “after receipt” of a certification request. *Id.* If a State or Tribe does not grant, grant with conditions, deny, or expressly waive the section 401 certification within a reasonable time period, section 401 states that the “the certification requirements of this subsection shall be waived with respect to such Federal application.” *Id.* If the certification requirement has been waived and the federal license or permit is issued, any subsequent action by a State or Tribe to grant, grant with conditions, or deny section 401 certification has no legal force or effect.

Section 401 authorizes States and Tribes to certify that a discharge into waters of the United States that may result from a proposed activity will comply with certain enumerated sections of the CWA, including the effluent limitations and standards of performance for new and existing discharge sources (sections 301, 302, and 306 of the CWA), water quality standards and implementation plans (section 303), and toxic pretreatment effluent standards (section 307). When granting a section 401 certification, States and Tribes are directed by CWA section 401(d) to include conditions, including “effluent limitations and other limitations, and monitoring requirements” that are necessary to assure that the applicant for a federal license or permit will comply with applicable provisions of CWA sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.”

As the Agency charged with administering the CWA,<sup>3</sup> as well as a certifying authority in certain instances, the EPA is responsible for developing a common regulatory framework for certifying authorities to follow when completing section 401 certifications. *See* 33 U.S.C. 1251(d), 1361(a). In 1971, the EPA promulgated regulations for implementing the certification

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<sup>3</sup> The EPA co-administers section 404 with the Army Corps of Engineers (the Corps).

provisions pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948 (FWPCA), but the EPA has never updated those regulations to reflect the 1972 amendments to the FWPCA (commonly known as the Clean Water Act or CWA), which created section 401, despite the fact that there were changes to the relevant statutory text. Since the 1972 CWA amendments, the EPA issued two guidance documents and participated as amicus curiae in court cases concerning CWA section 401, but the Agency has not updated its regulations to comport with the 1972 amendments and has not, to date, established robust internal procedures for implementing its roles under section 401. Over the last several years, litigation over the section 401 certifications for several high-profile infrastructure projects have highlighted the need for the EPA to update its regulations to provide a common framework for consistency with CWA section 401 and to give project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty.

On April 10, 2019, the President issued Executive Order 13868, entitled *Promoting Energy Infrastructure and Economic Growth* (the Executive Order or Order), which directed the EPA to engage with States, Tribes, and federal agencies and update the Agency's outdated guidance and regulations, including the 1971 certification framework. Pursuant to the Executive Order, on August 8, 2019, the EPA signed the proposed rule "Updating Regulations on Water Quality Certifications," and the proposal was published on August 22, 2019. 84 FR 44080. The 60-day public comment period for the proposal closed on October 21, 2019. Consistent with Executive Order 13868 and the 1972 CWA amendments, this final rule provides an updated common framework that is consistent with the Act and which seeks to increase predictability and timeliness.

The following sections provide an overview of section 401, relevant court cases, outreach, and other actions that inform today's rule, as well as provides responses to salient comments received on these topics.

*B. Executive Order 13868: Promoting Energy Infrastructure and Economic Growth*

The policy objective of the Executive Order is to encourage greater investment in energy infrastructure in the United States by promoting efficient federal licensing and permitting processes and reducing regulatory uncertainty. The Executive Order identified the EPA's outdated section 401 federal guidance and regulations as one source of confusion and uncertainty hindering the development of energy infrastructure.

Several commenters on the proposed rule argued that the EPA failed to demonstrate that the rule would meet the objectives of the Executive Order and the CWA, and they maintained that Presidential policy objectives cannot override the CWA's plain language and Supreme Court jurisprudence. One commenter stated that the EPA's actions under this Executive Order were driven by political considerations and the desire to undertake the rulemaking process as expeditiously as possible to meet the President's purportedly unlawful directions as stated in the Executive Order.

Other commenters asserted that the proposed rule is consistent with the Executive Order. These commenters appreciated the administration's recognition of the importance of energy infrastructure projects; the administration's recognition of the economic impact the section 401 process has had on some important energy infrastructure projects; and the EPA's review of the section 401 process. Such commenters supported the Executive Order's goal of promoting economic growth and supported the proposed rule's attempts to protect interstate and foreign



commerce from unconstitutional discrimination and unreasonable burdens and to clearly define the steps and timing for section 401 certifications.

As discussed throughout this final rule preamble, the Agency has determined that the final rule implements the fundamental statutory objectives of the CWA, while also complying with the Executive Order. The Agency disagrees with commenters who asserted that the rulemaking process was inappropriately initiated or inappropriately directed by the Executive Order. As noted above, the EPA's 1971 certification regulations<sup>4</sup> (36 FR 22487, Nov. 25, 1971; redesignated at 37 FR 21441, October 11, 1972; further redesignated at 44 FR 32899, June 7, 1979) had not been updated since they were promulgated in 1971, pursuant to section 21(b) of the FWPCA. Additionally, at the time the Executive Order was issued, the EPA's only guidance to the public on section 401 implementation was an interim handbook (now rescinded) entitled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* ("Interim Handbook"), which had not been updated since its release in 2010 and therefore did not reflect the current case law interpreting CWA section 401.

The Executive Order directed the EPA to review CWA section 401 and the EPA's 1971 certification regulations and interim guidance, issue new guidance to States, Tribes, and federal agencies within 60 days of the Order, and propose (as appropriate and consistent with law) new section 401 regulations within 120 days of the Order. The Executive Order also directed the EPA to consult with States, Tribes, and relevant federal agencies while reviewing its existing guidance and regulations to identify areas that would benefit from greater clarity.

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<sup>4</sup> These regulations were redesignated in 1972 and 1979 under the CWA, but no substantive change to the regulatory text has been made since 1971 notwithstanding changes to the relevant statutory text in the 1972 CWA. Therefore, throughout this final rule preamble, the Agency refers to these regulatory provisions as the "1971 certification regulations."

As part of this review, the Executive Order directed the EPA to take into account the federalism considerations underlying section 401 and to consider the appropriate scope of water quality reviews and conditions, the scope of information needed to act on a certification request in a reasonable period of time, and expectations for reasonable certification review times.

Section 3.a. of Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*.

Following the release of the EPA's new guidance document, the Executive Order directed the EPA to lead an interagency review of all existing federal regulations and guidance pertaining to section 401 to ensure consistency with the EPA's new guidance and rulemaking efforts. The Executive Order directs all federal agencies to update their existing section 401 guidance within 90 days after publication of the EPA's new guidance. Additionally, the Executive Order directs other federal agencies to initiate rulemaking, if necessary, within 90 days of the completion of the EPA's rulemaking, to ensure that their own CWA section 401 regulations are consistent with the EPA's new rules and with the Executive Order's policy goals. Although the Executive Order focuses on section 401's impact on the energy sector, section 401 applies broadly to any proposed federally licensed or permitted activity that may result in any discharge into a water of the United States. Therefore, updates to the EPA's 1971 certification regulations and guidance are relevant to all water quality certifications, not just those related to energy sector projects.

Additional information on the EPA's State and Tribal engagement is provided in section II.C of this notice, and additional information on the EPA's updated guidance document is provided in section II.D of this notice.

### C. *Summary of Stakeholder Engagement*

On June 11, 2018, the Agency published its 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions<sup>5</sup> announcing that the Agency was considering, as a long-term action, the issuance of a notice soliciting public comment on whether the section 401 certification process would benefit from a rulemaking to promote nationwide consistency and regulatory certainty for States, authorized Tribes, and stakeholders. The Agency's stakeholder outreach and engagement efforts since that announcement are summarized below.

On August 6, 2018, the Agency sent a letter to the Environmental Council of the States, the Association of Clean Water Administrators, the Association of State Wetland Managers, the National Tribal Water Council, and the National Tribal Caucus identifying the Agency's interest in engaging in potential clarifications to the section 401 process. The Agency discussed section 401 during several association meetings and calls and received correspondence from several stakeholders between Fall 2018 and Spring 2019. Early stakeholder feedback received prior to the issuance of the Executive Order, the August 6, 2018 letter described above, and the Agency's presentations given between Fall 2018 and Spring 2019, may be found in the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855).

Following release of the Executive Order, the EPA continued its effort to engage with States and Tribes on how to increase clarity in the section 401 certification process, including creating a new website to provide information on section 401 and notifying State environmental commissioners and Tribal environmental directors of a two-part webinar series for States and Tribes. *See* [www.epa.gov/cwa-401](http://www.epa.gov/cwa-401). The first webinar was held on April 17, 2019, and discussed the Executive Order and the EPA's next steps, and solicited feedback from States and Tribes

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<sup>5</sup> Available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2040-AF86>.

consistent with the Executive Order. Shortly thereafter, the EPA initiated formal consultation efforts under Executive Order 13132 on Federalism with States and Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments regarding provisions that require clarification within section 401 of the CWA and related federal regulations and guidance. The Agency held an initial federalism consultation meeting on April 23, 2019, and sent notification of the consultation period to States and Tribes on April 24, 2019. Consultation ran through May 24, 2019, and the EPA opened a docket for pre-proposal recommendations during this time period (Docket ID No. EPA-HQ-OW-2018-0855). On May 7, 2019, and May 15, 2019, the EPA held Tribal informational webinars, and on May 8, 2019, the EPA held an informational webinar for both States and Tribes. See sections V.F and V.G of this notice for further details on the Agency's federalism and Tribal consultations. Questions and recommendations from the webinar attendees are available in the pre-proposal docket (Docket ID No. EPA-HQ-OW-2018-0855).

During the consultation period, the EPA participated in phone calls and in-person meetings with inter-governmental and Tribal associations, including the National Governors Association and National Tribal Water Council. The EPA also attended the EPA Region 9 Regional Tribal Operations Committee meeting on May 22, 2019, to solicit recommendations for the rulemaking effort. The EPA engaged with federal agencies that issue licenses or permits subject to section 401, including the United States Department of Agriculture, the Federal Energy Regulatory Commission (FERC), the U.S. Army Corps of Engineers (Corps), the Alcohol and Tobacco Tax and Trade Bureau, the Nuclear Regulatory Commission, and the Bureau of Reclamation through several meetings and phone calls to gain additional feedback from federal partners.

At the webinars and meetings, the EPA provided a presentation and sought input on aspects of section 401 and the 1971 certification regulations that may benefit from clarification or

require updating, including timeframe, scope of certification review, and coordination among certifying authorities, federal licensing or permitting agencies, and project proponents. The EPA also requested input on issues and process improvements for the Agency's consideration.

Participant recommendations from webinars, meetings, and the docket represent a diverse range of interests, positions, and suggestions. Several themes emerged throughout this process, including support for ongoing State and Tribal engagement, support for retention of State and Tribal authority, and suggestions for process improvements for CWA section 401 water quality certifications. The EPA considered all of this information and stakeholder input during development of the proposed rule, including all recommendations submitted to the pre-proposal docket and feedback received prior to the initiation of, during, and after the formal consultation period.

On August 8, 2019, the EPA signed the proposed rule, "Updating Regulations on Water Quality Certifications," and the proposal was published on August 22, 2019. 84 FR 44080. The 60-day public comment period for the proposal closed on October 21, 2019. After signing the proposed rule, the EPA conducted a variety of stakeholder outreach engagements on the contents of the proposed rule. For example, on August 20, 2019, the EPA held a public webcast to present key elements of the proposed rule (*see*

<https://www.youtube.com/watch?v=eBI7Mj5ucyM&feature=youtu.be>). The EPA also held a public hearing in Salt Lake City, Utah, on September 5 and 6, 2019, to hear feedback from individuals from regulated industry sectors, environmental and conservation organizations, State agencies, Tribal governments, and private citizens. The EPA continued its engagement throughout the public comment period with States and Tribes through in-person meetings with representatives in Salt Lake City, Utah, and Chicago, Illinois. During these meetings, the Agency

provided an overview of the proposed rule, responded to clarifying questions from participants, discussed implementation considerations, and heard comments reflecting a range of positions on the proposal and varying interpretations of CWA section 401. A transcript of the public hearing and related materials and summaries of the State and Tribal meetings can be found in the docket for the final rule. At the request of individual Tribes, the EPA also held staff-level and leader-to-leader meetings with those Tribes.

A few commenters commended the EPA for its outreach efforts during the rule development process. Other commenters asserted that the EPA held an abbreviated public engagement process. Some commenters asserted that the EPA's consultation efforts with States, Tribes and local governments during the rulemaking process were inadequate. The Agency disagrees with commenters that its consultation with States or Tribes was inadequate. As discussed in section II.C, section V.F, and section V.G of this notice, the Agency consulted with States, Tribes, and local governments throughout the rulemaking process. See also the Agency's response to comments document in the docket for this final rule for further response on the Agency's outreach efforts.

In developing the final rule, the EPA reviewed and considered more than 125,000 comments on the proposed rule from a broad spectrum of interested parties. Commenters provided a wide range of feedback on various aspects of the proposal, including the legal basis for the proposed rule and the Agency's proposed definitions and certification procedures. Commenters also explained their views on how the proposal may impact project proponents, certifying authorities, and federal licensing and permitting agencies. The Agency summarizes the most salient public comments received on the proposed rule and provides responses in the applicable sections of this

final rule preamble. A separate response to comments document is also available in the docket for the final rule at Docket ID No. EPA-HQ-OW-2019-0405.

#### D. *Guidance Document*

Pursuant to the Executive Order, the Agency released updated section 401 guidance on June 7, 2019 (“the 2019 Guidance”), available at <https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes>. Coincident with the release of the 2019 Guidance, the EPA rescinded the 2010 Interim Handbook on section 401 water quality certification. The Interim Handbook had not been updated or revised since its release in 2010, had never been finalized, and did not reflect current case law interpreting CWA section 401.

The 2019 Guidance provided information and recommendations for implementing the substantive and procedural requirements of section 401, consistent with the areas of focus in the Executive Order. More specifically, the 2019 Guidance focused on aspects of the certification process, including the timeline for review and decision-making and the appropriate scope of review and conditions. Additionally, the 2019 Guidance provided recommendations for how federal licensing and permitting agencies, States, and Tribes can better coordinate to improve the section 401 certification process. The emphasis on early coordination and collaboration to increase process efficiency aligns with other agency directives under Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, which established the “One Federal Decision” policy. For major infrastructure projects, Executive Order 13807 directs federal agencies to use a single, coordinated process for compliance with the National Environmental Policy Act (NEPA), 42

U.S.C. 4321 *et seq.*, and emphasizes advance coordination to streamline federal permitting actions.

Some commenters asserted the 2019 Guidance is inconsistent with 50 years of practice and that it created confusion and uncertainty. Other commenters disagreed with the 2019 Guidance's limitations on timing of section 401 certifications and the scope of information that States may require to fully evaluate section 401 certification requests. Several commenters stated that the 2019 Guidance was inappropriately issued prior to rulemaking and should be withdrawn, and they asserted that either the Interim Handbook should be reinstated or the 2019 Guidance should be modified. Some commenters suggested that the issuance of the 2019 Guidance before rule finalization indicates that the EPA has predetermined the outcome of the rulemaking process, contrary to the Administrative Procedure Act (APA), and therefore that the guidance should be rescinded or superseded by new guidance consistent with the final rule.

The Agency disagrees with commenters who asserted the 2019 Guidance was unnecessary. As discussed above and as outlined in the Executive Order, the Interim Handbook created regulatory uncertainty and confusion because it no longer reflected the current case law interpreting CWA section 401, nor had it been updated or finalized. The 2019 Guidance was intended only to facilitate consistent implementation of section 401 and the 1971 certification regulations during this rulemaking process, and the Agency disagrees with commenters who suggested the 2019 Guidance reflected a predetermined outcome of this rulemaking process. The 2019 Guidance addressed the appropriate timeline for a State's or Tribe's review and section 401 certification decision-making and the appropriate scope of a State's or Tribe's certification review and conditions based on the EPA's 1971 certification regulations. The final rule, on the



other hand, is based on the Agency's holistic review of the 1972 statutory language, addresses a number of additional topics, and reflects and responds to public comments.

Some commenters said the 2019 Guidance should be retained but updated once the proposed rule is finalized. Other commenters stated the 2019 Guidance should be withdrawn once the proposed rule is finalized. One commenter asserted that additional guidance may be appropriate, but that the need for guidance depends on the degree of clarity in the final rule.

Coincident with issuing this final rule, the EPA is rescinding the 2019 Guidance. The EPA continues to support and encourage the extent of coordination recommended in the 2019 Guidance, including recommendations for project proponents, certifying authorities, and federal licensing and permitting authorities to engage in substantive discussions as early as possible, and for all parties to operate in good faith throughout the certification process. However, the EPA has concluded that retaining the 2019 Guidance after issuing this final rule could cause confusion. The Agency has determined that the final rule provides sufficient additional specificity and clarity on the issues discussed in the 2019 Guidance to both meet the expectations of the Executive Order and render the 2019 Guidance unnecessary. The EPA retains the option to develop new guidance to facilitate implementation of this final rule should the need arise.

#### *E. Effect on Existing Federal, State, and Tribal Laws*

According to the Executive Order, the EPA is to lead an interagency effort to review and examine existing federal guidance and regulations “for consistency with EPA guidance and rulemaking.” Section 3.d. of the Executive Order provides that, within 90 days after the EPA issues its final section 401 regulations, “if necessary, the heads of each 401 implementing Agency shall initiate a rulemaking to ensure that their respective agencies’ regulations are consistent with” the EPA’s final section 401 regulations and “the policies set forth in section 2 of

[the Executive Order].” Pursuant to the Executive Order, the other federal agencies that issue licenses or permits subject to the certification requirements of section 401 are expected to ensure that any regulations governing their own processing, disposition, and enforcement of section 401 certifications are consistent with the EPA’s final regulations and the policies articulated in section 2 of the Executive Order. The EPA engaged with other section 401 implementing agencies before and after the proposed rule was issued, and the EPA considered federal agency feedback in developing the proposal and this final rule. This final rule preamble includes suggested recommendations for federal agencies as they update or draft their section 401 implementing regulations. For instance, section III.F.2.a of this notice encourages federal agencies to establish in their regulations a minimum reasonable period of time for State and Tribal action to provide notice and regulatory certainty to project proponents and certifying authorities about applicable deadlines. However, these are only recommendations and the federal agencies themselves must determine how to update their own regulations to ensure consistency with this final rule and efficient administration of their license and permit programs. For its part, the EPA plans to review its National Pollutant Discharge Elimination System (NPDES) regulations to ensure its own permitting program certification regulations are consistent with this final rule.

In addition to conforming changes that federal agencies may make to federal regulations that implement section 401, it is likely that States and Tribes will want to evaluate their existing certification statutes or regulations to ensure consistency with the EPA’s final rule.

Certain commenters stated that the proposed rule would not be consistent with existing State law, such as State statutes or regulations regarding notice and comment, completeness, impact and degradation avoidance, and mitigation. Many of these commenters were particularly

concerned that existing State-enacted procedures require more information and time for State certification review and action than provided by the proposed rule. A few commenters challenged the EPA's authority to dictate State procedures and stated that the EPA should provide flexibility for State regulatory procedures in this rulemaking. Several commenters maintained that the proposed rule would require statutory and regulatory changes on the State level and encouraged the EPA to give States sufficient time to adapt by providing an extended effective date for the new rule. One commenter asserted that if States were not provided additional time to assess the new rule's impact on their State laws and regulations, the new rule could require the States to either violate their own laws or deny more section 401 certifications, which could result in litigation and further delay for projects subject to section 401.

Several commenters asserted that the proposed rule would make State and Tribal section 401 programs less efficient and would lead to national inconsistency. Several commenters asserted that the EPA's interpretation of the CWA and case law will result in legal challenges to the final rule, which would in turn lead to confusion and delays in its implementation contrary to the intent of the Executive Order. Several commenters also indicated that because States may need to change their statutes and regulations in response to the final rule, litigation will ensue over those State changes resulting in further regulatory uncertainty, defeating the intent of the proposal to make the section 401 process more efficient.

The EPA has considered and appreciates the concerns raised by these commenters and is mindful that the lack of clear federal guidance and implementation of CWA section 401 following enactment of the 1972 CWA amendments has resulted in a patchwork of State and Tribal programs with different timing, request, and review requirements for water quality certifications. However, the EPA's decades-long delay in promulgating section 401

implementing regulations does not undercut the EPA's authority and obligation to promulgate implementing regulations for this important CWA program. The EPA's delay in promulgating regulations also does not change the 1972 CWA amendment's statutory language or underlying congressional intent, nor does it allow for States or Tribes to implement water quality certification programs that exceed the authority granted by Congress.

The EPA acknowledges that some States and Tribes may update their regulations to be consistent with the procedural and substantive elements of this final rule. Regulatory consistency across federal, State, and Tribal governments with respect to issues like timing, waiver, and scope of section 401 reviews and conditions would help ensure that section 401 is implemented nationally in an efficient, effective, and transparent manner. Although such updates may have an initial burden on certifying authorities, they will ultimately result in more efficient certification and federal permitting processes. The Agency will face a similar task in updating its own NPDES regulations after this final rule is published, but will similarly benefit from more efficient, effective and transparent certification processes under updated regulations. Making the rule effective 30 days after publication in the Federal Register would be consistent with applicable law; however, the Agency is establishing the effective date 60 days after publication of the final rule in the Federal Register. This additional time will allow EPA to develop implementation materials for States, Tribes and federal agencies, as necessary or appropriate. The Agency stands ready to provide technical assistance to States, Tribes, and federal agencies seeking to update their certification procedures, guidance or regulations.

By promulgating these long-overdue regulations, it is not the EPA's intent that States or Tribes violate either federal, State, or Tribal law pending completion of updates to applicable State or Tribal law. The Agency is aware that most if not all States have emergency rulemaking

authorities that may help avoid such outcomes. Furthermore, as States and Tribes enact conforming changes to their existing laws, pursuant to section 401(b), the EPA remains ready and willing to provide any necessary technical assistance.

A few commenters supporting the proposed rule acknowledged the EPA's desire to preserve State sovereignty and principles of cooperative federalism while at the same time creating greater national consistency in both federal and State regulations implementing section 401. One commenter observed that the proposed rule would make the regulations consistent with the intent of the 1972 CWA amendments while allowing the States to retain their primary roles in the section 401 water quality certification process. Some commenters stated the current regulations have allowed States to impose conditions beyond the appropriate scope set forth in the statute, leading to lengthy delays in the certification process and resulting in a certification process that is ill-defined, confusing in scope, and lacking clear deadlines. A number of commenters asserted that the proposed rule would promote regulatory certainty, help streamline the federal permitting process for critical infrastructure development, enhance the ability of project proponents to plan for construction, and facilitate early and constructive engagement between project proponents, States or authorized Tribes, and federal agencies to ensure that proposed projects will be protective of local water quality.

The EPA acknowledges that although many certifications reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy, some certifying authorities have implemented water quality certification programs that exceed the boundaries set by Congress in section 401. After considering all of the comments received, the Agency has made several changes, described further below, to provide greater clarity and regulatory certainty in the final rule.

## F. *Legal Background*

This final rule concludes the EPA’s first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401. The Agency’s 1971 water quality certification regulations pre-dated the 1972 CWA amendments. This final rule therefore provides the EPA’s first holistic analysis of the statutory text, legislative history<sup>6</sup>, and relevant case law informing the implementation of the CWA section 401 program by the Agency and its federal, State, and Tribal partners. The final rule, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by the Agency’s expertise developed over nearly 50 years of implementing the CWA and policy considerations where necessary to address certain ambiguities in the statutory text. The following sections describe the basic operational construct and history of the 1972 CWA amendments, how section 401 fits within that construct, and certain core administrative and legal principles that provide the foundation for this final rule.

### 1. The Clean Water Act

Congress amended the CWA<sup>7</sup> in 1972 to address longstanding concerns regarding the quality of the nation’s waters and the federal government’s ability to address those concerns under existing law. Prior to 1972, responsibility for controlling and redressing water pollution in the nation’s waters largely fell to the Corps under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation’s major waterways, section 13 of the RHA made it unlawful to discharge refuse “into any navigable

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<sup>6</sup> The EPA observes that some legislative history related to section 401 is internally inconsistent. When interpreting section 401 for purposes of this rulemaking, the Agency has generally accorded such inconsistent and ambiguous legislative history less weight.

<sup>7</sup> The FWPCA has been commonly referred to as the CWA following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977). For ease of reference, the Agency will generally refer to the FWPCA in this notice as the CWA or the Act.

water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.”<sup>8</sup> 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), in 1961, and in 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the federal government to bring enforcement actions to abate water pollution.

These earlier statutory frameworks, however, proved challenging for regulators, who often worked backwards from an overly-polluted waterway to determine which dischargers and which sources of pollution may be responsible. *See EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 204 (1976). In fact, Congress determined that the prior statutes were inadequate to address the decline in the quality of the nation’s waters, *see City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981), so Congress performed a “total restructuring” and “complete rewriting” of the existing statutory framework of the Act in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme designed to prevent, reduce, and eliminate pollution in the nation’s waters generally, and to regulate the discharge of pollutants into waters of the United States specifically. *See, e.g., S.D.*

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<sup>8</sup> The term “navigable water of the United States” is a term of art used to refer to a water subject to federal jurisdiction under the RHA. *See, e.g.*, 33 CFR 329.1. The term is not synonymous with the phrase “waters of the United States” under the CWA, *see id.*, and the general term “navigable waters” has different meanings depending on the context of the statute in which it is used. *See, e.g., PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

*Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 385 (2006) (“[T]he Act does not stop at controlling the ‘addition of pollutants,’ but deals with ‘pollution’ generally[.]”).

The objective of the new statutory scheme was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) “that the discharge of pollutants into the navigable waters be eliminated by 1985;” and (2) “that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . .” *Id.* at 1251(a)(1)-(2).

Congress established several key policies that direct the work of the Agency to effectuate those goals. For example, Congress declared as a national policy “that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.” *Id.* at 1251(a)(3)-(7).

Congress provided a major role for the States in implementing the CWA, balancing the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources . . . .” *Id.* at 1251(b). Congress also declared as a national policy that States



manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that “[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.* at 1370.<sup>9</sup> Congress also pledged to provide technical support and financial aid to the States “in connection with the prevention, reduction, and elimination of pollution.” *Id.* at 1251(b).

To carry out these policies, Congress broadly defined “pollution” to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” *id.* at 1362(19), to parallel the broad objective of the Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation’s waters generally. *See, e.g., id.* at 1256(a) (authorizing the EPA to issue “grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution”); *see also* 84 FR 56626, 56632 (Oct. 22, 2019) (discussing non-regulatory program provisions); 85 FR 22250, 22253 (April 21, 2020) (same).

In addition to the Act’s non-regulatory measures to control pollution of the nation’s waters, Congress created a federal regulatory program designed to address the discharge of pollutants into a subset of those waters identified as “the waters of the United States.” *See* 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism: “Except as in compliance with this

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<sup>9</sup> 33 U.S.C. 1370 also prohibits states with EPA-approved CWA programs from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.” *Id.* at 1311(a). A “discharge of a pollutant” is defined to include “any addition of any pollutant to navigable waters from any point source,” such as a pipe, ditch or other “discernible, confined and discrete conveyance.” *Id.* at 1362(12), (14). The term “pollutant” means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into waters of the United States from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including by obtaining authorizations pursuant to the section 402 NPDES permit program or the section 404 dredged or fill material permit program. *See id.* at 1342, 1344. Congress therefore intended to achieve the Act’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by addressing pollution of all waters via non-regulatory means and federally regulating the discharge of pollutants to the subset of waters identified as “navigable waters.”<sup>10</sup>

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<sup>10</sup> Fundamental principles of statutory interpretation support the Agency’s recognition of a distinction between “nation’s waters” and “navigable waters.” As the Supreme Court has observed, “[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.” *Bailey v. United States*, 516 U.S. 137, 146 (1995) (recognizing the canon of statutory construction against superfluity). Further, “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Savings Ass’n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]”) (citation omitted). The non-regulatory sections of the CWA reveal Congress’ intent to restore and maintain the integrity of the nation’s waters using federal assistance to support state and local partnerships to control pollution in the nation’s waters in addition to a federal regulatory prohibition on the discharge of pollutants into the navigable waters. If

Within the regulatory programs established by the Act, two principal components focus on “achieving maximum ‘effluent limitations’ on ‘point sources,’ as well as achieving acceptable water quality standards,” and the development of the NPDES permitting program that imposes specific discharge limitations for regulated entities. *EPA v. State Water Resources Control Bd.*, 426 U.S. at 204. Together these components provide a framework for the Agency to focus on reducing or eliminating discharges while creating accountability for each regulated entity that discharges into a waterbody, facilitating greater enforcement and overall achievement of the CWA water quality goals. *Id.*; see *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (observing that 1972 amendments “largely supplanted” earlier versions of CWA “by replacing water quality standards with point source effluent limitations”).

Under this statutory scheme, the States<sup>11</sup> are authorized to assume program authority for issuing section 402 and 404 permits within their borders, subject to certain limitations. 33 U.S.C. 1342(b), 1344(g). States are also responsible for developing water quality standards for “waters of the United States” within their borders and reporting on the condition of those waters to the EPA every two years. *Id.* at 1313, 1315. States must develop total maximum daily loads (TMDLs) for waters that are not meeting established CWA water quality standards and must submit those TMDLs to the EPA for approval. *Id.* at 1313(d). And, central to this final rule, States under CWA section 401 have authority to grant, grant with conditions, deny, or waive water quality certifications for every federal license or permit issued within their borders that

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Congress intended the terms to be synonymous, it would have used identical terminology. Instead, Congress chose to use separate terms, and the Agency is instructed by the Supreme Court to presume Congress did so intentionally. For further discussion, see 84 FR at 56632 and 85 FR at 22253.

<sup>11</sup> The CWA defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3).

may result in a discharge into waters of the United States. *Id.* at 1341. These same regulatory authorities can be assumed by Indian Tribes under section 518 of the CWA, which authorizes the EPA to treat eligible Tribes with reservations in a similar manner to States (referred to as “treatment as States” or TAS) for a variety of purposes, including administering the principal CWA regulatory programs. *Id.* at 1377(e). In addition, States and Tribes retain authority to protect and manage the use of those waters that are not waters of the United States under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a).

In enacting section 401, Congress recognized that where States and Tribes do not have direct permitting authority (because they do not have section 402 or 404 program authorization or where Congress has preempted a regulatory field, *e.g.*, under the Federal Power Act), they may still play a valuable role in protecting the water quality of federally regulated waters within their borders in collaboration with federal agencies. Under section 401, a federal agency may not issue a license or permit for an activity that may result in a discharge into waters of the United States, unless the appropriate authority provides a section 401 certification or waives its ability to do so. The authority to certify a federal license or permit lies with the agency (the certifying authority) that has jurisdiction over the location of the discharge to the receiving water of the United States. *Id.* at 1341(a)(1). Examples of federal licenses or permits potentially subject to section 401 certification include, but are not limited to, CWA section 402 NPDES permits in States where the EPA administers the permitting program; CWA section 404 and RHA sections 9 and 10 permits issued by the Corps; bridge permits issued by the U.S. Coast Guard (USCG); and hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission (FERC).

Under section 401, a certifying authority may grant, grant with conditions, deny, or waive certification in response to a request from a project proponent. The certifying authority

determines whether the potential discharge from the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of state law. *Id.* Certifying authorities may also add to a certification “any effluent limitations and other limitations, and monitoring requirements” necessary to assure compliance. *Id.* at 1341(d). These additional provisions must become conditions of the federal license or permit should it be issued. *Id.* A certifying authority may deny certification if it is unable to determine that the discharge from the proposed activity will comply with the applicable sections of the CWA and appropriate requirements of state law. If a certifying authority denies certification, the federal license or permit may not be issued. *Id.* at 1341(a)(1). A certifying authority may waive certification by “fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.” *Id.*

With the exception of section 401, the EPA has promulgated regulatory programs designed to ensure that the CWA is implemented as Congress intended in the 1972 CWA.<sup>12</sup> This includes pursuing the overall “objective” of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” *id.* at 1251(a), while implementing the specific “policy” directives from Congress to, among other things, “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” *Id.* at 1251(b); *see also Webster’s II, New Riverside University Dictionary* (1994) (defining “policy” as a “plan or course of action, as of a government[, ] designed to influence and determine decisions and actions;” an

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<sup>12</sup> As noted in section II.F.3 of this notice, the EPA’s 1971 certification regulations were promulgated prior to the 1972 CWA Amendments and had not been updated to reflect the current statutory text until this final rule was developed.

“objective” is “something worked toward or aspired to: Goal”). The Agency therefore recognizes a distinction between the specific word choices of Congress, which reflect the need to develop regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress. For further discussion of these principles, *see* 84 FR 56638-39 and 85 FR at 22269-70.

Congress’ authority to regulate navigable waters, including waters subject to CWA section 401 water quality certification, derives from its power to regulate the “channels of interstate commerce” under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the “channels of interstate commerce” as one of three areas of congressional authority under the Commerce Clause). The Supreme Court explained in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that the term “navigable” indicates “what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that “Congress intended to exert anything more than its commerce power over navigation.” *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended “to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985); *see also SWANCC*, 531 U.S. at 167.

The classical understanding of the term navigable was first articulated by the Supreme Court in *The Daniel Ball*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being

used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Over the years, this traditional test has been expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). The Supreme Court also had clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross State boundaries. *See Utah v. United States*, 403 U.S. 9, 11 (1971). Congress therefore intended to assert federal regulatory authority over more than just waters traditionally understood as navigable, while rooting that authority in "its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3.

The EPA recognizes and respects the primary responsibilities and rights of States to regulate their land and water resources, as reflected in CWA section 101(b). 33 U.S.C. 1251(b), *see also id.* at 1370. The oft-quoted objective of the CWA to "restore and maintain the chemical,

physical, and biological integrity of the Nation’s waters,” *id.* at 1251(a), must be implemented in a manner consistent with Congress’ policy directives. The Supreme Court long ago recognized the distinction between waters subject to federal authority, traditionally understood as navigable, and those waters “subject to the control of the States.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564-65 (1870). Over a century later, the Supreme Court in *SWANCC* reaffirmed the States’ “traditional and primary power over land and water use.” 531 U.S. at 174. Ensuring that States retain authority over their land and water resources helps carry out the overall objective of the CWA and ensures that the Agency is giving full effect and consideration to the entire structure and function of the Act. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (citation omitted); *see also Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality) (“[C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).”) (original emphasis).

In summary, Congress relied on its authority under the Commerce Clause when it enacted the CWA and intended to assert federal authority over more than just waters traditionally understood as navigable, but it limited the exercise of that authority to “its commerce power over navigation.” *SWANCC*, 531 U.S. at 168 n.3. The Court in *SWANCC* found that “[r]ather than expressing a desire to readjust the federal-state balance [in a manner that would result in a significant impingement of the States’ traditional and primary power over land and water use], Congress chose [in the CWA] to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .’” *Id.* at 174 (quoting 33 U.S.C. 1251(b)). The Court found no clear statement from Congress that it



had intended to permit federal encroachment on traditional State power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id.* at 173-74. That is because the Supreme Court has instructed that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *Id.* at 172. The Court has further stated that this is particularly true “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173; *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“[The] plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere”). This means that the executive branch’s authority under the CWA, while broad, is not unlimited, and the waters to which CWA regulatory programs apply must necessarily respect those limits. For further discussion of these principles, *see* 84 FR 56655 and 85 FR at 22264. See section II.F.6 of this final rule preamble for a summary of public comments and Agency responses on interstate commerce.

In some cases, CWA section 401 denials have been challenged on grounds that the denial improperly interfered with interstate commerce. *See, e.g., Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-5005, Complaint at ¶¶206-210; ¶¶224-248 (W.D. Wash. filed Jan. 8, 2018) (alleging that State’s denial of section 401 certification violated dormant Commerce Clause and dormant foreign Commerce Clause). In *Lake Carriers Association v. EPA*, 652 F.3d 1 (D.C. Cir. 2011),

the court of appeals found that the section 401 statutory scheme of delegation of authority to States, by itself, does not create an impermissible burden on interstate commerce; however, the court signaled that certain actions taken by States pursuant to section 401 could be subject to dormant Commerce Clause challenges. 652 F.3d at 10 (“If [petitioners] believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state’s courts. If [petitioners] believe that a particular state’s law imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court.”).

## 2. The EPA’s Role in Implementing Section 401

The EPA, as the federal agency charged with administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401.<sup>13</sup> In addition to administering the statute and promulgating implementing regulations, the Agency has several other roles under section 401.

The EPA acts as the section 401 certification authority under two circumstances. First, the EPA will certify on behalf of a State or Tribe where the jurisdiction in which the discharge will originate does not itself have certification authority. 33 U.S.C. 1341(a)(1). In practice, this results in the EPA certifying on behalf of the many Tribes that do not have TAS authority for

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<sup>13</sup> See 33 U.S.C. 1251(d) (“Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.”); *id.* at 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopla Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *Cal. Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d Cir. 1997).

section 401. Second, the EPA will act as the certifying authority where the discharge would originate on lands of exclusive federal jurisdiction.<sup>14</sup>

The EPA also notifies neighboring jurisdictions when the Administrator determines that a discharge may affect the quality of such jurisdictions' waters. *Id.* at 1341(a)(2). Although section 401 certification authority lies with the jurisdiction where the discharge originates, a neighboring jurisdiction whose water quality is potentially affected by the discharge may have an opportunity to raise objections to a certification issued for a federal license or permit. Where the EPA Administrator determines that a discharge subject to section 401 "may affect" the water quality of a neighboring jurisdiction, the EPA is required to notify that other jurisdiction. *Id.* If the neighboring jurisdiction determines that the discharge "will affect" the quality of its waters in violation of a water quality requirement of that jurisdiction, it may notify the EPA and the federal licensing or permitting agency of its objection to the license or permit. *Id.* It may also request a hearing on its objection with the federal licensing or permitting agency. At such a hearing, section 401 requires the EPA to submit its evaluation and recommendations with respect to the objection. The federal agency will consider the jurisdiction's and the EPA's recommendations, and any additional evidence presented at the hearing, and "shall condition such license or permit in such manner as may be necessary to insure compliance with the

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<sup>14</sup> The federal government may obtain exclusive federal jurisdiction over lands in multiple ways, including where the federal government purchases lands consistent with article 1, section 8, clause 17 of the U.S. Constitution and a state chooses to cede jurisdiction to the federal government, or where the federal government reserved jurisdiction upon granting statehood. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525, 527 (1895). Examples of lands of exclusive federal jurisdiction include Denali National Park.

applicable water quality requirements” of the neighboring jurisdiction. *Id.* If the conditions cannot ensure compliance, the federal agency shall not issue the license or permit.

The EPA also must provide technical assistance for section 401 certifications upon the request of any federal or State agency or project proponent. *Id.* at 1341(b). Technical assistance might include provision of any relevant information on or comment on methods to comply with applicable effluent limitations, standards, regulations, requirements, or water quality standards.

Finally, the EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. Legislative history indicates that Congress created the water quality certification requirement to “recognize[] the responsibility of Federal agencies to protect water quality whenever their activities affect public waterways.” S. Rep. No. 91-351, at 3 (1969). “In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered.” *Id.* As an example, the legislative history discusses the Atomic Energy Commission’s failure to consider the impact of thermal pollution on receiving waters when evaluating “site selection, construction, and design or operation of nuclear powerplants.” *Id.*

The certification requirement first appeared in section 21(b) of the FWPCA, and it required States to certify that “such *activity* will be conducted in a manner which will not violate applicable *water quality standards*.” Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970) (emphasis added). As described above, the 1972 amendments restructured the CWA and created a framework for compliance with effluent limitations that would be established in discharge permits issued pursuant to the new federal permitting program. The pre-existing water quality certification requirement was retained in section 401 of the 1972 amendments but modified to be consistent with the overall restructuring of the CWA. The new section 401 required a water

quality certification to assure that the “*discharge will comply*” with *effluent limitations* and other enumerated regulatory provisions of the Act. 33 U.S.C. 1341(a) (emphasis added). The 1972 amendments also established a new section 401(d), which provides that certifications “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” compliance with the same enumerated CWA provisions and with “any other appropriate requirement” of State or Tribal law. 33 U.S.C. 1341(d).

The EPA first promulgated water quality certification regulations in 1971 to implement section 21(b) of the FWPCA.<sup>15</sup> Some operative provisions of the EPA’s 1971 certification regulations contain language from section 21(b) of the FWPCA that Congress changed in the 1972 amendments. For example, the EPA’s 1971 certification regulations directed authorities to certify that “*the activity will be conducted in a manner which will not violate applicable water quality standards.*” 40 CFR 121.2(a)(2)-(3) (emphasis added). These outdated provisions do not reflect the language of section 401 (as discussed elsewhere in this preamble) and have caused confusion for States, Tribes, stakeholders, and courts reviewing section 401 certifications. In section 304(h) of the CWA, Congress commanded the EPA to promulgate certification guidelines within 180 days of enactment of the 1972 amendments. *See* 33 U.S.C. 1314(h) (directing EPA to “promulgate,” by April 1973, “guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act”). Yet the EPA has not updated its certification regulations to

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<sup>15</sup> The EPA’s 1971 certification regulations were located at 40 CFR part 121. The EPA has also promulgated regulations addressing how 401 certification applies to the CWA section 402 NPDES program, found at 40 CFR 124.53, 124.54, 124.55. *See* 48 FR 14264 (Apr. 1, 1983). This final rule does not address the NPDES regulations, and the Agency will make any necessary conforming regulatory changes in a subsequent rulemaking.

conform with the 1972 amendments until now. A primary goal for this final rule is to update and clarify the Agency's regulations to ensure that they are consistent with the CWA.

### 3. The EPA's 1971 Certification Regulations

The EPA's 1971 certification regulations required certifying authorities to act on a certification request within a "reasonable period of time." 40 CFR 121.16(b). The regulations provided that the federal licensing or permitting agency determines what constitutes a "reasonable period," and that the period shall generally be six months but in any event shall not exceed one year. *Id.*

The 1971 certification regulations also provided that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on a request for certification; and second, when the federal licensing or permitting agency sends written notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id.* at 121.16(a)-(b). Once waiver occurs, certification is not required, and the federal license or permit may be issued. 33 U.S.C. 1341(a).

The 1971 certification regulations established different requirements that applied when the EPA was the certifying authority, including specific information that must be included in a certification request and additional procedures. Under these requirements, the project proponent was required to submit to the EPA Regional Administrator the name and address of the project proponent, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge would begin and end, and a description of

the methods to be used to monitor the quality and characteristics of the discharge. 40 CFR

121.22. Once the request was submitted to the EPA, the Regional Administrator was required to provide public notice of the request and an opportunity to comment, specifically stating that “all interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determines that such a hearing is necessary or appropriate.” *Id.* at

121.23. If, after consideration of relevant information, the Regional Administrator determined that there is “reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,” the Regional Administrator would issue the certification.<sup>16</sup> *Id.* at 121.24.

The 1971 certification regulations identified a number of requirements that all certifying authorities must include in a section 401 certification. *Id.* at 121.2. For example, the regulations provided that a section 401 certification shall include the name and address of the project proponent. *Id.* at 121.2(a)(2). They also provided that the certification shall include a statement that the certifying authority examined the application made by the project proponent to the federal licensing or permitting agency and bases its certification upon an evaluation of the application materials which are relevant to water quality considerations or that it examined other information sufficient to permit the certifying authority to make 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.” *Id.* at 121.2(a)(2)-(3). Finally, the regulations provided that

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<sup>16</sup> Use of the terms “reasonable assurance” and “activity” in this operative provision of the EPA’s 1971 certification regulations was consistent with section 21(b) of the pre-1972 statutory language. However, those terms are not used in the operative provision of CWA section 401, which replaced the pre-1972 language. *See* Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970).

the certification shall state “any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity,” and other information that the certifying authority deems appropriate.<sup>17</sup> *Id.* at 121.2(a)(4)-(5).

The 1971 certification regulations also established a process for the EPA to provide notification to neighboring jurisdictions in a manner that is similar to that provided in CWA section 401(a)(2). Under the 1971 certification regulations, the Regional Administrator was required to review the federal license or permit application, the certification, and any supplemental information provided to the EPA by the federal licensing or permitting agency, and if the Regional Administrator determined that there was “reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,” the Regional Administrator would notify each affected State within thirty days of receipt of the application materials and certification. *Id.* at 121.13. If the documents provided were insufficient to make the determination, the Regional Administrator could request any supplemental information “as may be required to make the determination.” *Id.* at 121.12. In cases where the federal licensing or permitting agency held a public hearing on the objection raised by a neighboring jurisdiction, notice of such objection was required to be forwarded to the Regional Administrator by the licensing or permitting agency no later than 30 days prior to the hearing. *Id.* at 121.15. At the hearing, the Regional Administrator was required to submit an evaluation and “recommendations as to whether and under what conditions the license or permit should be issued.” *Id.*

The 1971 certification regulations established that the Regional Administrator “may, and upon request shall” provide federal licensing and permitting agencies with information regarding

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<sup>17</sup> The term “desirable” is also not used in CWA section 401.



water quality standards and advise them as to the status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id.* at 121.30.

Finally, the 1971 certification regulations established an oversight role for the EPA when a certifying authority modified a prior certification. The regulation provided that a certifying authority could modify its certification “in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and *the Regional Administrator.*” *Id.* at 121.2(b) (emphasis added).

As noted throughout this final rule preamble, the EPA’s 1971 certification regulations were promulgated prior to the 1972 CWA amendments and in many respects do not reflect the current statutory language in section 401. In addition, the EPA’s 1971 certification regulations do not address some important procedural and substantive components of section 401 certification review and action. This final rule is intended to modernize the EPA’s regulations, align them with the current text and structure of the CWA, and provide additional regulatory procedures that the Agency believes will help promote consistent implementation of section 401 and streamline federal license and permit processes, consistent with the objectives of the Executive Order.

#### 4. Judicial Interpretations of Section 401

During the 48 years since its passage, the federal courts on numerous occasions have interpreted key provisions of section 401. The United States Supreme Court has twice addressed questions related to the scope and triggering mechanism of section 401, and lower courts also have addressed certain elements of section 401 certifications. This section of the preamble summarizes the U.S. Supreme Court decisions and major lower court decisions.

##### a. U.S. Supreme Court Decisions

##### i. *PUD No. 1 of Jefferson County*

In 1994, the Supreme Court reviewed a water quality certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). This particular decision, though narrow in its holding, has been read by other courts as well as the EPA (in past years) and some States and Tribes to significantly broaden the scope of section 401 beyond its plain meaning.

The principal dispute adjudicated in *PUD No. 1* was whether a State or Tribe may require a minimum stream flow as a condition in a certification issued under section 401. In this case, the project proponent identified two potential discharges from its proposed hydroelectric facility: “the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.” 511 U.S. at 711. The project proponent argued that the minimum stream flow condition was unrelated to these discharges and therefore beyond the scope of the State’s authority under section 401. *Id.*

The Court analyzed sections 401(a) and 401(d); specifically, it analyzed the use of different terms in those sections of the statute to inform the scope of a section 401 certification. Section 401(a) requires the certifying authority to certify that the *discharge* from a proposed federally licensed or permitted project will comply with enumerated CWA provisions, and section 401(d) allows the certifying authority to include conditions to assure that the *applicant* will comply with enumerated CWA provisions and “any other appropriate’ state law requirements.” 511 U.S. at 700. Emphasizing that the text of section 401(d) “refers to the compliance of the applicant, not the discharge,” the Court concluded 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.” *Id.* at 712.

The Court then concluded that this interpretation of the statute was consistent with the EPA’s 1971 certification regulations, to which the Court accorded *Chevron* deference.<sup>18</sup> The Court favorably quoted the EPA’s 1971 certification regulations at 40 CFR 121.2(a)(3); quoted the EPA’s guidance titled *Wetlands and 401 Certification*; and stated that “EPA’s conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401 and is entitled to deference.” 511 U.S. at 712 (citing, *inter alia*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ).

The Court was careful to note that a State’s authority to condition a certification “is not unbounded” and that States “can only ensure that the project complies with ‘any applicable effluent limitations and other limitations, under [33 U.S.C. 1311, 1312]’ or certain other provisions of the Act, ‘and with any other appropriate requirement of State Law.’” 511 U.S. at 712. The Court concluded that “state water quality standards adopted pursuant to § 303 are among the ‘other limitations’ with which a State may ensure compliance through the § 401 certification process” and noted that its view “is consistent with EPA’s view of the statute,” again citing the EPA’s pre-1972 regulations and subsequent guidance. *Id.* at 713.

Although *PUD No. 1* has been interpreted broadly by some to expand State authority under section 401—beyond assessing water quality impacts from the discharge, so as to allow conditions beyond the enumerated CWA provisions—the Court did not stray from the bedrock principles that a section 401 certification must address water quality and that appropriate conditions include those necessary to assure compliance with the State’s water quality standards. Indeed, referring to the section 401 language allowing certification conditions based on “any

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<sup>18</sup> The Court apparently failed to identify or understand that the EPA’s regulations were promulgated prior to the 1972 CWA amendments and thus do not interpret the 1972 Act.

other appropriate requirements of state law,” the Court explicitly declined to speculate “on what additional state laws, *if any*, might be incorporated by this language. But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are appropriate requirements of state law.” 511 U.S. at 713 (emphasis added).

On the scope of section 401, the dissenting opinion in *PUD No. 1* would have declined to adopt the interpretation suggested by the EPA’s regulations and guidance and instead analyzed the statutory section as a whole, attempting to harmonize sections 401(a) and (d). The dissent first noted that, if the majority’s conclusion that States can impose conditions unrelated to discharges is correct, “Congress’ careful focus on discharges in § 401(a)(1)—the provision that describes the scope and function of the certification process—was wasted effort,” and that the majority’s conclusion “effectively eliminates the constraints of § 401(a)(1).” 511 U.S. at 726 (Thomas, J., dissenting). The dissent then “easily reconciled” the two provisions by concluding that “it is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while section 401(d) permits a State to place conditions on a certification to ensure compliance of ‘the applicant,’ those conditions must still be related to discharges.” *Id.* at 726-27. The dissent further noted that each of the CWA provisions enumerated in section 401 “describes discharge-related limitations” and therefore that the plain language of section 401(d) supports the conclusion that certification conditions must address water quality concerns from the discharge, not the proposed activity as a whole. *Id.* at 727. Finally, the dissent applied the principle *ejusdem generis* in its analysis of statutory construction and concluded that because “other appropriate requirements of state law” are included in a list of more specific discharge-related CWA provisions, this “general reference to ‘appropriate’ requirements of state law is most reasonably construed to extend only

to provisions that, like the other provisions in the list, impose discharge-related restrictions.” *Id.* at 728.

The dissent also took issue with the majority’s reliance, at least in part, on the EPA’s regulations and its application of *Chevron* deference. The dissent noted that the Court had not first identified ambiguity in the statute and that the federal government had not sought judicial deference to EPA’s regulations. 511 U.S. at 728-29 (Thomas, J., dissenting). *See also* Brief for the United States as Amicus Curiae Supporting Affirmance, *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, No. 92-1911, (Dec. 1993). The dissent noted that there was no EPA interpretation directly addressing the relationship between sections 401(a) and (d), and that the only existing EPA regulation that addresses the conditions that may appear in section 401 certifications “speaks exclusively in terms of limiting discharges.”<sup>19</sup> *Id.* (citing 40 CFR 121.2(a)(4)).

The *PUD No. 1* decision addressed two other scope-related elements of section 401: whether certification conditions may be designed to address impacts to designated uses, and whether conditions related to minimum stream flows are appropriate under section 401. First, the Court conducted a plain language analysis of the CWA and concluded that, “under the literal terms of

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<sup>19</sup> The amicus brief filed by the Solicitor General on behalf of the EPA in this case did not grapple with the language in 401(a) and (d) at all, but primarily argued that the proposed project had two distinct discharges (which were undisputed) and that “both discharges could reasonably be said to cause a violation of the State’s water quality standards,” including the designated uses and antidegradation components. Brief for the United States as Amicus Curiae Supporting Affirmance, *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, No. 92-1911 at 12 n. 2 (Dec. 1993) (“It is therefore unnecessary to determine in this case whether Congress intended by the use of the term “applicant,” rather than “discharge,” in section 401(d) to grant States a broader power to condition certifications under section 401(d) than to deny them under section 401(a) and, if so, whether there are limitations on the States’ authority to impose such conditions.”) The amicus brief also did not inform the Court that the Agency’s implementing regulations included language from the prior version of the Act.

the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *Id.* at 715. This means that a section 401 certification may appropriately include conditions to require compliance with designated uses, which, pursuant to the CWA, are a component of a water quality standard. *Id.* Second, the Court acknowledged that the Federal Power Act (FPA) empowers FERC “to issue licenses for projects ‘necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction,’” and that the FPA “requires FERC to consider a project’s effect on fish and wildlife.” *Id.* at 722. Although the Court had previously rejected a State’s minimum stream flow requirement that conflicted with a stream flow requirement in a FERC license, the Court found no similar conflict in this case because FERC had not yet issued the hydropower license. *Id.* Given the breadth of federal permits that CWA section 401 applies to, the Court declined to assert a broad limitation on stream flow conditions in certifications but concluded that they may be appropriate if necessary to enforce a State’s water quality standard, including designated uses. *Id.* at 723.

ii. *S.D. Warren*

In 2006, the Court revisited section 401 in connection with the State of Maine’s water quality certification of FERC license renewals for five hydroelectric dams on the Presumpscot River. *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370 (2006) (*S.D. Warren*). The issue presented in *S.D. Warren* was whether operation of a dam may result in a “discharge” into the waters of the United States, triggering the need for a section 401 certification, even if the discharge did not add any pollutants. The Court analyzed the use of different terms—“discharge” and “discharge of pollutants”—within the CWA, how those terms are defined, and how they are used in CWA sections 401 and 402. The Court noted that section 402 expressly

uses the term “discharge of pollutants” and requires permits for such discharges; and that section 401, by contrast, provides a tool for States to maintain water quality within their jurisdiction and uses the term “discharge,” which is not independently defined in the Act.<sup>20</sup> Finding no specific definition of the term “discharge” in the statute, the Court turned to its common dictionary meaning: a “flowing or issuing out” and concluded that the term is “presumably broader” than “discharge of a pollutant.” *Id.* at 375-76.

The Court held that operating a dam “does raise a potential for a discharge” and, therefore, triggers section 401. 547 U.S. at 373. In so holding, the Court observed that Congress had defined “pollution” under the Act to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” 33 U.S.C. 1362(19), and that “[t]he alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines.” 547 U.S. at 385. Such changes in a river “fall within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the State’s concerns.” *Id.* at 386. The Court concluded by observing that “[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution.” *Id.* This sentence, when read in isolation, has been interpreted as broadening the scope of section 401 to allow certifying authorities to consider potential environmental impacts from a proposed federally licensed or permitted project that have nothing to do with water quality. However, the Court followed that sentence with a quote from Senator Muskie’s floor statement during the enactment of section 401:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of *water quality standard[s]*. No polluter will be able

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<sup>20</sup> The Court noted that the Act provides that “the term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 547 U.S. at 375 (quoting 33 U.S.C. 1362(16)).

to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with *water quality standards*. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of *water quality requirements*.

*Id.* (emphasis added). The Court then stated, “These are the *very reasons* that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C.

1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.”

*Id.* (emphasis added). Thus, when read in context, the Court’s statement about a State’s authority to address a “broad range of pollution” under section 401 does not suggest that an “appropriate requirement of State law” means anything other than water quality requirements or that a State’s or Tribe’s action on a certification request can be focused on anything other than compliance with appropriate water quality requirements.

#### b. Circuit Court Decisions

Over the years, federal appellate courts have also addressed important aspects of section 401, including the timing for certifying authorities to act on a request and the scope of authority of federal agencies other than the EPA to make determinations on section 401 certifications. This section highlights a few of the most significant issues concerning section 401 and the most often cited decisions but does not cover the universe of lower federal court or State court case law. The Agency intends for this final rule to provide consistency and certainty where there may currently be conflicting or unclear but locally binding legal precedent.

Recent case law has provided insight concerning the timing and waiver provisions of section 401. In 2018, the Second Circuit addressed the question of when the statutory review clock begins. *N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018). Considering Millennium Pipeline Company’s certification request, the court disagreed with the



State of New York and held that the statutory time limit is *not* triggered when a State determines that a request for certification is “complete,” but that the “plain language of Section 401 outlines a bright-line rule regarding the beginning of review,” and that the clock starts after “receipt of such request” by the certifying authority. *Id.* Otherwise, the court noted that States could “blur this bright-line 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.” *Id.* at 456. The Agency agrees with this holding.

The D.C. Circuit has also recently analyzed the statutory timeline for review of a certification and has correctly held that, consistent with the plain language of CWA section 401(a)(1), “while a full year is the absolute maximum, [the statute] does not preclude a finding of waiver prior to the passage of a full year.” *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), *cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 140 S.Ct. 650 (2019). Significantly, the court observed that the EPA’s own regulations—promulgated by “the agency charged with administering the CWA”—allowed for waiver after only six months. *Id.*

In *Hoopa Valley Tribe*, the D.C. Circuit also correctly held that “the withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review.” *Id.* at 1101. The court found that the project proponent and the certifying authorities (California and Oregon) had improperly entered into an agreement whereby the “very same” request for State certification of its relicensing application was automatically withdrawn-and-resubmitted every year by operation of “the same one-page letter,” submitted to the States before the statute’s one-year waiver deadline. *Id.* at 1104. The court observed that “[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry”

because the statute’s text “is clear” that failure or refusal to act on a request for certification within a reasonable period of time, not to exceed one year, waives the State’s ability to certify.<sup>21</sup> *Id.* at 1103. The court found that, pursuant to the unlawful withdrawal-and-resubmission “scheme,” the States had not yet rendered a certification decision “more than a decade” after the initial request was submitted to the States. *Id.* at 1104. The court declined to “resolve the legitimacy” of an alternative arrangement whereby an applicant may actually submit a new request in place of the old one. *Id.* Nor did it determine “how different a request must be to constitute a ‘new request’ such that it restarts the one-year clock.” *Id.* On the facts before it, the court found that “California’s and Oregon’s deliberate and contractual idleness” defied the statute’s one-year limitation and “usurp[ed] FERC’s control over whether and when a federal license will issue.” *Id.*

Another important area of case law deals with the scope of authority and deference provided to federal agencies other than the EPA in addressing issues arising under section 401. Many other federal agencies, including FERC and the Corps, routinely issue licenses and permits that require section 401 certifications and are responsible for enforcing State certification conditions that are incorporated into federal licenses and permits. However, because the EPA has been charged by Congress with administering the CWA, some courts have concluded that those other federal agencies are not entitled to deference on their interpretations of section 401. *See Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2002); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d. Cir. 1997). Other courts have concluded that FERC has an affirmative

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<sup>21</sup> Two decisions from the Second Circuit recently acknowledged that project proponents have withdrawn and resubmitted certification requests to extend the reasonable time period for a state to review. *See N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d at 456; *Constitution Pipeline v. N.Y. State Dep’t of Envtl. Conservation*, 868 F.3d 87, 94 (2d Cir. 2018). However, in neither case did the court opine on the legality of such an arrangement.

obligation to determine whether a certifying authority has complied with requirements related to a section 401 certification. *See City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (FERC had an obligation to “obtain some minimal confirmation of such compliance”); *see also Keating v. FERC*, 927 F.2d 616, 622-23, 625 (D.C. Cir. 1991) (while a federal agency may not question propriety of State certification before license has issued, “FERC must at least decide whether the state’s assertion of revocation satisfies section 401(a)(3)’s predicate requirements”).

In an important determination of procedural authorities, the Second Circuit has held that FERC—as the licensing agency—“may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period.” *Am. Rivers, Inc.*, 129 F.3d at 110-11. This holding is correct; the holding is consistent with and supported by the implied statutory authority of a federal agency to establish the “reasonable period of time (which shall not exceed one year)” in the first place. 33 U.S.C. 1341(a)(1).

Case law also highlights the potential enforcement challenges that federal agencies face with section 401 certification conditions that are included in federal licenses and permits. Federal agencies have been admonished not to “second guess” a State’s water quality certification or its conditions, *see, e.g., City of Tacoma*, 460 F.3d at 67; *Am. Rivers Inc.*, 129 F.3d at 107; *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (“FERC may not alter or reject conditions imposed by the states through section 401 certificates.”), even where the federal agency has attempted to impose conditions that are more stringent than the State’s conditions. *See Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 648 (4th Cir. 2018) (“the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality”); *see also Lake Carriers’ Assoc. v.*

*EPA*, 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that additional notice and comment on State certification conditions would have been futile because “the petitioners have failed to establish that EPA can alter or reject state certification conditions. . . .”). But in *Lake Carriers’ Assoc.*, the court also observed, “[n]otably, the petitioners never argued that the certifications failed to ‘compl[y] with the terms of section 401,’ . . . by overstepping traditional bounds of state authority to regulate interstate commerce” (citing *City of Tacoma*, 460 F.3d at 67), and the court concluded that it “therefore need not consider whether EPA has authority to reject state conditions under such circumstances.” Also, in *Snoqualmie Indian Tribe v. FERC*, the Ninth Circuit upheld FERC’s inclusion of minimum flow requirements greater than those specified in the State of Washington’s certification as long as they “do not conflict with or weaken the protections provided by the [State] certification.” 545 F.3d 1207, 1219 (9th Cir. 2008). In that case, FERC had added license conditions increasing the minimum flows specified in the State’s certification in order to “produce a great amount of mist” which it determined would “augment the Tribe’s religious experience,” one of the water’s designated uses. *Id.*; *see also* cases discussed at section III.G of this notice affirming a role for federal agencies to confirm whether certifications comply with the requirements of section 401.

This final rule is intended to provide clarity to certifying authorities, federal agencies, and project proponents, as it addresses comprehensively and for the first time relevant competing case law and attempts to clarify the scope of conditions that may be included in a certification and the federal agencies’ role in the certification process.

## 5. Administrative Law Principles

To understand the full context and legal basis for this final rule, it is useful to review some key governing principles of administrative law. In general, administrative agencies can exercise

only the authority that has been provided to them by Congress, and courts must enforce unambiguous terms that clearly express congressional intent. However, when Congress delegates authority to administrative agencies, it sometimes enacts ambiguous statutory provisions. To carry out their congressionally authorized missions, agencies, including the EPA, must often interpret ambiguous statutory terms. However, they must do so consistent with congressional intent. In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), the Supreme Court concluded that courts have a limited role when reviewing agency interpretations of ambiguous statutory terms. In such cases, reviewing courts defer to an agency's interpretation of ambiguous terms if the agency's interpretation is reasonable. Under *Chevron*, federal agencies—not federal courts—are charged in the first instance with resolving statutory ambiguities to implement delegated authority from Congress.

The Supreme Court has described the *Chevron* analysis as a “two-step” process. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). At step one, the reviewing court determines whether Congress has “directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. If the statute is silent or ambiguous, the reviewing court proceeds to the second step, in which the court must defer to the agency's “reasonable” interpretation of the statute. *Id.* at 844.

In the field of judicial review of agencies' regulations that interpret statutes that those agencies administer, *Chevron* deference relies on the principle that “when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.” *Encino Motorcars*, 136 S. Ct. at 2125 (citing *Chevron*, 467 U.S. at 843–44). Courts thus have

applied *Chevron* deference to an agency’s statutory interpretation “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”

*Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

In *Chevron*, the Supreme Court reviewed the EPA’s interpretation of statutory language from the Clean Air Act Amendments of 1977. Congress amended the Clean Air Act to impose requirements on States that had not achieved the national air quality standards promulgated by the EPA. States that had not attained the established air standards had to implement a permit program that would regulate “new or modified major stationary sources” of air pollution. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977). The EPA promulgated regulations defining a “stationary source” as the entire plant where pollutant-producing structures may be located. The EPA, therefore, treated numerous pollution-producing structures collectively as a single “stationary source,” even if those structures were part of the same larger facility or complex. *See* 40 CFR 51.18(j)(1)(i)-(ii) (1983). Under the EPA’s regulation, a facility could modify or construct new pollution-emitting structures within the facility or complex as long as the stationary source—the facility as a whole—did not increase its pollution emissions.

In 1981, the Natural Resources Defense Council (NRDC) opposed the EPA’s definition of “stationary source” and filed a challenge to the Agency’s regulations. The D.C. Circuit agreed with the NRDC and set aside the EPA’s regulations. The D.C. Circuit acknowledged that the Clean Air Act “does not explicitly define what Congress envisioned as a ‘stationary source,’ to which the permit program . . . should apply,” and also concluded that Congress had not clearly addressed the issue in the legislative history. *NRDC v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir.

1982). Without clear text or intent from Congress, the D.C. Circuit looked to the purposes of the program to guide the court's interpretation. *Id.* at 726. According to the court, Congress sought to improve air quality when it amended the Clean Air Act, and the EPA's definition of "stationary source" merely promoted the maintenance of current air quality standards.

In a unanimous decision, the Supreme Court reversed, finding that the D.C. Circuit had committed a "basic legal error" by adopting "a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that decision." *Chevron*, 467 U.S. at 842. The Court explained that it is not the judiciary's place to establish a controlling interpretation of a statute delegating authority to an agency, but, rather, that it is the agency's job to "fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843. When Congress expressly delegates to an administrative agency the authority to interpret a statute through regulation, courts cannot substitute their own interpretation of the statute when the agency has provided a reasonable construction of the statute. *See id.* at 843-44.

During the rulemaking process, the EPA had explained that Congress had not fully addressed the definition of "source" in the amendments to the Clean Air Act or in the legislative history. *Id.* at 858. The Supreme Court agreed, concluding that "the language of [the statute] simply does not compel any given interpretation of the term 'source.'" *Id.* at 860. And the legislative history associated with the amendments was "silent on the precise issue." *Id.* at 862.

In its proposed and final rulemaking, the EPA noted that adopting an individualized equipment definition of "source" could disincentivize the modernization of plants, if industry had to go through the permitting process to create changes. *Id.* at 858. The EPA believed that adopting a plant-wide definition of "source" could result in reduced pollution emissions. *Id.* Considering the Clean Air Act's competing objectives of permitting economic growth and

reducing pollution emissions, the Supreme Court stated that “the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well.” *Id.* at 863. The Court upheld the EPA’s definition of the term “stationary source,” explaining that “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.” *Id.* at 865.<sup>22</sup>

In the *Brand X* decision, the Supreme Court further elaborated on the *Chevron* doctrine, upholding agencies’ broad power to interpret ambiguous statutes as against contrary judicial interpretations. Even if a court has ruled on the interpretation of a statute, the “court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005) (emphasis added). Put another way, *Brand X* held that “a court’s choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation.” *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). This principle stems

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<sup>22</sup> For other instructive applications of *Chevron*’s interpretative principles, see *Entergy Corp. v. Riverkeeper, Inc.* 556 U.S. 208, 222-23 (2009) (statutory silence interpreted as “nothing more than a refusal to tie the agency’s hands”); *Zuni Pub. School Dist. v. Dep’t of Educ.* 550 U.S. 81, 89-94 (2007) (court considered whether agency’s interpretation was reasonable in light of the “plain language of the statute” as well as the statute’s “background and basic purposes”); *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471 (4th Cir. 2011) (“statutory construction . . . is a holistic endeavor”).



from *Chevron* itself, which “established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’” *Brand X*, 545 U.S. at 982 (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)). As *Chevron* itself noted, even the “initial agency interpretation is not instantly carved in stone.” *Chevron*, 467 U.S. at 863.

In *Brand X*, the Federal Communications Commission (FCC or Commission) interpreted the scope of the Communications Act of 1934, which subjects providers of “telecommunications service” to mandatory common-carrier regulations. *Brand X*, 545 U.S. at 977–78. *Brand X* Internet Services challenged the FCC’s interpretation, and the Ninth Circuit concluded, based on the court’s precedent, that the Commission’s construction of the Communications Act was impermissible *Id.* at 979–80. The Supreme Court granted certiorari and reversed. The Supreme Court upheld the FCC’s interpretation of the Communications Act by applying *Chevron*’s two-step analysis. The Court found that the relevant statutory provisions failed to unambiguously foreclose the Commission’s interpretation, while other provisions were silent. The FCC had “discretion to fill the consequent statutory gap,” and its construction was reasonable. *Id.* at 997.

As the Court noted, the entire “point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agencies.” 545 U.S. at 981 (quoting *Smiley*, 517 U.S. at 742). Thus courts cannot rely on judicial precedent to override an agency’s interpretation of an ambiguous statute. *Id.* at 982. Instead, as a “better rule,” a reviewing court can rely only on precedent that interprets a statute at “*Chevron* step one.” *Id.* “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.” *Id.* at 982–83. A contrary

rule would produce anomalous results, because the controlling interpretation would then turn on whether a court or the agency had interpreted the statutory provision first. *See id.* at

983. “[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.” *Id.* Agencies have the authority to revise “unwise judicial constructions of ambiguous statutes.” *Id.*

## 6. Response to Comments on the Legal Background

The Agency solicited and received numerous comments on the legal background for the proposed rule. Among others, these comments included legal arguments pertaining to the Tenth Amendment, interstate commerce, cooperative federalism, the APA, and the Agency’s rulemaking authority. The sections below provide the EPA’s response to the most salient of those comments.

### a. The Tenth Amendment and the Commerce Clause

Some commenters asserted the proposed rule would violate the Tenth Amendment, citing the sovereignty that States have over waters of the United States. One commenter asserted that jurisdictional power over waters of the State was reserved for the States and not delegated to Congress. Another commenter asserted that the proposal would constitute a “usurping” of State authority and overstepping the Tenth Amendment rights of the States. The EPA disagrees with these commenters. For the reasons set forth in section II.F.1 of this notice and in the following paragraph, the Agency considers this final rule to be a careful and thoughtful clarification of State and Tribal involvement in federal licensing or permitting proceedings, including those in which State and Tribal authority may otherwise be preempted by federal law. The final rule does not “usurp” State authority. As discussed, the EPA’s final rule is consistent with section 401, strikes the appropriate balance Congress intended between federal and State authority, and does not limit State authority any more than Congress intended under section 401.

The Agency also received a comment asserting that the proposed rule would violate the Tenth Amendment because federal agencies cannot commandeer States to regulate interstate commerce in particular ways, citing *New York v. United States*, 505 U.S. 144, 166 (1992). The commenter noted that in *New York*, the Supreme Court, in striking down portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required States to regulate as Congress instructed or to take title to the waste, found that Congress cannot command States how to legislate and that Congress must exercise legislative authority only directly upon individuals. The Agency disagrees with this commenter. This final rule neither directs the functioning of the States nor commands States how to legislate or regulate. The final rule merely affirms and clarifies the scope of the authority that Congress granted to certifying authorities to review and condition a federal license or permit within certain reasonable bounds, informed by the text of the Act, and provides a procedural framework for States, Tribes, and federal agencies to follow that will promote consistency in 401 certification proceedings.

In the proposal, the EPA solicited comment on whether the proposed rule appropriately balanced the scope of State authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters. Some commenters argued that the cases referenced in the proposed rule preamble, including *Lighthouse Resources, Inc. v. Inslee* and *Lake Carrier's Association v. EPA*, 652 F.3d 1 (D.C. Cir. 2011), are not relevant to this rulemaking. The Agency disagrees with the suggestion that these cases are irrelevant because, among other things, they demonstrate that section 401 actions are not insulated from legal challenges asserting State or Tribal interference with interstate commerce and violations of the Commerce Clause. The Agency did not rely on these decisions to inform the substance of the final rule; rather, they were

considered as part of the overall context of litigation and regulatory uncertainty that contributed to the need to update the 1971 certification regulations to be consistent with CWA section 401.

Other commenters supported the proposal and raised concerns that States and Tribes could use section 401 actions to override federal trade policy with which they disagree. At least one commenter asserted that coastal States and States that border Canada and Mexico could misuse section 401 to block the construction of international terminals for exports, including energy, agricultural, and manufacturing exports. This commenter asserted that such misuse could also result in blocking imports from trading partners based on objections of a single State. The EPA appreciates these comments and agrees that there is a risk that State or Tribal certification authority could be misused in the way described by the commenter. However, as described elsewhere in this final rule preamble and in the *Economic Analysis for the Clean Water Act Section 401 Certification Rule* (“the Economic Analysis,” available in the docket for this final rule), the EPA acknowledges that many certifications reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy, and that the limitations expressed in this rulemaking should further curb any improper invocation of section 401 authority.

The EPA has determined that this final rule appropriately balances the interests of State or Tribal participation in federal license or permit proceedings under section 401 with Congress’ goal of facilitating interstate commerce on navigable waters. Because Congress relied on its authority under the Interstate Commerce Clause when it enacted the CWA, including section 401, this rule respects that balance. The Agency has for the first time clearly defined the scope of certification, reducing the risk that States and Tribes would deny or condition certifications for

reasons beyond the authority provided in section 401 or that such denials or conditions would place undue burdens on interstate commerce.

b. Cooperative Federalism

A number of commenters asserted that the proposed rule is inconsistent with the concept of cooperative federalism and the important role of States and Tribes as co-regulators, and therefore, these commenters believed that the proposed rule undermines the cooperative federalism structure established by Congress in the CWA in section 101(b) and section 101(g). Most of these commenters noted that the CWA recognizes States' primary authority over their water resources, designates States as co-regulators under a system of cooperative federalism, and expresses intent to preserve and protect States' responsibilities and rights. Commenters stated that the CWA was founded on a principle of cooperative federalism, and that the EPA should not dictate what States can and cannot do. Another commenter asserted that the proposed rule would unduly limit States' authority and autonomy to protect their water resources. A few commenters asserted that the proposed rule would harm Congress' division of authority between certifying authorities and federal licensing and permitting agencies. Some commenters asserted that the proposed rule neglects States' interests.

Other commenters asserted that the proposed rule is consistent with the overall cooperative federalism framework established by Congress in the CWA and appropriately balances federal and State authority. A few commenters argued that under section 401, Congress was conferring on States a narrow exception to act in areas that are otherwise preempted entirely by federal law. These commenters described section 401 certifications as playing a limited role in a much larger federal permitting scheme envisioned in the CWA. A few commenters supporting the proposed rule described an appreciation for the EPA's desire to preserve State sovereignty and cooperative

federalism in conjunction with greater consistency in implementing section 401. Several commenters observed that the proposed rule would promote efficiency and would be consistent with the intent of the 1972 CWA amendments, leading to consistent nationwide implementation, while allowing the States to retain their primary roles under the CWA. Other commenters stated that the current regulations have allowed States to impose conditions beyond the scope of water quality effects of a discharge, leading to lengthy delays and a process that is ill-defined, confusing in scope, and lacking clear deadlines. Other commenters suggested that the proposed rule supports timely issuance of permits and licenses and agreed that the proposed rule would ensure that section 401 certification does not exceed the scope of CWA jurisdiction.

The EPA has considered these diverse comments and concludes that the final rule does not infringe upon the roles of States as co-regulators, nor does it undermine cooperative federalism. The final rule does not and cannot alter the basic scope of authority granted by Congress to States and Tribes for the review of potential discharges associated with federal licenses and permits for compliance with water quality standards. States and authorized Tribes, for example, remain primarily responsible to develop the water quality standards with which federal projects must comply.

Accordingly, this rule neither diminishes nor undermines cooperative federalism. Rather, the final rule clearly identifies when a certification is required and the permissible scope of such a certification—including conditions of that certification—and reaffirms that certifying authorities have a reasonable period of time to act on a certification request, which cannot exceed one year. This clarity helps define the appropriate parameters of cooperative federalism contemplated by section 401, and does not undermine it.

The EPA disagrees with commenters who suggest that concepts of “cooperative federalism” preclude the EPA from establishing regulations to implement section 401. Cooperative federalism must be implemented consistent with the statutory framework under the CWA, which does not allow EPA to authorize, either explicitly or by implication, States to implement this important federal program in a manner beyond the authority established by Congress. Indeed, as the Agency charged with administering the CWA, EPA’s role here is similar to its baseline setting function in other aspects of the Act, to ensure that there are sufficient authorities and limitations in place for States and Tribes to effectively implement CWA programs within the scope that Congress established. The final rule provides, for the first time, a consistent framework to govern the implementation of CWA section 401 that complies with the 1972 CWA amendments.

c. Administrative Procedure Act

Some commenters asserted that the proposed rule is arbitrary and capricious and an abuse of discretion. Some commenters cited *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29 (1983), and argued that the EPA “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 43. One commenter asserted that the EPA was arbitrary and capricious because the proposed rule lacks analysis of water quality impacts and fails to consider whether the proposed rule, if adopted, will ensure that the CWA’s overarching goal to protect water quality is met. This commenter further asserted that when combined with the EPA’s recent action to significantly narrow the definition of “waters of the United States,” the effect of the proposed

rule could be to leave a regulatory gap, especially in cases where federal law preempts State water quality regulations. Commenters also argued, citing *State Farm*, 463 U.S. at 43, that the EPA failed to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” These commenters also cited *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009), and asserted that, when the EPA adopts CWA regulations, it cannot “ignore the directive given to it by Congress ... which is to protect water quality.” One commenter argued that the Agency elevated industrial interests over State section 401 authority and therefore considered factors not allowed by Congress in violation of the APA, citing *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 19 (D.C. Cir. 2019) (*quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

The final rule is neither arbitrary nor capricious nor an abuse of the EPA’s discretion. In crafting the final rule, the Agency started with the statutory language of the CWA; where the plain language of the Act was unclear or otherwise ambiguous, the EPA considered the structure and purposes of the Act, relevant legal precedent, and legislative history. The EPA also carefully considered the widely varying and competing comments received during the pre-proposal outreach, including Tribal and State engagement, and more than 125,000 public comments filed in the public docket, which are described throughout this final rule preamble. These are factors that Congress intended the Agency to consider. 5 U.S.C. 553(b) and (c). The Agency carefully examined the statutory language and the legislative history when determining the scope of certification and the appropriate role of federal licensing and permitting agencies. The final rule promotes the overarching goals of the CWA to prevent, reduce, and eliminate pollution in the nation’s waters and to regulate discharges into waters of the United States, while preserving



States' major role in implementing the CWA. The Agency has examined relevant and available data and articulated a robust basis for the rulemaking in the proposed and final rule preambles.

See the Economic Analysis and the Supporting Statement for the Information Collection Request for the Clean Water Act Section 401 Certification Rule for further discussion of available data.

Some commenters asserted the proposed rule is arbitrary and capricious because it is a reversal of existing policy and that the Agency did not provide adequate support for the policy reversal. Some commenters argued that when an agency undertakes a new interpretation, it needs a factual record on which to make such a change. These commenters asserted that no record exists in the proposed rule and that no recognition of prior State and EPA practice is evident. One commenter argued that the EPA failed to provide a valid, reasoned basis for departing from decades of agency practice. Some commenters also asserted that the Agency did not demonstrate that the existing regulations are inadequate or explain how the proposed rule will provide increased predictability in comparison, noting that litigation over section 401 denials falls short of a reasoned explanation. These commenters argued that the proposed rule is just as likely to create more confusion, unpredictability, and delay given the sweeping changes that the proposed rule seeks to implement. Some commenters asserted that the EPA was required to and has failed to conduct a careful analysis of past certification reviews to demonstrate the need for the proposed rule. Some commenters argued that the proposed rule does not consider and analyze alternatives, as these commenters assert the Agency is required to do, particularly when it proposes to reverse its policy, citing *State Farm*, 463 U.S. at 46-48; *Ctr. For Science in the Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986).

The Agency disagrees with these commenters and concludes that its justification in this rulemaking is more than adequate. The Agency's final rule includes for the first time a well-

defined scope for State and Tribal review and actions under section 401. As articulated throughout the proposal and this final rule preamble, the 1971 certification regulations were promulgated to implement section 21(b) of the 1970 FWPCA, not section 401 of the 1972 CWA amendments. *See* section II.F.3 of this notice. The 1972 amendments made two major changes affecting the scope of the certification requirement: it changed “activity” to “discharge” in section 401(a) and added section 401(d), which describes effluent limitations, other limitations, and monitoring requirements that may be included in a certification. These important statutory elements were not present or contemplated in the 1971 certification regulations, which the EPA is updating with this final rule. It is entirely appropriate, and necessary, for the EPA to conform to the 1972 CWA amendments when updating its almost 50-year-old certification regulations. As noted throughout the proposal preamble and the Economic Analysis, the EPA acknowledges that many certifications reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy. Although a few high profile certification denials are part of the factual and administrative record for this rulemaking, and EPA has considered these facts during the rulemaking process, the EPA has not relied on these facts as the sole or primary basis for this rulemaking. The Agency’s longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of those controversial section 401 certification actions and the resulting litigation. To illustrate the type of uncertainty this rule is attempting to resolve, recent court cases indicate that some project proponents, certifying authorities and federal agencies have different ideas about when the time for review of a certification begins and—once begun—whether the review period can be tolled or extend beyond one year. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019); *New York State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018); *Constitution*

*Pipeline Co., LLC v. New York State Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d Cir. 2017).

Questions have also arisen regarding the role of the federal agency in determining whether a waiver has occurred. *Millennium Pipeline Co. v. Seggos*, 860 F. 3d 696 (D.C. Cir. 2017). Recent litigation also raises the issue of a certifying authority's ability to deny certification for other than water quality-related reasons. See *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-5005 (W.D. Wash. filed Jan. 8, 2018).

This rule updates the EPA's regulations to be consistent with the language of section 401 as enacted in 1972. The final rule, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by the Agency's expertise developed over nearly 50 years of implementing the CWA and policy considerations where necessary to address certain ambiguities in the statutory text. For the first time, this final rule aligns the EPA's regulations with the 1972 amendments and provides clarity to certifying authorities, federal licensing and permitting agencies, project proponents, and the general public.

Other commenters asserted that the proposed rule is carrying out the direction given by the Executive Order to stop States from "hindering the development of energy infrastructure" and asserted that administrative action with such a predestined result should not be afforded the level of deference typically afforded. Certain commenters also cited *Watt v. Alaska*, 451 U.S. 259, 273 (1981), and *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976), to argue that the EPA is overturning fifty years of practice under the CWA in violation of the clear language of 33 U.S.C. 1251(b), 33 U.S.C. 1341, and 33 U.S.C. 1370; and asserted that the EPA is entitled to less deference when overturning past practice.

The Agency disagrees that this rulemaking result was predetermined by the Executive Order. As discussed in this final rule preamble, the Executive Order does not specify details about what

the regulation must say, deferring to the Agency and its technical expertise, as informed by public input, to develop a regulation consistent with the CWA. The EPA issued a proposed rule, received public comment on that rule, made changes in this final rule in response to comments and to increase clarity and regulatory certainty for the section 401 certification process, and explained the basis for these changes. None of that was predetermined. The EPA further disagrees with commenters' assertions that either the proposed rule or this final rule violates the CWA. As described throughout this notice, the EPA for the first time conducted a holistic analysis of the text, structure, and history of CWA section 401. The final rule is based on this holistic analysis and is consistent with the language and congressional intent of section 401 and is informed by important policy considerations and the Agency's expertise. Commenter's reliance on *Watt v. Alaska*, 451 U.S. 259 273, (1981), and *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976), is misplaced because both decisions pre-date *Chevron* and *Brand X*. As described in section II.F.5 above, EPA has undertaken this rulemaking in accordance with key principles of administrative law, respecting unambiguous terms of the CWA and interpreting ambiguous language in section 401 consistent with congressional intent. The EPA's approach and rationale are set out in detail in the proposal and this final rule preamble and are supported by applicable Supreme Court precedent.

d. Rulemaking Authority

Several commenters cited *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935), and argued that the proposed rule is unconstitutional because it reflects the executive branch legislating absent congressional delegation to do so. One commenter asserted that federal executive agencies have no inherent authority to make law and are subject to the legislative powers of the Congress. This commenter cited *Louisiana Pub. Serv. Comm'n v. FCC*,

476 U.S. 355, 374 (1986), and argued that agency authority is limited to the authority granted by Congress, and that the EPA cannot add conditions outside the scope of the CWA for which Congress provided. Other commenters asserted that by seeking to limit how States exercise their authority under section 401, the proposed rule would exceed the Agency’s statutory authority “to prescribe such regulations as are necessary to carry out [the EPA Administrator’s] functions under [the Clean Water Act]” (33 U.S.C. 1361(a)) and would instead intrude upon the “responsibilities and rights” Congress expressly reserved to the States. *See* 33 U.S.C. 1251(b). Other commenters agreed with the proposal, stating that the EPA is tasked with promulgating rules for the implementation of the CWA, including one commenter citing *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (2003).

The EPA agrees that the section 401 rulemaking must be consistent with the CWA and the EPA’s authority under the Act, but disagrees with commenters who asserted that the proposal or this final rule exceeded that authority. Section 501 of the CWA gives the Administrator the authority to adopt rules “as are necessary to carry out his functions under this chapter.” 33 U.S.C. 1361(a). Section 101(d) of the CWA expressly provides that the Administrator shall administer the CWA. 33 U.S.C. 1251(d). Section 401 of the CWA includes responsibilities for the Administrator to issue certifications when a State or interstate agency has no authority to issue a certification under section 401(a)(1), to ensure the protection of other States’ waters under section 401(a)(2), and to provide technical assistance under section 401(b). Section 304(h) of the CWA also specifically directs the EPA to “promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act.” 33 U.S.C. 1314(h) (setting April 1973 deadline for doing so). The EPA is doing so with this final rule.

To carry out its functions under section 401, the EPA must adopt rules that ensure transparency and accountability for actions taken under section 401. This includes defining the scope of section 401 and adopting appropriate procedures to implement the timing, public notice and other requirements in section 401. Upon examination of the language of section 401, the relevant case law and legislative history, the Agency recognizes that section 401 contains some ambiguities and lacks clarity in some sections. The Administrator's role under section 101(d), as the person charged with administering the CWA, includes adopting reasonable interpretations of the statute to resolve ambiguities and provide clarity. For example, because CWA section 304(h) requires the Administrator to develop guidelines that "shall include the factors that must be provided" in any CWA section 401 certification, the EPA appropriately interprets that provision as authorizing the Administrator to identify "factors" that may not be included in a certification. The final rule presents a reasonable interpretation of the scope of section 401, which, given the ambiguities in sections 401(a) and 401(d), is properly the subject of Agency interpretation. The final rule also requires certification conditions and denials to be within that scope and that certain information be included in a certification or denial to support the action. These substantive and procedural regulations are necessary for the Administrator to act as a certifying authority, to administer section 401 provisions related to neighboring jurisdictions, and to provide technical assistance to other certifying authorities, federal agencies, and project proponents.

Other commenters objected to the proposed rule, asserting that it would disrespect the separation of powers by not implementing the will of Congress as expressed in the CWA. U.S. Const. art. II, § 3. As discussed throughout this notice, the proposed rule was consistent with statutory language of the CWA and congressional intent, and this final rule appropriately implements the will of Congress as expressed in the CWA.

One commenter questioned the EPA’s claim that it has the power to alter “unwise” judicial decisions. A few commenters stated that *Chevron* deference does not give a federal agency the power to rewrite federal law, and they asserted, citing *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-650 (1990); *Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117 (2016); and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019), that the proposed rule falls outside the scope of *Chevron* deference. A few commenters argued that the proposal’s “holistic” review inappropriately found ambiguity in the statutory language to justify drastic changes to the federal-State relationship that section 401 established. These commenters argued that instances where federal authority is encroaching on State authority warrant heightened concern, citing *SWANCC*, 531 U.S. 159, 173 (2001), and asserted that any changes must be based on a clear statement from Congress.

Other commenters stated that the divergent language of section 401(a) and section 401(d) creates ambiguity that needs to be resolved. These commenters argued that the EPA’s proposed interpretation is reasonable and necessary to fill that statutory gap. One commenter stated that the EPA correctly recognized that the Court’s reliance on *Chevron* deference in *PUD No. 1* was entirely misplaced, as the Court did not begin by first identifying an ambiguity in the statute, and the Court ignored the fact that the EPA’s own regulations at the time spoke only in terms of “discharges.” A number of commenters agreed with the EPA’s proposal to address the ambiguities in the CWA statutory language and the inconsistent application of the current regulations that impact project applicants and other States’ sovereignty. These commenters agreed that the proposed rule would promote regulatory certainty, help streamline the federal licensing and permitting process for critical infrastructure development, enhance the ability of project proponents to plan for construction, and facilitate early and constructive engagement

between permittees, States or authorized Tribes, and federal agencies to ensure that proposed projects will be protective of local water quality.

As discussed in section II.F.5 of this notice, *Chevron* supplies the appropriate framework for judicial review of statutory interpretation. If the language of a congressional statute is clear, that unambiguous meaning controls. If, however, the congressional text is ambiguous, a reviewing court will defer to the implementing Agency's permissible interpretation. Where, as in CWA section 401(a), Congress used unambiguous terms like "which shall not exceed one year" and "after the receipt of such request," it is reasonable, indeed necessary, for the Agency to apply the plain meaning of those terms when drafting its implementing regulations. Where terms are ambiguous, such as "other appropriate requirement of State law" in CWA section 401(d), the EPA is authorized to fill the congressional gap and supply a reasonable interpretation. *Brand X* supports the EPA's authority to interpret ambiguous terms in section 401 and its ability to make reasonable regulatory choices. That case recognizes that an Agency's statutory interpretation is precluded only when, in a prior decision, a court concluded that its contrary interpretation was compelled by the plain language of the relevant text. *Brand X*, 545 U.S. at 982 ("[A] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). None of the EPA interpretations upon which its final regulatory language is based, including the Agency's decision that section 401(d) limitations and requirements may be placed only on the "discharge" and not on the "activity," are inconsistent with that principle.

#### *G. Legal Construct for the Final Rule*



As the preceding discussion demonstrates, the most challenging aspects of section 401 concern the scope of review and action on a certification request. The Agency is finalizing a regulation that will clarify these aspects and provide additional regulatory certainty for States, Tribes, federal agencies, and project proponents on the timing and procedural requirements of the CWA. This section summarizes some of the core legal principles that inform this final rule, and section III of this notice describes how the Agency is applying those legal principles to support the final rule.

#### 1. Scope of Certification

The EPA has for the first time conducted a holistic analysis of the text, structure, and history of CWA section 401. As a result of that analysis, the EPA is establishing the scope of section 401 as protecting the quality of waters of the United States from point source discharges associated with federally licensed or permitted activities by requiring compliance with water quality requirements, as defined in this final rule.

Since at least 1973, the EPA has issued memoranda and guidance documents, and the Department of Justice has filed briefs in various court cases on behalf of the EPA, addressing section 401. Only a handful of these documents address the scope of section 401, and none was the product of a holistic examination of the statute or its legislative history. As a result, these documents included little or no explanation for the Agency's interpretations. For example, in 1989, the EPA issued a guidance document asserting that a section 401 certification could broadly address "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation. . . ." EPA, *Wetlands and 401 Certification* 23 (April 1989). The guidance document's only explanation for this assertion is a reference to section 401(a)(3), which provides that a certification for a

construction permit may also be used for an operating permit that requires certification. The guidance document, which did not undergo notice and comment procedures, does not provide any analysis to support its assertion that a certification could address all potential impacts from the “proposed activity” as opposed to the discharge. Several years later, the United States filed an amicus brief in the Supreme Court on behalf of the EPA in the *PUD No. 1* case. The amicus brief asserted that petitioners were “mistaken” in their contention that the State’s minimum flow condition is outside the scope of section 401 because the condition would be valid “if it is necessary to assure that *discharges* resulting from the project will comply with applicable provisions of the CWA or ‘any other appropriate requirement of State law.’” *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, No. 92-1911 at 11-12 (Dec. 1993) (emphasis added). The brief went on to identify “two distinct discharges” that would result from the petitioner’s facility and that would violate the CWA. The amicus brief did not offer an affirmative interpretation to harmonize the different language in sections 401(a) and 401(d) and instead relied on the plain language in section 401(a). More than a decade later, the United States’ Supreme Court amicus brief in the *S.D. Warren* case adopted without explanation the Supreme Court’s analysis in *PUD No. 1* that once section 401 is triggered by a discharge, a certification can broadly cover impacts from the entire activity. Finally, in 2010, the EPA issued its now-rescinded Interim Handbook, which included a number of recommendations on scope, timing, and other issues, none of which were supported with robust analysis or interpretation of the Act. The Interim Handbook, which did not undergo notice and comment procedures either, also did not reference the fact that the 1971 certification regulations were not updated after the CWA was enacted in 1972.

This rulemaking is the first time that the EPA has undertaken a holistic review of the text of section 401 in the larger context of the structure and legislative history of the 1972 Act and earlier federal water protection statutes, and the first time the Agency has subjected its analysis to public notice and comment. The final rule is informed by this holistic review and presents a framework that the EPA considers to be most consistent with the text of the Act and congressional intent. After considering and taking into account the comments submitted on the proposed rule, the Agency has made some enhancements in this final rule to appropriately capture the scope of authority for granting, conditioning, denying, and waiving a section 401 certification. For further discussion and response to comments on the scope of certification, see section III.E of this notice.

a. Water Quality

The EPA concludes that the scope of a State's or Tribe's section 401 review or action is not unbounded and must be limited to considerations of water quality. Clarifying the proper scope in this manner aligns with the objective of the CWA to restore and maintain water quality (*see* CWA section 101(a)). Moreover, there is no suggestion in either the plain language or the structure of the statute that Congress envisioned section 401 to authorize action beyond that which is necessary to address water quality directly. Indeed, as described in greater detail above, the 1972 amendments to the CWA resulted in the enactment of a comprehensive scheme designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into waters of the United States specifically.

In its recent decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, No. 18–260, the Supreme Court reaffirmed that “Congress’ purpose as reflected in the language of the Clean Water Act is to ‘restore and maintain the . . . integrity of the Nation’s waters,’ §101(a)” (Op. at

2, emphasis added) and underscored the importance of interpreting the statutory text “in light of the statute’s language, structure, and purposes” in a manner that avoids the creation of “a massive loophole in the permitting scheme that Congress established” that would “allow[] easy evasion of the statutory provision’s basic purposes.” (Op. at 12, 15 (April 23, 2020)). The EPA’s interpretation of the scope of CWA section 401 as limited to considerations of water quality is fully consistent with these fundamental principles and respects the congressional scheme at issue in *County of Maui*. As discussed below and throughout the preamble, this is also true of the Agency’s other textual interpretations that inform the definitions and requirements of this rule relating to, for example, “discharge,” “a reasonable period of time (which shall not exceed one year,” “water quality requirements,” and “any other appropriate requirement of State law.”

The EPA is aware that some certifying authorities may have previously interpreted the scope of section 401 in a way that resulted in the incorporation of non-water quality-related considerations into their certification review process. For example, certifying authorities have on occasion required in a certification condition the construction of biking and hiking trails, requiring one-time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and the creation of public access for fishing along waters of the United States. Certifying authorities have also attempted to address all potential environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity or project that may be identified in an environmental impact statement or environmental assessment, prepared pursuant to the NEPA or a State law equivalent. This includes, for example, consideration of impacts associated with air emissions and transportation effects.

The Agency has concluded that interpreting the scope of section 401 to allow States and Tribes to regulate and consider effects of an activity rather than a discharge would invoke the outer limits of power that Congress delegated to the Agency under the CWA. The imposition of conditions unrelated to water quality is not consistent with the scope of the CWA generally or section 401. There is nothing in the text of the statute or its legislative history that signals that Congress intended to impose, using section 401, federal requirements on licensed or permitted activities beyond those addressing water quality-related impacts. Indeed, Congress knows how to craft statutes to require consideration of multi-media effects (*see, e.g.*, NEPA), and has enacted specific statutes addressing impacts to air (Clean Air Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act), by way of example.<sup>23</sup> Subsequent congressional action directly addressing a particular subject is relevant to determining whether a previously adopted statute reaches that subject matter. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000) (determining that “actions by Congress over the past 35 years” that addressed tobacco directly, when “taken together,” “preclude[d] an interpretation” that a previously adopted statute, the Food, Drug, and Cosmetic Act, “grant[ed] the FDA jurisdiction to regulate tobacco products.”).

If Congress had intended section 401 of the CWA to authorize consideration or the imposition of certification conditions based on air quality or transportation 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. Neither the CWA nor section 401 contains any

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<sup>23</sup> *See, e.g.*, 42 U.S.C. 4321 *et seq.* (NEPA); 42 U.S.C. 7401 *et seq.* (Clean Air Act); 16 U.S.C. 1531 *et seq.* (Endangered Species Act); and 16 U.S.C. 470 *et seq.* (National Historic Preservation Act).

such clear statement. In fact, Congress specifically contemplated a broader policy direction in the 1972 amendments that would have authorized the EPA to address impacts to land, air, and water through implementation of the CWA, but it was rejected.<sup>24</sup> The Agency has concluded that inclusion of the phrase “any other appropriate requirement of State law” in section 401(d) hardly provides clear direction from Congress that section 401(d) could extend beyond water quality. Therefore EPA concludes that section 401(d)—like section 401(a) and the rest of the Act—is limited to considerations of “water quality.”<sup>25</sup>

Pursuant to the plain language of section 401, when a State or authorized Tribe (and in some cases, the EPA) issues a certification, it has determined that the discharge into waters of the United States from a proposed federally licensed or permitted activity will comply with applicable effluent limitations for new and existing sources (CWA sections 301, 302, and 306), water quality standards and implementation plans (section 303), toxic pretreatment effluent standards (section 307), and—by way of its power to add conditions pursuant to section 401(d)—other “appropriate requirements” of State or Tribal law. 33 U.S.C. 1341(a)(1), (d). The enumerated CWA provisions identify requirements to ensure that discharges of pollutants do not degrade water quality,<sup>26</sup> and specifically referenced throughout section 401 is the

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<sup>24</sup> As Congress drafted the 1972 CWA amendments, the House bill (H.R. 11896) included section 101(g) within its “Declaration of Goals and Policy” providing, “(g) In the implementation of this Act, agencies responsible therefor shall consider all potential impacts relating to the water, *land, and air* to insure that other significant environmental degradation and damage to the health and welfare of man does not result.” H.R. 11896, 92nd Cong. (1971) (emphasis added). Section 101(g) of the House bill was “eliminated” at conference, and the Act was ultimately passed with no federal policy, goal, or directive to address non-water quality impacts through the CWA. S. Rep. 92-1236, at 100 (1972) (Conf. Rep.).

<sup>25</sup> The Agency also concludes that the term “applicant” in section 401(d) creates ambiguity in the statute. *See* section II.G.1.b of this notice for discussion of the use of the term “applicant” in section 401(d).

<sup>26</sup> For example, CWA section 306 defines the standard of performance for new sources of discharges as “a standard for the control of the discharge of pollutants which reflects the greatest

requirement to ensure compliance with “applicable effluent limitations” and “water quality requirements,” underscoring the focused intent of this provision on the protection of water quality from discharges.<sup>27</sup> See 33 U.S.C. 1341(a), (b), (d). The legislative history for the Act provides further support for the EPA’s interpretation, as it frequently notes that the focus of the section is on assuring compliance with water quality requirements and water quality standards and the elimination of any discharges of pollutants. See, e.g., S. Rep. No. 92-414, at 69 (1971).

The CWA does not define what is an “appropriate requirement” of State law for purposes of adding conditions to a section 401 certification.<sup>28</sup> In interpreting this term, the Agency acknowledges the need to respect the clear policy direction from Congress to recognize and preserve State authority over land and water resources within their borders, see 33 U.S.C. 1251(b), and the Agency must avoid interpretations of the CWA that infringe on traditional State land use planning authority. See *SWANCC*, 531 U.S. at 172-73; *Will*, 491 U.S. at 65. One interpretation of this clause in section 401(d) could be that it authorizes the denial of certification or the imposition of conditions in a federal license or permit based on non-water

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degree of effluent reduction which the Administrator determines to be achievable through application of best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.” 33 U.S.C. 1316(a)(1). Section 303 notes that new or revised state water quality standards “[s]hall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.” *Id.* at 1313(c)(2)(A).

<sup>27</sup> The term “effluent limit” is defined as, “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance[,]” 33 U.S.C. 1362(11); and the CWA requires that “water quality standards” developed by states and tribes “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” *Id.* at 1313(c)(2)(A).

<sup>28</sup> The EPA notes that during congressional hearings on the 1972 amendments, the House Committee was presented with testimony that the term “applicable water quality requirements” should be defined, but no definition was included in the enacted bill. See section III.E.2.b for further discussion on this legislative history.

quality-related impacts if those requirements are based on any existing State or Tribal law. Such an interpretation, however, is counterintuitive in a statute aimed at protecting the “chemical, physical, and biological integrity of the nation’s waters.” For example, it is difficult to imagine what guiding principle would help one determine whether to import state labor law or professional licensing requirements into a section 401 certification; such requirements could arguably be relevant to a dam project, but mere relevance is not nearly sufficient to sweep these types of laws within the ambit of an environmental statute aimed at water quality. The CWA does not give EPA a clear basis to venture into such regulatory arenas, which (in the absence of clearly expressed congressional direction) are more appropriately reserved to the powers of the States, “powers with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461 (describing the “plain statement rule”).

The Agency does not believe that Congress intended the phrase “any other appropriate requirement of State law” to be read so broadly. Instead, the *ejusdem generis* canon helps to inform the appropriate interpretation of the statutory text. Under this principle, where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. *See Wash. State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383-85 (2003). Here, the general term “appropriate requirement” in section 401(d) follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States.<sup>29</sup> Given the text, structure, purpose, and legislative history of the CWA and

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<sup>29</sup> See Section II.G.1.c for further discussion on point source discharges to waters of the United States in the context of section 401. Although section 401(a) mentions five sections of the CWA, section 401(d) omits section 303. In *PUD No. 1*, the Court interpreted section 303 to be included in section 401(d) by reference to section 301. *PUD No. 1*, 511 U.S. at 712-13.



section 401, and informed by important policy considerations and the Agency’s expertise, the EPA interprets “appropriate requirement” for section 401 certification purposes to include those provisions of State or Tribal law that contain requirements for point source discharges into waters of the United States, including provisions that are more stringent than federal law. *See* S. Rep. No. 92-414, at 69 (1971) (“In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under the Act, shall through certification become conditions on any Federal license or permit.”). In this respect, the EPA agrees with the logic of Justice Thomas’s dissent in *PUD No. 1*, wherein he concludes that “the general reference to ‘appropriate’ requirements of State law is most reasonably construed to extend only to provisions that, like other provisions in the list, impose discharge-related restrictions.” *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting). The Agency’s interpretation gives meaning to Congress’s decision to use the word “appropriate” in the phrase “any other appropriate requirement of State law set forth in such certification.”

Consistent with the proposal, the final rule limits the scope of section 401 and the term “appropriate requirements of State law” to those requirements directly related to water quality. As discussed in greater detail in section III.E.2.b of this notice, the final rule definition of “water quality requirements” has been modified from the proposal, but does not stray from the core principle and focus of Title IV of the CWA—to protect the quality of waters of the United States from point source discharges.

b. Activity or Discharge

Based on the text, structure, and legislative history of the CWA, the EPA is affirming under this final rule that a certifying authority’s review and action under section 401 must be limited to

water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project. Section 401(a) explicitly provides that the certifying authority, described as “the State in which the *discharge* originates or will originate,” must certify that “any such *discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act” (emphasis added). The plain language of section 401(a) therefore directs authorities to certify that the discharge resulting from the proposed federally licensed or permitted project will comply with the CWA. Section 401(d) uses different language and requires the certifying authority to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any *applicant* for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification” (emphasis added).<sup>30</sup> The use of the term “applicant” in section 401(d)—instead of “discharge” as found in section 401(a)—creates ambiguity, and has been interpreted as broadening the scope of section 401(a), beyond consideration of water quality impacts from the “discharge” which triggers the certification requirement, to allow certification conditions that address water quality impacts from any aspect of the construction or operation of the activity as a whole. *See PUD No. 1*, 511 U.S. at 712.

The ordinary meaning of the word “applicant” is “[o]ne who applies, as for a job or admission.” *See Webster’s II, New Riverside University Dictionary* (1994). In section 401(d), this term is used to describe the person or entity that applied for the federal license or permit that

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<sup>30</sup> As a matter of practice, the Corps seeks State certification for “its own discharges of dredged or fill material,” “[a]lthough the Corps does not process and issue permits for its own activities.” 33 CFR 336.1(a)(1).

requires a certification. The use of this term in section 401(d) is consistent with the text of the CWA, which uses the term “applicant” throughout to describe an individual or entity that has applied for a grant, a permit, or some other authorization.<sup>31</sup> Importantly, the term is also used in section 401(a) to identify the person responsible for obtaining the certification: “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State ....” In the section 401 context, the term “applicant” also may include in some circumstances the federal licensing or permitting agency, such as where the federal agency is seeking certification for a general license or permit.

Relying on the presence of the term “applicant” in section 401(d) to interpret section 401(d) as allowing certification conditions that are unrelated to a discharge would expand section 401 regulatory authority beyond the scope of those sections of the Act enumerated in section 401. Those enumerated CWA sections focus on regulating discharges to waters of the United States. The Agency is not aware of any other instance in which the term “applicant” (or permittee or owner or operator) as used in the CWA has been interpreted to significantly expand the jurisdictional scope or meaning of the statute. The Agency therefore understands the term “applicant” in section 401(d) as merely identifying the person or entity responsible for obtaining and complying with the certification and any associated conditions and not as expanding the

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<sup>31</sup> See, e.g., 33 U.S.C. 1311 (“An application for an alternative requirement under this subsection shall not stay the applicant’s obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.”); *id.* at 1344 (“Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.”)

regulatory scope of that section. This interpretation of the term “applicant,” which appropriately ties the term to the discharges that are the regulatory focus of section 401 as a whole and to the purposes of this section, is consistent with and supported by the use in section 401(d) of the phrase “applicant *for a Federal license or permit*,” which refers back to the fuller phrase set forth at the beginning of section 401(a): “applicant *for a Federal license or permit to conduct any activity ... which may result in any discharge* into the navigable waters.” (Emphasis added.) This interpretation also gives reasonable, and permissible, meaning to the term “appropriate” in the phrase “any other appropriate requirement of State law set forth in such certification.” The textual history and legislative history of section 401, discussed below, provide additional support for this interpretation.

Section 401 was updated as part of the 1972 CWA amendments to reflect the restructuring of the Act, as described in section II.F.1 of this notice. Two important phrases were modified between the 1970 and the 1972 versions of section 401 that help explain what Congress intended with the 1972 amendments. First, the 1970 version provided that an authority must certify “that such *activity* . . . will not violate water quality standards.” Pub. L. No. 91-224 § 21(b)(1) (emphasis added). Significantly, Congress modified this language in 1972, requiring an authority to certify “that any such *discharge* shall comply with the applicable provisions of [the CWA].” 33 U.S.C. 1341(a) (emphasis added). On its face, this modification made the 1972 version of section 401 consistent with the overall framework of the amended statutory regime, which focuses on regulating discharges to attain water quality standards and adds new federal regulatory programs to achieve that purpose. 33 U.S.C. 1311, 1312, 1313, 1316, 1317, 1342 and 1344.

Second, the 1972 version included section 401(d) for the first time. This provision authorizes

conditions to be imposed on a certification “to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification ....”*Id.* at 1341(d). This new section also requires such conditions to be included in the federal license or permit. *Id.*

Together, these amendments to the pre-1972 statute focus section 401 on discharges that may affect water quality, enumerate newly created federal regulatory programs with which section 401 mandates compliance, and require that water quality-related certification conditions be included in federal licenses and permits and thereby become federally enforceable. The legislative history describing these changes supports a conclusion that the provisions were added intentionally and with the purpose of making the new section 401 consistent with the new framework of the Act. Indeed, the 1971 Senate Report provided that section 401 was “amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” S. Rep. No. 92-414, at 69 (1971).

An EPA attorney previously analyzed the modifications made to section 401 between the 1970 and 1972 Acts. *See* Memorandum from Catherine A. Winer, Attorney, EPA Office of General Counsel, Water Division, to David K. Sabock, North Carolina Department of Natural Resources (Nov. 12, 1985).<sup>32</sup> In its analysis, the attorney characterized the legislative history quoted above as “not very explicit,” and characterized the new section 401 language as “not

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<sup>32</sup> Available at <https://www.epa.gov/sites/production/files/2015-01/documents/standards-marinas-memo.pdf>.

altogether clear.” *Id.* Based on this analysis, the attorney found at that time that “the overall purpose of section 401 is clearly ‘to assure that Federal licensing or permitting agencies cannot override water quality requirements’” and that “section 401 may reasonably be read as retaining its original [i.e., pre-1972] scope, that is, allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a ‘discharge’ in the narrow sense.” *Id.* (citing S. Rep. No. 92-414, at 69 (1971)).

The EPA has now performed a holistic analysis of the text and structure of the CWA, the language of section 401, and the amendments made between 1970 and 1972. Based on this review, the EPA now concludes that the 1972 version of section 401 made specific changes to ensure that *discharges* were controlled in compliance with the 1972 CWA regulatory programs and appropriate requirements of State law. For the reasons noted above in section II.F.1 of this notice, identifying and regulating discharges, as opposed to managing ambient water quality, promotes accountability and enforcement of the Act in a way that the 1970 and earlier versions did not. The EPA also observes that, had Congress intended the 1972 amendments to retain the original scope concerning “activity,” it could have easily crafted section 401(d) to authorize certification conditions to assure that “the activity” would comply with the specified CWA provisions, but it did not. Instead, Congress’ use of the term “discharge” in section 401(a) frames the scope of the certification requirement under the Act. As a result, the Agency now considers a more natural and more reasonable interpretation of the 1972 amendments to be that Congress rejected the idea that the scope of a certifying authority’s review or its conditions should be defined by the term “activity.” Congress specifically did not carry forward the term “activity” in the operative phrase in section 401(a) and did not incorporate it into the new provision

authorizing certification conditions in section 401(d). Under basic canons of statutory construction, the EPA begins with the presumption that Congress chose its words intentionally. *See, e.g., Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”). This is also consistent with the dissent in *PUD No. 1*, wherein Justice Thomas concluded that “[i]t is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the ‘applicant’[,], those conditions must still be related to discharges.” *PUD No. 1*, 511 U.S. at 726-27 (Thomas, J., dissenting). The EPA has concluded that this interpretation is reasonable and the most appropriate reading of the statute and related legal authorities.

As described in detail in section II.F.4.a.i of this notice, the Supreme Court in *PUD No. 1* considered the scope of a State’s authority to condition a section 401 certification. In response to petitioners’ argument in that case that certification conditions may only be limited to the “discharge” referenced in section 401(a), the Court noted that “[t]he text refers to the compliance of the applicant, not the discharge.” *Id.* at 712. Without further analysis of the ambiguity created by the use of the term “applicant” in section 401(d), the Court concluded that “§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.” *Id.* at 712. The Court did not grapple with the range of actions that its interpretation may require of the applicant, or whether the entire range would or should be within the scope of section 401. The Court did not evaluate or find support for its interpretation in the legislative history of the 1972 amendments to the CWA, nor did the Court find that Congress had established an intent that the term “applicant”

in section 401(d) should mean “activity.” Although some have argued that the Court’s conclusion is based on a plain language interpretation of section 401(d), for the reasons explained below, the EPA disagrees. The EPA concludes that the use of the term “discharge” in section 401(a) and “applicant” in section 401(d) creates ambiguity, that the plain text of 401(d) also is ambiguous, and that neither the Court’s analysis nor its holding in *PUD No. 1* foreclose alternative interpretations.

In its discussion of the CWA, the Supreme Court in *PUD No. 1* did not analyze section 401 at “*Chevron* step one” or rely on “the unambiguous terms” of the CWA to support its reading of section 401. *See Brand X*, 545 U.S. at 982. Instead, the Court “*reasonably read*” section 401(d) “as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” *PUD No. 1*, 511 U.S. at 712 (emphasis added). To support what it considered to be a reasonable reading of section 401(d), the Court looked at the EPA’s 1971 certification regulations at 40 CFR 121.2(a)(3) and related guidance available at that time, *PUD No. 1*, 511 U.S. at 712, but the Court did not have before it the EPA’s interpretation of how sections 401(a) and 401(d) could be harmonized. In fact, the Court either was not aware of or did not mention that the EPA’s 1971 certification regulations in place at that time predated the 1972 CWA amendments and therefore contained outdated terminology implementing what was functionally a different statute. As described above, the EPA’s 1971 certification regulations were consistent with the text of the pre-1972 CWA, and they required a State to certify that the “activity” will comply with the Act. The 1972 CWA amendments changed this language to require a State to certify that the “discharge” will comply with the Act.

Based in part on what the EPA now recognizes was infirm footing, the Court found that “EPA’s conclusion that activities—not merely discharges—must comply with state water quality



standards is a *reasonable interpretation* of § 401 and is entitled to deference.” *Id.* (emphasis added). As amicus curiae in the Supreme Court, the United States did not seek *Chevron* “deference for the EPA’s regulation in [the *PUD No. 1* case]” or for the EPA’s interpretation of section 401. *Id.* at 729 (Thomas, J., dissenting). In fact, the United States’ amicus brief for the Court did not analyze or interpret the different language in sections 401(a) and 401(d) and instead asserted that it was unnecessary to harmonize the provisions to resolve the dispute. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, No. 92-1911 at 12 n. 2 (Dec. 1993). The amicus brief asked the Court to analyze the two undisputed discharges from the proposed federally licensed project and to determine whether they would cause violations of the State’s water quality standards. *Id.* at 11-16.

Given the circumstances of the *PUD No. 1* litigation, and the fact that the Supreme Court did not analyze section 401 under *Chevron* step 1 or rely on unambiguous terms in the CWA to support its interpretation of the statute, *PUD No. 1* does not foreclose the Agency’s interpretation of section 401 in this final rule. *See Brand X*, 545 U.S. at 982–83. The Supreme Court’s “choice of one reasonable reading” of section 401 does not prevent the EPA “from later adopting a different reasonable interpretation.”<sup>33</sup> *Eurodif S.A.*, 555 U.S. at 315. An agency may engage in “a formal adjudication or notice-and-comment rulemaking” to articulate its interpretation of an ambiguous statute. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). When it does, courts

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<sup>33</sup> The EPA is not modifying the Agency’s longstanding interpretation of the Act that was confirmed by the Court in *PUD No. 1* that “a water quality standard must ‘consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses’” and that “a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” 511 U.S. at 714-15 (emphasis in original; quoting 33 U. S. C. 1313(c)(2)(A)).

apply “*Chevron*-style” deference to the agency’s interpretation. *Id.* That is exactly what the EPA is doing in this final rule. The EPA has for the first time, holistically interpreted the text of sections 401(a) and 401(d) to support this update to the Agency’s 1971 certification regulations while ensuring consistency with the plain language of the 1972 CWA.

c. Discharges from Point Sources to Waters of the United States

Based on the text, structure, and purpose of the Act, the history of the 1972 CWA amendments, relevant legislative history, and supporting case law, and informed by important policy considerations and the Agency’s expertise, the EPA has concluded that a certifying authority’s review and action under section 401 is limited to water quality impacts to waters of the United States resulting from a potential *point source* discharge from a proposed federally licensed or permitted project. The text of section 401(a) clearly specifies that certification is required for any federal license or permit to “conduct any activity . . . which may result in any discharge into the *navigable* waters” (emphasis added). Prior interpretations extending section 401 applicability beyond such waters conflict with and would render meaningless the plain language of the statute. And although the statute does not define with specificity the meaning of the unqualified term *discharge*, interpreting section 401 to cover all discharges without qualification would undercut the bedrock structure of the CWA regulatory programs, which are focused on addressing *point source* discharges to waters of the United States. CWA section 502(14) defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from

which pollutants are or may be discharged.”<sup>34</sup>

As described in section II.F.1 of this notice, the CWA is structured such that the federal government provides assistance, technical support, and grant money to assist States in managing *all* of the nation’s waters. By contrast, the federal regulatory provisions, including CWA sections 402 and 404, apply only to *point source* discharges to waters of the United States. 33 U.S.C. 1362(7). Section 401 is the first section of Title IV of the CWA, titled Permits and Licenses, and it requires water quality-related certification conditions to be legally binding and federally enforceable conditions of federal licenses and permits. *Id.* at 1341(d). Similar to the section 402 and 404 permit programs, section 401 is a core regulatory provision of the CWA. Accordingly, the scope of its application is most appropriately interpreted, consistent with the other federal regulatory programs, as addressing point source discharges into waters of the United States.

The EPA is not aware of any court decisions that have directly addressed the scope of waters covered by section 401; however, the plain text of section 401 is clear and EPA’s interpretation is supported by legislative history (*see* section II.G.1.b of this notice). Additionally, public commenters noted that many state Attorneys General submitted comments on the Agency’s rulemaking to define “waters of the United States” asserting that modifying that definition would modify the scope of state review under section 401, further supporting the EPA’s interpretation that section 401 is limited to waters of the United States.

In *Oregon Natural Desert Association v. Dombeck*, the Ninth Circuit relied on the text and structure of section 401 to interpret the meaning of “discharge” in section 401. 172 F.3d 1092

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<sup>34</sup> In the section 404 context, point sources include bulldozers, mechanized land clearing equipment, dredging equipment, and the like. *See, e.g., Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

(9th Cir. 1998). In that case, a citizen’s organization challenged a decision by the U.S. Forest Service to issue a permit to graze cattle on federal lands without first obtaining a section 401 certification from the State of Oregon. The government argued that a certification was not needed because the “unqualified” term “discharge”—as used in CWA section 401—is “limited to point sources but includes both polluting and nonpolluting releases.” *Id.* at 1096. Finding that the 1972 amendments to the CWA “overhauled the regulation of water quality,” the court said that “[d]irect federal regulation [under the CWA] now focuses on reducing the level of effluent that flows from point sources.” *Id.* The court stated that the word “discharge” as used consistently in the CWA refers to the release of effluent from a point source. *Id.* at 1098. The court found that cattle—even if they wade in a stream—are not point sources. *Id.* at 1098-99. Accordingly, the court held that certification under section 401 was not required. *Id.* at 1099.

The EPA previously suggested that the scope of section 401 may extend to nonpoint discharges to non-federal waters<sup>35</sup> once the requirement for the section 401 certification is triggered. Specifically, in the EPA’s now-withdrawn Interim Handbook, the Agency included the following paragraphs,

The scope of waters of the U.S. protected under the CWA includes traditionally navigable waters and also extends to include territorial seas, tributaries to navigable waters, adjacent wetlands, and other waters. Since § 401 certification only applies where there may be a discharge into waters of the U.S., how states or tribes designate their own waters does not determine whether § 401 certification is required. Note, however, that once § 401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it [sic] is an aquatic resource addressed by “other appropriate provisions of state [or tribal] law.”

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Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S. The Ninth Circuit Court of Appeals ruled that the discharge must be from a

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<sup>35</sup> Non-federal waters refer to those waters that are not waters of the United States.

point source, and agencies in other jurisdictions have generally adopted the requirement. Once these thresholds are met, the scope of analysis and potential conditions can be quite broad. As the U.S. Supreme Court has held, once §401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.

Interim Handbook, 5, 18 (citations omitted). To support the first referenced paragraph on the scope of waters, the Interim Handbook cited section 401(d), presumably referring to the use of the term “applicant” rather than “discharge” used in section 401(a).<sup>36</sup> To support the second paragraph on the scope of discharges, the Interim Handbook cited the *PUD No. 1* and *S.D. Warren* Supreme Court decisions. It appears that both paragraphs from the Agency’s Interim Handbook relied on the *PUD No. 1* Court’s interpretation of the ambiguity created by the different language in sections 401(a) and 401(d).<sup>37</sup>

For many of the same reasons why the Agency is not interpreting the use of the word “applicant” in section 401(d) as broadening the scope of certification beyond the discharge itself, the Agency is also declining to interpret section 401(d) as broadening the scope of waters and the types of discharges to which the CWA federal regulatory programs apply. As an initial matter, the Agency agrees with the Ninth Circuit’s analysis and holding in *Dombeck* that section 401 certification is not required for nonpoint source discharges. *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1098-99 (9th Cir. 1998). Were the Agency to interpret the use in section 401(d) of the term “applicant” instead of the term “discharge” as authorizing

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<sup>36</sup> Interim Handbook, at 5 n. 23. Tellingly, footnote 23 of the Interim Handbook also states, “Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. *See, e.g.*, RGL 92-04, ‘Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.’”

<sup>37</sup> The *S.D. Warren* decision did not analyze or adopt the *PUD No. 1* Court’s analysis of sections 401(a) and 401(d).

the federal government to implement and enforce CWA conditions on, or that affect, non-federal waters, that single word (“applicant”) would effectively broaden the scope of the federal regulatory programs enacted by the 1972 CWA amendments beyond the limits that Congress intended. Such an interpretation could permit the application of the CWA’s regulatory programs, including section 401 certification conditions that are enforced by federal agencies, to land and water resources more appropriately subject to traditional State land use planning authority where not otherwise preempted by federal law. *See, e.g., SWANCC*, 531 U.S. at 172-73.

As described in section II.F.4.a.i of this notice and pursuant to its authority to reasonably interpret ambiguous statutes to fill gaps left by Congress, the EPA is interpreting the language in sections 401(a) and (d) differently than the Supreme Court did in *PUD No. 1*. The Court’s prior interpretation, that once a “discharge” triggers the certification requirement in section 401(a) the certification itself may cover the entire “activity,” was not based on the plain unambiguous text of the statute, but rather was based on the Court’s own interpretation of ambiguous text in light of the interpretation of the statute set forth in the 1971 certification regulations (*see* section II.F.4.a.i of this notice). The EPA’s interpretation under this final rule is also based on a reasonable interpretation of the text, structure, and legislative history of section 401 and is informed by important policy considerations and the Agency’s expertise, and the Agency’s current rule is not foreclosed by the Court’s prior interpretation. *See Brand X*, 545 U.S. at 982.

For the reasons above, the EPA is concluding that section 401 is a regulatory provision that creates federally enforceable requirements, and for this and other reasons, its application must be limited to point source discharges into waters of the United States. This interpretation is consistent with the text and structure of the CWA as well as the principal purpose of this rulemaking, i.e., to ensure that the EPA’s regulations (including those defining a section 401

certification's scope) are consistent with the current CWA.<sup>38</sup> For further discussion on the Agency's interpretation and comments received on discharges under section 401, see section III.A.2.a of this notice.

## 2. Timeline for Section 401 Certification Analysis

Based on the language of the CWA and consistent with the relevant case law, the EPA is clarifying that a certifying authority must act on a section 401 certification within a reasonable period of time, which shall not exceed one year, and that there is no tolling provision to stop the clock at any time.

The text of section 401 expressly states that a certifying authority must act on a section 401 certification request within a reasonable period of time, which shall not exceed one year. 33 U.S.C. 1341(a)(1). Importantly, as the words "shall not exceed" suggest, the CWA does not guarantee that a certifying authority may take a full year to act on a section 401 certification request. The certifying authority may be subject to a shorter period of time, provided it is reasonable. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) ("Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the [EPA]—the agency charged with administering the CWA—

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<sup>38</sup> Although the legislative history on section 401 sometimes lacks clarity and can be internally inconsistent, the Agency's interpretation is consistent with much of the legislative history from the 1972 amendments. *See, e.g.*, H.R. Rep. No. 92-911, at 124 (1972) ("It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters. It is not intended that State certification is or will be required for discharges into the contiguous zone or the oceans beyond the territorial seas."); 118 Cong. Rec. 33,692, 33,698 (1972) ("[t]he Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State."); S. Rep. No. 92-411, at 69 (1971) ("This section is substantially 21(b) of existing law amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." (parentheticals omitted)); 117 Cong. Rec. 38,797, 38,855 (1971) (Mr Muskie: "Sections 401 and 402 provide for controls over discharge.")

generally finds a state’s waiver after only six months.” (citing 40 CFR 121.16)). The CWA’s legislative history indicates that inclusion of a maximum period of time was to “insure that sheer inactivity by the [certifying authority] will not frustrate the Federal application.” H.R. Rep. No. 92-911, at 122 (1972).

The timeline for action on a section 401 certification must conclude within a reasonable period of time (not to exceed one year) after receipt of a certification request. *Id.*; 33 U.S.C. 1341(a)(1). The CWA does not specify any legal requirements for what constitutes a request or otherwise define the term. As discussed further in section III.C, this final rule addresses that ambiguity to provide additional clarity and regulatory certainty. Additionally, the EPA has long recommended that a project proponent requiring a federal license or permit subject to section 401 certification hold early discussions with both the certifying authority and the federal agency, to better understand the certification process and potential data or information needs.

The CWA does not contain provisions for tolling the timeline for any reason, including to request or receive additional information from the project proponent. If the certifying authority has not acted on a request for certification within the reasonable time period, the certification requirement will be waived and the federal agency may proceed to issue the license or permit.

The final rule provides for specific timeframes for certain procedural requirements (*e.g.*, pre-meeting filing requests, discussed in final rule preamble section III.B; and public notice when EPA acts as the certifying authority, discussed in final rule preamble section III.H). Throughout this final rule, EPA intends that the term “days” refers to calendar days as opposed to business days. For further discussion on the Agency’s interpretation of the timeline for section 401 certification analysis and related comments, see section III.F of this notice. This final rule is



intended to provide greater clarity and certainty and to address some of the delays and confusion associated with the timing elements of the section 401 certification process.

### **III. Final Rule**

This final rule is intended to make the Agency's regulations consistent with the current text of CWA section 401, increase efficiencies, and clarify aspects of CWA section 401 that have been unclear or subject to differing legal interpretations in the past. The Agency is replacing the entirety of the 1971 certification regulations at 40 CFR part 121 with this final rule. The following sections further explain the Agency's rationale for the final rule, provide a detailed explanation and analysis for the substantive changes that the Agency is finalizing, and respond to significant public comments received on the proposed rule.

The EPA's 1971 certification regulations were issued when the Agency was but a few months old and the CWA had not yet been amended to include the material revisions to section 401.<sup>39</sup> In modernizing 40 CFR part 121, this final rule recognizes and responds to significant changes to the CWA that occurred after the 1971 regulations were finalized, especially the 1972 and 1977 amendments to the CWA.

Updating the 1971 certification regulations to clarify expectations, timelines, and deliverables also increases efficiencies. Some aspects of the 1971 certification regulations have been implemented differently by different authorities, likely because the scope and timing of review were not clearly addressed in EPA's regulations. While the EPA recognizes that States and Tribes have broad authority to implement State and Tribal law to protect their water quality, *see* 33 U.S.C. 1251(b), section 401 is a federal regulatory program that contains limitations on

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<sup>39</sup> *See* 36 Fed. Reg. 22487, Nov. 25, 1971, redesignated at 37 Fed. Reg. 21441, Oct. 11, 1972, further redesignated at 44 Fed. Reg. 32899, June 7, 1979; Reorganization Plan No. 3 of 1970 (creating the EPA), 84 Stat. 2086, effective Dec. 2, 1970.

when and how States and Tribes may exercise this particular authority. This final rule modernizes and clarifies the EPA's regulations and will help States, Tribes, federal agencies, and project proponents know what is required and what to expect during a section 401 certification process, thereby reducing regulatory uncertainty. For further discussion on ways the final rule will reduce regulatory uncertainty, see the Economic Analysis available in the docket for this final rule.

The EPA's 1971 certification regulations did not fully address the public notice requirements called for under CWA section 401(a)(1). The EPA is finalizing public notice requirements applicable to the EPA as the certifying authority but is not extending these requirements to other certifying authorities. The EPA encourages certifying authorities to consider how their public notice requirements can be developed or modified to ensure timely decision-making and to work with federal licensing and permitting agencies to minimize conflicts between State program administration and the federally established reasonable period of time.

Because the EPA has frequently received requests for information regarding certifying authority requirements, the Agency solicited comment on whether it would be appropriate or necessary to require certifying authorities to submit their section 401 procedures and regulations to the EPA for informational purposes. One commenter stated that it would be useful for the EPA to compile procedures of certifying authorities and make these publicly available in one location, while another commenter stated that it was unnecessary and inappropriate for the EPA to compile procedures of certifying authorities. Some commenters stated that it is not necessary for certifying authorities to submit their section 401 certification procedures and regulations to the EPA. One commenter noted that their procedures are public information available on the state website. Another commenter stated that a regulation that requires submittal of section 401

procedures is unnecessary and duplicative because the State already works with the EPA on section 401 procedures.

The EPA has considered these comments, and the final rule does not include a requirement for certifying authorities to submit their procedures to the EPA. However, to promote transparency and regulatory certainty, the EPA strongly encourages certifying authorities to make their certification regulations and any “water quality requirements” that may be considered during a certification process available online. In the interest of transparency, clarity, and public accessibility, the EPA may consider compiling certifying authorities’ procedures and water quality requirements on its website in the future.

In addition to the substantive changes in the final rule described below, the Agency made a number of revisions to streamline and clarify the regulatory text, and to more closely align that text to the language in section 401. These changes include revising the definitions of “Administrator” and “discharge”; replacing the language “proposed discharge location” in section 121.11(a) with “facility or activity” for consistency with section 401; revising certain text in sections 121.7(f), 121.12, and 121.16 for consistency with section 401; and removing redundant language throughout the final rule.

#### *A. When Section 401 Certification is Required*

##### *1. What is the Agency Finalizing?*

Under this final rule, the requirement for a section 401 certification is triggered based on the potential for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States. Consistent with section 401(a)(1), section 121.2 of the final rule provides that:

Certification is required for any license or permit that authorizes an activity that may result in a discharge.

This provision is modified from the proposal to provide greater clarity regarding when a certification is required, but the Agency does not intend for this change to alter the meaning of the provision from the proposal. This final rule preamble also clarifies in section III.M that certification also is required before a federal agency issues a general license or permit which may result in a discharge. As discussed further below, in the final rule the term “discharge” is defined to mean a point source discharge into a water of the United States, and the term “license or permit” is defined to mean a license or permit issued by a federal agency to conduct any activity which may result in a discharge. The final rule reflects that section 401 is triggered by the potential for a discharge to occur, rather than an actual discharge.

## 2. Summary of Final Rule Rationale and Public Comment

Section 121.2 of the final rule is consistent with the Agency’s longstanding interpretation and is not intended to alter the scope of applicability established in the CWA.

### a. “Discharge”

In section 401 and under the final rule, the presence of, or potential for, a discharge is a key element of when a water quality certification is required. Consistent with the text of the statute, under the final rule section 401 is triggered by the potential for a discharge to occur, rather than the presence of an actual discharge. The final rule defines the term “discharge” consistent with the proposal but replaces the term “navigable waters” in the proposed definition with “waters of the United States” in the final definition. This change is not intended to change the meaning of the definition; rather, it provides clarity and consistency across other CWA programs.

Many commenters agreed that the requirement for a section 401 certification is triggered by the potential for a discharge from a federally licensed or permitted activity. One commenter stated that the EPA’s reliance on an actual discharge would disregard the broad scope of section

401, which is designed to consider all potential discharges over the life of a federally licensed or permitted activity. One commenter stated that the proposed definition of “discharge” does not contemplate a potential discharge. The commenter asserted that such an interpretation would conflict with the text of section 401 which states that water quality certification applies to any “federal license or permit to conduct any activity...which may result in a discharge.”

The EPA agrees with commenters that the language of the statute triggers the section 401 certification requirement based on a potential discharge.<sup>40</sup> Section 401 is different from other parts of the Act<sup>41</sup> and provides certifying authorities with a broad opportunity to review proposed federally licensed or permitted projects that may result in a discharge into waters of the United States within their borders. The Agency does not agree that the concept of “potential” must be incorporated into the rule text definition of “discharge” itself; the final rule provision at section 121.2 clearly states that a 401 certification is required for “an activity which *may* result in a discharge” (emphasis added).

In the proposal, the EPA requested that certifying authorities and project proponents submit comment on prior experiences with undertaking the certification process and later determining that the proposed federally licensed or permitted project would not result in an actual discharge. The EPA also requested comment on whether there are specific procedures that could be helpful in determining whether a proposed federally licensed or permitted project will result in an actual discharge, and how project proponents may establish for regulatory purposes that there is no

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<sup>40</sup> A certification is required for “a Federal license or permit to conduct any activity ... which *may result* in any discharge into the navigable waters...” 33 U.S.C. 1341(a)(1) (emphasis added).

<sup>41</sup> See, e.g., *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) (holding that “the EPA cannot impose a duty to apply for a permit on a [concentrated animal feeding operation] that ‘proposes to discharge’ or any CAFO before there is an *actual* discharge.”); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (same).

potential discharge and therefore no requirement to pursue a section 401 certification. *See* 84 FR 44080. One commenter supported allowing the certifying authority or project proponent to determine, after the certification process is triggered, that a section 401 certification is not required where there is no actual or potential discharge. Another commenter expressed concern that this would allow the project proponent to determine that a section 401 certification is no longer required if the project proponent determines, after the section 401 certification process is triggered, that there is no actual or potential discharge. Another commenter stated that a project that is clearly defined early in the federal licensing or permitting and certification processes would help project proponents, certifying authorities, and federal agencies establish whether there is a potential discharge, and therefore promote compliance with section 401 obligations or clarify that 401 certification is not required. One commenter supported a process for determining when a project with a potential for a discharge will result in an actual discharge. A few commenters stated that a process for determining whether or not there will be an actual discharge ignores the statutory phrase “may result in a discharge,” and they asserted that giving project proponents a role in such a process is improper because they have no authority to find that section 401 would not apply.

This final rule does not provide a process for certifying authorities or project proponents to determine whether a federally licensed or permitted project may have a potential or actual discharge. However, the federal agencies whose licenses or permits may be subject to section 401 should consider whether such procedures, if incorporated into their implementing regulations, may provide additional clarity within their licensing and permitting programs. The EPA observes that, if a certifying authority or project proponent determines after the certification process is triggered that there is no actual discharge from the proposed federally licensed or

permitted project and no potential for a discharge, there is no longer a need to request or obtain certification. The EPA notes that ultimately the project proponent is responsible for obtaining all necessary permits and authorizations, including a section 401 certification. If the federal licensing or permitting agency determines that there is a potential for a discharge, as part of its evaluation of the proposed project, it may not issue the federal license or permit unless a section 401 certification is granted or waived by the certifying authority. If a project proponent requests a section 401 certification and later asserts that section 401 does not apply, the EPA recommends that the project proponent discuss the matter with, and provide supporting information and documentation to, the certifying authority and the federal agency. As provided in section 401(b) and section 121.16 of the final rule, the EPA is available to provide technical assistance throughout the section 401 process when requested to do so.

The EPA has concluded that unlike other CWA regulatory provisions, section 401 is triggered by the potential for any unqualified discharge, rather than by a discharge of pollutants. This interpretation, reflected in both the proposal and this final rule, is consistent with the text of the statute and with U.S. Supreme Court precedent. In *S.D. Warren*, the Court considered whether discharges from a dam<sup>42</sup> were sufficient to trigger section 401, even if those discharges did not add pollutants to waters of the United States. Because section 401 uses the term *discharge* but the Act does not provide a specific definition for the term,<sup>43</sup> the Court applied its ordinary dictionary meaning, “flowing or issuing out.” *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot. et al.*, 547 U.S. 370, 376 (2006). The Court concluded that Congress intended this term to

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<sup>42</sup> In *S.D. Warren*, the Court was not asked to decide whether the discharges from the dams were point source discharges.

<sup>43</sup> The Act provides, “The term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 33 U.S.C. 1362(16).

be broader than the term “discharge of pollutants” that is used in other provisions of the Act, like section 402. *See, e.g.*, 33 U.S.C. 1342, 1344; *S.D. Warren*, 547 U.S. at 380-81. For further discussion of *S.D. Warren*, see section II.F.4.a.ii of this notice, and for further discussion of discharges, see section III.A.2.a of this notice. The Court held that discharges from the dam triggered section 401 because “reading § 401 to give ‘discharge’ its common and ordinary meaning preserves the state authority apparently intended.” *S.D. Warren*, 547 U.S. at 387. The EPA’s interpretation reflected in this final rule is consistent with the Court’s conclusion.

Many public commenters addressed the proposed definition of “discharge.” Some commenters stated that the definition of “discharge” in the proposed rule should not contain the word “discharge.” Some commenters stated that the proposed rule’s definition of discharge is unnecessary because there is no ambiguity in that statutory term. Many commenters cited *S.D. Warren* to argue that the EPA’s definition of “discharge” was too narrow, and that the rule should define discharge by its common meaning, “issuing or flowing out.” Several commenters were concerned that if discharge was defined as being from a point source then the discharge would need to contain pollutants, because of the CWA definition of “point source.”<sup>44</sup> One commenter recommended that “discharge” be defined as “the specific outflow from a point source into navigable waters.” Another commenter asserted that *S.D. Warren* was wrongly decided and that section 401 should be triggered only by discharges of pollutants.

The EPA has considered these comments and concludes that, given the diverse interpretations presented in public comments, including a definition of “discharge” in the section 401 certification regulations will increase clarity. Consistent with the proposal, the Agency has

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<sup>44</sup> The CWA defines point source as “any discernible, confined and discrete conveyance ... from which pollutants *are or may be* discharged.” 33 U.S.C. 1362(14) (emphasis added).



concluded that a discharge need not involve pollutants in order to trigger section 401. The EPA disagrees with commenters who asserted that a point source discharge necessarily requires a discharge of pollutants. The definition of point source in section 502(14) of the CWA provides that a point source is a conveyance from which pollutants are *or may be* discharged. A discharge of pollutants is not required for a conveyance to be considered a point source. As discussed immediately above and in section III.A.2.a of this notice, the EPA's longstanding position is that the term "discharge" as used in section 401 is limited to point sources but includes releases regardless of whether they contain pollutants. The Agency disagrees with commenters who stated that using the term "discharge" within the definition of "discharge" creates confusion or ambiguity. Indeed, the final rule definition is consistent with the CWA section 502(16) definition of "discharge," which also contains the term "discharge." The EPA also disagrees with commenters who asserted that the proposed definition was narrower than the Court's opinion in *S.D. Warren*. As noted above, the final rule's definition is consistent with the Court's application of the ordinary meaning of the term. Finally, the EPA disagrees with the commenter's recommendation to define "discharge" as the specific outflow from a point source into navigable waters. The EPA has concluded that this language could be construed quite narrowly to mean a discharge from a specific "outfall" such as a pipe or outlet, while excluding discharges from dredge or fill projects.

One commenter requested that the EPA clarify that section 401 certification is required only where there is a discharge of pollutants to a water of the United States, and not simply a withdrawal of water. As discussed above, the EPA does not interpret section 401 as requiring a discharge of pollutants. However, the EPA agrees with commenters that a section 401 certification is not required for a water withdrawal that has no associated potential for a point

source discharge to a water of the United States. Multiple court decisions have concluded that a water withdrawal is not a discharge and therefore does not trigger the need for a water quality certification.<sup>45</sup>

b. “From a Point Source”

The final rule provides that, to trigger section 401, a discharge must be from a point source. Several commenters agreed that a section 401 certification is required only where there is a point source discharge. A few commenters agreed that Title IV of the CWA focuses on point source discharges, specifically in sections 402 and 404, leading them to conclude that section 401 should apply only to point sources as well. One commenter stated that the trigger for section 401 is specifically a potential point source discharge, citing to *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998). Some commenters stated that the Supreme Court in *S.D. Warren* held that the certification requirement was not limited to discharges of pollutants, but that the discharge must nonetheless be a point source discharge, citing *Dombeck*. Other commenters also referred to *S.D. Warren* to assert that the Supreme Court refused to limit the term “discharge” to only include a point source discharge. These commenters stated that the Supreme Court held that the term “discharge of pollutants” was limited to point sources and the term “discharge” was significantly broader. In doing so, many commenters took issue with the EPA’s reliance on *Dombeck*. One commenter cited *Russello v. United States*, 464 U.S. 16 (1983), to argue generically that “when ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”

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<sup>45</sup> See, e.g., *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (holding that withdrawal of water from lake does not constitute discharge for CWA section 401 purposes).

The final rule requirement that a discharge must be from a point source to trigger section 401 is consistent with case law from the Ninth Circuit, which concluded that the word “discharge” as used consistently throughout the CWA refers to the release from a point source, and that use is also appropriate for section 401. *Dombeck*, 172 F.3d at 1099. The EPA has consistently implemented the interpretation of section 401 articulated by the *Dombeck* court and adopts the Ninth Circuit’s interpretation in this final rule. The interpretation that a discharge must be a point source discharge is consistent with the structure of the Act and with the other CWA regulatory programs (*see* section III.A.2.a of this notice).<sup>46</sup>

The EPA disagrees with commenters who asserted that the Supreme Court in *S.D. Warren* specifically addressed whether a discharge must be from a point source. The Court’s focus in *S.D. Warren* was on whether pollutants must be added to constitute a “discharge.” *S.D. Warren*, 547 U.S. at 376-87. *See also ONDA v. USFS*, 550 F.3d 778, 783-84 (9th Cir. 2008) (noting that “[t]he issue in *S.D. Warren* was narrowly tailored to determine whether a discharge from a point source could occur absent addition of any pollutant to the water emitted from the dam turbines”). The Court stated that the term discharge is broader than “discharge of a pollutant” and “discharge of pollutants,” but noted that “discharge” is not defined in the statute. *S.D. Warren*, 547 U.S. at 376. The Court also noted that for purposes of section 401, “neither the EPA nor FERC has formally settled the definition, or even set out agency reasoning,” and the Court therefore continued to rely on the dictionary definition of the term to mean “flowing or issuing out” or “to emit; to give outlet to; to pour forth . . .” *Id.* In 2008, after the *S.D. Warren* decision was issued, the Ninth Circuit was asked to revisit its 1998 decision in *Dombeck*. In response, the

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<sup>46</sup> *See, e.g.*, Briefs of the United States in *ONDA v. Dombeck*, Nos. 97-3506, 97-35112, 97-35115 (9th Cir. 1997), and *ONDA v. USFS*, No. 08-35205 (9th Cir. 2008).

Ninth Circuit held that “[n]either the ruling nor the reasoning in *S.D. Warren* is inconsistent with this court's treatment of nonpoint sources in § 401 of the Act, as explained in *Dombeck*.

Accordingly, the principles of *stare decisis* apply, and this court need not revisit the issue decided in *Dombeck*.” *ONDA v. USFS*, 550 F.3d 778, 785 (9th Cir. 2008). The Agency agrees.

In this final rule, the EPA is formally establishing a definition for the term “discharge” for purposes of CWA section 401 and setting out its reasoning in support of the definition. The final rule’s definition is consistent with the Agency’s longstanding interpretation of the statute and with relevant Ninth Circuit case law, and nothing in *S.D. Warren* or *PUD No. 1* precludes the EPA from adopting the definition in the final rule.<sup>47</sup>

c. “Into a Water of the United States”

Consistent with the proposal, the final rule reflects that section 401 is triggered by a potential discharge into a water of the United States. 33 U.S.C. 1341(a)(1), 1362(7). Potential discharges into State or Tribal waters that are not waters of the United States do not trigger the requirement to obtain section 401 certification. *Id.* at 1342(a)(1).

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<sup>47</sup> On April 23, 2020, the United States Supreme Court issued a decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, No. 18–260, which addressed the question whether the Clean Water Act requires a NPDES permit under section 402 of the Act when pollutants originate from a point source but are conveyed to navigable waters by groundwater. The Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.” *Op.* at 15 (emphasis in original). The Court articulated a number of factors that may prove relevant for purposes of section 402 permitting. *Id.* at 16. Consistent with the Court’s decision, if a discharge of a pollutant is determined to require a federal permit under section 402 as the functional equivalent of a direct discharge, it will also be subject to section 401 because, as discussed above, the term “discharge” under section 401 includes a discharge of a pollutant subject to section 402. *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 375 (2006) (citing 33 U.S.C. 1362(16)). This conclusion is consistent with the Court’s decision in *Maui*.

Many commenters agreed that certification is required where there is a discharge into a water of the United States. Some of these commenters agreed that section 401 would not apply to non-federal waters. A couple of commenters expressed concern that by limiting the requirement for a section 401 certification to activities that discharge directly to waters of the United States, there would be many federally permitted projects where section 401 certification would not be required even though discharges from those projects could impact State or Tribal waters. A few commenters argued that the EPA's deference to States has been inconsistent, noting that the Agency's proposed rulemaking to define "waters of the United States" placed strong emphasis on States' authority to protect their water resources, while the proposed section 401 rulemaking reduces States' authority to protect their water resources. These commenters said that they had difficulty reconciling the States' expanded role under the "waters of the United States" rule with the diminished role of States in the proposed rule.

The final rule's interpretation that a discharge must be into a water of the United States to trigger the section 401 certification requirement is consistent with the plain text of the statute, is supported by the legislative history, and is consistent with other CWA regulatory program requirements that apply to discharges to waters of the United States, not discharges to State or Tribal waters. *Id.*; *see also* H.R. Rep. No. 92-911, at 124 (1972) ("It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into *navigable waters.*") (emphasis added); *see also* section III.A.2.a of this notice for discussion on discharges to waters of the United States. The EPA disagrees with commenters who suggested that this rule is inconsistent with the recently finalized rule defining "waters of the United States." Both rules are intended to provide clarity on the scope of federal authority and State or Tribal authority to regulate certain waters. The final definition of "waters of the United States"

reestablishes the appropriate balance between waters subject to federal regulation and those waters or features that are subject to exclusive State or Tribal jurisdiction. As described further in section II.F of this notice, section 401 provides a role for States and authorized Tribes to participate in federal license or permitting processes, including those in which they may otherwise be preempted by federal law. States and Tribes retain authority to regulate and protect waters of the State or Tribe in accordance with State and Tribal law and where not preempted by federal law. As explained in detail in the proposed rule preamble, section 401 is a *federal* regulatory provision, as certification conditions are incorporated into federal licenses and permits and are enforceable by the federal government. If section 401 was expanded to cover activities with discharges to non-federal waters, such an expansion would authorize the federal government to regulate waters and features that are beyond the scope of CWA regulatory authority; Congress did not intend these waters to be subject to federal regulation.

d. Federal License or Permit

Section 401 certification requirements are triggered when a project proponent applies for a federal license or permit to conduct an activity which may result in any discharge into a water of the United States. 33 U.S.C. 1341(a)(1). However, in those cases where a federal agency discharges dredged or fill material into waters of the United States but does not issue itself a license or permit, the Corps' regulations require reasonable and appropriate efforts to demonstrate compliance with effluent limitations and state water quality standards, which typically includes seeking certification.<sup>48</sup> Consistent with the proposal, the final rule defines the

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<sup>48</sup> See Appendix C of Engineer Regulation 1105-2-100; 33 CFR 335.2 (“[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters, but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.”).

term “license or permit” to mean “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in a discharge.”

The CWA does not list specific federal licenses and permits that are subject to section 401 certification requirements. The EPA believes that the most common examples of licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits issued by EPA in States where the EPA administers the NPDES permitting program; CWA section 404 permits for the discharge of dredged or fill material and Rivers and Harbors Act sections 9 and 10 permits issued by the Army Corps of Engineers; and hydropower and interstate natural gas pipeline licenses issued by FERC. The final rule does not provide an exclusive list of federal licenses and permits that may be subject to section 401. Instead, the final rule focuses on whether there is potential for the activity authorized by the federally issued license or permit to result in a discharge from a point source into a water of the United States.

A few commenters requested clarification on the requirement for a federal license or permit to trigger the need for a section 401 certification. One commenter asserted that the proposal was unclear because the proposed regulatory text did not tie the need for a section 401 certification to an application for a federal license or permit. The EPA disagrees with the suggestion that the proposal does not tie the need for a section 401 certification to the application for a federal license or permit. Section 121.2 of the proposed rule stated that “any applicant for a license or permit to conduct any activity which may result in a discharge shall provide the Federal agency a certification from the certifying authority...” As noted above, the proposal and this final rule define the term “license or permit” as one issued by a federal agency.

A few commenters suggested that additional language be added to the proposed definition of “discharge” to clearly describe what constitutes a point source, including language concerning

equipment and construction activities associated with the discharge of dredged or fill material.

The EPA believes that defining “point source” in the final rule is unnecessary in light of the statutory definition (33 U.S.C. 1362(14)) and court decisions concluding that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are “point sources.”<sup>49</sup>

Another commenter asserted that States have required facilities to obtain a section 401 certification where the facility has a permit from a State with delegated authority under section 402. Section 401 certification is not required for State- or Tribally-issued permits when the State or Tribe has assumed operation of the permit program in lieu of the federal government.<sup>50</sup> The CWA statutory language is clear that the license or permit triggering the need for a section 401 certification must be a federal license or permit, that is, one issued by a federal agency.

Implementation of a State or Tribal permit program in lieu of the federal program does not “federalize” the resulting licenses or permits for purposes of section 401. Section 401 certification does not apply to those authorizations issued by the State or Tribe.<sup>51</sup> The CWA

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<sup>49</sup> See, e.g., *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *U.S. v. Larkins*, 657 F.Supp. 76 (W.D. Kent. 1987), *aff’d*, 852 F.2d 189 (6th Cir. 1988).

<sup>50</sup> State or Tribal implementation of a license or permit program in lieu of the federal program, such as a CWA section 402 permit issued by an authorized state, does not federalize the resulting licenses or permits and therefore does not trigger section 401 certification. This conclusion is supported by the legislative history of CWA section 401, which noted that “since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.” H.R. Rep. No. 92-911, at 127 (1972). The legislative history of the CWA amendments of 1977, discussing state assumption of section 404, also noted that “[t]he conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority.” H.R. Rep. No. 95-830, at 104 (1977).

<sup>51</sup> As described elsewhere in this notice, the Corps’ existing certification regulations provide a reasonable period of time of 60 days for federally issued CWA section 404 permits. 33 CFR 325.2(b)(1)(ii); see also final rule preamble section III.F. To the extent that certifying authorities believe that this timeline is too short to provide certification for a Federally issued section 404 permit, States are authorized to assume administration of that program for certain waters. 40



anticipates that States and Tribes issuing those permits will ensure consistency with CWA provisions and other appropriate requirements of State and Tribal law as part of their permit application evaluation.

One commenter noted that the proposal indicated that the Corps does not process and issue permits for its own activities and stated that federal agencies should be subject to the same certification request submittal requirements as non-federal agency project proponents. In response, the EPA notes that the CWA ties the requirement for a section 401 certification to a federal license or permit. As a result, in circumstances where there is no federal license or permit, including when federal agency activities do not require a license or permit, section 401 certification is not required. Nonetheless, the Corps' current regulations indicate that section 401 requires the Corps to seek section 401 certification for dredge and fill projects involving a discharge into waters of the United States, regardless of whether the Corps issues itself a permit for those activities.<sup>52</sup>

#### B. *Pre-filing Meeting Request*

##### 1. What is the Agency Finalizing?

The EPA proposed to establish a pre-filing meeting process when the EPA is the certifying authority to ensure that the Agency receives early notification of anticipated projects and can discuss information needs with the project proponent. Many commenters stated that it would be helpful for project proponents to request pre-filing meetings with all certifying authorities (not just the EPA), although most commenters did not say that certifying authorities should be

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CFR 233; *see also Final Report of the Assumable Waters Subcommittee* (May 2017), available at <https://www.epa.gov/cwa404g/nacept-assumable-waters-subcommittee-final-report-may-10-2017>.

<sup>52</sup> See 33 CFR 336.1(a)(1) ("The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.").

required to accept such meetings. In light of these comments, and because the benefits of the pre-filing process are applicable regardless of the identity of the certifying authority, the EPA is finalizing a requirement that all project proponents, including federal agencies when they seek certification for general licenses or permits, submit a request for a meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request.<sup>53</sup> The final rule requires only that the project proponent request the pre-filing meeting and leaves to the discretion of the certifying authority whether a pre-filing meeting may be necessary or appropriate for a particular project. The meeting request itself provides advance notification to the certifying authority that a certification request may be forthcoming and therefore promotes early coordination, even when the certifying authority does not hold a pre-filing meeting.

## 2. Summary of Final Rule Rationale and Public Comment

The EPA is expanding the proposed pre-filing meeting request requirement, and under this final rule, all project proponents, including federal agencies when they seek certification for general licenses or permits, must submit a request for a pre-filing meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request. This requirement will ensure that certifying authorities receive early notification and have an opportunity to discuss the project and potential information needs with the project proponent before the statutory timeframe for review begins. The final rule also encourages the certifying authority to

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<sup>53</sup> The EPA recognizes that some activities conducted in response to a hurricane or other similar event may require emergency procedures that do not allow for compliance with pre-request meeting procedures. Federal licensing and permitting agencies should establish such emergency procedures by regulation to ensure that project proponents, certifying authorities, and the public are made aware of the types of circumstances that could prevent compliance with ordinary pre-filing meeting request requirements. Nothing in this final rule precludes federal agencies from establishing emergency procedures to ensure continuation of operations or other appropriate emergency procedures, including procedures that may not allow for compliance with pre-request meeting procedures.

take actions to initiate coordination with the Federal agency after receiving the pre-filing meeting request.

In order to facilitate early engagement and coordination, and using its discretion to interpret the term “request” as applied to certification procedures, the EPA is finalizing a regulatory requirement in section 121.4 of the final rule that all project proponents must submit a request for a pre-filing meeting at least 30 days in advance of submitting a certification request. Under the final rule, certifying authorities are given an opportunity to accept or host such a pre-filing meeting, but they retain discretion to decline the request or simply not respond. Under the final rule, if the certifying authority does not respond to the request, the project proponent may submit a certification request as long as it includes documentation, as required in section 121.5 of the final rule, that it requested the pre-filing meeting at least 30 days prior to submitting the certification request.

In addition to requiring the project proponent to request a pre-filing meeting, the proposed rule would have required EPA to respond within a certain period of time and also required the parties to discuss certain topics and to be prepared to share certain information during the pre-filing meeting. The final rule no longer requires those additional procedures and instead encourages certifying authorities, project proponents and federal licensing and permitting agencies to engage in early coordination. Under the final rule, if the certifying authority grants the pre-filing meeting, the project proponent and the certifying authority are encouraged to discuss the nature of the proposed project and potential water quality effects. The final rule also encourages the project proponent to provide a list of other required State, interstate, Tribal, territorial, and federal authorizations and to describe the anticipated timeline for construction and operation. After receiving the pre-filing meeting request, the certifying authority is encouraged to

contact the federal agency and to identify points of contact, so as to facilitate information sharing between the certifying authority and Federal agency throughout the certification process. In the final rule, the EPA encourages these important steps to help promote an efficient certification process. These recommendations are consistent with many recommendations in EPA's 2019 Guidance (which EPA is rescinding in this action, as no longer necessary in light of this final rule) as well as with recommendations made in the proposed rule preamble.

The Agency believes that the term "request" as used in the statute is broad enough to include an implied requirement that, as part of the submission of a request for certification, a project proponent also provide the certifying authority with advance notice that a certification request is imminent. The relatively short time (no longer than one year and possibly much less) that certifying authorities are provided under the CWA to act on a certification request (or else waive the certification requirements of section 401(a)) provides additional justification in this context to interpret the term "request for certification" to allow the EPA to require a pre-filing meeting request.

Many commenters supported the EPA's proposal to require project proponents to request pre-filing meetings. Several commenters supported the proposed pre-filing process where the EPA is the certifying authority, while others supported extending it to all certifying authorities. Several commenters stated that such meetings, while useful for a variety of purposes (*e.g.*, identifying what information may be needed from a project proponent), should not be mandatory. Other commenters stated that such meetings should be used only for complex, non-routine projects. Some commenters asserted that the pre-filing process could penalize States who choose not to attend pre-filing meetings, even though it may not be feasible or necessary in all instances, and argued that the EPA should not seek to supplant a State's expertise on when a pre-

filing meeting is necessary. Several commenters noted that some States have established their own pre-filing meeting requirements and should be encouraged to develop their own criteria, including choosing whether to hold such pre-filing meetings. Additionally, some commenters felt that the proposed 30-day notice for such meetings was too short, while another commenter requested that the EPA provide “safeguards” to ensure that States do not use the pre-filing meeting as an opportunity to request unreasonable information or studies that would delay a certification request. Some commenters noted that while likely to yield useful information, the proposed regulations lack a means of enforcing the pre-filing procedures and asserted that the process could reward applicants who fail to cooperate with pre-filing procedures. Some commenters noted that the proposal did not include expected outcomes from such early collaboration and asserted that this could result in inadequate certification requests. Some commenters stated that the EPA’s proposal did not include sufficient guidance on best practices for pre-filing meetings, such as what information the project proponent should be prepared to share with the certifying authority.

The EPA agrees with commenters who stated that pre-filing meetings would generally improve early coordination and promote efficiency in section 401 certification decision-making, although the utility of such meetings could depend on the complexity of the project and resources of the certifying authority. The EPA also agrees with commenters who stated that pre-filing meetings under the final rule should have an accountability mechanism, and thus the final rule requires the project proponent to include documentation of its pre-filing meeting request in any certification request filed with the certifying authority (*see* section III.C of this notice). The EPA recommends that project proponents submit a pre-filing meeting request in writing and maintain a copy of the written request, as the final rule requires such documentation to be

submitted in a certification request. If a project proponent does not submit a pre-filing meeting request or does not maintain documentation that it made the request, the subsequent certification request will not meet the requirements of the final rule, and in such circumstances the reasonable period of time would not start.

The final rule does not set a limit on how early a project proponent may submit a pre-filing meeting request or initiate discussions with a certifying authority in order to encourage early and ongoing coordination between the project proponent and the certifying authority. The Agency disagrees with the suggestion that a pre-filing meeting requirement could delay a certification request. Even if the certifying authority does not agree to meet, the project proponent is free to submit a certification request 30 days after submitting the meeting request. *See* section III.C of this notice. In some cases, a project proponent may find it beneficial to engage with a certifying authority well in advance of the 30-day pre-filing meeting period, particularly for complex projects. The 30-day period after submittal of the pre-filing meeting request and prior to the submission of a certification request provides an opportunity for the project proponent to verify whether a section 401 certification is required and for the certifying authority to identify potential information, in addition to the certification request requirements in this rule, that may be necessary for the certifying authority to act on the certification request. Ultimately, the Agency believes that this provision of the final rule will allow for a more efficient and predictable certification process for all parties.

Under the final rule, certifying authorities are not required to grant pre-filing meeting requests. The EPA has determined that certifying authorities are in the best position to determine when a pre-filing meeting is necessary to help ensure that they receive all necessary information to act on certification requests within the reasonable period of time. The Agency encourages

project proponents and certifying authorities to use the pre-filing meeting to discuss the proposed project and to determine what information is needed to enable the certifying authority to act on the certification request in the reasonable period of time. Additionally, certifying authorities and project proponents may use the pre-filing meeting to discuss other appropriate water quality requirements that may be applicable to the certification request and any necessary procedural requirements (*e.g.*, ascertain whether the State or Tribe requires any fees). The EPA expects that certifying authorities may take advantage of a pre-filing meeting request for larger or more complex projects and might choose to decline the request for more routine and less complex projects. The pre-filing meeting may be conducted in-person, or remotely (through telephone, online, or other virtual platforms), as deemed appropriate by the certifying authority.

Certifying authorities are encouraged to develop pre-filing meeting procedures tailored to identify information that may be needed to review and act on a certification request. Such procedures could vary depending on the project type, project complexity, or the triggering federal license or permit, to enable greater efficiency and predictability in the certification process. The Agency emphasizes that any pre-filing meeting procedures or pre-filing expectations developed or promulgated by certifying authorities cannot modify the requirements for a certification request established in this final rule. The EPA also notes that any new State or Tribal pre-filing meeting procedures may not be used to extend the 30-day timeline following a pre-filing meeting request for project proponents to submit a certification request, nor may pre-filing meeting procedures be used to extend or modify the reasonable period of time established by a Federal agency. The EPA believes that requiring a pre-filing meeting request too early could be an abuse of the process and result in an unreasonable extension of the reasonable period of time that Congress envisioned, which is not to exceed one year. Rather, such procedures should

be focused on allowing both the project proponent and the certifying authority an opportunity to develop a common understanding and expectation of the types of information that may be necessary for a certifying authority to act on a certification request consistent with section 401 and this final rule.

Some commenters asserted that pre-filing meetings should not limit a State's ability to request additional information after a certification request has been made. Other commenters did not think that pre-filing meetings should preclude project proponents from withdrawing and resubmitting certification requests to extend the reasonable period of time, which they stated is sometimes necessary for complex projects. Under the final rule, the pre-filing meeting request requirement does not affect a certifying authority's ability to request additional information from a project proponent once the reasonable period of time has started (*see* section III.F.2.a of this notice), but such information requests cannot operate to extend the reasonable period of time (*see* section III.F for further discussion on how certifying authorities may request an extension to the reasonable period of time from the federal agency). This requirement also does not affect the ability of project proponents to withdraw a certification request voluntarily (*see* section III.F of this notice). The Agency disagrees with commenters who asserted that the pre-filing meeting request requirement would penalize certifying authorities who choose not to avail themselves of the pre-filing meeting; accepting a pre-filing meeting is not a mandatory requirement. The Agency anticipates that certifying authorities will act in good faith when evaluating pre-filing meeting requests and identifying information they may need to review and act on a certification request. The Agency notes that early engagement and coordination, including participation in a pre-filing meeting, may help increase the quality of information that is provided by project



proponents and may reduce the need for the certifying authority to make additional information requests during the reasonable period of time.

In addition to pre-filing meetings between certifying authorities and project proponents, commenters also suggested a variety of ways in which federal agencies could facilitate information-sharing prior to the certifying authority's receiving a certification request. For example, one commenter expressed support for advance coordination between States and federal agencies to streamline federal licensing and permitting actions. A couple of commenters suggested that federal agencies should notify States and Tribes of projects that require a section 401 certification as soon as possible. One of these commenters stated that the coordination between State and federal environmental review requirements and processes should be done without diminishing section 401 certification authority. Another commenter objected to federal agency use of pre-filing meetings to inform the duration of the reasonable period of time for review for certification actions, unless there were clear inputs and outcomes for such meetings.

The EPA recognizes that federal agencies are uniquely positioned to promote pre-filing coordination with certifying authorities and with project proponents, so as to harmonize project planning activities and to promote timely action on certification requests. The Agency acknowledges that other federal agencies may provide for pre-filing discussions in their regulations, *see, e.g.*, 18 CFR 5.1(d)(1) and 33 CFR 325.1(b), and recognizes that many certifying authorities and federal agencies already have coordination memos, memoranda of agreement, or other cooperative mechanisms in place. The Agency is not finalizing specific requirements for federal agency coordination with certifying authorities (except when federal agencies are themselves seeking certification, *see* section III.M of this notice). However, if there is a pre-application process required or facilitated by the federal licensing or permitting agency

and if the timing of that process would allow the project proponent to request a pre-filing meeting from the certifying authority at least 30 days before submitting a certification request, then a joint meeting among federal agencies, certifying authorities, and project proponents could also be used as the pre-filing meeting for a certification request.

In general, the EPA encourages federal agencies to notify certifying authorities as early as possible about proposed projects that may require a section 401 certification. Additionally, the EPA encourages federal agencies (1) to timely respond to requests from certifying authorities for information concerning the proposed federal license or permit, and (2) to the extent consistent with agency regulations and procedures, provide technical and procedural assistance to certifying authorities and project proponents upon request. The EPA also encourages project proponents and certifying authorities to engage in any additional pre-filing discussion opportunities that may facilitate greater communication and information sharing, and therefore a more efficient and informed certification decision.

### *C. Certification Request/Receipt*

#### *1. What is the Agency Finalizing?*

Under this final rule, a project proponent must submit a certification request to a certifying authority to initiate an action under section 401. Consistent with the text of the CWA, the final rule provides that the statutory timeline for certification review starts when the certifying authority receives a “certification request,” rather than when the certifying authority receives a “complete application” or “complete request” as determined by the certifying authority. After considering public comments, the final rule has been revised to provide a general definition of “certification request” and provide two different lists of documents and information that must be included in a certification request: one list for individual licenses and permits and a separate list

for the issuance of a general license or permit. The certification request requirements, as well as other provisions of the final rule tailored to the issuance of general licenses and permits, are described in detail in section III.M of this notice.

To better account for water quality certifications required for general licenses or permits, the definition of “project proponent” has been modified as follows pursuant to section 121.1(j) of the final rule:

*Project proponent* means the applicant for a license or permit or the entity seeking certification.

This final rule’s definition of “project proponent” extends all of the substantive and procedural requirements in this final rule to federal agencies seeking certification for a general license or permit.

Pursuant to section 121.1(c) of the final rule,

*Certification request* means a written, signed, and dated communication that satisfies the requirements of section 121.5 (b) or (c).

Section 121.5(b) of the final rule includes an enumerated list of documents and information that must be included in a certification request for an individual license or permit, including the seven components from the proposed rule and two new components. A certification request must include all components to start the statutory clock. A certification request submitted for an individual license or permit shall:

1. identify the project proponent(s) and a point of contact;
2. identify the proposed project;
3. identify the applicable federal license or permit;
4. identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
5. include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
6. include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all

- approvals or denials already received;
7. include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
  8. contain the following statement: *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief’*; and
  9. contain the following statement: *‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’*

The statutory reasonable period of time for a certifying authority to act on a certification request begins when the certifying authority is in “receipt of such request.” The EPA is finalizing the definition of the term “receipt” as proposed:

*Receipt* means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.

Together, these provisions will provide greater certainty for project proponents, certifying authorities, and federal agencies concerning when the reasonable period of time has started. Each of these provisions is discussed in greater detail below.

## 2. Summary of Final Rule Rationale and Public Comment

The Act places the burden on the project proponent to obtain a section 401 certification from a certifying authority in order to receive a federal license or permit. As discussed in the preamble to the proposed rule, the section 401 certification process begins on the date when the certification request is received by a certifying authority. The statute limits the time for a certifying authority to act on a request as follows:

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

33 U.S.C. 1341(a)(1) (emphasis added). The plain language of the Act requires that the reasonable period of time to act on certification not extend beyond one year after the receipt of the certification request. The statute, however, does not define those terms. As discussed in the preamble to the proposed rule, because they are not defined and their precise meaning is ambiguous, these terms are susceptible to different interpretations. This ambiguity has resulted in inefficiencies in the certification process; individual certification decisions that have extended beyond the statutory reasonable period of time; regulatory uncertainty; and litigation. *See* section II.F of this notice. As the Agency charged with administering the CWA, the EPA is authorized to interpret through rulemaking undefined terms, including those associated with CWA section 401 certifications. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Given the large number of certification requests submitted each year<sup>54</sup> and the statutory requirement that those requests be acted on within a reasonable period of time not to exceed one year, the EPA is finalizing definitions for the terms “certification request” and “receipt” to provide project proponents, certifying authorities, and federal agencies with clear regulatory text stating when the statutory reasonable period of time begins.

The EPA is finalizing a definition for “certification request” that requires a written, signed, and dated communication that satisfies the requirements of section 121.5(b) or (c) of the final rule. A certification request that meets the requirements of the final rule begins the certifying authority’s reasonable period of time. The structure of the final rule is somewhat different than the proposal because, as described above, the final rule contains two separate lists for certification requests; however, the purpose and function of the “certification request” remains consistent with the proposal.

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<sup>54</sup> *See* section 2 of the Economic Analysis.

Commenters provided numerous recommendations for what should be included in a certification request, including but not limited to information on prior contamination at the project site, payment of applicable fees, specific project proponent contacts, specific geographic information, construction and mitigation plans, engineering plans, sediment sampling plans, aquatic resources and their condition, the characteristics of the discharge, description of all affected wetlands and waters, State-listed species information and habitat assessments, baseline data and information, and the complete federal license or permit application, as well as a statement from the project proponent that all information is true and correct. Conversely, a few commenters recommended removing the specific components of a “certification request” and argued that the proposed information was not necessary for a certifying authority to act on a request for certification. The EPA considered all of these comments and made some modifications in the final rule. The final definition of “certification request” requires that the project proponent’s written submission contain the components identified in either section 121.5(b) or (c) of the final rule.

Section 121.5(b) of the final rule addresses certification requests submitted by project proponents, as the term is defined in the final rule, and it requires the seven components listed in the proposed definition, with a slight modification in one component, as well as two additional components: a statement that all information contained in the request is true, accurate, and complete to the best of the project proponent’s knowledge, and documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. These additional components are discussed further below. The Agency has modified the fourth factor in the final rule to require project proponents to identify the location and the *nature of* any potential discharge that may result from the proposed project and the

location of receiving waters. This modification clarifies that project proponents should identify the nature of the discharge, including (as appropriate) the potential volume, extent, or type of discharge associated with the proposed project. This modification is similar to the modification made in the factors to be considered by a federal agency when setting the reasonable period of time. See section III.F for further discussion. The inclusion of this information will provide the certifying authority with clear notice that the project proponent has submitted a certification request and a sufficient baseline of information to allow it to begin its evaluation in a timely manner.

The Agency requested comment on whether it should include a reference to “any applicable fees” among the components of its definition of a certification request. Many commenters stated that a certifying authority’s applicable fees should be a required element in the final rule. One commenter suggested that applicable fees for a section 401 certification might be affected by the type of federal license or permit for which they are applying. After considering all of the public comments on this issue and conducting additional research into whether and how certifying authorities may require fees for section 401 certifications, the EPA has decided not to include a reference to fees in the enumerated list of elements of a certification request. States vary in how and when they require fees in the certification process. They have different fee structures and different requirements for the timing of paying a certification-related fee. The Agency encourages the project proponent and the certifying authority to discuss during the pre-filing meeting the certifying authority’s fee structure and the project proponent’s obligation, if any, to pay a fee related to the section 401 certification. Given the States’ differing practices in this area, the final rule does not include proof of fee payment as a required component of a certification request to trigger the statutory timeframe for State or Tribal action.

Consistent with the proposal, the final rule requires a project proponent to identify the location of any potential discharge in the certification request. To meet this requirement, the EPA recommends that the project proponent provide locational information about the extent of the project footprint and all potential discharge locations, as shown on design drawings and plans. The EPA recommends that project proponents be prepared to provide underlying geographic data such as shapefiles or geodatabases. Alternatively, the project proponent should consider identifying potential discharge locations on hard copy maps. The Agency acknowledges that the appropriate format and method to identify potential discharge locations may change with evolving technology and recommends that project proponents and certifying authorities discuss the best approach to providing the information required for the certification request.

The EPA received comments from the public and feedback from other federal agencies that the categories of information identified in the proposed definition of certification request may not be appropriate for a federal agency seeking section 401 certification for a general license or permit. For example, at the time of certification, a federal agency may not know the location of every potential discharge that may in the future be covered under a general license or permit. In response to these comments and to improve the utility and clarity of the final rule, the Agency is also finalizing in section 121.5(c) of the final rule a separate list of documents and information required for a “certification request for issuance of a general license or permit.” See section III.M of this notice for further discussion of the certification process for general licenses or permits.

The Agency received public comments emphasizing the efficiencies that can be gained by federal agencies issuing general licenses and permits, such as general NPDES permits issued by the EPA and Nationwide or Regional section 404 general permits issued by the Corps. A few commenters stated that federal agencies should follow procedures that are consistent with other



project proponents when submitting certification requests and complying with other aspects of the rule. The EPA agrees with commenters that consistent procedural and substantive requirements for all water quality certifications would promote regulatory certainty for project proponents, federal agencies, and certifying authorities and has modified the final rule definition of “project proponent” to promote consistent water quality certifications. Section 121.1(j) of the final rule defines “project proponent” to mean “the applicant for a license or permit or the entity seeking certification.” With this modified definition, the final rule clarifies that federal agencies that issue general licenses or permits must comply with all of the procedural and substantive requirements of this final rule.

Consistent with the proposal, sections 121.5(b) and (c) of the final rule include the following statement—*“The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.”*

This requirement is intended to remove any potential ambiguity on the part of the certifying authority about whether the written request before it is, in fact, a “certification request” that triggers the statutory timeline. One commenter noted that, if a project proponent is uncertain whether the certifying authority will be able to certify its project within the reasonable period of time, the project proponent could submit a non-compliant certification request that omits one or more components, which would prevent the reasonable period of time clock from starting. The Agency agrees with this commenter that if a project proponent does not submit a certification request as defined at section 121.5(b) of the final rule, then the reasonable period of time does not begin. The Agency encourages pre-filing meetings, engagement, and information sharing between project proponents and certifying authorities, but such engagement does not start the

reasonable period of time unless a certification request, as defined in the final rule, is submitted to the certifying authority.

Sections 121.5(b) and (c) of the final rule include two additional provisions that were not in the proposed rule: a statement that all information contained in the certification request is true, accurate, and complete to the best of the requester's knowledge and belief, and documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. Both requirements are intended to create additional accountability on the part of the project proponent to ensure that information submitted in a certification request accurately reflects the proposed project, and to ensure that the project proponent has complied with the requirement to request a pre-filing meeting with the certification authority. If a certification request does not include these components, it does not meet the conditions of section 121.5(b) or (c) of the final rule and it does not start the statutory clock.

Notwithstanding the text of section 401(a)(1), which refers to a "request for certification," some commenters asserted that requiring a "certification request," as opposed to a "complete application," contravened congressional intent and cooperative federalism, and represented a change in the EPA's longstanding practice. As discussed in the preamble to the proposed rule, section 401 does not use the term "complete application" or prescribe what a "certification request" would require. The reference in prior EPA guidance to a "complete application," without explaining what an "application" must include, has led to inconsistent and subjective determinations about the sufficiency of certification request submittals. This, in turn, has caused uncertainty about when the statutory reasonable period of time begins to run. The Agency is authorized to interpret ambiguous statutory terms, *see Chevron*, 467 U.S. at 844, and is finalizing

what it deems the most appropriate, reasonable interpretation of “certification request” to reduce uncertainty and enable project proponents and certifying authorities to objectively and transparently understand which submittals start the reasonable period of time.

Some commenters also asserted that a standardized definition of “certification request” cannot capture all of the kinds of information necessary for the certifying authority to make an informed decision on a certification request. They expressed concern that project proponents would be incentivized to circumvent a certifying authority’s meaningful review by not providing additional information. Additionally, some commenters suggested that certifying authorities should be given the flexibility to develop their own definition of a “request” or “application” to meet their applicable State and Tribal laws and needs. While the Agency acknowledges these commenter concerns, the EPA disagrees. As discussed above, the Agency is authorized to interpret the term “certification request” because the Act does not define the term, nor does it prescribe the amount of information that must be included in a certification request. *See Chevron*, 467 U.S. at 844. In this final rule, the Agency is interpreting “certification request” to include components that the Agency believes are necessary to provide a certifying authority with clear notice that a request has been submitted and a sufficient baseline of information for the certifying authority to begin its review. It is important to distinguish between the amount of information appropriate to start the certifying authority’s reasonable period of time and the amount of information that may be necessary for the certifying authority to take final action on a certification request. The components of a “certification request” identified in the final rule are intended to be sufficient information to start the reasonable period of time but may not necessarily represent the totality of information a certifying authority may need to act on a certification request. Nothing in the final rule’s definition of “certification request” precludes a

project proponent from submitting additional, relevant information or precludes a certifying authority from requesting and evaluating additional information within the reasonable period of time (*see* section III.H of this notice for specific procedures when the EPA is the certifying authority). Indeed, in many cases it may be in the interest of the project proponent and may provide a more efficient certification process if relevant information about the discharge and potential impacts to the receiving waters is provided to the certification authority early in the certification process.

As discussed in section III.B of this notice, the Agency is finalizing a pre-filing meeting request requirement for all project proponents, including federal agencies when they seek a section 401 certification for general licenses or permits. The Agency is including a documentation requirement for the pre-filing meeting as a component of a certification request to ensure that certifying authorities are given an opportunity to engage in early discussions with project proponents and federal agencies, if desired. The Agency encourages project proponents and certifying authorities to use the pre-filing meeting to discuss the proposed project and to determine what information (if any), in addition to that required to be submitted as part of the “certification request,” may be needed to enable the certifying authority to take final action on the certification request in the reasonable period of time. The certifying authority may also take this opportunity to discuss any other State or Tribal permits that may be applicable or required for the proposed project.

Although some commenters requested that the Agency include more detailed certification request components, the Agency believes additional detailed information is best ascertained through pre-filing meetings and engagement during the reasonable period of time. If pre-filing meetings, discussions, and submittals during the reasonable period of time fail to produce the

information necessary for a certifying authority to grant certification or grant certification with conditions, the final rule reaffirms that certifying authorities retain the ability to deny or waive a certification request. It is important to reiterate that the burden is on the project proponent to submit a certification request to the certifying authority and work cooperatively to provide additional information as appropriate to facilitate the certification process. Likewise, the burden is on the certifying authority to evaluate the certification request in good faith and to request information, documents, and materials that are within the scope of section 401 as provided in this final rule and that can be produced and evaluated within the reasonable period of time.

The Agency also disagrees with commenters who asserted that the proposed definition of “certification request” would narrow State authority, that it contradicted the goals and purpose of the CWA, and that it was contrary to the plain language of section 401. The term “request” is not defined in the Act. As discussed above, the Agency is authorized to interpret ambiguous statutory terms, and believes the final definition of “certification request” and the provisions in sections 121.5(b) and (c) of the final rule will provide needed clarity and help ensure that certifying authorities have sufficient notice and information to begin their evaluation of a certification request. The final rule does not limit the ability of a certifying authority to communicate with project proponents and to identify and request additional information necessary to take an informed action on a certification request in the reasonable period of time. Indeed, by providing greater clarity on when the statutory reasonable period of time begins and by encouraging early and constructive dialogue between project proponents and certifying authorities, the final rule facilitates a certifying authority’s efforts to protect waters of the United States within its borders within the timeframe mandated by Congress.

A number of commenters provided examples of projects that had been delayed because a certifying authority repeatedly requested additional information before a certification request would be considered “complete.” These commenters asserted that these types of repeated requests for additional information undermine the statutory requirement to act on a certification request within a reasonable period of time, not to exceed one year. Other commenters asserted that a certifying authority cannot reasonably act on a certification request based only on the information required by the proposed rule. The EPA acknowledges the desire for certifying authorities to have all necessary information as soon as possible in the certification process, but the Agency must balance that desire while remaining loyal to the statutory requirement for timely action on a request. The Agency believes that its final rule strikes the appropriate balance by identifying the kinds of information that provide a reasonable baseline about any project while recognizing the ability of certifying authorities and project proponents to request and provide additional information both before and after the review clock starts.

The Agency also sees the value in finalizing certification request components that are objective and do not require subjective determinations by a certifying authority about whether the request submittal requirements have been satisfied. A certification request must have all components listed at section 121.5(b) or (c) of the final rule to start the statutory reasonable period of time. If any of the components of section 121.5(b) or (c) of the final rule is missing from the certification request, the statutory reasonable period of time does not start. With respect to the component of a certification request for project proponents at section 121.5(b)(5) of the final rule, the EPA acknowledges that not all proposed projects may be subject to monitoring or treatment for a discharge (*e.g.*, section 404 dredge or fill permits rarely allow for a treatment option). The final rule has been modified slightly to add the word “manage” to broaden the scope

of information that may be provided by project proponents. However, if a project is not subject to monitoring, treatment, or management requirements for its discharge, the project proponent should state that in the certification request. The effect of such statement would be to make that component inapplicable to that project. Many commenters expressed concern that the proposed components of a certification request would require subjective determination regarding the appropriate level of detail. However, the Agency believes that the final certification request components do not require a subjective inquiry into their sufficiency or any inquiry beyond whether they have been provided in the request.

The final rule requires a certification request to include a statement that, to the best of the project proponent's knowledge and belief, all information contained in the request is true, accurate, and complete. This requirement is intended to ensure that project proponents are making a good-faith effort to provide the certifying authority with accurate information necessary to begin its evaluation of the certification request. Additionally, as discussed above, the EPA anticipates that the project proponent and the certifying authority will coordinate information needs before and throughout the reasonable period of time, if necessary. The EPA expects that the project proponent both will provide a certification request that includes the components identified in the final rule and will engage with the certifying authority, as requested, to understand and respond to appropriate and reasonable additional information requests that are within the scope of section 401 and can be generated and reviewed within the reasonable period of time. For its part, the EPA expects that the certifying authority will act within the scope of section 401, as provided in the CWA and in this final rule.

The EPA solicited comment on whether the Agency should generate a standard form for all certification requests. Most commenters did not support the development of a standard form and

noted that most States have their own forms for “complete applications.” At this time, the Agency is not developing a standard form for project proponents to use to submit certification requests, but notes that States and Tribes that wish to continue using standard forms may choose to update those forms to be consistent with the final definition of “certification request.” The Agency may consider developing such forms in the future, if useful to project proponents and certifying authorities.

Some commenters asked for clarification on the practical effect on the review clock of a project proponent’s independently withdrawing a certification request by its own choice and not at the request of a certifying authority. If a project proponent withdraws a certification request because the project is no longer being planned or if certain elements of the proposed project materially change from what was originally proposed or from what is described or analyzed in additional information submitted by the project proponent, it is the EPA’s interpretation that the certifying authority no longer has an obligation to act on that request. To avoid scenarios like those presented in *Hoopa Valley* and to address the EPA’s policy concern that section 401 certification delays also delay implementation of updated State and Tribal water quality standards and other requirements, the EPA expects that voluntary withdrawal by the project proponent will be done sparingly and only in response to material modifications to the project or if the project is no longer planned. In these circumstances, if the project proponent seeks to obtain a certification in the future, the project proponent must submit a new certification request. At a minimum, the project proponent would have to wait 30 days before re-submitting a certification request, because under the final rule project proponents must request a pre-filing meeting at least 30 days before submitting a certification request, and voluntary withdrawal by a



project proponent of a prior certification request does not obviate this pre-filing requirement. For further discussion about project proponent withdrawal, see section III.F of this notice.

Commenters asked the Agency to clarify when a change in the proposed project would be so significant that it would require a new request. Many commenters asserted that the proposed rule would prevent extending the reasonable period of time even though the scope of the project changes during the reasonable period of time. Other commenters noted that the proposed rule did not account for project changes that may result from the federal license or permit review processes. A couple of commenters stated that the EPA should provide guidance to federal agencies on when a new certification request would be necessary based on the type and change in a project's scope, while one commenter asked the Agency to clarify whether projects that change in scope or design require a new certification.

After considering public comments on this issue, the final rule does not identify each circumstance that may warrant the submission of a new certification request because the Agency believes that such circumstances are best addressed on a case-by-case basis. However, if certain elements of the proposed project (e.g., the location of the project or the nature of any potential discharge that may result) change materially after a project proponent submits a certification request, it may be reasonable for the project proponent to submit a new certification request. Administrative changes, such as a change in the point of contact or the list of other required permits, and minor changes to the proposed project, such as those that do not change the project footprint in a material way, should not warrant the submission of a new certification request. The EPA recognizes that complex projects that are subject to multi-year federal licensing or permitting procedures may change over time as a result of those federal procedures. From a practical standpoint, the EPA encourages project proponents to maintain close coordination and

communication with certifying authorities and recommends that the project proponent provide information about any project changes to the certifying authority regardless of when the change occurred or whether a certification has already been issued by the certifying authority. As an additional measure, the Act and the final rule provide certifying authorities with the opportunity to inspect a certified project prior to initial operation to ensure the project will comply with the certification.

The Agency is finalizing the definition of “receipt” as proposed, so as to provide clarity for project proponents and certifying authorities about when the certification request is deemed received and the statutory clock begins. The CWA does not define the term “receipt of such request” in section 401(a)(1), which has led States, Tribes, and project proponents, as well as courts, to use different definitions. “Receipt of the request” has been used alternately to mean receipt by the certifying authority of the request in whatever form it was submitted by the project proponent, or receipt of a “complete application” as determined by differing regulations established by certifying authorities. The statute also does not specify how requests are to be “received” by the certifying authority—whether by mail, by electronic submission, or some other means. The EPA understands that some certifying authorities have established general submission procedures for project proponents to follow when seeking State or Tribal licenses or permits. The EPA encourages the use of consistent procedures for all submittals, including section 401 certification requests. The final rule requirement that certification requests be documented as received “in accordance with applicable submission procedures” is intended to recognize that certifying authorities may have different procedures for submission of requests established in State or Tribal law. For instance, some certifying authorities may require hard copy paper submittals, while others may require or allow electronic submittals. If the certifying

authority accepts hard copy paper submittals, the EPA recommends that the project proponents submitting a hard copy request send the request via certified mail (or similar means) to confirm receipt of the certification request. If the certifying authority allows for electronic submittals, the EPA recommends that the project proponent set up an electronic process to confirm receipt of the request. Nothing in the final rule precludes the use of electronic signatures when deemed appropriate by the certifying authority. The EPA recommends that project proponents retain a copy of any written or electronic confirmation of submission or receipt for their records.

One commenter disagreed with the suggestion that the word “receipt” is ambiguous but nonetheless agreed with the proposed rule because, this commenter asserted, states have made efforts to evade the one-year reasonable period of time. For the reasons explained above, EPA disagrees with the commenter and concludes that the word is ambiguous. Another commenter stated that section 401 does not require certifying authorities to act “upon” receipt of a request, but “after” receipt of a request. This commenter is correct that the statute requires certifying authorities to act on a certification request “within a reasonable period of time (which shall not exceed one year) after receipt of such request.” As discussed above, the Agency has the authority to interpret ambiguous statutory terms, including the terms “request” and “receipt of such request.” The Agency has defined “receipt” to mean “the *date* that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.” Therefore, under the EPA’s final rule, the statutory clock begins on the date when the certification request is documented as received by the certifying authority.

Some commenters recommended that “receipt” should mean the date when a certification request and all materials required by State or Tribal law are documented as received by a certifying authority in accordance with applicable submission procedures. The Agency disagrees

with these commenters. The EPA is aware that some States have regulations establishing what should be in a request for certification and when it will be considered “complete.” For instance, the California Code of Regulations states: “Upon receipt of an application, it shall be reviewed by the certifying agency to determine if it is complete. If the application is incomplete, the applicant shall be notified in writing no later than 30 days after receipt of the application, of any additional information or action needed.” Cal. Code Regs. tit. 23, 3835(a). The EPA also notes that some State regulations may require the completion of certain processes, studies, or other regulatory milestones before it will consider a certification request “complete.” Although the CWA provides flexibility for certifying authorities to follow their own administrative procedures, particularly for public notice and comment, *see* 33 U.S.C. 1341(a), these procedures cannot be implemented in such a manner as to violate the CWA. The Act requires the timeline for review to begin “after receipt” of a certification request, notwithstanding any completeness determination procedure, and it requires certifications to be processed within a “reasonable period of time (which shall not exceed one year.”).

One principal goal of this rulemaking is to provide additional clarity and certainty about the certification process, including when the reasonable period of time begins. Establishing a consistent and objective list of information necessary to start the statutory reasonable period of time is necessary to achieve that goal. As discussed above, the Agency has defined the elements necessary to provide the certifying authority with sufficient notice and information to begin to evaluate a request for certification. If there are additional information needs aside from the finalized components provided in a certification request, the certifying authority and project proponent may discuss those needs during the pre-filing meeting (*see* section III.B of this notice) or during the reasonable period of time. The requirement that certification requests be received

“in accordance with applicable submission procedures” cannot be used by certifying authorities to introduce unreasonable delay between when an agency receives a certification request and when “receipt” occurs, as this would contravene this final rule.

Many commenters expressed concern that the proposal lacked any requirement that a request be “administratively complete.” One commenter asserted that without a robust administrative record on which to rely, certifying authorities would be more vulnerable to successful challenges of their certification determinations. The final rule establishes that a certification request is administratively complete when it contains the items set forth in section 121.5(b) or (c). The final rule requires that the project proponent request a pre-filing meeting with the certifying authority before submitting the certification request, thereby providing that certifying authority the opportunity to discuss any additional informational needs it may have. If a project proponent fails to supply the certifying authority with information necessary to assure that the discharge from the proposed project complies with the water quality requirements, the certifying authority may so specify in a denial of the certification. If the certifying authority requests information from the project proponent that is beyond the scope of section 401, the project proponent’s remedy lies with a court of competent jurisdiction. To avoid situations where the certifying authority requests information from project proponents that cannot be developed and submitted within the reasonable period of time, the EPA recommends that both the project proponent and the certifying authority work in good faith, consistent with section 401, and have early and sustained coordination and communication to streamline the overall certification process.

Some commenters asserted that under the proposed rule, the federal agency would not have a reliable way to determine whether a certifying authority has received a request because the proposed rule required only project proponents, and not certifying authorities, to alert federal

agencies when a project proponent had submitted a certification request. Project proponents have the burden of requesting certification from a certifying authority and for providing federal agencies with the certification to help fulfill the requirements of a federal license or permit. After reviewing public comments, the Agency has decided not to finalize the requirement proposed at section 121.4(b) in order to provide all interested parties with greater clarity and a common understanding regarding the status of a certification request. To effectuate notice of a certification request at the earliest point in time, section 121.5(a) of the final rule requires a project proponent to submit a certification request to the appropriate certifying authority and the federal licensing or permitting agency concurrently. Including this requirement in the final rule will provide the federal agency with notification about a certification request and sufficient information to determine the reasonable period of time for that certification request. This process will also address commenter concerns by providing federal agencies and certifying authorities with a concurrent notice when a certification request is received. As discussed above, the Agency recognizes that certifying authorities may have different submission procedures and recommends that project proponents submit copies to the federal agency in a manner consistent with the certifying authority's submission procedures, to ensure that the request is received at the same time. The final rule requires the federal agency to communicate the reasonable period of time to the certifying authority within 15 days of receiving the certification request from the project proponent in accordance with section 121.5(a) of the final rule. The EPA expects federal licensing and permitting agencies to provide the notice required in this final rule and strongly encourages federal agencies to promulgate or update agency-specific regulations to implement CWA section 401 and this final rule. However, in the unlikely event that the federal agency does not provide the required notice, the EPA recommends that certifying authorities assume that the

federal agency's promulgated default reasonable period of time applies (e.g., the Corps' 60 days). If the federal agency fails to provide notification and has not promulgated a default or categorical reasonable period of time, the Agency recommends that certifying authorities assume the reasonable period of time expires one year from the date the certification request was received. The Agency recommends that all parties retain copies of certification requests for their records in case there is any misunderstanding about the beginning of the reasonable period of time.

EPA acknowledges that many States and Tribes have established their own requirements for section 401 certification request submittals, which may be different from or more extensive than the "certification request" requirements set forth in this final rule. However, these additional requirements should not be used to expand the certification request requirements in this final rule, which are intended to establish clear expectations for certifying authorities and project proponents, and which provide a transparent and consistent framework for when the reasonable period of time begins. The EPA notes that certifying authorities may update their existing section 401 certification regulations to be consistent with the EPA's regulations. Additionally, the EPA observes that certifying authorities may wish to work with neighboring jurisdictions to develop regulations that are consistent from State to State. This may be particularly useful for interstate projects, like pipelines and transmission lines, requiring water quality certifications from more than one State.

Some commenters requested additional clarification about when project proponents should submit a certification request, relative to the timelines in federal licenses or permits or other federal laws. One commenter stated it would be helpful to specify a point in the federal permitting timeline when project proponents should submit a certification request. The

commenter suggested that this point in time should be based on when States would have adequate information to make a certification decision. One commenter explained that if a State is required to issue section 401 certification before NEPA environmental documentation is complete and made available, the State would have to initiate state environmental review before NEPA documents are available, which is an unnecessarily burdensome approach for both the State and the applicant. Other commenters noted that the proposed rule could place an unnecessary burden on States and Tribes if an EIS results in a no action alternative being chosen, but the State or Tribe has already expended resources to complete a section 401 certification. The EPA also observes that some federal permit or license procedures can be lengthy and can result in project modifications in the early stages of the process.

The Agency is not prescribing a specific point in a federal licensing or permitting process when project proponents are required to submit a certification request. The Agency is aware that FERC's regulations already establish when during the hydropower licensing process a project proponent may request certification. Specifically, FERC's regulations require project proponents to complete a years-long process that includes environmental studies and reviews before a project proponent may request certification for that federal license. *See* 18 CFR sections 5.22, 5.23. The Agency encourages all federal licensing and permitting agencies to evaluate their programs and processes and to consider promulgating or updating their section 401 implementing regulations to specify when a section 401 certification request should be submitted. Providing additional specificity and procedures for project proponents may reduce the duplication of work between federal, State and Tribal authorities and may make the certification process more efficient. In the absence of formal guidance or rulemaking from the appropriate federal licensing or permitting agency, the EPA recommends that project proponents, certifying



authorities, and federal agencies coordinate and discuss the appropriate timing for a section 401 certification request in light of the federal licensing or permitting process and other project approval requirements.

#### D. *Certification Actions*

##### 1. What is the Agency Finalizing?

Consistent with the text of the CWA, under the final rule a certifying authority may take one of four actions pursuant to its section 401 authority: grant certification, grant certification with conditions, deny certification, or waive its opportunity to provide a certification. These actions are reflected in section 121.7 of the final regulatory text. Any action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification (*see* section III.E of this notice), must be completed within the established reasonable period of time (*see* section III.F of this notice), and must otherwise be in accordance with section 401 of the CWA (*see* section III.G of this notice). Alternatively, a certifying authority may expressly waive the certification requirement. Under the final rule, certifying authorities may also implicitly waive the certification requirement by failing or refusing to act (*see* section III.G.2.d of this notice). All certification actions must be in writing, and the contents and effects of such actions are discussed below in section III.G of this notice. The final rule is consistent with the Agency's longstanding interpretation of what actions may be taken in response to a certification request.

##### 2. Summary of Final Rule Rationale and Public Comment

Under the final rule, if the certifying authority determines that the discharge from a proposed project will comply with specific provisions enumerated in CWA section 401(a) and with other appropriate State or Tribal water quality requirements, it may grant that certification with or

without conditions, as appropriate. To provide additional clarity, section 121.1(n) of the final rule defines “water quality requirements” (*see* section III.E.2.b of this notice for further discussion of this definition). If the certifying authority cannot certify (with or without conditions) that the discharge from a proposed project will comply with “water quality requirements,” it may either deny or waive certification. There may be multiple reasons why a certifying authority is unable to certify, including a lack of resources for reviewing the certification request, higher priority work that the certifying authority must attend to, or evidence that the discharge will not comply with “water quality requirements.” Under the former circumstances, waiver would be appropriate; and under the latter circumstance, denial would be appropriate.

a. Grant

When a certifying authority grants a section 401 certification, it has concluded that the potential point source discharge into waters of the United States from the proposed project will be consistent with “water quality requirements.” Granting certification allows the federal agency to proceed with issuing the license or permit.

b. Grant with Conditions

If the certifying authority determines that the potential discharge from a proposed project would be consistent with “water quality requirements” only if certain conditions are met, the authority may include such conditions in its certification. Where the certifying authority grants certification with conditions in accordance with section 401 and this final rule, the federal agency may proceed to issue the license or permit. Certification conditions that satisfy the requirements of this final rule must be incorporated into the federal license or permit, if issued, and become federally enforceable.

c. Deny

A certifying authority may deny certification if it is unable to certify that the potential discharge from a proposed project would be consistent with “water quality requirements” as defined in this rule. CWA section 401(a)(1) provides that “[n]o license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.” 33 U.S.C. 1341(a)(1).

This final rule reaffirms the ability of a project proponent to submit a new certification request if a previous request is denied. Some commenters agreed that it would always be proper to allow project proponents to request certification again if the certifying authority denied their previous request(s). Other commenters interpreted this provision as preventing certifying authorities from denying with prejudice and recommended that the final rule explicitly allow certifying authorities the option to deny with prejudice. These commenters asserted that denial with prejudice is a tool that preserves certifying authorities’ resources in cases where they are asked to review substantially similar certification requests for the same project once it has already determined that the project cannot comply with water quality requirements. Some commenters argued that section 401 does not preclude certifying authorities from denying requests with prejudice, and that regulations that precluded certifying authorities from doing so would be inconsistent with the statute. Other commenters noted that the statute does not explicitly authorize denial with prejudice or prevent a project proponent from requesting a new section 401 certification after a request is denied. The EPA agrees that the statute is silent on this issue. The EPA is not aware that any other CWA program authorizes a permit application to be denied with prejudice or explicitly precludes a permit applicant from re-applying for a permit after an initial denial. For consistency with other CWA programs, and because nothing in section

401 prohibits a project proponent from submitting a new certification request after a denial is issued, the EPA is finalizing this provision as proposed. In the event that a denial is issued, the EPA recommends that the project proponent discuss with the certifying authority whether project plans could be altered or whether additional information could be developed to demonstrate that the discharge from the proposed project will comply with applicable water quality requirements upon submittal of a new certification request.

d. Waive

Under the final rule, a certifying authority may waive its opportunity to certify in two ways (*see* section 121.9(a) of the final regulatory text). First, the certifying authority may waive expressly by issuing a written statement that it is waiving certification. Second, the certifying authority may implicitly or constructively waive by failing or refusing to act within the reasonable period of time, failing to act in accordance with the procedural requirements of section 401, or failing to act in accordance with the requirements in sections 121.7(c)-(e) of this rule.<sup>55</sup> As discussed throughout this final rule preamble, section 401 requires a certifying authority to act on a certification request within a reasonable period of time, not to exceed one year. If the certifying authority fails or refuses to act within that reasonable period, the certification requirement will be deemed waived by the federal licensing or permitting agency. *Id.* As described further in section III.G.2.d of this notice, if a certification grant, grant with conditions, or denial does not satisfy the procedural requirements of this final rule, it is waived. When a certifying authority waives the requirement for a certification, under this final rule the

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<sup>55</sup> As noted elsewhere in this notice, waiver of a specific certification condition does not waive the entire certification.

federal agency may proceed to issue the license or permit in accordance with its implementing regulations.

E. *Appropriate Scope for Section 401 Certification Review*

1. What is the Agency Finalizing?

While Congress did not provide a single, clear, and unambiguous definition of the appropriate scope of section 401, the text, structure, and legislative history of the CWA (including the name of the statute itself—the Federal *Water* Pollution Control Act Amendments of 1972 or, more commonly, the Clean Water Act) demonstrate that section 401 appropriately focuses on addressing *water quality* impacts from *potential or actual discharges* from federally licensed or permitted projects. The EPA, as the federal entity charged with administering the CWA, has authority to reasonably resolve any ambiguity in section 401’s scope through notice and comment rulemaking. To accomplish this, the Agency is finalizing as proposed section 121.3 of the regulatory text, which contains the following clear and concise statement of the scope of certification:

The *scope of a Clean Water Act section 401 certification* is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.

The Agency is also finalizing definitions of the terms “discharge” and “water quality requirements.” Together, these provisions of the final rule provide clarity on the scope of section 401. As explained in section III.A of this notice, based on the text and structure of the Act, as well as the history of modifications between the 1970 version and the 1972 amendments, the EPA has concluded that section 401 is best interpreted as protecting water quality from federally licensed or permitted activities that may result in point source discharges into waters of the United States. The Agency is finalizing the definition of *discharge* with only one change,

replacing “navigable waters” with “waters of the United States”:

*Discharge* for purposes of this part means a discharge from a point source into a water of the United States.

The Agency chose to use the more commonly used term “waters of the United States” to increase clarity in the final rule; however, this does not change the meaning of the definition. As described further below, the term “water quality requirements” is used throughout section 401, and the term “other appropriate requirements of State law” is used in section 401(d), but neither of these terms is defined in the CWA. As the terms are used in the CWA, the EPA interprets “other appropriate requirements of state law” to mean a subset of “water quality requirements.” To give more specific meaning to this ambiguous and undefined language, the final rule defines the term “water quality requirements” as follows:

*Water quality requirements* means applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.

The final rule uses the term “water quality requirements” to define the universe of provisions that certifying authorities may consider under sections 401(a) and 401(d). This definition has been modified from the proposal to provide additional clarity.

The scope of certification in section 121.3 is the foundation of the final rule. The scope is based on the text, structure, and legislative history of the CWA, is informed by important policy considerations and the Agency’s expertise, and informs all other provisions of the final rule. The scope of certification provides clarity to certifying authorities, federal agencies, and project proponents regarding the nature and breadth of the environmental review that is expected and the type of information that may reasonably be needed to review a certification request. The scope applies to all actions on a certification request, including a decision to grant, grant with conditions, or deny. The scope of certification also helps inform what may be a reasonable

period of time for a certifying authority to review and act on a certification request.

To help ensure that section 401 certification actions are taken within the scope of certification, the EPA is finalizing certain requirements for certifications in section 121.7(c) of the final rule, certification conditions in section 121.7(d) of the final rule, and denials in section 121.7(e) of the final rule. For further discussion of the contents and effects of certification conditions and denials, see section III.G of this notice.

## 2. Summary of Final Rule Rationale and Public Comment

The Agency is finalizing as proposed the scope of certification in section 121.3 of the final rule. Consistent with the proposal, the scope of a section 401 certification in the final rule is limited to assuring that a “discharge” from a federally licensed or permitted activity—rather than the activity as a whole—“will comply” with “water quality requirements.” The definition of “water quality requirements” has been modified in the final rule to provide additional clarity.

### a. Activity versus Discharge

The Agency is finalizing the rule as proposed, focusing the scope of section 401 on the discharge from a federally licensed or permitted activity, as opposed to the activity as a whole. As described in section II.G.1.b of this notice, section 401(a) explicitly provides that the certifying authority, described as “the State in which the *discharge* originates or will originate,” must certify that “any such *discharge* will comply with the applicable provisions of sections 301, 302, 303, 306 and 307 of this Act” (emphasis added). The plain language of section 401(a) therefore directs authorities to certify that the discharge resulting from the proposed federally licensed or permitted project will comply with the CWA. Although section 401(d) authorizes a certifying authority to establish conditions to assure that the “applicant” will comply with applicable water quality requirements, the EPA does not interpret the use of “applicant” in

section 401(d) as broadening the scope beyond consideration of water quality impacts from the “discharge,” as set out in section 401(a).

Some commenters asserted that the proposed scope of review for section 401 conflicts with the language of the CWA, applicable case law, and the legislative history of the CWA. These commenters asserted that the proper scope of section 401 should include all water quality impacts from the federally licensed or permitted activity or the project as a whole. Many commenters relied on the Supreme Court’s rationale in *PUD No. 1* and argued that the plain language of section 401(d) is unambiguous and reasonably read as authorizing conditions and limitations on the activity as a whole. Commenters asserted that the plain meaning of the statutory language is clear, as is the legislative intent, and further asserted that the EPA’s reliance on *Chevron* is misplaced. Commenters claimed that the Court in *PUD No. 1* found the statutory language unambiguous and analyzed section 401 under *Chevron* step 1 and therefore, they argue, *Brand X* does not support EPA’s reanalysis of the statutory language in a manner contrary to the *PUD No. 1* opinion. These commenters asserted that even if it was not a *Chevron* step 1 analysis, the Court’s majority opinion is a reasonable, holistic reading of section 401. These commenters also asserted that the Court did not rely on the EPA’s interpretation of the statute, but relied on the plain language of the statute and therefore, they argue, *Brand X* does not support the EPA’s reanalysis of the statutory language in a manner contrary to *PUD. No. 1*. Some commenters also asserted that the proposed scope of certification improperly departs from the EPA’s longstanding interpretation without providing an adequate justification.

Other commenters agreed with the EPA’s interpretation of the statutory language and case law analysis in the proposed rule preamble, including the interpretation of the scope of certification, and agreed that section 401 is a limited grant of federal authority to States and



Tribes. These commenters found the EPA’s interpretation of section 401 reasonable despite their view that it was inconsistent with the majority opinion in *PUD No. I*. These commenters also observed that the Court in *PUD No. I* did not have the benefit of an EPA interpretation of the 1972 version of section 401.

The Agency disagrees with commenters who asserted that the proposed scope of certification conflicts with the CWA, case law, and legislative history, and disagrees with the contention that the proposed scope was not supported by adequate justification. The scope of certification in the final rule is based on the EPA’s holistic examination of section 401 and the legislative history. Congress’ change in section 401(a) from “activity” to “discharge” in the 1972 amendments reflects the “total restructuring” and “complete rewriting” of the existing statutory framework in 1972 that resulted in the core provisions of the CWA that regulate discharges into waters of the United States. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of 1972 amendments). *See also County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, No. 18–260, Op. at 2 (April 23, 2020). The final rule gives due weight to Congress’ intentional choice to change the language in section 401(a) to ensure that “discharges” from federally licensed or permitted activities, rather than the activity as a whole, comply with appropriate water quality requirements.

The Agency also disagrees with commenters who asserted that the scope of certification is expressed unambiguously in section 401. As demonstrated by the variation in public comments received, section 401 is susceptible to a multitude of interpretations. The EPA also disagrees with the suggestion that the *PUD No. I* Court found section 401 to be unambiguous. Nowhere in the opinion does the Court conclude that section 401 is unambiguous. In fact, the Supreme Court in *PUD No. I* offered its own interpretation of the ambiguous language in section 401 when it

“reasonably read” the scope of section 401 to allow conditions and limitations on the activity as a whole. As discussed in detail in section II.F.4.a.i of this notice, although the Court did not articulate a *Chevron* step one or step two analysis in its decision, the Court did reference EPA’s 1971 certification regulations with approval and concluded that the EPA’s “reasonable interpretation” (based on those regulations) is entitled to deference. *Id.* The Court further found the EPA’s regulations to be consistent with the Court’s own reasonable reading of the language of sections 401(a) and (d). *Id.* at 712. As discussed in section II.F.4.a.i of this notice, the Court’s “reasonable reading” of a statute undercuts any argument that the statute’s text or meaning is unambiguous.

For the first time, the EPA has presented in this final rule the Agency’s interpretation and analysis of section 401. The Agency’s interpretation of the scope of section 401 as presented in section 121.3 of this final rule is not foreclosed by the holding in *PUD No. 1*. The Court’s conclusion that section 401 applied to the activity as a whole, rather than the discharge, did not follow from the unambiguous terms of the statute. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005). The scope of certification in section 121.3 of this final rule is permissible and is based on a reasonable interpretation of the ambiguity created by the different language Congress used in sections 401(a) and 401(d) of the Act.

Some commenters supported the alternative interpretation presented in the proposed rule to the effect that only the CWA sections enumerated in section 401(a) may be used as a basis for a water quality certification denial, while section 401(d) lists the considerations for applying conditions to a granted water quality certification. These commenters stated that this approach reflects the plain language of the CWA, and therefore that “any other appropriate requirement of State law” could be considered only when applying conditions to a water quality certification and

cannot be grounds for a denial. Other commenters stated that section 401(a) and section 401(d) do not and have never been interpreted to have different scopes. After considering all public comments on this and other issues, the Agency is not finalizing the proposed alternative interpretation. The EPA believes that interpreting section 401 as establishing different standards for issuing a denial under section 401(a) and for requiring conditions under section 401(d) is likely to lead to implementation challenges, including confusion by project proponents, certifying authorities and federal licensing and permitting agencies. Moreover, if a certifying authority determines that it must add conditions under section 401(d) to justify a grant of certification under section 401(a), that is equivalent to deciding that—without those conditions—it must deny certification. The standard is therefore essentially the same. As explained above in this section and in section II.F.4.a.i of this notice, the Agency is finalizing what it has determined to be the most appropriate, reasonable interpretation of section 401 that is based on a holistic analysis of section 401, the entirety of the CWA, and the legislative history.

Some commenters argued that the focus of the CWA 1972 amendments on discharges does not override what they assert are the plain terms of section 401 and accused the EPA of selectively picking language to support a narrower scope. Some commenters disagreed with the EPA's view that the proposed rule is necessary to update EPA's certification regulations to conform with the 1972 CWA amendments, and they maintained that the EPA's reading of the statute is inconsistent with Supreme Court precedent. Other commenters agreed that the proposed rule is necessary, as the existing water quality certification regulations were promulgated prior to the 1972 CWA amendments, and these commenters agreed that the conflicting interpretations that have followed the original promulgation need to be addressed through revised regulations.

For the reasons explained in section II.F of this notice, the EPA concludes that the existing certification regulations must be updated to reflect the language of the 1972 CWA amendments. This final rule reflects the EPA's holistic review of the CWA statutory text, the history of that text, and legislative history, and is informed by relevant case law. The EPA acknowledges that the final rule's focus on discharges, as opposed to the activity as a whole, is not consistent with the majority opinion in *PUD No. 1*; however, the Agency's rationale supporting its interpretation is grounded in the text of the statute, gives due weight to word choices made by Congress, and is clearly explained in the proposed and final rule preambles.

Some commenters asserted that the proposed rule was inconsistent with other holdings in *PUD No. 1*, including that (1) States could condition a certification on any limitations necessary to ensure compliance with State water quality standards or other appropriate requirements of State law; (2) a minimum flow condition was an appropriate requirement of State law; and (3) a State's authority to impose minimum flow requirements would not be limited on the theory that it interfered with FERC's authority to license hydroelectric projects. The EPA disagrees with these commenters. First, neither the proposed rule nor the final rule prohibits water quality-related certification conditions that are necessary to assure compliance with appropriate State or Tribal law. Rather, the rule clarifies the scope of laws that are appropriate for consideration and as the basis for certification conditions. As described in this section of the notice, the EPA made some changes in the final rule to provide additional clarity and regulatory certainty. Second, neither the proposed rule nor the final rule address minimum flow issues.

Some commenters asserted it was inappropriate for the proposed rule to rely on Justice Thomas' "nonbinding" dissent in *PUD No. 1* instead of the holding of the majority opinion. One commenter suggested that reliance on the dissent exposes the EPA to legal challenge, injecting

even more uncertainty into water quality certification programs. For the reasons explained in sections II.F.4.a.i, the EPA disagrees with these commenters. The EPA is not relying on any single judicial opinion for its interpretation of ambiguous statutory terms in this final rule.

Rather, the final rule reflects the EPA's holistic analysis of the text, structure, and history of CWA section 401, informed by the Agency's expertise developed over nearly 50 years of implementing the CWA.

Commenters asserted that the proposed rule would weaken the ability of States and Tribes to protect water quality, and some commenters asserted that the proposed rule would lead to negative impacts to the environment and public health. Some commenters asserted that the purpose of the rule is not consistent with the CWA's goal of protecting and enhancing the quality of the nation's waters. These commenters maintained that the proposed rule would not facilitate States' and Tribes' ability to carry out their roles and responsibilities under the CWA. Some commenters asserted that most federally licensed or permitted projects may result in water quality impacts beyond just those from a point source discharge, and argued that the appropriate scope of the certification is the activity and not only the discharge. These commenters provided examples of project impacts that they asserted may affect water quality but would be tangential to the discharge itself, including increased water withdrawals, releasing pollutants into groundwater, increased erosion and sedimentation, reduced stormwater infiltration, disconnecting ecosystems, and harming endangered species. Other commenters expressed concern that limiting the scope of section 401 to discharges would not allow States and Tribes to address indirect impacts from the project, such as impacts resulting from hydrological changes or increases in impervious surfaces that result in high-velocity runoff events that can deposit sediment or other pollutants into waterways.

The Agency recognizes the importance of protecting water quality and that aquatic resources serve a variety of important functions for protection of overall water quality. Ultimately, the Agency's interpretation of section 401 is a legal interpretation that has been established within the overall framework and construct of the CWA, informed by important policy considerations and the Agency's expertise. The purpose of this rulemaking is to provide a clear articulation of what is authorized by CWA section 401, including the appropriate procedures and scope of decision-making for water quality certifications, that is supported by a robust and comprehensive legal analysis of the statute. The federal licenses and permits that are subject to section 401 are also subject to additional federal agency statutory reviews, including the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act, all of which are intended to provide a comprehensive environmental evaluation of potential impacts from a proposed project. In addition, where applicable, the CWA's longstanding regulatory permitting programs, like those under sections 402 and 404, will continue to address water quality issues related to the discharge of pollutants into waters of the United States, and the CWA's non-regulatory measures, like protection of water quality from nonpoint sources of pollution under section 319, will continue to address pollution of water generally to achieve the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. Section 401, on the other hand, provides specific and defined authority for States and Tribes to protect their water quality in the context of a federal licensing and permitting process, including those processes in which State or Tribal authority may otherwise be entirely preempted by federal law. The language of section 401 makes it clear that this authority is limited and does not broadly encompass all potential environmental impacts from a project.

Some commenters requested examples of what considerations would be outside the scope of certification, based on the Agency's limiting the scope of certification to discharges, rather than to the entire activity or project. Commenters mentioned specific considerations that they believed should be excluded from the scope of certification in the regulatory text, such as effects caused by the presence of pollutants in a discharge that are not attributable to the discharge from a federally licensed activity, effects attributable to features of the permitted activity besides the discharge, and effects caused by the absence or reduction of discharge. The Agency generally agrees that such considerations would be beyond the scope of certification as articulated in this final rule; however, the Agency is not modifying the regulatory text to reflect these specific considerations, as there may be unique project-specific facts or circumstances that must inform whether a particular impact is caused by the discharge, as defined in this final rule.

b. Water Quality Requirements

Under the final rule, the term "water quality requirements" means applicable effluent limitations for new and existing sources (CWA sections 301, 302, and 306), water quality standards (section 303), toxic pretreatment effluent standards (section 307), and State or Tribal regulatory requirements for point source discharges into waters of the United States, including those more stringent than federal standards. The definition in the final rule has been modified from the proposal to provide additional clarity.

The term "water quality requirements" is used throughout section 401, and the term "other appropriate requirements of State law" is used in section 401(d), but neither of these terms is defined in the CWA.<sup>56</sup> Because the EPA interprets "other appropriate requirements of state law"

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<sup>56</sup> In 1971, EPA Administrator Ruckelshaus provided a written statement to the Chairman of the House Committee on Public Works concerning H.R. 11896. H.R. Rep. No. 92-911, at 147-171 (1972). The Administrator described 401(d) as it was drafted at the time as requiring

to be a subset of “water quality requirements,” the final rule uses the term “water quality requirements” to define the universe of provisions that certifying authorities may consider when evaluating a certification request pursuant to CWA sections 401(a) and 401(d). The EPA’s interpretation of these terms and the final definition are intended to closely align the scope and application of section 401 regulations with the text of the statute.

An interpretation of section 401 that most closely aligns with the text of the statute would limit “water quality requirements” to sections 301, 302, 303, 306 and 307 of the CWA and State and Tribal laws and regulations that are either counterparts to or that implement these enumerated sections of the Act. The EPA considered adopting this interpretation in the final rule, but recognizes that, in some cases, it may be difficult to determine whether a State or Tribal statute or regulation was adopted “to implement” sections 301, 302, 303, 306 and 307 of the CWA. In many cases, State or Tribal statutes may have been enacted prior to the 1972 CWA amendments, but updated or modified over the decades to implement or incorporate portions of the enumerated CWA provisions.

To avoid placing a potentially burdensome factual inquiry on States and Tribes, the final rule definition of “water quality requirements” is drafted more broadly to include those enumerated provisions of the CWA and State and Tribal regulatory requirements that pertain specifically to point source discharges into waters of the United States. This is consistent with the plain

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certifications to “assure compliance with Sections 301 and 302 and ‘any other applicable water quality requirement in such State.’” *Id.* at 166. The Administrator noted that “[t]he scope of the catchall phrase is not defined in Section 401, and the question arises as to whether certification by the State is to include certification with respect to discharges from point sources to meet the provisions of Sections 306 or 307.” *Id.* The Administrator stated that 401(d) could be “more clearly expressed if the term ‘applicable water quality requirement’ was defined. . . .” and then offered an interpretation and a definition of the term. *Id.* The Administrator’s recommendation was not adopted in the enacted bill, and this rulemaking is the first formal step the EPA has taken to clarify the meaning of the terms in section 401(d).



language of the statute because, with one exception, each of the enumerated CWA provisions in section 401 describes discharge-related limitations. The only exception is section 303, which addresses water quality standards, but these are primarily used to establish numeric limits in point source discharge permits. Further, and as described in section III.A of this notice, section 401 applies only to actual or potential discharges into waters of the United States. The final definition of “water quality requirements” therefore closely aligns with the text of the statute, while providing an objective test for whether a particular provision is within the scope of section 401. The Agency anticipates that this approach will increase clarity and efficiency in the certification process. Under this final rule, a State or Tribal regulatory requirement that applies to point source discharges into waters of the United States is a “water quality requirement” and is therefore within the scope of certification.

The phrase “state or tribal regulatory requirements for point source discharges into waters of the United States” in the final rule’s definition includes those provisions of State or Tribal law that are more stringent than federal law, as authorized in CWA section 510. 33 U.S.C. 1370. The legislative history supports the EPA’s interpretation in this final rule. *See* S. Rep. No. 92-414, at 69 (1971) (“In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit.”). It is important to note, however, that these more stringent provisions may not alter the scope of certification as provided in this final rule. For example, nonpoint source discharges and discharges to other non-federal waters are not within the scope of certification and are not included in the definition of “water quality requirements.” Accordingly, they are not factors to be considered when making decisions on certification requests.

Some commenters agreed that the proposed definition limiting “any other appropriate requirement of state law” to “EPA-approved state or tribal Clean Water Act regulatory program provisions” is the correct interpretation of the Act because section 401 cannot apply beyond the authority of the CWA. These commenters agreed that the principle *ejusdem generis* and the logic of Justice Thomas’s dissent in *PUD No. 1* show that the appropriate interpretation of “any other appropriate requirement of state law” extends “only to provisions that, like other provisions in the statutory list, impose discharge-related restrictions,” which are the “regulatory provisions of the CWA.” Other commenters expressed confusion regarding the meaning and scope of the phrase “EPA-approved state or tribal Clean Water Act regulatory program provisions” in the proposed rule and asked for clarification on which regulatory programs would be included in that term. Some commenters stated that this lack of clarity made the scope of the proposed rule ambiguous such that States and Tribes would not be able to implement the regulations.

The EPA has made some enhancements to the final rule definition of “water quality requirements” to provide better clarity and regulatory certainty. The final rule does not require these State and Tribal provisions to be EPA-approved. In making this change, the Agency considered that there may be State or Tribal regulatory provisions that address point source discharges into waters of the United States that only partially implement certain CWA programs or that were not submitted to the EPA for approval. The EPA also considered, as noted by some commenters, that States and Tribes may submit to the EPA CWA regulatory program provisions, including water quality standards and applications for “treatment as States” (TAS), and wait months or sometimes years for the EPA to act on those submittals. The final rule language addresses this concern by broadening the universe of State and Tribal laws that may be considered “water quality requirements” compared to the proposal.

A few commenters expressed concern that the proposed rule failed to recognize that most Tribes do not have EPA-approved water quality regulations. These commenters asserted that in areas where the EPA is the certifying authority, the Administrator would not be able to consider water quality protective ordinances or water quality standards adopted by Tribes, leaving no protection for most Tribal waters. The EPA appreciates these comments, and under the final rule, State and Tribal regulatory provisions for point source discharges into waters of the United States are “water quality requirements” regardless of whether they have been approved by the EPA. Therefore, if a Tribe has adopted water quality standards under Tribal law that serve as a basis for effluent limitations or other requirements for point source discharges into waters of the United States, the certifying authority must consider those provisions when evaluating a certification request.

Some commenters asserted that the proposed rule would limit the ability of a Tribe to adopt water quality regulations or to obtain TAS for section 401 certifications. Neither the proposal nor the final rule affect in any way the ability of a Tribe to adopt CWA water quality standards or obtain TAS. The EPA understands there may be unique challenges with Tribal implementation of CWA statutory authorities, but reiterates that pursuant to section 401(b), the EPA is available and obligated to provide technical expertise on any matter related to section 401. In addition, the EPA actively and routinely provides financial and technical assistance to Tribes for the development of aquatic resource protection programs. Such assistance includes Tribal capacity building for new or enhanced regulatory programs, as well as development of laboratory, field, and quantitative methods, tools, and trainings for monitoring and assessing aquatic resources. With this final rule, the Agency is reaffirming its responsibilities under section 401 to serve as a resource and consultant to Tribes requesting technical assistance.

Some commenters, citing the broad interpretation of “any other appropriate requirement of State law” in EPA’s Interim Handbook, stated that the EPA has not provided an adequate explanation or rationale for departing from its prior interpretation of the CWA. The EPA disagrees with the suggestion that it has not provided sufficient or adequate explanation for the interpretation presented in the proposed rule. In any event, the final rule is based in part on the plain language of section 401, which provides that the enumerated sections of the CWA and “any other appropriate requirement of State law” must be considered in a water quality certification. The CWA does not define what is an “appropriate requirement of State law,” and the EPA reasonably interprets this term to refer to a subset of “water quality requirements,” a term that is also used throughout section 401. The final rule, like the proposal, is informed by the principle *ejusdem generis*. Under this principle, where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. *See Wash. State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383-85 (2003). Given the breadth of potential interpretations of “water quality requirements” and “other appropriate requirement of State law” described throughout this notice, the Agency concludes that the most appropriate interpretation is one that remains loyal to the text of the statute. Accordingly, the final definition of “water quality requirements” includes sections 301, 302, 303, 306, and 307 of the CWA and State or Tribal statutes and regulations governing point source discharges into waters of the United States.

A few commenters stated that the EPA’s reliance on the canon of statutory interpretation *ejusdem generis* is unfounded because, if the context of a statute dictates an alternative interpretation, *ejusdem generis* should not apply, citing *N. & W. Ry. v. Train Dispatchers*, 499 U.S. 117 (1991). The EPA disagrees with these commenters who assert that the context of

section 401(d) dictates a different result. The use of the word “appropriate” in section 401(d) indicates that Congress intended to limit the phrase “requirement of state law” in some meaningful manner. It is reasonable to conclude that Congress intended that limitation to be informed by the enumerated provisions of the CWA that appear in section 401, as well as other key statutory touchstones like the terms “discharge” and “navigable waters,” *i.e.*, “waters of the United States.” *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 578-79 (1980) (rejecting application of *ejusdem generis* where—unlike the word “appropriate” in section 401(d)—the relevant statutory phrase “any other final action” did not contain limiting language that rendered its meaning uncertain and in need of further interpretation). The phrase “any other appropriate requirement of State law” in section 401(d) is not unlimited or expansive, but rather it contains limiting language (“appropriate”) that must not be read out of the statute. In short, the canon of statutory interpretation of *ejusdem generis* is a tool that the EPA reasonably and properly used to inform the interpretation of the ambiguous statutory text in section 401.

Many commenters agreed with the analysis in the proposed rule preamble that section 401 focuses on protecting water quality and is not intended to address other environmental impacts such as air emissions, transportation effects, climate change, and other examples mentioned in the preamble to the proposed rule. These commenters stated that the proposed rule’s definition of water quality requirements appropriately ensures that the scope of certification addresses water quality concerns within the scope of the CWA. A few commenters stated that the legislative history for the CWA generally supports water quality as the appropriate boundary for the scope of water quality certifications, citing 116 Cong. Reg. 8,984 (Mar. 24, 1970), and S. Rep. No. 92-414 (1971). The EPA agrees with these commenters and concludes that the final rule appropriately limits water quality certifications issued under section 401 to water quality issues.

Some commenters maintained that the proposed rule's definition of water quality requirements would allow a certifying authority only to consider numeric water quality criteria. Some commenters requested that the definition of water quality requirements be revised to explicitly include aquatic use criteria and impacts such as streamflow and water quantity. Some commenters expressed concern that the scope of water quality requirements under the proposed rule would no longer allow States and Tribes to consider water quality standards that go beyond the scope of, or are more stringent than, the CWA. Neither the proposed definition of "water quality requirements" nor the final rule would limit States to evaluating only numeric water quality criteria in a certification review. While numeric water quality criteria are a central element of a water quality certification, the final definition allows States and Tribes to evaluate narrative water quality standards and other regulatory requirements that apply to point source discharges into waters of the United States.

Some commenters requested that the final rule clarify that requiring minimum in-stream flows is beyond the scope of water quality requirements and that fish and wildlife impacts are not within the proper scope of section 401, because those impacts are more appropriately addressed under other federal statutes and regulations. The EPA agrees that, in some cases, these elements may be beyond the scope of section 401. However, neither the proposed rule nor the final rule specify whether minimum flow conditions would be appropriate certification conditions. Given the case-specific nature of such an analysis, the final rule does not include categorical exclusions requested by these commenters.

Some commenters stated that the proposed rule would violate the broad savings clause in section 510, which applies to any pollution control or abatement requirement. These commenters asserted that nothing in section 510 excludes conditions imposed under section 401. These

commenters further asserted that numerous courts have held that sections 401 and 510 evince Congress' clear intent not to preempt but to "supplement and amplify" State authority. The EPA interprets section 401 as providing an opportunity for States and Tribes to evaluate and address water quality concerns during the federal license or permit processes, which, in some cases, might otherwise preempt State authority. There is nothing in the text of section 401(d) that supports the idea that States have unbounded authority—as a result of section 510 or otherwise—to impose an unlimited universe of conditions on an applicant for a federal license or permit. Any such conditions must be—as the statute specifies—based on certain enumerated provisions of the CWA and on any other "appropriate" requirements of State law. As the Agency charged with administering the CWA, EPA is authorized to interpret "appropriate" in a way that balances the scope and focus of section 401 and State prerogative under section 510. If Congress intended for section 401 to reserve all State authorities over pollution control and abatement, as it did under section 510, Congress could have specifically referenced section 510 within section 401. Congress did not do so, and instead cited to other specific provisions of the CWA and referenced other "appropriate" requirements of State law.

In fact, the 1972 Senate Bill version of section 401(d) explicitly referenced section 510 and provided that a certification could include conditions necessary to assure that the applicant would comply with "any more stringent water quality requirements under State law as provided in section 510 of this Act..." S. 2770, 92nd Cong. (1972). This language was not included in the enacted bill, but the Senate Bill version demonstrates that Congress considered including a reference to section 510 within section 401, but did not do so. This is further evidence that Congress did not intend section 401 to operate as a broad savings clause for any pollution control or abatement requirement, as some commenters assert.

These commenters also fail to account for the use of the word “appropriate” in section 401(d) as a meaningful limitation on what may be considered as part of the scope of certification under section 401. For the reasons stated above, the Agency concludes that State and Tribal regulatory requirements for point source discharges into waters of the United States properly allow States to participate in the section 401 certification process, consistent with the CWA.

As discussed throughout this section and as illustrated by public comments, the terms “water quality requirements” and “any other appropriate requirement of state law” lend themselves to a range of potential interpretations. Informed by the public comments received, the EPA considered a number of different interpretations prior to finalizing the definition of the term “water quality requirements.” At one end of the spectrum, the Agency considered whether the text of section 401(d) could mean that the only State or Tribal law-based limitations allowed in a certification would be “monitoring” requirements “necessary to assure” that the applicant for a federal license or permit will “comply with” “any other appropriate requirement of State law.” While this may be a permissible interpretation of section 401(d), and it may appear consistent with the directive in CWA section 304(h) that the EPA establish test procedures for the analysis of pollutants and factors that must be included in a certification, the EPA is not adopting this interpretation in the final rule. Such an interpretation would significantly limit the universe of conditions related to “appropriate requirements of State law” to only monitoring conditions and would be narrower than the interpretation set forth in both the proposed and final rule. This interpretation also would not provide any additional clarity as to the scope of State or Tribal law that could be the basis for those monitoring conditions.

At the other end of the spectrum, the EPA considered whether section 401(d) certification conditions could be based on *any* State or Tribal law, regardless of whether it is related to water



quality. This interpretation reflects the current practice of some certifying authorities. The Agency rejected this broad and open-ended interpretation of section 401(d) as inconsistent with the structure and purposes of section 401 as reflected in the text of the provision, including Congress's inclusion of the limiting modifier "appropriate" in the phrase "any other appropriate requirement of State law." By including the term "appropriate," Congress placed at least some limits on the phrase "any other . . . requirement of State law." The EPA concludes that such an open-ended interpretation would be far more broad than the proposed rule and the final rule, would exceed the scope of authority provided under the CWA, and would further reduce regulatory certainty.

The EPA also considered another broader interpretation that would authorize certification conditions based on any State or Tribal water quality-related provision. Such an interpretation could bring in conditions that purport to address non-federal waters or that regulate nonpoint source discharges. Some commenters stated that section 401 provided a broad grant of authority to States and Tribes to protect water quality without limitations. These commenters asserted that to interpret the statute otherwise would read "any other appropriate requirement of state law" out of the statute. These commenters also cited other cases that suggest that a broad scope of State laws may be considered for a water quality certification. The EPA did not adopt this broad interpretation in the final rule because the EPA concluded that it is not required by the statute and is not the better reading of section 401(d). Although the interpretation has some superficial appeal, it errs by equating "appropriate" with "any" and thereby fails to provide meaning to the word "appropriate." Under the familiar interpretative canon, no portion of a statute may be construed as mere surplusage. Such an interpretation would also be inconsistent with the regulatory framework of the CWA, which addresses point source discharges from waters of the

United States.

Finally, the EPA considered an interpretation that would limit water quality requirements to those provisions of State or Tribal law that restore or maintain the physical, chemical, and biological integrity of the nation's waters, consistent with CWA section 101(a). These same principles could also be applied to only waters of the United States, or narrowed to only include water quality requirements that restore or maintain the chemical integrity of waters. Although this may be a permissible interpretation of the statute, the EPA concluded that it may not provide sufficient specificity or regulatory certainty.

The EPA considered all of these public comments and the varying interpretations described above and is finalizing a definition of "water quality requirements" that strikes a balance among various competing considerations while remaining loyal to the text of the CWA. The final rule is a reasonable interpretation of the ambiguous statutory text, is within the clear scope of the CWA, and will provide additional clarity and regulatory certainty for certifying authorities, project proponents, and federal licensing and permitting agencies.

c. Scope of Certification Conditions and Denials

The scope of certification described above is the foundation of the final rule and it informs all other provisions of the final rule, including all actions taken by a certifying authority. Under this final rule, certification conditions and denials must be within the scope of certification as provided in section 121.3 of the final rule. In other words, a condition must be necessary to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements, as defined at section 121.1(n) of this final rule, and a denial must be due to the inability of a certifying authority to determine that the discharge from the proposed project will comply with water quality requirements.

To promote transparency and to help assure that certifying authorities understand and consider the appropriate scope of information when developing a certification condition or issuing a denial, the final rule also requires a certifying authority to include specific information to support each condition or denial. These requirements help to build a comprehensive administrative record and to document the certifying authorities' basis for the condition or denial. As discussed in greater detail in section III.G.2.b of this notice, this final rule requires that the following information be included in a certification to support each condition:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and
2. A citation to federal, state, or tribal law that authorizes the condition.

Similarly, as discussed in greater detail in section III.G.2.c of this notice, the final rule requires that the following information be included in a denial of certification:

1. The specific water quality requirements with which the discharge will not comply;
2. A statement explaining why the discharge will not comply with the identified water quality requirements; and
3. If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.

These requirements are intended to increase transparency and ensure that any limitation or requirement added to a certification, and any denial, is within the scope of certification.

As discussed in section II.G.1.a of this notice, the EPA is aware that some certifying authorities may have previously interpreted the scope of section 401 to include non-water quality-related considerations. For example, the EPA understands some certifying authorities have included conditions in a certification that have nothing to do with effluent limitations, monitoring requirements, water quality, or even the CWA. Such requirements were perhaps

based on other non-water quality-related federal statutory or regulatory programs (NEPA, ESA), or on concerns about environmental media other than water. Or such requirements might have been related to State, Tribal, or local laws, policies, or guidance that are unrelated to the regulation of point source discharges to waters of the United States. Similarly, the EPA is aware of circumstances in which some States have denied certifications on grounds that are unrelated to water quality requirements and that are beyond the scope of CWA section 401.<sup>57</sup> The EPA does not believe that such actions are authorized by section 401, because they go beyond assuring that “discharges” from federally licensed or permitted activities comply with “water quality requirements.” See also section II.G.1 of this notice for further discussion of the terms “discharge” and “water quality requirements.”

Some commenters provided comment regarding the appropriate scope of denials. These commenters asserted that the proposed scope of review would limit a certifying authority’s ability to deny certification. A few commenters asserted that states should be able to deny certification if any state requirements would not be met. Other commenters argued that the scope of denial should be limited to just those CWA provisions enumerated in section 401(a). As discussed in section III.D of this notice, the final rule provides a certifying authority the ability to deny certification if it is unable to certify that the proposed discharge will comply with “water quality requirements” as defined in this rule. The Agency disagrees with commenters who asserted that a certifying authority should be able to deny certification if any State or Tribal

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<sup>57</sup> See Letter from Thomas Berkman, Deputy Commissioner and General Counsel, New York State Department of Environmental Conservation, to Georgia Carter, Vice President and General Counsel, Millennium Pipeline Company, and John Zimmer, Pipeline/LNG Market Director, TRC Environmental Corp. (Aug. 30, 2017) (denying section 401 certification because “FERC failed to consider or quantify the effects of downstream [greenhouse gas emissions] in its environmental review of the Project”).

requirements would not be met. As discussed above in section III.E.2.b of this notice, extending the scope of review to any State or Tribal law would be inconsistent with Congress's inclusion of the limiting modifier "appropriate" in the phrase "any other appropriate requirement of State law," and the Agency is not finalizing the proposed alternative interpretation that would limit the scope of denials to the CWA provisions enumerated in section 401(a). The Agency's interpretation of the scope of certification, including the scope of denials, strikes a balance among competing considerations while remaining loyal to the text of the CWA.

Many commenters specifically addressed the appropriate scope of conditions. Some commenters urged the EPA not to use a small number of examples of conditions that did not directly relate to protecting water quality to justify narrowing the scope of certification conditions. These commenters provided additional examples of conditions that certifying authorities have included in certifications, such as building and maintaining fish passages, compensatory mitigation, temporal restrictions on activities to mitigate hazards or protect sensitive species, pre-construction monitoring and assessment of resources, habitat restoration, tree planting along waterways, spill management plans, stormwater management plans, and facilitating public access. The EPA appreciates commenters' providing additional examples of certification conditions. The EPA agrees that in many instances, each of these examples may be beyond the scope of certification as articulated in this final rule. However, there may be unique project-specific facts or circumstances, including the nature of the discharge and applicable water quality standards and related designated uses, that must inform whether a particular condition is within the scope of certification, as defined in this final rule.

A few commenters stated that narrowing States' and Tribes' ability to condition licenses and permits may lead to more certification denials. The EPA disagrees with these commenters, as the

scope of certification in the final rule informs the scope of appropriate conditions and the appropriate bases for denial. In other words, if this final rule would preclude a State from requiring tree planting as a certification condition, the final rule would also preclude a State from denying certification based on a lack of trees planted in or around the project area.

Some commenters stated that limiting the proposed definition of “water quality requirements” to exclude State laws that are not EPA-approved would preclude conditions based on State-required riparian buffers, erosion and sedimentation controls, chloride monitoring, mitigation, fish and wildlife protection, drinking water protections, fish ladders, and adaptive management measures. As discussed above, the Agency is finalizing a definition of “water quality requirements” that removes the condition that State or Tribal law requirements must be “EPA-approved.” Under the final rule, the definition of “water quality requirements” includes “state or tribal regulatory requirements for point source discharges into a water of the United States,” and includes State or Tribal provisions that are more stringent than federal requirements.

One commenter suggested that instead of limiting section 401 certification conditions to water quality-related conditions, the EPA should consider having each State define the reserved authorities under section 401 that it intends to apply in a certification, as well as the types of discharges associated with those State authorities. The EPA disagrees with this commenter’s suggestion, as it would result in a greater patchwork of State regulations, with potentially every State establishing a different scope of certification and a different range of discharges that may be subject to certification in each State. One principal goal of this rulemaking is to provide greater clarity, regulatory certainty, and predictability for the water quality certification process. Finalizing a rule like the one suggested by this commenter would undercut those outcomes significantly.

The EPA recognizes that, historically, many State and Tribal certification actions have reflected an appropriately limited interpretation of the purpose and scope of section 401.

However, as discussed above, the Agency is also aware that some certifications have included conditions that may be unrelated to water quality, including many of the types noted above, such as requirements for biking and hiking trails to be constructed, one-time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and public access for fishing and other activities along waters of the United States. Using the certification process to yield facility improvements or payments from project proponents that are unrelated to water quality impacts from the proposed federally licensed or permitted project is inconsistent with the authority provided by Congress.

Some commenters stated that the EPA should clarify in the final rule that certification conditions must be directly related to impacts to water quality requirements from the project proponent's activity, and not water quality concerns caused by other entities. One commenter stated that the guiding principle for courts tasked with determining the propriety of section 401 certification conditions has been whether the condition was designed to directly address water quality effects caused by the licensee's or permittee's activity, and courts have emphasized that state agencies evaluating requests for water quality certifications may not consider the effects of activities other than those being licensed. This commenter recommended that the EPA revise section 121.5(d) of the proposed rule to state, "Any condition must directly address a water quality effect caused by the particular activity for which the applicant is seeking a license or permit." The EPA agrees with these commenters that certification conditions must be directly related to water quality impacts from the proposed project. However, the EPA has concluded that the requirements in section 121.7(d) of the final rule accomplish the commenter's request, and

the EPA did not modify the final rule to include what EPA believes would be a redundant provision. The EPA is also aware of certification conditions that purport to require project proponents to address pollutants that are not discharged from the construction or operation of a federally licensed or permitted project. As discussed in this section, certification conditions must be necessary to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements, because this is the extent of authority provided in section 401.

The Agency proposed a definition for “condition” in an attempt to clarify that conditions included in a water quality certification must be within the scope of certification, as defined in this final rule. Some commenters supported the proposed definition of condition and the structure of the proposed rule. Other commenters stated that the EPA unnecessarily defined “condition” to allow for federal review of water quality certifications. One commenter stated that the argument that Congress intended to allow the EPA to define the term “condition” under section 401 misconstrues the structure of section 401(d). This commenter stated that under the plain language of section 401(d), States impose “limitations” and “monitoring requirements” in a certification, and the certification itself then becomes “a condition” on the federal permit. This commenter further stated that there is no ambiguity in the statute, which requires that the entire certification is incorporated into the federal license or permit.

The Agency disagrees that it misinterpreted section 401(d) of the statute and further disagrees with the suggestion that there is no ambiguity in section 401(d).<sup>58</sup> The EPA

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<sup>58</sup> The legislative history of the 1972 amendments does not provide a clear answer on this issue. See H.R. Rep. No. 91-911, at 124 (1972) (“the effluent limitations and other limitations and any monitoring requirements will become a condition on any Federal license or permit.” *But see* S. Rep. No. 92-414, at 69 (1971) (“such a certification becomes an enforceable condition on the Federal license or permit.”))



acknowledges that interpretations other than what were presented in the proposed rule could be permissible under the statute, if adequately supported by a reasoned explanation. The EPA considered the specific interpretation advanced by this commenter and is not adopting this interpretation in the final rule. As a practical matter, courts that have considered challenges to certification conditions have routinely focused their review on those specific conditions, rather than the entire certification itself. *See PUD No. 1*, 511 U.S. at 713-14; *Deschutes River All. v. Portland Gen. Elec. Co.*, 331 F. Supp. 3d 1187, 1192, 1199-1209 (D. Or. 2018); *Airport Communities Coal. v. Graves*, 280 F. Supp. 2d 1207, 1214-17 (W.D. Wash. 2003). The EPA’s final rule is consistent with these courts’ interpretations. For these reasons and to promote clarity and regulatory certainty, the EPA is declining to adopt this particular interpretation. However, based on other enhancements in the final rule, the Agency has decided not to finalize a definition for “condition.” Together, the “scope of certification” and “water quality requirements,” as well as the rule’s language specifying the elements required in a certification with conditions, appropriately limit what can be properly considered a condition under the final rule, such that defining the term is not necessary. Moreover, section 121.7(a) of the final rule specifically provides that any action to grant a certification with conditions must be within the scope of certification. The scope of certification extends to the scope of conditions that are appropriate for inclusion in a certification—specifically, that these conditions must be necessary to assure that the discharge from a federally licensed or permitted activity will comply with water quality requirements, as defined at section 121.1(n) of this final rule.

#### F. *Timeframe for Certification Analysis and Decision*

##### 1. What is the Agency Finalizing?

In this final rule, the EPA is reaffirming that CWA section 401 requires certifying authorities to act on a request for certification within a reasonable period of time, which shall not exceed one year. By establishing an absolute outer bound of one year following receipt of a certification request, Congress signaled that certifying authorities have the expertise and ability to evaluate potential water quality impacts from even the most complex proposals within a reasonable period of time after receipt of a request, and in all cases within one year. Under the final rule, federal agencies determine the reasonable period of time for a certifying authority to act on a certification request, and the final rule establishes procedures for setting, communicating, and (where appropriate) extending the reasonable period of time. The EPA is also reaffirming that section 401 does not include a tolling provision, and the period of time to act on a certification request does not pause or stop once the certification request has been received. The final rule provides additional clarity on what is a “reasonable period” and how the period of time is established.

## 2. Summary of Final Rule Rationale and Public Comment

### a. Reasonable Period of Time

The EPA is finalizing the proposed rule’s provision that federal licensing and permitting agencies determine the reasonable period of time, either categorically or on a case-by-case basis. Some federal licensing and permitting agencies have appropriately exercised their authority to set the reasonable period of time through promulgated regulations, including EPA, FERC and the Corps. EPA’s regulations at 40 CFR 124.53(c)(3) provide that “the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency. . . .” FERC’s regulations at 18 CFR 5.23(b)(2) provide that “[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.” The Corps’ regulations at 33 CFR 325.2(b)(1)(ii) state that “[a] waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act.” The Executive Order directed all federal agencies with licenses or permits that may trigger section 401 certification to update their existing regulations to promote consistency across the federal government upon completion of this rulemaking to modernize the EPA’s certification regulations.

Public commenters provided a variety of perspectives about which entity should set the reasonable period of time. Some commenters agreed with the proposed rule that federal agencies are the appropriate entity to determine the reasonable period of time, subject to the statutory one-year limit. One commenter said the federal agencies should set the time period to maximize efficiency, increase timeliness of decision-making, and reduce uncertainty. Some commenters asserted that the reasonable period of time should be set by the certifying authority, because they believe that federal agencies lack expertise on State environmental and administrative requirements and therefore may set a reasonable period of time that is incompatible with those requirements or too short for complex projects. Other commenters asserted that federal agencies do not have authority under section 401 to determine the reasonable period of time. One commenter asserted that while federal agencies have the authority to adopt regulations setting a “reasonable time” for decisions, citing *Millennium Pipeline Co. v. Seggos*, 860 F. 3d 696, 700 (D.C. Cir. 2017), the CWA did not give federal agencies unfettered discretion to set deadlines

that prevent States and Tribes from exercising their substantive authority under section 401, citing *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). One commenter noted that it is a conflict of interest for the federal agency to determine the “reasonable period of time” where that federal agency is both the project proponent and the agency issuing the license or permit. Other commenters believed that the EPA should determine the reasonable period of time in coordination with the certifying authority. Finally, some commenters stated that a one-year reasonable period of time should be provided without any additional federal agency discretion, which they asserted would increase regulatory certainty and ensure sufficient time to meet Tribal consultation obligations.

The EPA has considered these comments and concluded that it is reasonable and appropriate for federal agencies to set the reasonable period of time. The Agency disagrees that certifying authorities should set the reasonable period of time and disagrees that the EPA should set the reasonable period of time for all certification requests. The Agency also disagrees that certifying authorities should always have an entire year to act on a certification request, as a year may not be “reasonable” in all cases, and section 401 does not guarantee one year but rather states the action shall be taken within a reasonable period of time which “shall not exceed one year.” 33 U.S.C. 1341(a)(1). The statutory language of section 401 provides that a certification shall be waived if the certifying authority fails or refuses to act within the reasonable period of time, but the statute is silent on who should set the reasonable period of time. *Id.* The Agency is authorized to reasonably interpret the statute (*see Chevron*, 467 U.S. at 843-44) and concludes that federal licensing and permitting agencies should continue to fill this role as they have done for the past

several decades. This interpretation is consistent with judicial and administrative precedent<sup>59</sup> and with federal regulations that were promulgated decades ago through public notice and comment rulemaking (*see, e.g.*, 33 CFR 325.1(b)(ii) and 18 CFR 5.23(b)(1)). From a practical standpoint, federal licensing and permitting agencies have decades of experience in processing applications in accordance with their license and permit programs, and it is reasonable for the EPA to conclude that federal agencies would have the necessary knowledge and expertise to establish a reasonable period of time that is appropriate considering the applicable federal procedures.

The Agency disagrees with the commenter’s suggestion that there is a conflict of interest when the federal agency setting the reasonable period of time is also the project proponent. This final rule requires federal agencies to comply with the same requirements, including requirements concerning the reasonable period of time, as other project proponents when they require a federal permit that triggers the certification process.

In setting the reasonable period of time for a certification—either on a project-by-project basis or categorically—this final rule requires federal agencies to consider:

1. The complexity of the proposed project;
2. The nature of any potential discharge; and
3. The potential need for additional study or evaluation of water quality effects from the discharge.

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<sup>59</sup> *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (“Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the [EPA]—the agency charged with administering the CWA—generally finds a state’s waiver after only six months. *See* 40 CFR 121.16.”); *Constitution Pipeline Company, LLC*, 164 FERC P 61029 (F.E.R.C.), 2018 WL 3498274 (2018) (“[T]o the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.”). *See* the Economic Analysis for further discussion on the litigation posture of the *Constitution Pipeline Company, LLC* case.

With one exception discussed further below, the EPA is finalizing these factors as proposed.

These factors maintain flexibility for federal agencies to consider project-specific or categorical information that should be readily available. If certifying authorities believe more time is necessary than what is established by the federal agency, they may request an extension to the reasonable period of time as described below.

A federal agency may decide that it is more efficient to establish the reasonable period of time based on common attributes of a category of licenses, permits, or potential discharges—rather than on a case-by-case basis. This type of categorical approach may be set out through rulemaking or other procedures in accordance with law. Establishing categorical reasonable periods of time may be more efficient, conserve resources, and increase regulatory transparency.

Some commenters supported the proposed three factors for determining the reasonable period of time. Other commenters recommended that a variety of additional factors be added, including but not limited to State law requirements for public participation and procedure; State agency workload and resource constraints; substantive State law requirements for environmental review, type of permit, or timing of season-dependent field studies ; time to review a certification request and any subsequent supplemental information; time for all stakeholders to provide input on a certification request; time for project proponents to provide additional information; other federal program requirements; and the extent of potential impact from a discharge. Several commenters noted that under the process set forth in the proposed rule, the federal agency could be required to set the reasonable period of time based on the three factors, but without receiving the actual certification request.

After considering these public comments, the EPA is finalizing three factors that federal agencies must consider when setting the reasonable period of time. In response to comments, the

second factor has been modified to require the federal agency to consider the *nature of any* potential discharge. This modification clarifies that, in establishing the reasonable period of time, federal agencies should consider not only the potential for a discharge, but also the nature of any potential discharge, including (as appropriate) the potential volume, extent, or type of discharge associated with a particular project or particular category of license or permit. Consistent with the proposal, these factors may be used to establish a reasonable period of time on a project-by-project basis or categorically.

Many of the factors that commenters recommended would be subsumed by one of the factors that the EPA is finalizing, such as project complexity. Many of the concerns that commenters raised about the proposal -- for example, that the reasonable period of time does not account for State public notice procedures -- would also be a concern under the status quo 1971 certification regulations. However, over the past few decades, certifying authorities and federal agencies have formulated joint applications, memoranda of agreement, and other mechanisms to ensure that public participation requirements are met within the reasonable period of time. The EPA expects certifying authorities and federal agencies to continue these cooperative approaches to facilitate implementation of the final rule.

The EPA received a variety of comments regarding a potential default reasonable period of time of six months, including conflicting views on whether six months is too long or too short, and whether a default reasonable period of time would increase or decrease clarity and regulatory certainty. Some commenters asserted that a default reasonable period of time of six months would be too short in cases in which certifying authorities have not received all necessary information from project proponents, or for project proponents requiring FERC licenses. Another commenter stated that without a default period of time, the rule would introduce regulatory

uncertainty and result in inefficiencies and delays. The Agency has considered these comments and is finalizing the rule as proposed with no default or minimum reasonable period of time. The final rule thus provides federal licensing and permitting agencies the maximum flexibility to develop appropriate procedures for their permitting programs as they update their certification regulations in accordance with the Executive Order.

The final rule also clarifies the process by which federal agencies and certifying authorities communicate regarding the reasonable period of time. A clear understanding of the reasonable period of time will prevent certifying authorities from inadvertently waiving their opportunity to certify a request and will provide regulatory certainty to the project proponent. As explained in section III.C of this notice, the Agency has modified the proposed rule to respond to commenter concerns and is finalizing a requirement that the project proponent provide the certification request to the federal agency concurrently when it submits the certification request to the certifying authority. Under the final rule and consistent with the proposal, within 15 days of receiving the certification request from the project proponent, the federal agency must provide, in writing, the following information to the certifying authority: the date of receipt, the applicable reasonable period of time to act on the certification request, and the date upon which waiver will occur if the certifying authority fails or refuses to act. This provision is substantively identical to the one proposed, with minor modifications to increase clarity.

Public commenters expressed implementation concerns regarding the process for federal agencies to communicate the reasonable period of time to the certifying authority. One commenter believed that the 15-day turnaround time may not be practical, and a few commenters suggested that there is no accountability for federal agencies that fail to provide the required information within 15 days. A few commenters recommended adding a procedure for



adjudicating circumstances where the certifying authority disagrees with the reasonable period of time set by the federal agency. One commenter noted there is no requirement that the federal agency explain the chosen time period, making it more difficult to challenge the federal agency's decision or to petition for more time. One commenter said that federal agencies should be required to communicate the reasonable period of time even when agencies have promulgated time periods categorically by project type in their section 401 implementing regulations.

The EPA has considered these comments and is finalizing as proposed the process for federal agencies to communicate the reasonable period of time. The EPA understands that this process may create additional administrative burdens on federal agencies, given the number of section 401 certification requests that are submitted each year. However, the Agency expects that the benefit of clarity and transparency that this additional process will provide for all parties involved in a section 401 certification process will outweigh any additional burden on federal agencies. The EPA also expects the federal agencies will quickly routinize this process by developing and using forms, electronic notifications, or other tools to minimize the potential administrative burden associated with providing written notice of the reasonable period of time. The EPA does not anticipate that federal agencies will fail to set, or fail to notify certifying authorities of, the reasonable period of time under this final rule. The EPA expects federal agencies to communicate and act in good faith and in accordance with this final rule regarding the establishment of a reasonable period of time. Consistent with the proposal, the final rule authorizes federal agencies to establish categorical reasonable periods of time for types of licenses or permits, thereby increasing efficiency and transparency. To provide additional certainty to certifying authorities and project proponents, the EPA recommends that federal agencies promulgate in their updated certification regulations a minimum reasonable period of

time that may be extended on a case-by-case basis, so long as it does not exceed one year from receipt of the certification request. To the extent that federal agencies are considering establishing additional procedures for communicating the reasonable period of time to certifying authorities (*e.g.*, directing all project proponents to a public website to view categorically-established reasonable periods of time in federal agency regulations), the EPA supports the development of such procedures so long as they comply with the requirements in this rule. The EPA disagrees with the suggestion that a separate appeal process is necessary for certifying authorities to adjudicate the federal agency's reasonable period of time, as this final rule provides a process for the certifying authority to request an extension to the established reasonable period of time and describes clear factors for federal agencies to consider when setting the reasonable period of time in the first instance.

The EPA is clarifying that section 401 does not prohibit a federal agency from extending an established reasonable period of time, provided that the extended time period is reasonable and does not exceed one year from receipt. Some commenters stated that it would increase regulatory uncertainty for project proponents if the reasonable period of time could be modified. However, most commenters on this issue agreed that the rule should allow the flexibility to modify timeframes, and many of these commenters agreed that the rule should mirror the statute and maintain the maximum timeframe of one year. A few commenters suggested that the Agency clarify the process for modifying the time period, for instance by requiring specific information to be included in an extension request, or by providing federal agencies with a deadline to respond to extension requests. Another commenter said the rule should provide a dispute resolution process in the event the federal agency denies the State's request for an extension. A few commenters stated that federal agencies should be prohibited from shortening the reasonable

period of time, and other commenters asserted that federal agencies, in the spirit of cooperative federalism, should consult with certifying authorities about when shorter timelines may be appropriate.

The EPA does not expect reasonable periods of time to be extended frequently, but the final rule is intended to provide federal agencies with additional flexibility to account for unique circumstances that may reasonably require a longer period of time than was originally established. For such cases, the EPA is finalizing as proposed the process by which the extended time period should be communicated in writing to the certifying authority and the project proponent to ensure that all parties are aware of the change. This provision is substantively identical to the proposed provision, with minor modifications to increase clarity. The EPA finds it unnecessary to include additional timelines and procedures in the regulatory text because, as many commenters on the proposed rule pointed out, many certifying authorities and federal agencies already have established procedures in place through cooperative agreements or memoranda of agreement. The Agency intends to maintain flexibility in the final rule for federal agencies and certifying authorities to coordinate in this manner and to routinize these processes to increase efficiencies. Under the final rule, the reasonable period of time could be extended, as there may be project-specific cases when this is appropriate, so long as the period of time remains “reasonable.” Consistent with the proposal, the final rule does not authorize a reasonable period of time to be shortened once it is established. The Agency has made edits in final rule section 121.6 to clarify that the reasonable period of time can be extended, but not shortened, once it is established. This change provides flexibility in circumstances where unique or complex issues may arise, but maintains certainty for the certifying authority that the reasonable period of time, once established, cannot be made shorter.

The EPA is reaffirming in this final rule that the federal agency also determines whether waiver has occurred. Some commenters asserted that federal agencies do not have authority to determine that waiver has occurred. The EPA has considered these comments and disagrees with them. Relevant court decisions and the EPA's 1971 certification regulations recognized the role of the federal agency to determine whether a waiver has occurred. *See Millennium Pipeline Company, L.L.C.*, 860 F.3d at 700-01 (acknowledging that a project proponent can ask the federal agency to determine whether a waiver has occurred). Consistent with the proposal, this final rule clarifies the procedures for a federal agency to notify a certifying authority and project proponent that a waiver has occurred. As discussed in section III.G.2.d of this notice below and pursuant to section 121.9 of the final rule, if the certifying authority fails or refuses to act before the date specified by the federal agency, the federal agency is required to communicate in writing to the certifying authority and the project proponent that waiver has occurred.

b. Tolling

Section 401 does not include a tolling provision. Consistent with the proposal, the EPA concludes in this final rule that the period of time to act on a certification request does not pause or stop for any reason once the certification request has been received. One recent court decision held that withdrawing and resubmitting the same certification request for the purpose of circumventing the one-year statutory deadline does not restart the reasonable period of time. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*). The EPA agrees with the *Hoopa Valley* court that "Section 401's text is clear" that one year is the absolute maximum time permitted for a certification, and that the statute "does not preclude a finding of waiver prior to the passage of a full year." *Id.* at 1103-04. The court of appeals noted that "[b]y shelving water quality certifications, the states usurp FERC's control over whether and when a

federal license will issue. Thus, if allowed, the withdrawal-and-resubmittal scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.” *Id.* at 1104. The court further observed that the legislative history supports its interpretation of the statute’s plain language, because “Congress intended Section 401 to curb a *state’s* ‘dalliance or unreasonable delay.’” *Id.* at 1104-05 (emphasis in original).

The *Hoopa Valley* case raised another important issue: perpetual delay of relicensing efforts (in that case for more than a decade) delays the implementation and enforcement of water quality requirements that have been updated and made more stringent in the years or decades since the last relicensing process. *See id.* at 1101.<sup>60</sup> This concern was also raised in stakeholder recommendations received during pre-proposal outreach. One stakeholder specifically cited the delays in the *Hoopa Valley* case as a “concrete example of how the § 401 certification process was being manipulated by a state certification agency to delay implementation of effective water quality controls and enhancement measures” and that “allowing the § 401 certification process to be used to achieve further delays in the re-licensing process is in turn an abuse of the certification process.” Letter from National Tribal Water Council to David P. Ross, Assistant Administrator of the Office of Water, EPA (Mar. 1, 2019).

Given the *Hoopa Valley* court’s plain language analysis of the statute and the potential water quality impacts from allowing certification decisions to be delayed, and the Agency’s agreement with that analysis, section 121.6(e) of the final rule provides:

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<sup>60</sup> This is a concern shared by the EPA. The Agency has taken steps to promote its own compliance with CWA deadlines, including acting on State and Tribal water quality standard submittals, because prior delays have created a significant backlog of state submittals awaiting an Agency action. Memorandum from David P. Ross, Assistant Administrator of the Office of Water, to Regional Administrators (June 3, 2019). These delays and backlogs prevent States and Tribes from timely implementing and enforcing updated programs and standards that could otherwise be improving water quality.

The certifying authority is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time other than specified in section 121.6(d).

This clear statement reflects the plain language of section 401 and, as described above, is supported by legislative history. The Agency expects this clarification to reduce delays and to help ensure that certification requests are processed within the reasonable period of time established by the federal agency, and at most, within one year from receipt of the request.

Some commenters agreed that section 401 establishes an outer bound of one year for the reasonable period of time. However, other commenters argued that the rule should allow flexibility on the timeline beyond one year. Many of these commenters argued States should not be limited to one year if they have received inadequate information and if projects are complex. One commenter asserted that section 401 allows for a State to “act on” a request within one year without reaching a final decision in that one year, and the commenter asserted that this interpretation provides a legal basis to allow extensions exceeding one year.

Some commenters supported the proposed provision to the effect that the certifying authority is not authorized to request the project proponent to withdraw a request or take other action to modify or restart the time period. Most of these commenters stated that the proposed rule makes clear the allowable time may not exceed the maximum of one year, and some of these commenters agreed that no tolling should be allowed. Some of these commenters cited the *Hoopa Valley* case, and one commenter cited the CWA legislative history. However, some commenters disagreed with the suggestion that certifying authorities should be prohibited from coordinating with project proponents to modify or restart the reasonable period of time, as they asserted this would be contrary to well-established practice. Some commenters stated that a reasonable period of time longer than one year may be warranted for complete information to be

submitted and for accommodating adequate State review and certification of projects. Most of these commenters asserted that withdrawal and resubmittal to toll the timeline is the best way to manage unforeseen issues or information gaps. A few of these commenters stated that the words “for the purpose of” in proposed rule section 121.4(f) (“[t]he certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action *for the purpose of* modifying or restarting the established reasonable period of time” (emphasis added)) creates a subjective element depending on the certifying authority’s intent, and would create ambiguity in the rule if finalized as proposed.

The Agency understands that in cases where the certifying authority and project proponent are working collaboratively and in good faith, it may be desirable to allow the certification process to extend beyond the reasonable period of time and beyond the one-year statutory deadline. However, the final rule reflects the statutory language that the reasonable period of time may not exceed one year, 33 U.S.C. 1341(a)(1), and the *Hoopa Valley* holding that certifying authorities and project proponents lack discretion under the CWA to engage in a coordinated effort to extend the reasonable period of time. Additionally, the Agency disagrees with the commenter’s assertion that the term “act on” provides a legal basis to extend the reasonable period of time beyond one year. As discussed in section III.D of this notice, a certifying authority may take one of four actions on a certification request: grant certification, grant certification with conditions, deny certification, or expressly waive certification. If a certifying authority fails or refuses to take one of these actions within the reasonable period of time, the CWA provides that the certifying authority will be deemed to have waived the certification requirement. 33 U.S.C. 1341(a)(1). The Agency agrees with public commenters that it would increase clarity to remove the words “for the purpose of” in proposed rule section

121.4(f), and the final rule has been modified accordingly. The Agency has also clarified in final rule section 121.6(e) that the certifying authority may take action to extend the reasonable period of time only in accordance with section 121.6(d). Because the final rule does not contemplate that the reasonable period of time can be tolled or “restarted,” as described below in this section, final regulatory text section 121.6(e) was also edited from the proposal so as to increase clarity and to remove the term “restarting.”

Many commenters asked for clarification on a project proponent’s ability to withdraw and resubmit a request, noting that project proponents often voluntarily withdraw and resubmit applications. Some commenters requested that the Agency clarify what action a certifying authority should take when a project proponent withdraws a request. In response, the Agency notes that nothing in the final rule precludes project proponents from voluntarily withdrawing requests of their own accord. However, to prevent scenarios like the *Hoopa Valley* case, and to address the EPA’s policy concern about section 401 delays, the Agency expects that project proponents will rarely voluntarily withdraw requests for certification. The EPA expects that such withdrawals will take place only if the project plans have been modified such that a new certification request is required, or if the project is no longer planned. If a project proponent withdraws a certification request because the project is no longer being planned or if the project materially changes from what was originally proposed, as described above, the certifying authority no longer has an obligation to act on that request within the reasonable period of time. In all cases, project proponent withdrawals would not result in tolling or pausing the clock, but rather any resubmitted request would be subject to the pre-filing meeting request requirement. After receipt by the certifying authority, the new request would initiate a new reasonable period of time as determined by the federal agency.



Some commenters supported stopping the clock when project proponents are not responsive to requests for additional information, or do not provide adequate information to the certifying authority. Some commenters requested clarification on whether withdrawn requests that are resubmitted would restart a paused clock, or completely restart the reasonable period of time. Commenters also asked for clarification on whether the contents of the request, *i.e.*, whether it is substantially the same or a different request, would affect the restarting of the clock.

The Agency is reaffirming in this final rule that the clock does not toll for any reason. The Agency disagrees that the clock should toll while project proponents gather additional information or for any other reason, as there is no statutory basis for tolling. As described above, the reasonable period of time begins when a certifying authority receives a certification request as defined in the final rule, and it ends when the certifying authority takes action to grant, grant with conditions, deny, or waive. The Agency is clarifying that the reasonable period of time does not continue to run after a certification decision is issued regardless of whether there is time remaining in the “reasonable period of time.” As explained in section III.L of this notice, a certifying authority cannot modify the certification after issuing a decision to the federal agency.

The EPA recognizes that there may be project-specific situations when the reasonable period of time may be extended (not to exceed one year) to account for project complexities or the need to gather additional information. Procedures for extending the reasonable period of time are explained above and included in the final rule. As discussed above, the EPA expects voluntary withdrawals of certification requests to occur only when the project has materially changed, as described above, or is no longer planned. In such a case, a new request would initiate a new reasonable period of time and would not “restart” the clock from a prior withdrawn request for

certification. The EPA would not expect such a new request to be identical to a previously withdrawn request for certification.

Many commenters noted that given the proposed rule's shortened timeframes, limitations on States and Tribes collecting additional information, and provisions allowing the reasonable period of time to begin prior to "an application being complete," States may decide to deny certification rather than risking the possibility that a federal agency would determine that the State waived certification. These commenters noted that the process of successive State denials of certification and the resulting litigation could result in delaying projects and defeating the intent of the proposed rule to promote efficiency and certainty.

The Agency disagrees with these commenters. Neither the proposal nor the final rule shortened the timeframe for certification. The statute requires action on a certification request within a reasonable period of time not to exceed one year. The proposed rule and this final rule provide exactly the same timeframe as the statute provides. To the extent commenters view the clarifications in the rule that the statute does not authorize tolling or a "withdrawal and resubmit" scheme as "shortening the timeframe," the Agency disagrees because these mechanisms that have previously been used to extend the reasonable period of time are not authorized by the statute. Similarly, neither the proposal nor this final rule limits the ability of a certifying authority to collect additional information from a project proponent. The final rule provides an objective list of information that a project proponent must provide to a certifying authority to start the reasonable period of time. As described above, this is intended to provide transparency and predictability so all parties understand what information is necessary to start the reasonable period of time. The Agency encourages the parties to engage throughout the certification process

to help ensure the certifying authority has the information needed to act on the certification request.

Additionally, the final rule includes a number of provisions that should reduce the need for certifying authorities to deny certification based on insufficient information. Section III.B of this notice describes a mandatory pre-filing meeting request, which will allow project proponents and certifying authorities to begin early conversations about proposed projects prior to the start of the reasonable period of time. Additionally, section III.C of this notice discusses factors that a project proponent should consider in determining when to submit a certification request, as the timing of request submission affects the information that may be available for certifying authorities to make timely decisions. Section III.C identifies opportunities for federal licensing and permitting agencies to establish by rule an appropriate point in the federal licensing or permitting process when a project proponent should request certification. Finally, this final rule establishes certain criteria that the EPA as a certifying authority must follow when making additional information requests (*e.g.*, only requesting information that is related to the discharge; only requesting information that can be collected within the reasonable period of time). The Agency encourages all certifying authorities to consider whether similar criteria would help clarify expectations when certifying authorities seek additional information during the certification process.

#### *G. Contents and Effects of Certification*

##### *1. What is the Agency Finalizing?*

Under the final rule, any action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification, must be completed within the reasonable period of time, and must otherwise be in accordance with section 401 of the

CWA. Alternatively, a certifying authority may waive the certification requirement, whether expressly or by failing to act. The Agency is finalizing the requirement that any action on a certification request must be in writing and must clearly state whether the certifying authority has chosen to grant, grant with conditions, or deny certification. This final rule also requires that any express waiver of the certification requirement by the certifying authority be in writing.

Under the final rule, a certification must include certain supporting information for each condition, including, at a minimum, a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and a citation to the federal, State, or Tribal law that authorizes the condition. The final rule also includes slightly different information requirements to support conditions in a certification for issuance of a general license or permit. These requirements are described in section III.M below. The EPA had proposed also to require a statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements. The EPA is not including that provision in the final rule.

In circumstances where certification is denied, the EPA is finalizing the requirement that the written notification of denial state the reasons for denial, including the specific water quality requirements with which the discharge will not comply; a statement explaining why the discharge will not comply with the identified water quality requirements; and if the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements. The Agency has made minor editorial changes to these provisions in the final rule to increase clarity, but the final rule provisions retain the same meaning as the proposed rule provisions. The final rule also includes slightly different

information requirements to support a denial of a certification for issuance of a general license or permit. These requirements are described in section III.M below.

Under the final rule, if a certification or denial does not include the information requirements described further below, the certification or the denial will be considered waived by the federal licensing or permitting agency. Likewise, if a certification condition is not supported by the required information, the condition will be considered waived under the final rule. Under the final rule, a waived condition does not result in waiver of the entire certification.

Additionally, if a certifying authority fails to follow the procedural requirements of section 401, such as the public notice provisions, or fails to complete its review within the reasonable period of time, the certification will be deemed waived.

## 2. Summary of Final Rule Rationale and Public Comments

The CWA does not define the term “certification” or offer a definitive list of its contents or elements. Section 304(h) of the CWA requires the EPA to promulgate factors which must be provided in any section 401 certification, and under section 501(a) the EPA may reasonably interpret the statute to add content to those terms. *See* 33 U.S.C. 1251(d); 33 U.S.C. 1361(a); *Chevron*, 467 U.S. at 843-44. The EPA’s 1971 certification regulations included certification requirements. In this final rule, EPA is updating those requirements for each type of certification action and is more fully addressing the effects of those actions.

### a. Grant

Granting a section 401 certification demonstrates that the certifying authority has concluded that the potential discharge into waters of the United States from the proposed activity will be consistent with water quality requirements. Granting certification allows the federal agency to proceed with issuing the license or permit. Consistent with the proposal, the final rule requires

all certification grants, with or without conditions, to be in writing and to include a written statement that the discharge from the proposed federally licensed or permitted project will comply with water quality requirements, as defined at section 121.1(n) of the final rule. The Agency has concluded that this is a straightforward requirement and one that promotes transparency for the public.

b. Grant with Conditions

If the certifying authority determines that the potential discharge from a proposed activity would be consistent with water quality requirements only if certain conditions are met, the authority may include such conditions in its certification. The EPA proposed that three elements be included in a certification to support each condition. The Agency is finalizing two of those elements.

Some commenters supported the proposed requirement for certifying authorities to cite applicable State or Tribal law and to provide an explanation of the necessity for each condition. Some commenters agreed that these requirements would provide transparency, and assist the federal license or permitting agency with implementation and enforcement. Other commenters asserted that these requirements would be overly burdensome for certifying authorities. Some commenters asserted that certifying authorities already generally cite the applicable State laws and regulations on which they base their conditions, and other commenters said that these requirements would create new obligations for certifying authorities. Other commenters confirmed that the value of including this information in every certification, in terms of transparency and regulatory certainty, will far outweigh the minimal additional administrative burden of including this information in a certification. The EPA agrees that requiring an explanation for the necessity of the condition and a citation to the underlying State, Tribal, or

federal laws, as appropriate, will promote transparency and consistency and is finalizing these requirements. The EPA intends this provision to require citation to the specific State or Tribal statute or regulation or the specific CWA provision, e.g., CWA section 301(b)(1)(C), that authorizes the condition, and that general citations to CWA section 401 or other general authorization or policy provisions in federal, State, or Tribal law would be insufficient to satisfy the proposed requirement.

Some commenters also supported the proposed requirement for certifying authorities to identify whether a less stringent condition could satisfy applicable water quality requirements. However, most commenters asserted that this requirement would be burdensome for certifying authorities, suggesting that States and Tribes would need to conduct two detailed analyses for the certification: one to establish appropriate conditions, and another to evaluate whether a less stringent condition would be sufficient. A commenter suggested that proposed section 121.5(d)(1) may conflict with proposed section 121.5(d)(3). This commenter recommended replacing section 121.5(d)(3) with a requirement that the certifying authority include only the least stringent conditions necessary to satisfy applicable water quality requirements. The EPA has considered these comments. Under the final rule, certifying authorities will not have to identify whether and to what extent a less stringent condition could satisfy applicable water quality requirements. As described in the preamble for the proposed rule, this provision is included in the EPA's existing certification regulations for the NPDES permit program (*see* 40 CFR 124.53(e)(3)), but the EPA agrees with the commenters that asserted that it may be difficult to provide an explanation as to why a condition is necessary and to also identify a less stringent condition that could satisfy water quality requirements.

The EPA disagrees with the suggestion that the information requirements for conditions in

section 121.5(d)(1) and (2) of the final rule would be burdensome for certifying authorities.

Certifying authorities should already be generating this type of information to build complete and legally defensible administrative records to support their certification actions. As a general matter, if a certifying authority determines that one or more conditions are necessary for a section 401 certification, the certifying authority should clearly understand and articulate why it is necessary and should identify the legal authority for requiring such conditions. Including this information in the certification itself provides transparency for the project proponent, the federal licensing and permitting agency, and the public at large. For these reasons, the EPA has determined that these are appropriate requirements, and they are included in the final rule.

During pre-proposal stakeholder engagement, the EPA also heard from federal agencies that, because several court decisions have concluded that such agencies do not have authority to “review and reject the substance of a State certification or the conditions contained therein,” *Am. Rivers, Inc.*, 129 F.3d at 106, non-water quality-related conditions are often included in federal licenses and permits. Once included in the federal license or permit, federal agencies have found it challenging to implement and enforce these non-water quality-related conditions. Additionally, stakeholders in pre-proposal engagement and in public comments expressed concern that federal agencies do not always enforce the certification conditions incorporated in their federal licenses or permits.

EPA agrees that it is important for federal agencies to have a clear understanding of the basis for certification conditions, because conditions must be included in a federal license or permit. Several appellate courts have analyzed the plain language of the CWA and concluded that the Act “leaves no room for interpretation” and that “state conditions *must* be” included in the federal license or permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645 (4th



Cir. 2018) (emphasis in original); *see also U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 548

(D.C. Cir. 1992) (“FERC may not alter or reject conditions imposed by the states through

section 401 certificates.”); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir.

1997) (recognizing the “unequivocal” and “mandatory” language of section 1341(d));

*Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) (collecting cases). The

EPA acknowledges commenters who asserted that federal agencies may not consistently enforce certification conditions, and also acknowledges that federal agencies can apply discretion in

enforcement decisions. However, providing a citation to the legal authority underpinning a

certification condition is one way to make it easier for federal agencies to enforce these

conditions. Federal agencies during pre- and post-proposal engagement acknowledged that this

information will help them understand how best to implement and enforce certification

conditions. In addition, including this information in each certification will provide transparency

for the overall certification process and allow the project proponent to understand the legal basis

for each condition and to assess whether a condition is within the statute’s lawful scope and

what recourse may be available to challenge it in an appropriate court of competent jurisdiction.

Overall, the EPA concludes that the benefits of providing this information will significantly

outweigh any additional administrative burden that certifying authorities may incur because of

these new requirements.

One commenter asserted that the language in proposed section 121.8(b) should be changed

from “[t]he license or permit must clearly identify any conditions that are *based on* the

certification” to “[t]he license or permit must clearly identify any conditions that are *from* the

certification.” This commenter asserted that the conditions cannot be based on the certification

because federal agencies do not have authority to develop their own certification conditions or to

modify a condition in a certification prior to incorporating it into the federal permit. The EPA has made this change in section 121.10 of the final rule for clarity and to reaffirm that if a condition meets the procedural requirements of section 401 and includes the elements listed in 121.7(d) of the final rule, the condition must be incorporated into the federal license or permit in its entirety, as drafted by the certifying authority. Consistent with the proposal, under the final rule, deficient certification conditions do not invalidate the entire certification, nor do they invalidate the remaining conditions in the certification. As discussed below, the Agency has clarified in the final rule that conditions that do not meet these requirements will be deemed waived.

c. Deny

A certifying authority may choose to deny certification if it is unable to certify that the discharge from a proposed project would be consistent with applicable water quality requirements. If a certification is denied, the federal agency may not issue a license or permit for the proposed project. *Id.* at 1341(a). Consistent with the proposal, the final rule requires certification denials to be made in writing and to include three elements to support certification denials. The Agency has made minor editorial changes to these provisions in the final rule to increase clarity, but the final rule provisions retain the same meaning as the proposed rule provisions.

Some commenters agreed with the proposal to require certain information in a certification denial. One commenter asserted that when preparing denials, it would be helpful for certifying authorities to specify water quality requirements with which the proposed project will not comply, as this would assist federal agencies with their duty to determine whether a section 401 certification facially satisfies the requirements of section 401. Another commenter

recommended that the final rule also require a statement that there is no certification condition which would prevent noncompliance with water quality requirements.

Other commenters opposed the proposed requirement that certification denials include “the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements.” These commenters asserted that this requirement was vague, unnecessary, and burdensome and further asserted that it would improperly place a new burden on certifying authorities that should be borne by project proponents to show why their project complies with water quality requirements. A few of these commenters recommended that insufficient information should be a basis for denial.

As a general matter, the EPA disagrees with the suggestion that including this information in a denial would be overly burdensome for certifying authorities. Indeed, a number of States asserted in public comments that the primary reason why certifications cannot be issued within the reasonable period of time is that project proponents have not provided sufficient information or a “complete” certification request. If this is the case, certifying authorities should be able to identify what information is lacking that precludes a determination that the project will comply with water quality requirements, as the term is defined in the final rule. Clearly establishing a record to support the basis for a denial should already be done as a matter of course to establish a complete defensible administrative record for the certifying authority’s action. Further, any denial should be informed by the record before the certifying authority and should be issued with information sufficient to allow the project proponent to understand the basis for denial and have an opportunity to modify the project or to provide new or additional information in a new certification request.

The EPA is finalizing the requirement that a certification denial be in writing and include three elements to support the denial. The required elements will lead to more transparent decision-making and a more complete record of the administrative action. The final rule's requirements may also facilitate discussions between certifying authorities and project proponents about what may be necessary to obtain a certification should the project proponent submit a new certification request in the future. A certifying authority's explanation of why a discharge from a proposed project will not comply with relevant water quality requirements will also assist reviewing courts in understanding whether the denial is appropriately based on the scope of certification discussed in section III.E of this notice.

Some commenters asserted that the proposed rule would prohibit certifying authorities from denying certification based on a lack of information sufficient to grant certification. The EPA disagrees with these commenters. Indeed, by requiring that "if the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements," the final rule reaffirms and clarifies that insufficient information about the proposed project can be a basis for a certification denial. If the certifying authority determines that there is no specific data or information that would allow the certifying authority to determine that the discharge will comply with water quality requirements, it should indicate as such and provide the basis for the determination in its written decision to deny certification.

As noted in the preamble to the proposed rule, the EPA is aware that some certifying authorities have requested "additional information" in the form of multi-year environmental investigations and studies, including completion of a NEPA review, before the certifying authority would act on a certification request. As discussed in section III.H of this notice, the

final rule explicitly prohibits the EPA from requesting additional information that cannot be generated within the reasonable period of time. The rationale for this prohibition applies to all certifying authorities; the Agency believes that such requests for additional information, regardless of which certifying authority generates such requests, would be contrary to the plain language of the statute, which requires certifying authorities to act on a request within a reasonable period of time that does not exceed one year. While additional information requests may be a necessary part of the certification process, such requests may not result in extending the period of time beyond which the CWA requires certifying authorities to act.

d. Waiver

When a certifying authority waives the requirement for a certification, under this final rule the federal agency may proceed to issue the license or permit in accordance with its implementing regulations. A certifying authority may waive expressly by issuing a written statement that it is waiving certification, or implicitly waive by failing or refusing to act. Waiver may occur due to a failure or refusal to act in accordance with the procedural requirements of section 401 or within the reasonable period of time (*see* section III.F of this notice), or by failing or refusing to provide information required to support certifications (section 121.7(c) of the final rule) or denials (section 121.7(e) of the final rule). A condition may also be waived by failing or refusing to provide information required to support certification conditions (section 121.7(d) of the final rule).

i. Explicit Waiver

Under the final rule, a certifying authority may waive expressly by issuing a written statement that it is waiving the requirement for certification. Some commenters supported allowing certifying authorities to explicitly waive certification. One commenter observed that

doing so could allow the federal permitting authority to proceed more quickly with issuing a license or permit if it need not wait until the end of the reasonable period of time. Several commenters asserted that the statute does not provide for express waiver. A few other commenters stated that certifying authorities should be required to provide a detailed statement explaining their reasoning for waiving certification.

The EPA has determined that, although the statute does not explicitly provide for express or affirmative waiver, providing this opportunity in the final rule is not inconsistent with a certifying authority's ability to waive through failure or refusal. *See EDF v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("We do not interpret [the Act] to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation."). The EPA also agrees with the commenters who stated that allowing explicit waivers may create efficiencies in circumstances where the certifying authority knows early in the process that it will waive. The EPA is not requiring certifying authorities to provide a detailed statement explaining their reasoning for waiving, as the Agency recognizes certifying authorities may waive for a variety of reasons. Consistent with the proposal, the final rule provides that a certifying authority may expressly waive by providing written notification of waiver to the project proponent and federal agency.

An express or affirmative waiver does not reflect a determination that the discharge will comply with water quality requirements. Instead, an express or affirmative waiver indicates that the certifying authority has chosen not to act on a certification request. The EPA agrees with the commenter who noted that express or affirmative waiver enables the federal agency to proceed with issuing a license or permit where the certifying authority has stated it does not intend to act, thereby avoiding the need to wait for the reasonable period of time to lapse.

ii. Implicit Waiver

The plain language of section 401(a)(1) provides that the certification requirement is waived when a certifying authority “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year).” 33 U.S.C. 1341(a)(1). The Agency proposed to define “fails or refuses to act” with the intention of providing greater clarity for project proponents, certifying authorities, and federal agencies about when an implicit or constructive waiver could occur. The Agency is not finalizing the proposed definition of “fails or refuses to act” and is instead providing additional clarification in the final rule about specific procedural failures that could trigger a federal agency to determine that waiver has occurred.

Under the proposed rule, waiver would occur if the certifying authority actually or constructively failed or refused to act within the scope of certification or within the reasonable period of time. The proposed rule preamble explained that the phrase “fails or refuses to act” lends itself to at least two interpretations. Under one interpretation, a certifying authority that takes no action, or refuses to take action, has waived certification. Under an alternative interpretation, a certifying authority that takes action beyond the scope of section 401 has failed or refused to act in a way Congress intended and has waived certification. The proposed definition was intended to resolve this ambiguity in the statute.

Some commenters supported the proposed definition of “fail or refuse to act,” including the implicit or constructive waiver provision. A few commenters cited *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), in support of the proposed rule, and these commenters agreed that it would be appropriate for federal agencies to facially review certifications. Some of these commenters said that this approach is not supported by the text of the statute or by congressional intent. Many commenters asserted that the legislative history of the waiver provision makes clear

that it was intended only to prevent a State's sheer inactivity. One of these commenters noted that the legislative history acknowledges that the waiver provision cannot protect against arbitrary State agency action and that the courts are the forum to challenge a State's refusal to give a certification.<sup>61</sup> Some commenters stated that allowing the federal agency to review a certification denial as a failure to act is unreasonable and essentially grants the federal government veto power over State action.

The EPA disagrees with commenters who asserted that federal agencies cannot review certifications. As discussed below, some courts have concluded that federal agencies have an affirmative obligation to determine whether a certifying authority has complied with requirements related to a section 401 certification. *See City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006); *Keating v. FERC*, 927 F.2d 616, 622-623, 625 (D.C. Cir. 1991). The final rule affirms that it is the responsibility of the federal agency to facially review certifications to ensure that certifying authorities have complied with the procedural requirements of section 401. If a federal agency, in its review, determines that a certifying authority failed or refused to comply with the procedural requirements of the Act, including the procedural requirements of this final rule, the certification action, whether it is a grant, grant with conditions, or denial, will be waived.

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<sup>61</sup> The EPA observes that some legislative history related to section 401 is internally inconsistent and should not be relied upon as a definitive statement of congressional intent. The history quoted by these commenters (H.R. Rep. No. 92-911, at 121-22 (1972)) says both that a failure or refusal amounts to waiver and that a refusal must be addressed in a State court challenge brought by the project proponent. "In such situations, where there is conflicting legislative history and 'the statute is silent or ambiguous with respect to the specific issue,' our [the court's] role is to determine 'whether the agency's answer is based on a permissible construction of the statute.'" *Smriko v. Ashcroft*, 387 F.3d 279, 288 (3d Cir. 2004) (quoting *Chevron*); *United States v. Deardorff*, 343 F. Supp. 1033, 1037-38 (S.D.N.Y. 1971) (the canon of statutory interpretation that "legislative history not be used to interpret a statute that is clear and unambiguous on its face . . . is particularly apposite where the legislative history is itself somewhat ambiguous.").



After considering public comments and other enhancements in this final rule, the Agency is not finalizing the definition of “fail or refuse to act.” The Agency concludes that the key ambiguous term in this statutory phrase is “to act” and reasonably interprets this term to mean not just any act or action, but an act or action that is “in conformance with applicable statutes and regulations.” The final rule provides a clear and unambiguous list of actions that are not in conformance with section 401 and that therefore amount to waiver. The clarity in the final rule provides certifying authorities with sufficient notice that all actions on certification requests must be taken in accordance with the procedural requirements of the statute and this final rule. Accordingly, the Agency has decided that a separate definition of “fail or refuse to act” is not necessary. Treatment of procedural deficiencies as waivers is consistent with the EPA’s existing regulations for the NPDES program. *See* 40 CFR 124.53(e)(2) (providing that for certification on a draft permit, “[f]ailure to provide such citation waives the right to certify with respect to that condition”).

The waiver provision in section 121.9 of the final rule has been expanded to provide additional clarity on the circumstances that amount to a failure or refusal to act. As discussed in section III.G.2.e of this notice, a federal agency must determine whether waiver has occurred, either expressly or implicitly through a failure or refusal to act. Section 401 provides that certifying authorities may take one of four possible actions on a certification request: grant, grant with conditions, deny, or waive. As long as a certifying authority takes one of these four actions within the reasonable period of time and in accordance with the procedural requirements of the Act and this final rule, the certifying authority will have acted on the certification request. However, section 401 provides that where a certifying authority “fails or refuses” to act on a certification request, certification shall be waived. 33 U.S.C. 1341(a)(1). Under the final rule, a

certifying authority waives certification if it fails or refuses to act on a certification request in accordance with the procedural requirements of section 401 and this final rule, including but not limited to issuing public notice, acting within the reasonable period of time, providing certification for projects that are within their jurisdiction, providing certification decisions in writing, and including the information required to support a certification or denial. The final rule also provides that a certification condition may be waived if the certifying authority fails or refuses to provide information required in section 121.7(d). Under the final rule, deficient conditions are severable from the certification. In other words, waiver of a specific certification condition does not waive the entire certification.

e. Federal Agency Review of Certifications

The proposed rule would have required federal agencies to review a certification action to determine whether it was issued in accordance with the procedural requirements of the Act and determine whether the action was taken within the “scope of certification” as provided in the rule. The EPA has considered public comments and relevant court decisions and is retaining in the final rule the requirement that federal agencies review certification actions for compliance with the procedural requirements of section 401, including procedural requirements in this final rule. However, the final rule does not require federal agencies to substantively evaluate or determine whether a certification action was taken within the scope of certification. As a general matter, federal agencies may not readily possess the expertise or detailed knowledge concerning water quality and State or Tribal law matters that would be necessary to make such substantive determinations. The EPA has determined that other provisions of this final rule, such as the definitions of “water quality requirements,” “discharge,” and “certification,” and the information requirements for certification conditions and denials listed in section 121.7(d) and section

121.7(e), will help ensure that certifying authorities have the information and necessary tools to act on a certification request within the scope of certification as provided in this rule. The Agency is not finalizing the provisions in section 121.6(c) and section 121.8(a)(1)-(2) of the proposed rule.

i. Federal Agency Procedural Review

The final rule requires federal agencies to determine whether a certifying authority's certification, certification condition, or denial includes the information requirements in sections 121.7(c), 121.7(d), or 121.7(e) of the final rule. This federal agency review is entirely procedural in nature and does not require any specific expertise or knowledge in water quality or State or Tribal law. Under the final rule, the federal agency's review is limited to determining whether the certification action was taken in accordance with procedural requirements and whether the certification, condition, or denial includes all of the required information. Federal agency review under the final rule does not include a substantive evaluation of the sufficiency of that information.

A few commenters supported the proposed requirement that federal agencies substantively review water quality certifications and asserted that such reviews would bring clarity and certainty to the water quality certification process. These commenters also supported the proposed authority for federal agencies to determine that constructive waiver occurred for certifications, conditions, and denials that failed to comply with procedural requirements of the rule. Some commenters stated that allowing federal agencies to review and reject certifications, conditions, and denials would violate the rights of States and Tribes. Some commenters stated that section 401(a)(1), which provides that "[n]o license or permit shall be granted if certification has been denied," prohibits the federal government from vetoing denials. Some commenters

stated that the EPA did not provide any legal support from the CWA or case law for its proposed approach of allowing federal review of certifications, conditions, and denials.

The Agency has made modifications in the final rule text to clarify that federal agency review of certifications, conditions, and denials is procedural in nature and does not extend to substantive evaluations. The EPA's final regulatory text at sections 121.8 (Effect of denial of certification), 121.9 (Waiver), and 121.10 (Incorporation of certification conditions into the license or permit) contemplate that the federal licensing or permitting agency will review certifications only to ensure that certifying authorities have included certain required elements and completed certain procedural aspects of a section 401 certification. Under the final rule, federal agencies are required to determine whether certification denials include the three elements listed in section 121.7(e). If certification denials do not include these three elements, the certifying authority has "fail[ed] or refuse[d] to act" (as explained in section III.G.2.d of this notice) and therefore has waived certification. Similarly, federal agencies are required to determine whether certification conditions include the two elements listed in section 121.7(d) of the final rule. If the certification conditions do not satisfy the requirements by listing these two elements, the certifying authority has "fail[ed] or refuse[d] to act" and will waive that deficient certification condition.

In delineating such a role for federal licensing or permitting agencies, the EPA has interpreted the statute reasonably and appropriately. In *City of Tacoma, Washington v. FERC*, the Court of Appeals for the D.C. Circuit noted that "[i]f the question regarding the state's section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: 'No license or permit shall be granted until the certification

*required by this section* has been obtained or has been waived.” 460 F.3d at 67-68 (citing 33 U.S.C. 1341(a)(1)) (emphasis in original). The court went on to explain that even though the federal agency did not need to “inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] at least to confirm that the state has facially satisfied the express requirements of section 401.” *Id.* at 68; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (“had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago, decommissioning of the Project might very well be underway”); *Airport Communities Coalition v. Graves*, 280 F. Supp.2d 1207, 1217 (W.D. Wash. 2003) (holding that the Army Corps had discretion not to incorporate untimely certification conditions).

Some commenters stated that allowing federal review of water quality certifications would ignore the fact that the States and Tribes are the experts on their water resources and know what is necessary to assure that the water quality standards passed under State and Tribal law are met. Another commenter requested clarification about whether the EPA would provide any assistance or guidance to federal agencies as they review certification denials and asked for clarification about how the EPA would ensure consistency and reliability across such decisions.

As discussed below, the final rule does not require the federal agency to make a substantive inquiry into the sufficiency of the information provided in support of a certification, condition, or a denial. Rather, the final rule requires only that the federal agency confirm that the certifying authority has complied with procedural requirements of the Act and these regulations and has included the required information in a certification, condition, or denial. Although this limited review function may be new to some federal agencies, it is consistent with the EPA’s own longstanding practice under its NPDES regulations implementing section 401 that allow the

EPA to make such determinations under certain circumstances. *See* 40 CFR 124.53(e). Under the final rule, if a certification, condition or denial meets the procedural requirements of section 401 and this final rule, the federal agency must implement the certifying authority's action, irrespective of whether the federal agency may disagree with aspects of the certifying authority's substantive determination.

ii. Federal Agency Review of Scope

The proposed rule would have required federal licensing and permitting agencies to review and determine whether certifications, conditions, and denials are within the "scope of certification," as articulated in this final rule. The final rule does not include this additional substantive federal agency review requirement.

A number of commenters supported the proposed language that would allow a federal agency to set aside certification conditions or denials that are not within the "scope of certification." Some of these commenters agreed that conditions should not be included in licenses or permits if they do not meet the definition of "water quality requirements" under the final rule. One of these commenters stated that federal agency review of certifications would allow issues of scope to be resolved expeditiously by the federal agency through the federal licensing or permitting process, rather than by forcing the applicant to challenge the certification decision through a separate administrative or judicial appeal process, which could take months or years to resolve. The commenter also asserted that the proposal would allow the federal agency to protect the integrity of its licensing or permitting process by rejecting conditions that exceed the scope of section 401 even if the applicant chooses not to challenge the conditions. Another commenter asserted that the federal agency has an obligation to determine that a certification decision "complies with the terms of section 401," and that this obligation is

supported by case law. The commenter maintained that this obligation logically also includes the obligation to confirm that certification conditions are within the scope of section 401.

Other commenters asserted that the proposed approach would conflict with sections 401(a) and (d) because, they assert, that under section 401(a) a federal license or permit may not issue if certification is denied, and under section 401(d), federal agencies have no authority to review or veto State or Tribal conditions or certifications. These commenters stated that the proposed provision would improperly circumvent judicial review. Some commenters stated that the proposed rule's federal agency review provision is in contravention of the legislative intent. Some commenters stated that judicial precedent prohibits the EPA from authorizing federal agencies to review the scope or grounds for State and Tribal decisions on water quality certifications. One commenter stated that the authority of federal agencies to review State section 401 certifications is narrow and limited to ensuring that the State complies with the specific procedural requirements set forth in section 401, citing *City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991). A few commenters stated that a federal agency's scope of review would lead to more confusion and litigation and would make the certification process more time consuming.

The Agency has considered this diverse range of opinions. For the reasons explained above, the Agency has concluded that under the final rule, federal agencies have an affirmative obligation to review certifications to ensure that certifying authorities have complied with procedural requirements and have included the required information for certifications, conditions, and denials. But the final rule does not authorize federal agencies to substantively review certifications or conditions to determine whether they are within the scope of

certification. The EPA disagrees with commenters who assert that section 401(d) unambiguously requires one approach or another. As described throughout the proposed and final rule preambles, there are widely varying views and interpretations of section 401, and relevant court decisions reflect these disparate views and interpretations. The final rule provides a framework for section 401 water quality certifications that is reasonable, is supported by the language of the CWA, and will provide greater clarity and regulatory certainty.

One commenter stated that none of the cases cited by the EPA in the proposed rule suggested that federal agencies have authority to review the substance of State-imposed section 401 conditions to determine whether they comply with the EPA's view of the appropriate scope of the statute. The same commenter stated that the proposal's rationale that federal agencies have struggled to enforce State certification conditions misses the point and that enforcement of certification conditions may also be initiated by the appropriate States through State law, citing *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Env't'l Protection*, 833 F.3d 360 (3d Cir. 2016). One commenter stated that EPA Office of General Counsel opinions have previously "interpreted [401(d)] broadly to preclude federal agency review of state certifications," citing *Roosevelt Campobello Inter. Park v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (citing opinions of the EPA Office of General Counsel on the issue). Some commenters also stated that to review a condition to determine whether it falls substantively within the scope of water quality requirements would create a substantial burden on federal agencies making these types of determinations.

Some commenters stated that the proper place for water quality certifications and their conditions to be challenged is in court, particularly State court. Some commenters stated that State courts are the appropriate venue to challenge water quality certifications because those



certifications are issued under State law and State courts know how best to interpret State law.

Some commenters stated that the legislative history for the 1972 amendments to the CWA repeatedly shows that Congress intended conflicts regarding the scope of section 401 to be resolved by State courts, not federal agencies.

For the reasons articulated in the proposed and final rule preambles, the EPA disagrees with the proposition that relevant case law precludes any federal review of certification conditions. The EPA also disagrees with one commenter's assertion that, as a general matter, States may independently enforce certification conditions through State law. See section III.K.2.a of this notice for further discussion on the enforcement of certification conditions within federal licenses or permits. Although the proposed requirement was consistent with the principle that federal agencies have the authority to reject certifications or conditions that are inconsistent with the requirements and limitations of section 401 itself (*see City of Tacoma, Wash. v. FERC*), the final rule reflects the EPA's conclusion that courts of competent jurisdiction are better suited to evaluate the underlying State or Tribal law to determine whether a specific certification condition or the basis for a denial is within the scope of certification. The EPA also acknowledges that existing lower court case law on this topic is mixed, and that requiring federal agencies to conduct a substantive review to determine whether conditions or denials are within the scope of certification could create new litigation risk (including litigation-related staffing and cost burdens) for those federal agencies and further complexity and uncertainty concerning the appropriate path for remedying a substantively unlawful certification condition or denial. The final rule's scope of certification, requiring that "conditions" be within that scope, and requiring certifying authorities to provide specific information in support of a condition or a denial, will

help provide reviewing courts with the information and tools necessary to conduct a proper evaluation of certification conditions and denials.

### iii. Remedying Deficient Conditions and Denials

The proposed rule would have allowed federal agencies to provide certifying authorities with the opportunity to remedy deficient conditions and denials. However, in response to public comments and to increase clarity in the final rule, the Agency is not finalizing these provisions.

Commenters expressed a variety of viewpoints about whether federal agencies can or should provide certifying authorities with the opportunity to remedy deficient conditions and denials. One commenter did not support providing certifying authorities with the opportunity to remedy conditions that are not related to water quality, while other commenters asserted that the ability to remedy deficient conditions should be mandatory rather than discretionary. Some commenters expressed concern regarding timeframes for federal review, notification to States and Tribes, and opportunity for States and Tribes to remedy water quality certifications and suggested that the opportunity to cure a deficient condition could effectively shorten the reasonable period of time. Commenters also requested that certifying authorities should be able to remedy deficient conditions regardless of whether the reasonable period of time has expired, or at least up until the one-year maximum reasonable period of time specified in the CWA. Some commenters expressed concern that the proposal did not provide an administrative appeal process for a certifying authority to dispute that conditions and denials are in fact “deficient.”

The Agency has considered these comments and determined not to include in the final rule an express allowance for certifying authorities to remedy deficient conditions after the certification action is taken. The Agency recognizes and agrees with many of the implementation and process-related concerns raised by commenters, including concerns that there may not be

sufficient time to remedy deficient conditions during the established reasonable period of time.

The EPA disagrees with the commenters who asserted that the certifying authority must be given an opportunity to remedy deficient conditions even after the reasonable period of time has expired. The final rule contains additional clarification on procedural and substantive requirements. These clarifications should provide certifying authorities with the information and tools necessary to act on certification requests consistent with section 401 and within the scope of certification provided in this final rule, reducing the need to remedy deficient conditions or denials. The EPA has concluded in the final rule that if a federal licensing or permitting agency wishes to create procedures whereby certifying authorities may remedy deficient conditions or denials, it may do so in its own water quality certification regulations. Such procedures may not be used to exceed the one-year statutory limit on the reasonable period of time. The approach in the final rule provides sufficient flexibility to those federal agencies should they wish to update their water quality certification regulations to provide additional procedures for remediating deficient certification conditions or denials.

#### *H. Certification by the Administrator*

##### *1. What is the Agency Finalizing?*

In the final rule, the Agency is establishing specific procedures regarding public notice and requests for additional information that apply only when the EPA is the certifying authority. As discussed in section III.B of this notice, the Agency proposed to require pre-filing meeting procedures only when the EPA is the certifying authority, but the final rule expands the requirement for pre-filing meeting requests to all project proponents, including federal agencies when they seek certification for general licenses or permits, regardless of the certifying authority.

The rationale for expanding this practice to all section 401 certifying authorities as a best practice for all certification actions is more fully explained in section III.B of this notice.

## 2. Summary of Final Rule Rationale and Public Comments

Section 401(a)(1) of the CWA provides that “[i]n any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.” 33 U.S.C. 1341(a)(1). Currently, all States have authority to implement section 401 certification programs. However, the EPA acts as the certifying authority in two scenarios: (1) on behalf of federally recognized Indian Tribes that have not received TAS for section 401, and (2) on lands of exclusive federal jurisdiction, such as Denali National Park. When acting as a certifying authority, the EPA is subject to the same timeframes and section 401 certification requirements as other certifying authorities. This section outlines additional procedures that apply only when the EPA is the certifying authority.

The first scenario arises when Tribes do not obtain TAS authorization for section 401 certifications. As discussed in section II.F.1 of this notice, Tribes may obtain TAS authorization for purposes of issuing CWA section 401 certifications. If a Tribe does not obtain TAS for section 401 certifications, the EPA is responsible to act as the certifying authority for projects resulting in a potential discharge into waters of the United States on Tribal land.

The second scenario arises when the federal government has exclusive federal jurisdiction over land. The federal government may obtain exclusive federal jurisdiction in multiple ways, including where the federal government purchases land with State consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; where a State chooses to cede jurisdiction to the federal government; and where the federal government reserved jurisdiction upon granting statehood. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30

(1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895). For example, the federal government retained exclusive jurisdiction over Denali National Park in Alaska's Statehood Act. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

The EPA's 1971 certification regulations identified circumstances where the Administrator certifies instead of a State, Tribe, or interstate authority, and limited the Administrator's certification to certifying that a potential discharge "will not violate applicable water quality standards." 40 CFR 121.21. However, this language reflects the language of section 21(b) of the FWPCA (1970) and is not consistent with the statutory language of section 401(a), which requires authorities to certify that the potential discharge will comply with the applicable provisions of CWA sections 301, 302, 303, 306, and 307. In this final rule, the Agency is modernizing and clarifying its regulations by finalizing the following text in section 121.13(a):

Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements is required where no state, tribe, or interstate agency has authority to give such a certification.

In circumstances where the EPA is the certifying authority and the water body impacted by the proposed discharge does not have any applicable water quality standards, the EPA's 1971 certification regulations provided the EPA with an advisory role. 40 CFR 121.24. The statute does not explicitly provide for this advisory role, and therefore, this final rule does not include a similar provision. However, the Agency believes that the technical advisory role provided in section 401(b) and discussed in section III.J of this notice is sufficient to authorize the EPA to play an advisory role in such circumstances. As a result, omitting this text in the final rule is unlikely to change the Agency's existing practice. 33 U.S.C. 1341(b).

Commenters provided feedback on a few general aspects of this topic. Several commenters expressed the importance of the Administrator's certification authority where a Tribe or interstate authority lacks such authority. Some of these commenters stressed that the EPA has a trust obligation to protect water quality for those Tribes that lack TAS and a responsibility to provide Tribes with an opportunity for meaningful input. One commenter stated that the EPA had not provided a list or map of the geographic areas in which it intends to assert certification authority and requested that the EPA explicitly identify all lands within its jurisdiction and the basis for EPA's jurisdictional assertion.

The EPA has a statutory obligation to act as a certifying authority, pursuant to CWA section 401(a)(1). Separately, pursuant to the Agency's 1984 Indian Policy (EPA Policy for the Administration of Environmental Programs on Indian Reservations, *see* <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy>), the EPA has a responsibility to coordinate with Tribes when making decisions and managing environmental programs that affect reservation lands. The EPA takes these obligations and responsibilities seriously. Consistent with the CWA, the final rule directs the EPA to act as the certifying authority on behalf of Tribes that do not have TAS for CWA section 401. Under the final rule, the EPA does this by determining whether the potential discharge from a proposed project will comply with water quality requirements, as defined and explained in section III.E.2.b of this notice. As provided in section 401(a)(1) and in section 121.7(f) of the final rule, if there are no water quality requirements applicable to the waters receiving the discharge from the proposed project, the EPA will grant certification. The Agency will continue to comply with the EPA Policy on Consultation and Coordination with Indian

Tribes when certifying on behalf of Tribes and disagrees with commenters who suggested that this rule would preclude Tribes from contributing meaningful input.

The EPA does not maintain a national map of lands for which the Agency serves as the certifying authority, as such borders may on occasion change as Tribes continue to annex and cede lands. Rather, it is the duty of the project proponent to determine the appropriate certifying authority when seeking a section 401 certification. The EPA acknowledges that there may be potential for jurisdictional overlap between certifying authorities at certain project sites (*e.g.*, at the boundaries of Tribal lands), and the Agency believes that the requirement for project proponents to request a pre-filing meeting with certifying authorities will provide an opportunity for clarifying discussions about which agency or organization is the proper certifying authority.

Some commenters expressed confusion about whether the “EPA as the certifying authority requirements” in the proposed rule applied to just the EPA, or to all certifying authorities, and one commenter asserted that subpart D of the proposed regulatory text should not use the term “certifying authority” to define those instances in which the EPA is taking action. The Agency disagrees that using the term “certifying authority” in subpart D of the proposed regulatory text is unclear, as subpart D of the proposed rule is titled “Certification by the Administrator” and section 121.11(c) of the proposed rule explained that for purposes of this subpart the Administrator is the certifying authority. However, to avoid any potential for confusion, the EPA has replaced the word “certifying authority” with “the Administrator” throughout subpart D of the final rule. As noted above, when the EPA is the certifying authority, it must comply with all of the requirements in the final rule, not just subpart D.

This final rule includes two sets of procedural requirements that would apply only when the Administrator is the certifying authority: (1) clarified public notice procedures, and (2) specific

timelines and requirements for the EPA to request additional information to support a certification request. These requirements are discussed below and are included in final rule sections 121.15 and 121.14.

The EPA also proposed a third set of procedural requirements that would have applied only when the Administrator is the certifying authority: pre-filing meeting request requirements. As explained in section III.B of this notice, the EPA is finalizing a requirement that all project proponents, including federal agencies when they seek certification for general licenses or permits, submit a pre-filing meeting request to the certifying authority, regardless of whether the Administrator is the certifying authority. This requirement is now in section 121.4 of final rule subpart B, rather than in subpart D.

Some commenters recommended extending all three of these sets of proposed requirements to all certifying authorities. Other commenters recommended that none of the proposed requirements should apply to all certifying authorities. The EPA has considered the conflicting perspectives in these comments and has concluded in this final rule that only the pre-filing meeting request requirements will apply to all certifying authorities, as described in section III.B of this notice.

a. Public Notice Procedure

Section 401 requires a certifying authority to provide procedures for public notice, and a public hearing where necessary, on a certification request. Some courts have held that this includes a requirement for public notice itself. *City of Tacoma*, 460 F.3d at 68. The 1971 certification regulations at 40 CFR part 121.23 described the EPA's procedures for public notice after receiving a request for certification. The EPA is updating its regulations to provide greater



clarity to project proponents, federal agencies, and other interested parties concerning the EPA's procedures for public notice when the Administrator is the certifying authority.

Under the final rule, when the Administrator is the certifying authority, the Agency will provide appropriate public notice, within 20 days of receipt of a certification request, to parties known to be interested. If the EPA in its discretion determines that a public hearing is appropriate or necessary, the Agency will, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony at a public hearing.

One commenter stated that the public should be kept informed of the section 401 process and proposed project plans, especially for large projects. Another commenter suggested that public participation requirements in the section 401 certification review process should be expanded, which they maintained would lead to better identification of projects that should be denied certification because of adverse effects on water quality. A few commenters disagreed with the proposition that public notice should be limited to parties known to be interested and asserted that notice should be provided to the general public. One commenter suggested that the public should receive a minimum of 30-days' notice prior to a hearing, or another timeframe tied to the date when information is made available for public review.

The EPA appreciates the public commenters who provided feedback on the public notice process for when the EPA is the certifying authority. The public notice and hearing process in the final rule will ensure that the Agency keeps the public informed about the section 401 certification process and proposed project plans. The proposed rule included a list of potentially interested parties, such as Tribal, State, county, and municipal authorities, heads of State agencies responsible for water quality, adjacent property owners, and conservation organizations. To avoid artificially or unintentionally narrowing the universe of potentially interested parties,

this list is not included in the final rule. The procedures in the final rule, including providing notice to interested parties, will provide sufficient public notice, as required in section 401, and will provide the public with an opportunity to inform the EPA's certification decision through public comments. Under the final rule, the Agency may also, at its discretion, determine whether a public hearing is appropriate and necessary. In such cases, all interested and affected parties would be given the opportunity to present evidence or testimony at a public hearing. The Agency is not prescribing a single timeframe for the length of public notice under the final rule. The appropriate timeframe for notice and comment is more appropriately determined on a case-by-case basis, considering project-specific characteristics as well as the length of the established reasonable period of time. In general, the EPA anticipates that public notices will provide for a 30-day comment period; however, comment periods as short as 15 days or as long as 60 days may be warranted in some cases, based on the nature of the project and the reasonable period of time. The public hearing may be conducted in-person, or remotely (through telephone, online, or other virtual platforms), as deemed appropriate by the Agency.

b. Requests for Additional Information

The definition of a certification request in this final rule identifies the information that project proponents are required to provide to certifying authorities when they submit a certification request. However, in some cases, the EPA may conclude that additional information is necessary to determine that the potential discharge will comply with water quality requirements (as defined at section 121.1(n) of the final rule). Section 401 does not expressly address the issue of whether and under what circumstances a certifying authority may request additional information to review and act on a certification request. The EPA concluded that it is reasonable and consistent with the CWA's statutory framework that when the Administrator is the certifying authority, the

Agency be afforded the opportunity to seek additional information necessary to do its job.

However, consistent with the statute's firm timeline to act on a certification request, it is also reasonable to assume that Congress intended some appropriate limits be placed on the timing and nature of such requests. This final rule fills the statutory gap and provides a structure for the Administrator as the certifying authority to request additional information and for project proponents to timely respond. Consistent with the proposal, this final rule includes procedural requirements and timeframes for action that will provide transparency and regulatory certainty for the Agency and project proponents. However, in response to public comments and to increase clarity, the Agency has provided enhancements to the final rule text.

Some commenters stated that the procedures proposed for when the EPA is the certifying authority would inhibit the EPA from seeking additional information on water quality effects relevant to making a certification decision. Some of these commenters stated that this would lead to unnecessary denials of certification where, had better information been developed, a certification may have been granted. The Agency disagrees with the suggestion that the procedures proposed for when the EPA is the certifying authority would lead to certification decisions based on incomplete information. Consistent with the proposal, the EPA must request information within 30 days of receipt. The final rule includes additional clarifications that if the EPA finds it necessary to request additional information, then the EPA must make an *initial request* within 30 days of receipt. Nothing in the regulation precludes the EPA from making additional information requests at a later point in the process after an initial request is made, so long as that information can be developed by the project proponent and considered by the EPA within the reasonable period of time. This final rule acknowledges that certifying authorities like the EPA need relevant information as early as possible to review and act on section 401

certification requests within the reasonable period of time. As discussed in section III.B of this notice, the pre-filing meeting request requirement under this final rule is intended to ensure that the EPA has an opportunity to engage with the project proponent early, learn about the proposed project, and consider what, if any, additional information might be needed from the project proponent.

Under the final rule, if the Agency needs additional information, an initial request for information must be made to the project proponent within 30 days after the receipt of a certification request. Additional information may include, for example, more detail about the contents of the potential discharge from the proposed project or specific information about treatment or waste management plans or additional details about discharges associated with the operation of the facility. The final rule does not preclude the Agency from making additional requests for information, but such requests for information must still comply with the requirements outlined below in this section of the final rule preamble.

The EPA is finalizing a provision that when the Administrator is the certifying authority, the Agency can request only additional information that is within the scope of certification and is directly related to a potential discharge from the proposed project and its potential effect on the receiving waters. Some commenters supported the proposal to limit additional information requests to information within the scope of the section 401 certification, while other commenters disagreed with the limitation. The Agency considered these and other comments and is finalizing this provision with minor modifications to provide clarity and certainty when the EPA is the certifying authority.

Several commenters stated that the proposal would not distinguish between complex and simple projects and noted that the type of information needed to develop a certification for a

complex project, such as a 30- or 50-year FERC license, would not be the same as that needed for a shorter-term or simpler project. The EPA agrees with commenters that information needs may differ depending on the complexity of the proposed project and other project-specific factors. The final rule provides sufficient flexibility for the Administrator to request project-specific information to help inform the certification decision. To ensure that the Agency's action remains within the scope of certification, the EPA has determined that any additional information requested must be within the scope of certification and must be directly related to the discharge from the proposed project and its potential effect on receiving waters. In addition to ensuring that the Agency acts within the scope of certification, limiting the type of information that the EPA may request as the certifying authority eliminates unnecessary and burdensome requests. Doing so also limits EPA review of information irrelevant to the Agency's decision-making process.

The EPA is also finalizing a provision that when the Administrator is serving as the certifying authority, the Agency can request only additional information that can be collected or generated within the established reasonable period of time. Some commenters disagreed with this provision, and one commenter asserted that this provision would contravene the CWA and the statute's emphasis on protecting human health and the environment. Several commenters stated that the proposal defers to a project proponent to determine what information may reasonably be developed during the "reasonable period of time," because the project proponent could claim that it would take too long to collect or generate the information.

The Agency disagrees with commenters that suggested that this provision defers to project proponents to determine what information may be developed during the reasonable period of time. In most cases, it should be objectively known whether certain information can be generated or collected within the reasonable period of time. For example, a multi-year study cannot be

conducted within a 12-month reasonable period of time. Similarly, a 180-day study cannot be conducted within a 60-day reasonable period of time. In the event of disputes between the EPA and the project proponent about whether certain new information can be collected or generated within the reasonable period of time, the EPA will engage directly and in good faith with the project proponent to resolve the dispute.

This final rule is also intended to address issues that have caused delays in certifications and project development and that have resulted in protracted litigation. Although these provisions apply only when the EPA is the certifying authority, they may serve as models for other certifying authorities. For example, the Agency is aware that some certifying authorities have requested “additional information” in the form of multi-year environmental investigations and studies, including completion of a NEPA review, before the authority would even begin review of the certification request.<sup>62</sup> Consistent with the plain language of section 401, under this final rule, when the Administrator is acting as the certifying authority, such requests from the EPA

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<sup>62</sup> Some stakeholders have suggested that it may be challenging for a state to act on a certification request without the benefit of review under NEPA or a similar state authority. *See, e.g.,* Cal. Pub. Res. Code Section 21000 *et seq.*; Wash. Rev. Code Section 43.21C.150. Consistent with the EPA’s 2019 Guidance, the EPA recommends that certifying authorities do not need to delay action on a certification request until a NEPA review is complete. The environmental review required by NEPA has a broader scope than that required by section 401. For example, the NEPA review evaluates potential impacts to all environmental media, as well as potential impacts from alternative proposals that may not be the subject of a federal license or permit application. By comparison, a section 401 certification review is far more narrow and is focused on assessing potential water quality impacts from the proposed federally licensed or permitted project. Additionally, many NEPA reviews have taken more than one year to complete. Waiting for a NEPA process to conclude may result in waiver of the certification requirement for failure to act within a reasonable period of time. To the extent that State or Tribal implementing regulations may have required a NEPA review to be completed as part of a section 401 certification review, the EPA encourages certifying authorities to update those regulations to incorporate deadlines consistent with the reasonable period of time established under the CWA, or to decouple the NEPA review from the section 401 process, so as to ensure timely action on section 401 certification requests and to avoid waiver by the certifying authority.

would not be authorized because they would extend the statutory reasonable period of time, which is not to exceed one year. This final rule provides clarity that, while additional information requests may be a necessary part of the certification process, such requests may not result in extending the period of time beyond which the CWA requires the Agency to act.

Under this final rule, when the Administrator is acting as the certifying authority, in any request for additional information, the EPA must include a deadline for the project proponent to respond. The deadline must allow sufficient time for the Agency to review the additional information once it is received, and to act on the certification request within the established reasonable period of time.

Many commenters asserted that the proposed rule would not require project proponents to timely respond to requests for additional information. Some commenters requested that the EPA clearly state that failure by the project proponent to complete a section 401 certification request or provide requested additional information within a specified time period should be grounds for denial of certification.

The Agency disagrees with the suggestion that the project proponent would not be required to timely respond to requests for additional information. Under the final rule, when the Administrator is the certifying authority, project proponents must submit requested information by the EPA's deadline. The Agency has clarified in section 121.14(e) that a project proponent's failure to provide additional information does not prevent the Administrator from taking action on a certification request. If the project proponent fails to submit the requested information, the Agency may conclude that it does not have sufficient information to certify that a potential discharge will comply with applicable water quality requirements and may therefore deny the certification request. The EPA may also use its expertise to evaluate the potential risk associated

with the remaining information or data gap and to consider granting certification within the reasonable period of time with conditions to address those potential risks. The EPA expects that when the Administrator is the certifying authority, these procedures will provide clarity and regulatory certainty to the EPA and project proponents. The EPA notes that States and Tribes may choose to adopt similar provisions to ensure that all certifying authorities are working effectively and in good faith to act on certification requests within the reasonable period of time, and that denials based on a lack of information are not done simply for administrative purposes but because additional information is needed to assure that the discharge from the proposed project will comply with water quality requirements and the lack of information cannot be addressed by appropriate certification conditions. The EPA further notes that under the proposal and this final rule, certifying authorities are not obligated to act on incomplete certification requests. If a certification request is not complete as required by this final rule, the reasonable period of time does not begin.

#### *I. Determination of Effect on Neighboring Jurisdictions*

##### *1. What is the Agency Finalizing?*

Consistent with the proposal, under the final rule, if the EPA in its discretion determines that a neighboring jurisdiction may be affected by a discharge from a federally licensed or permitted project, the EPA must notify the affected jurisdiction, the certifying authority, and the federal agency within 30 days of receiving the notice of the certification from the federal agency. The final rule includes certain enhancements to the proposed rule to increase clarity and regulatory certainty, as explained below in this section of the final rule preamble.

##### *2. Summary of Final Rule Rationale and Public Comment*



Section 401(a)(2) requires federal agencies to immediately notify the EPA when a certification is issued by a certifying authority for a federal licensing or permitting application. Section 401(a)(2) also provides a mechanism for the EPA to notify States and authorized Tribes where the EPA has determined the discharge from a proposed federally licensed or permitted project subject to section 401 may affect the quality of their waters. The EPA's 1971 certification regulations established procedural requirements for this process but required updating to align with CWA section 401 and to establish additional clarity. The EPA recognizes that federal agencies may have different processes to satisfy this requirement and will continue to work with these agencies to ensure that the Agency is notified of all certifications. The final rule does not contain a standardized process for federal agencies to immediately notify the EPA when certifications are issued. The EPA expects federal agencies to develop notification processes as they update their certification regulations in accordance with the Executive Order. The final rule provides flexibility for federal agencies to develop processes and procedures that work best within their licensing or permitting programs. Additionally, the Agency has made minor, non-substantive modifications to the regulatory text at section 121.12(a) to clarify that the federal agency's statutory obligation to notify the EPA is triggered when the federal agency receives a federal license or permit application and the related certification. The text of section 401(a)(2) provides that the federal agency must "immediately" notify the EPA of such application and certification. To aid in clarity and implementation, the Agency reasonably interprets "immediately" to mean within five days of the Federal agency's receiving notice of the certification. 33 U.S.C. 1341(a)(2). The EPA believes that, in the context of section 401(a)(2), five days is a reasonable interpretation of the statutory term "immediately." The federal agency needs some amount of time to process receipt of the license application and certification from the

project proponent or certifying authority, review the received materials (which might be substantial), and then transmit notice to the appropriate EPA office. Allowing for five days is a prompt yet reasonable period of time to complete this process. Moreover, unlike emergency response or notifications provisions in environmental statutes, the provisions in CWA 401 governing certifications do not appear to require an emergency response that might—in other contexts—justify interpreting “immediately” to require a shorter period of time to act. As provided in section 121.9(c) of the final rule, the federal agency must provide a separate written notification of any waiver determination; this notification need not occur prior to transmitting the certification to EPA under section 121.12(a) of the final rule.

This final rule affirms the EPA’s interpretation that section 401(a)(2) establishes authority for the Agency to determine in its discretion whether the discharge from a certified project may affect the water quality in a neighboring jurisdiction. One public commenter agreed with the EPA’s interpretation and discretion concerning the determination whether a project may affect downstream States under CWA section 401(a)(2). Other commenters stated that even if the EPA’s discretion is supported by the language of the CWA, the unbounded scope of the discretion is not consistent with the statute and would not provide accountability to neighboring States, the project proponent, or the public without additional clarification. Some commenters stated that the EPA should provide notice to neighboring jurisdictions in every instance, thereby allowing neighboring jurisdictions who are best situated to understand their own water quality concerns to make a determination as to whether there would be an effect on water quality. Some commenters stated that the rule should set forth specific factors that the EPA would consider in making a determination or that the EPA’s determination should be made in consultation with neighboring jurisdictions. Other commenters requested that the EPA develop regulations or

guidance that would explain when the EPA would exercise its authority to notify downstream jurisdictions.

The EPA appreciates these comments and recognizes the desire for more prescriptive and specific provisions concerning the determination of potential effects on neighboring jurisdictions. As a general matter, the EPA intends to use its technical expertise from administering the CWA over nearly fifty years to evaluate whether a certified project may affect a neighboring jurisdiction. At this time, the EPA is not establishing specific provisions in the final rule, but the EPA may in the future take action to further clarify this provision via either additional rulemaking or guidance.

The final rule modifies the EPA's 1971 certification regulations to mirror the CWA in describing the EPA's procedural duties regarding neighboring jurisdictions. The statute provides that, following notice of a section 401 certification, the Administrator shall within 30 days notify a potentially affected downstream State or authorized Tribe "[w]henver such a discharge *may affect, as determined by the Administrator*, the quality of the waters of any other State." 33 U.S.C. 1341(a)(2) (emphasis added). Because the EPA's duty to notify is triggered only when the EPA has made a determination that a discharge "may affect" a downstream State or Tribe, the section 401(a)(2) notification requirement is contingent. It is not a duty that applies to the EPA with respect to all certifications, rather it applies where—exercising its discretion—the EPA has determined that the certified discharge "may affect" a neighboring jurisdiction's waters. This provision is being finalized with minor modifications to increase clarity regarding the EPA's discretionary determination. The Agency has made minor, non-substantive modifications to the regulatory text at section 121.12(b) to clarify that the 30-day review period is triggered after the Administrator receives notice from the federal agency.

The EPA is also clarifying the section 401(a)(2) notification process in this final rule, as such procedures were not described in sufficient detail in the 1971 certification regulations. If, as described above, the EPA determines that a neighboring jurisdiction may be affected by a certified discharge from a federally licensed or permitted project, the EPA must notify the affected jurisdiction, certifying authority, federal agency, and project proponent within 30 days of receiving the notice that certification was issued for a proposed project. If the Agency does not provide the required notification within 30 days of receiving notification from a federal agency, the federal agency may resume processing the federal license or permit. The EPA need not wait the full 30 days, but may notify the federal agency at any time so that it may continue processing the license or permit.

Some public commenters requested changes to the proposed procedures, such as different timelines for neighboring jurisdictions to make a decision. One commenter requested that timelines be flexible and incorporate the same factors that the federal agencies would consider for determining the reasonable period of time. Other commenters stated that neighboring jurisdictions should be able to request additional information to make a determination. The EPA is finalizing notification procedures substantively as proposed, because they are consistent with the text of section 401(a)(2).

The final rule also provides a predictable framework for determinations by neighboring jurisdictions. The final rule requires that the EPA's notification to neighboring jurisdictions be in writing, dated, and state that the neighboring jurisdiction has 60 days to notify the EPA and the federal agency, in writing, whether or not the discharge will violate any of its water quality requirements (as defined at section 121.1(n) of the final rule) and whether the jurisdiction will object to the issuance of the federal license or permit and request a public hearing from the

federal agency. The final rule also requires that, if the neighboring jurisdiction requests a hearing, the federal agency must forward the hearing notice to the EPA at least 30 days before the hearing takes place. The public hearing may be conducted in-person or remotely through telephone, online, or other virtual platforms, as deemed appropriate by the Agency. Under the final rule, the EPA must provide its recommendations on the federal license or permit at the hearing. After considering the EPA's and the neighboring jurisdiction's input, the federal agency is required to condition the license or permit as necessary to assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements, as the term is defined in the final rule. Consistent with section 401(a)(2), under the final rule, if additional conditions cannot assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements, the federal agency cannot issue the license or permit. The final rule further clarifies that the federal agency may not issue the license or permit pending the conclusion of the determination of effects on a neighboring jurisdiction.

One commenter asserted that the EPA should consider all Tribes as neighboring jurisdictions for purposes of section 401(a)(2), irrespective of whether they have TAS. The commenter argued that limiting the application of the neighboring jurisdiction provision to those Tribes with TAS would subject Tribes without TAS to a lesser standard of review and ultimately resource protection. The Agency has determined that only States or authorized Tribes are considered to be "neighboring jurisdictions" under the final rule. As explained in section II.F.1 of this notice, section 518 of the CWA authorizes the EPA to treat eligible Tribes with reservations "as a State"

within the meaning of that provision, but the CWA does not authorize the EPA to treat all Tribes in that manner. 33 U.S.C. 1377(e).<sup>63</sup>

#### *J. The EPA's Role in Review and Advice*

The final rule reaffirms the EPA's important role in providing advice and technical assistance as requested through the certification process. The final rule provision in section 121.16 has been modified from the proposal to better align with the text of section 401 and the scope of certification in this final rule.

As described in the proposal, the EPA's 1971 regulations limited the provision of technical assistance to concerns regarding "water quality standards." To be consistent with the 1972 amendments, the final rule replaces this term with the broader "water quality requirements" which, as defined in the final rule, includes water quality standards. The proposed rule included a provision specifically authorizing a certifying authority, federal agency, or project proponent to request assistance from EPA to evaluate whether a certification condition was intended to address water quality effects from the discharge. The Agency is not finalizing that provision because it concluded that the final rule section 121.16 is broad enough to capture all technical advice that may be requested by certifying authorities, federal agencies, and project proponents.

Some commenters expressed concern that the proposed rule's description of the EPA's review and advice role goes beyond the authority provided in section 401(b). Other commenters supported the EPA's providing assistance upon request. Other commenters asked whether the

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<sup>63</sup> This final rule does not change the regulations under which federally recognized Indian Tribes obtain authorization to be treated in the same manner as states. 40 CFR 131.4(c) expressly states that where the EPA determines that a Tribe is eligible for TAS for purposes of water quality standards, the Tribe is likewise eligible to the same extent as a State for purposes of section 401 certifications. The regulations also establish criteria, application requirements, and application processing procedures for Tribes to obtain TAS authorization for purposes of CWA water quality standards. *See* 40 CFR 131.8.

EPA would be the “decision maker” or a party to litigation challenging a certification if a project proponent, certifying authority, or federal agency relied on the EPA’s technical advice at any point during the certification process.

Under the final rule, federal agencies, certifying authorities, and project proponents may seek the EPA’s technical expertise at any point during the section 401 water quality certification process. The Agency disagrees with commenters who asserted that the proposed regulation exceeded the authority provided in section 401(b). The Agency is not asserting independent or expanded authority in this role, but rather will provide assistance upon request. The legislative history for the Act provides further support for the Agency’s technical role under section 401(b). *See* H.R. Rep. No. 92-911, at 124 (1972) (“The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency.”). Under the final rule section 121.16, a certifying authority, federal agency, or project proponent may request assistance from the Administrator to provide relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements. This provision of the final rule is not intended to give the EPA authority to make certification decisions, or to independently review certifications or certification requests. Nor does this provision authorize the EPA to interpret a State or Tribal water quality standard or designated use in a manner that is inconsistent with the State or Tribe’s interpretation or implementation of that standard. This provision is merely intended to implement a provision of the statute that has been in effect since 1972. The provision of technical advice to project proponents, certifying authorities, or federal agencies is not a final

agency action, and it does not render the EPA a decision maker for purposes of the certification action or subsequent action of the federal agency.

#### K. *Enforcement*

##### 1. What is the Agency Finalizing?

Under the final rule, the federal agency issuing the applicable federal license or permit is responsible for enforcing certification conditions that are incorporated into a federal license or permit. Once the certifying authority acts on a certification request, the CWA does not provide independent authority for certifying authorities to enforce the conditions that are included in a certification under federal law. Under the final rule, the EPA is interpreting the CWA to clarify that this enforcement role is reserved to the federal agency issuing the federal license or permit.

Consistent with section 401, the final rule also expands the post-certification inspection function from the 1971 certification regulations to all certifying authorities. Under the final rule, certifying authorities are provided the opportunity to inspect the facility or activity prior to initial operations, in order to determine whether the discharge from the certified project will violate the certification. After an inspection, the certifying authority is required to notify the project proponent and federal agency in writing if it determines that the discharge from the certified project will violate the certification. The certifying authority is also required to specify recommendations concerning measures that may be necessary to bring the certified project into compliance with the certification.

##### 2. Summary of Final Rule Rationale and Public Comment

The CWA expressly notes that all certification conditions “shall become a condition on any Federal license or permit” subject to section 401. 33 U.S.C. 1341(d). The EPA’s 1971 certification regulations did not discuss the federal agency’s responsibility to enforce



certification conditions after they are incorporated into the permit. Under the final rule and consistent with the Act, the federal agency is responsible for enforcing certification conditions that are incorporated into a federal license or permit. In limited circumstances, the EPA's 1971 certification regulations required the Agency to provide notice of a violation and to allow six months for a project proponent to return to compliance before pursuing further enforcement. *See* 40 CFR 121.25. The EPA finds no support for that provision in CWA section 401, and such a provision is not included in the final rule.

a. Federal Agency Enforcement of Certification Conditions

The CWA does not provide an independent regulatory enforcement role for certifying authorities. The role of the certifying authority is to review the proposed project and to either grant certification, grant certification with conditions, deny certification, or waive certification. Once the certifying authority acts on a certification request, section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law. Rather, federal agencies typically have enforcement authority in accordance with the enabling statutes that provide such agencies with permitting and licensing authority.

Many commenters agreed with the proposal that the enforcement of section 401 conditions in a federal license or permit is the sole responsibility of the federal agency that issues the license or permit. A few commenters asserted that nothing in the CWA provides States with the authority to enforce or implement conditions of a section 401 certification. Another commenter stated that if certification conditions were enforceable independent of the federal license or permit, there would have been no need for Congress to require conditions to become part of the federal license or permit under section 401(d). Another commenter requested that the final rule unequivocally provide that section 401 certification conditions may be enforced only after they

are incorporated into the federal license or permit and only in the same manner as the other conditions of the federal license or permit, and that such conditions may not be independently enforced pursuant to the CWA. As reflected in the final rule regulatory text, the EPA generally agrees with these commenters.

Other commenters asserted that the rule should allow States and Tribes to independently enforce their section 401 certification conditions. Some commenters asserted that providing federal agencies with exclusive authority to enforce section 401 certification conditions, and limiting State enforcement, is contrary to the language of the CWA, legislative history, and case law, citing *Deschutes River Alliance v. PGE Co.*, 249 F.Supp.3d 1182 (D. Or. 2017); *S.D. Warren*, 547 U.S. at 386. Another commenter asserted that the Agency failed to cite any legal authority for prohibiting States from enforcing their own certifications. One commenter asserted that section 401 does not override State enforcement authority under State law, in those States that have provided for it. A few commenters referenced the savings clause in section 510 as explicitly preserving State authority to enforce State laws and requirements and suggested that reservation includes enforcement of section 401 certifications.

The EPA has considered these comments and has concluded that some of them reflect a misunderstanding of the proposed rule. The Agency recognizes that some States have enacted State laws authorizing State enforcement of certifications or certification conditions in State court. State enforcement under State authorities may be lawful where State authority is not preempted by federal law.<sup>64</sup> Nothing in this final rule prohibits States from exercising their

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<sup>64</sup> Examples of situations where State authority would be preempted by federal law include FERC's sole authority to approve the construction of interstate natural gas pipelines and to regulate the transportation of natural gas for resale on these interstate pipelines under the Natural Gas Act (5 U.S.C. 717 *et seq.*; see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013)) and FERC's exclusive

enforcement authority under enacted State laws; however, the legality of such enforcement actions may be subject to review by a court of competent jurisdiction. Therefore, today's rule does not implicate, let alone violate, the reservation of state authority contained in section 510 of the Act.

Rather, the EPA concludes that section 401 of the CWA does not authorize States and Tribes to independently enforce section 401 certification conditions under federal law. The CWA expressly authorizes the certifying authority to review the proposed project and to either grant certification, grant certification with conditions, deny certification, or waive certification. Once the certifying authority acts on a certification request, the CWA does not authorize certifying authorities to enforce certification conditions under federal law; rather, a federal agency may enforce its license or permit, including section 401 certification conditions. The EPA has reviewed and considered legislative history from the 1972 amendments and concludes that, on this point, the legislative history is either silent or lacks a definitive statement of congressional intent.<sup>65</sup> The Agency agrees with the commenter who noted that if certification conditions were enforceable independent of the federal license or permit, there would have been no need for

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authority to license nonfederal hydropower projects under the Federal Power Act (16 U.S.C. 797(e), 817(1); *see also California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946)).

<sup>65</sup> Most of the legislative history simply repeats the language from section 401 that certification conditions “will become a condition on any Federal license or permit” (H.R. Rep. No. 92-911, at 124 (1972) or that the certification becomes an “enforceable condition on the Federal license or permit” (S. Rep. No. 92-414, at 69 (1971)). However, the Senate’s consideration of the Conference report states that “If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401. Of course, any more stringent requirements imposed by a State pursuant to this section shall be enforced by the *Administrator*.” Sen. Consideration of Conf. Rep. No. 92-1236 (Exhibit 1), at 171 (1972) (emphasis added) As discussed in sections III.H, III.I, and III.J of this notice, the text of section 401 provides specific roles for EPA as a certifying authority, protecting waters in neighboring jurisdictions, and providing technical assistance, but section 401 does not provide an enforcement role for EPA when it is not the federal licensing or permitting agency.

Congress to require conditions to be included in the federal license or permit under section 401(d).

A few commenters asserted that without State enforcement, project proponents will be less likely to comply with the State conditions, to the detriment of the environment. Some commenters asserted that the certifying authority, not the federal agency, often has the technical knowledge, organizational structure, and staffing capacity to conduct inspections and to enforce section 401 certification conditions. One commenter noted that the proposal creates regulatory uncertainty if States cannot enforce certifications and conditions. Other commenters suggested that enforcement of section 401 certifications should be done jointly by federal agencies and certifying authorities. One commenter asserted that the proposed rule should be revised to allow federal agencies and States to determine their appropriate roles in enforcing water quality certifications. Another commenter asserted that federal agencies are not precluded from consulting with certifying authorities if additional substantive expertise is needed, but argued that it was important for project proponents to know to whom they are accountable and to eliminate the potential for any conflicting obligations.

The Agency disagrees with commenters' suggestion that water quality will be compromised if States cannot independently enforce certifications under federal law. The federal licensing or permitting agency remains responsible for exercising its enforcement authority for all provisions of the federally issued license or permit, including any conditions incorporated from a certification. The Agency also disagrees with commenters who requested that the EPA include authority in the final rule for States and Tribes to independently enforce or to jointly enforce certification conditions. The EPA cannot create via rulemaking federal or state enforcement authority that is not expressly authorized in the statute. However, the EPA always

encourages coordination and cooperation between certifying authorities and federal agencies, particularly if such coordination can result in greater accountability and compliance with certification conditions. This final rule is intended to promote efficient permitting processes and regulatory certainty by clarifying that section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law. This final rule provides clarification on who holds project proponents accountable under federal law and eliminates any confusion about which entity is responsible for enforcing specific certification conditions in the federal license or permit. This final rule also eliminates the possibility of inconsistent interpretation and enforcement of the certification conditions in the federal license or permit, increasing the likelihood that project proponents will be able to comply with the certification conditions. Additionally, as discussed above, the final rule does not preclude States from pursuing enforcement actions where authorized under State law and not preempted by other federal statutory provisions. Importantly, the Agency agrees that federal agencies are not precluded from consulting with certifying authorities or the EPA when exercising their enforcement authority under CWA section 401.

The Agency received feedback during stakeholder outreach, both pre-proposal and post-proposal, expressing concern that federal agencies may not consistently or sufficiently enforce certification conditions incorporated into their federal licenses or permits. The Agency has also received feedback from other federal agencies noting the potential challenge with enforcing certain certification conditions, particularly those that are ill-defined, that lack clarity, or that are beyond the scope of certification as outlined in section III.E of this notice. The Agency anticipates the clarity provided in this final rule with respect to the scope of a certification, the scope of the conditions of a certification (*see* section III.E.2.c of this notice), and the

requirements for a certification with conditions (*see* section III.G.2.b of this notice) will provide federal agencies with sufficient information to enable them to effectively enforce certification conditions.

Enforcement plays an essential role in maintaining robust compliance with the CWA, and a critical part of any strong enforcement program is the appropriate use of enforcement discretion. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Enforcement programs exercise discretion and make careful and informed choices about where to conduct investigations, identifying the most serious violations and reserving limited enforcement resources for the cases that can make the most difference. *See Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001). It is important for enforcement programs to retain their enforcement discretion because federal agencies are in the best position to (1) determine whether a particular action is likely to succeed, (2) assess whether the action fits agency policies, and (3) determine whether there are enough agency resources to undertake and effectively prosecute the action, taking account of all other agency constraints and priorities. *See Heckler*, 470 U.S. at 831.

A couple of commenters asserted that section 401 is not included in the CWA enforcement provision, CWA section 309, and that the CWA citizen suit provision, CWA section 505, does not authorize a citizen suit to enforce certification conditions. One commenter noted that although *Dombeck* held that a citizen suit could be used to challenge the issuance of a permit without a certification, the court did not make reference to the enforcement of certification conditions. A few other commenters asserted that enforcement of section 401 certification conditions is authorized under the CWA citizen suit provision, citing CWA section 505, *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), and *Deschutes River Alliance v. PGE Co.*, 249 F.Supp.3d 1182 (D. Or. 2017).

The EPA considered these public comments and the varying interpretations described above and is declining to adopt a particular interpretation in this final rule. The EPA did not propose an interpretation of the CWA section 505 citizen suit provision and did not solicit comment on its applicability to section 401 certifications or certification conditions, and EPA is therefore declining to finalize an interpretation of these provisions in this final rule.

Section 401(a)(4) and the EPA's 1971 certification regulations at 40 CFR part 121.26 through 121.28 describe circumstances in which the certifying authority may inspect a facility that has received certification prior to operation<sup>66</sup> and may notify the federal agency so that the agency may determine whether the facility will violate applicable water quality requirements. 33 U.S.C. 1341(a)(4). The Agency is updating these regulations to reflect the scope of certification review under the modern CWA. *See* section 121.11 of the final rule and section III.E of this notice. The Agency has made minor, non-substantive modifications to section 121.11(a) from proposal to match the language of section 121.11(b) and section 401(a)(4). Additionally, consistent with section 401, the EPA is expanding this inspection function to all certifying authorities and is clarifying the process by which certifying authorities should notify the federal agency and project proponent of any concerns arising from inspections.

Consistent with section 401, this final rule provides certifying authorities the opportunity to inspect the facility or activity prior to initial operation in order to determine whether the discharge from the certified project will violate the certification. The EPA notes that section 401(a)(4) authorizes certifying authorities to “review the manner in which the facility or activity shall be operated. . .” for purposes of assuring that water quality requirements will not be violated. 33 U.S.C. 1341(a)(4). The final rule uses the terms “inspect” and “inspection” because

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<sup>66</sup> The Agency notes that operation may include implementation of a certified project.

these are well understood terms that provide additional clarity in the final rule. The Agency does not expect these terms to change the meaning of section 401(a)(4), as implemented through section 121.11 of the final rule. After an inspection, the certifying authority is required to notify the project proponent and the federal agency responsible for issuing the federal license or permit in writing if the discharge from the certified project will violate the certification. The certifying authority is also required to specify recommendations concerning measures that may be necessary to bring the certified project into compliance with the certification.

Some commenters asserted that a certifying authority's compliance assurance and enforcement role should not be limited to one pre-operational inspection and asserted that the certifying authority must be allowed to inspect the project both before and during operation in order to ensure the project is compliant with any certification conditions. One commenter explained that the certifying authority would not always be able to determine compliance with all conditions of the certification prior to operation. Another commenter asserted that it would be unacceptable for the State (rather than the project proponent) to identify the measures necessary to correct identified violations of certification conditions. Another commenter stated that it is unclear whether States have jurisdiction over post-license maintenance and repair projects that have an impact on water quality.

The EPA disagrees with commenters who suggested that the final rule should expand the inspection and enforcement authority provided in section 401. As finalized, this rule is consistent with the breadth of inspection and enforcement authority provided in section 401. This provision in the final rule is intended to allow the certifying authority the opportunity to inspect the facility or activity to determine whether the discharge will violate the certification issued. This final rule clarifies that after commencement of operations, enforcement of certification conditions



incorporated into the federal license or permit is reserved to the federal agency that issued the federal license or permit under federal law. Accordingly, after commencement of operations, all inspections and enforcement will be conducted by the federal agencies. As discussed above, federal agencies are not precluded from consulting with certifying authorities or the EPA when exercising their enforcement authority under section 401.

b. Reasonable Assurance vs. Will Comply

The proposed rule replaced the language from the existing regulations requiring a “reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards” with language requiring “that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” The Agency received comments expressing concerns about this proposed change. According to these commenters, the “will comply” language could result in States’ including certification conditions that are difficult or impossible to comply with, resulting in greater non-compliance by project proponents. A few commenters expressed concern that “will comply” would impose a stricter standard on States than “reasonable assurance,” such that they would be unable to develop conditions that include adaptive management provisions. These commenters maintained that the “reasonable assurance” standard currently allows for adaptive future decision-making despite present uncertainties. Other commenters stated that, in some cases, certifying authorities may be unable to demonstrate that a proposed project will be in compliance with water quality requirements at all times in the future, potentially resulting in more denials. Another commenter stated that the language in the final rule should include a “reasonable assurance” standard that a discharge would meet water quality requirements, rather than the “will comply” standard in the proposal. Several commenters noted that sections 401(a)(3) and (a)(4) retained the “reasonable assurance”

language and asserted that Congress inadvertently changed the language in (a)(1) and (d).

Another commenter argued that the ambiguity throughout 401(a) and (d) suggests that the competing provisions cannot be harmonized based on a plain language reading of the statute alone.

The Agency disagrees with the suggestion that the “reasonable assurance” language should be retained in the final rule. The “reasonable assurance” language in the EPA’s 1971 certification regulations was an artifact from the pre-1972 version of section 21(b), which provided that the certifying authority would certify “that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.” Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970). The Agency acknowledges that the inclusion of the phrase “reasonable assurance” in section 401(a)(3) and (a)(4) creates some ambiguity. The legislative history does not explain why Congress retained the term in sections 401(a)(3) and (a)(4) but not in sections 401(a) and (d).

Under basic canons of statutory construction, the EPA begins with the presumption that Congress chose its words intentionally. *See, e.g., Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”). The Agency presumes that Congress chose to use the phrase “will comply” in sections 401(a)(1) and (d), while retaining the phrase “reasonable assurance” in 401(a)(3) and (a)(4). As such, the scope under this final rule and the “will comply” language are consistent with the 1972 CWA amendments to section 401(a)(1) and (d), which require certifying authorities to conclude that a discharge “will comply” with water quality requirements (as defined in section 121.1(n) of this final rule).

The Agency disagrees with the suggestion that using “will comply” will place an impossible

standard on certifying authorities. The Agency does not intend or believe that the statutory language requires States to ensure that a project will maintain strict compliance, in every respect, throughout its entire existence. The inclusion of the statutory language “will comply” does not require certifying authorities to provide absolute certainty that applicants for a federal license or permit will never violate water quality requirements. Indeed, future compliance depends on many factors besides just facility design and operation, and it would not be reasonable for an authority to certify that no unknown future event could ever result in a violation of the certification. The use of the language comparable to “will comply” is not uncommon in CWA regulatory programs. For example, CWA section 402 contemplates that an NPDES permits may issue only upon a showing that discharge “will meet” various enumerated provisions. 33 U.S.C. 1342(a). This standard has not precluded States, Tribes, or the EPA from routinely issuing NPDES permits for a variety of discharges; nor has it resulted in NPDES permits that are impossible for permittees to comply with. The Agency concludes that use of the statutory language “will comply” in the final rule remains loyal to the words that Congress chose when it enacted section 401. The Agency has no theoretical or empirical basis to conclude that the language in the final rule will materially change the way in which certifying authorities, including the EPA, process certification requests, so long as certifying authorities act in good faith and in accordance with CWA section 401.

#### *L. Modifications*

##### *1. What is the Agency Finalizing?*

The EPA is finalizing the rule as proposed and is removing EPA’s oversight role for modifications to an existing certification. Additionally, the final rule does not authorize or include any procedure for certifying authorities to modify certifications after issuance. As

discussed below, there are other established procedures that certifying authorities may rely on to address modifications, should the need arise.

## 2. Summary of Final Rule Rationale and Public Comment

### a. The EPA's Role in Modifications

Section 401 does not provide an express oversight role for the EPA with respect to the issuance or modification of section 401 certifications. The EPA's role under section 401 consists of providing a common framework for the program through rulemaking, providing technical assistance under section 401(b), ensuring the protection of other States' waters under section 401(a)(2), and acting as the certifying authority in some circumstances. However, the EPA's 1971 certification regulations provided the Agency an oversight role in the unique context of modifications to existing water quality certifications. 40 CFR 121.2(b). The final rule removes this oversight role from the regulatory text, as it is inconsistent with the statute.

The Agency solicited comment generally on the appropriate scope of the EPA's oversight role under section 401, and specifically whether the EPA should play any role in oversight of State or Tribal certifications or modifications, and, if so, what that role should be. The Agency received a considerable number of public comments on this issue, most of which supported removing the EPA's oversight role for modifications to certifications. Some commenters agreed with the proposal that there is no statutory basis for section 121.2(b) of the 1971 certification regulations, nor is there any indication that Congress intended for the EPA to have an oversight role for modifications to certifications. Another commenter suggested that the EPA could follow the process described in the proposed rule section 121.10 to meet its obligation under section 401(a)(2) regarding neighboring States with respect to a modification to a section 401 certification.

The EPA agrees with commenters that there is no statutory basis in section 401 for the Agency to have an oversight role for modifications to certifications. The Agency disagrees with the commenter who asserted that it would be appropriate to expand the EPA's authority provided under section 401(a)(2) to grant the Agency a more formal oversight role. The EPA's role under section 401(a)(2) is plainly limited to (1) notifying a State or authorized Tribe if the Agency makes a discretionary determination that a discharge from a certified project may affect the waters of that jurisdiction, and (2) subsequently providing recommendations to the federal agency if the affected neighboring jurisdiction requests a hearing. *See* section III.I of this notice.

b. Modifications by Certifying Authorities

In light of the statute's one-year time limit for a certifying authority to act on a section 401 certification, the EPA solicited comment on whether and to what extent States or Tribes should be able to modify a previously issued certification, either before or after the reasonable period of time expires, before or after the license or permit is issued, or to correct an aspect of a certification or its conditions if remanded or found unlawful by a federal or State court or administrative body.

Certain commenters were in favor of retaining the ability for States and Tribes to modify certifications. One commenter asserted that other CWA sections, such as sections 402 and 404, also do not explicitly allow for modifications, yet the EPA and the Corps assume authority to modify permits issued under those sections as long as they follow their own processes to do so. However, many commenters suggested that certain parameters should be applied to modifications, such as restrictions on "unilateral" modifications and "reopener" clauses. The EPA disagrees with commenters who argued in favor of allowing modifications to certifications. As described throughout this final rule preamble, section 401 certifications are unique in that

they are not subject to ongoing enforcement by certifying authorities or oversight by the EPA, as section 402 and 404 permits may be. Indeed, once a certification is issued, the conditions therein are incorporated into a *different* document, a federal license or permit, for implementation and enforcement. Allowing certifications to be modified after issuance could create significant confusion and regulatory uncertainty within those federal license and permit programs.

Some commenters argued that “unilateral” modifications by the certifying authority should not be allowed, whereas other commenters favored a broad ability for States and Tribes to modify certifications. The commenters who disfavored unilateral modifications argued that it would effectively void the maximum reasonable period of time of one year and would lead to economic uncertainty for the project and possibly lengthy and expensive litigation. One commenter stated that unilateral modifications should be allowed in certain circumstances, such as before the reasonable period of time has expired.

Some commenters encouraged the EPA to provide clarity on the process by which a certification can be modified and the timeframe for that modification, so as to help avoid future regulatory uncertainty and litigation. A few commenters asked the EPA to clarify the process by which federal agencies must respond to any requested revisions to certifications beyond the reasonable period of time. As discussed in more detail below, the final rule does not authorize certifications to be modified after they have been issued. Section 401 does not grant States the authority either to unilaterally modify a certification after it is issued or to include “reopener” clauses in a certification. However, other established procedures are available to address situations that necessitate a modification after a certification has been issued.

Some commenters distinguished between modifications made within the reasonable period of time and those outside of that timeframe. A few of these commenters suggested various

scenarios in which a modification should be allowed, including scenarios in which a court remands a certification or condition, the project proponent wants to correct an error, or the discharge in the federal license or permit changes. Another commenter asserted that State modification of certification conditions outside of the one-year review period should not automatically become part of the license or permit, citing *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003).

The EPA has determined that section 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certifying authority to reopen the certification in the future or through any other mechanism. The Agency also notes that the ability to unilaterally modify a certification after issuance is unnecessary, because circumstances that may necessitate modifications often will be linked to other actions that have established procedures. For example, if a federal license or permit is modified or the underlying project is changed such that the federal license or permit requires modification, it may trigger the requirement for a new certification, depending on the federal agency's procedures. *See, e.g.*, 18 CFR 5.23 (requiring project proponents to submit a new certification request when the project proponent submits an application to FERC to amend an existing hydropower license or to amend a pending application for a hydropower license). Similarly, if a court vacates or remands a certification or condition thereof, the certifying authority may need to modify the certification, depending on the specifics of the court's decision, and the federal agency may need to modify the license or permit accordingly. To reduce uncertainty, federal agencies may establish procedures in their regulations to clarify how modifications would be handled in these specific scenarios. For example, the EPA's existing regulations regarding certification in the NPDES program, located at 40 CFR 124.55(b), provide

procedures for modification in certain circumstances (“If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under [section] 124.53 may issue a modified certification or notice of waiver and forward it to EPA.”).

Additionally, the need to unilaterally modify a certification to address a change in the proposed project should be unnecessary under this final rule. As discussed in section III.C of this notice, if certain elements of the proposed project change materially after a certification is issued, it may be reasonable for the project proponent to submit a new certification request. The clock stops after a certifying authority issues a certification decision, and therefore the Agency disagrees with the suggestion that modifications should be allowed to occur after that point but within the reasonable period of time.

The EPA requested comment on whether EPA should expressly prohibit certification conditions that may create regulatory uncertainty, including conditions that extend the effective date of a certification beyond the reasonable period of time and conditions that authorize certifications to be reopened. Some commenters opposed certification conditions that enable a State or Tribe to “reopen” or revisit the certification at a specific time or upon certain triggering events. A few commenters argued that reopeners could effectively eliminate the one-year time limit in the statute and transform section 401’s grant of State authority into an ongoing regulatory role. Another commenter, stating that reopener clauses allowing a State or Tribe to unilaterally modify a certification are contrary to law, noted that a regulation prohibiting such clauses would be consistent with judicial precedent, citing *Triska v. Dept of Health & Env’tl. Control*, 355 S.E.2d 531, 533-34 (S.C. 1987). Other commenters maintained that States and



Tribes should retain their authority to modify certifications whenever circumstances warrant, and that no federal agency should have authority over conditions issued by a State or Tribe or future modifications to those conditions. A few commenters noted that the broad authority granted in section 401(d) of the CWA also provides authority for a State or Tribe to include a “reopener” clause to ensure that their waters are protected, especially given the long timeframes for some projects.

The EPA has considered these comments and concludes that reopener clauses are inconsistent with section 401. The final rule does not include an explicit prohibition on reopener clauses because the EPA has concluded that such conditions are already proscribed by section 121.6(e) of the final rule. By including a reopener condition in a certification, the certifying authority intends to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future. As described in section III.F above, the reasonable period of time to act on a certification request begins when a certifying authority receives the request, and ends when the certifying authority takes action to grant, grant with conditions, deny, or waive. The reasonable period of time does not continue to run after a certification decision is issued. A reopener condition, if allowed under this final rule, would effectively extend the established reasonable period of time into the future, potentially indefinitely. The Agency acknowledges that projects may change after a certification is issued; but, as discussed above, there are other procedures in this final rule and in other federal agency regulations that can address project changes that would necessitate a new or modified certification or federal license or permit. Reopener conditions are not authorized under this final rule because such actions by the certifying authority would modify the reasonable period of time, contrary to section 121.6(e) of the final rule.

As discussed above, section 401 does not provide certifying authorities with the authority to modify certifications after they are issued. The Agency disagrees with commenters who assert that section 401(d) provides certifying authorities with authority to include reopener clauses as a condition on a federal license or permit. As a general matter, administrative agencies possess the inherent authority to reconsider prior decisions;<sup>67</sup> however, section 401 provides express statutory language (e.g., specifying the time period in which a certifying authority must act on a certification request or waive its right to act; requiring certification conditions to be incorporated into a separate federal permit) that displaces the general principle, and thus Congress has precluded the certifying authority from reconsidering or modifying a certification. For the reasons explained above, unilateral modifications, including certification conditions that would reopen the certification in the future, are not authorized in section 401.

The Agency also disagrees with commenters that assert that the federal agency should not have authority over certification conditions or modifications. As discussed in section III.G.2.b of this notice, consistent with section 401(d), certification conditions that meet the requirements of final rule section 121.7(d) shall be incorporated into the federal license or permit. Accordingly, the federal agency is the appropriate party to address any modifications to the license or permit, including those certification conditions incorporated into the license or permit.

#### M. *General Licenses and Permits*

##### 1. What is the Agency Finalizing?

In response to comments received, the Agency is finalizing several provisions specific for certifications for the issuance of general licenses or permits. Section 121.5(c) of the final rule

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<sup>67</sup> See e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *FCC v. Fox Television Studios*, 556 U.S. 502, 514-15 (2009); *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993).

specifically defines elements of a “certification request” that must be submitted for the issuance of general licenses or permits. The Agency is also including additional provisions in section 121.7 of the final rule to address certification conditions and denials for general licenses and permits.

This final rule preamble also reaffirms that a federal agency seeking certification for a general license or permit must comply with all provisions of this final rule, including the pre-filing meeting request requirement in section 121.4. This final rule preamble also clarifies a federal agency’s obligation under section 401(a)(2) to notify the EPA when it receives certification for a general license or permit.

## 2. Summary of Final Rule Rationale and Public Comment

The majority of certifications are issued for projects that require an individual federal license or permit. However, certifications are also required prior to the issuance or establishment of a general license or permit. General licenses and permits are vital to the effective operation of several federal programs such as the CWA section 402 and section 404 programs, producing efficiencies that save time and money for project proponents and regulators. General licenses and permits provide streamlined procedures for project proponents by authorizing categories of discharges or simplified review procedures when the discharges comply with specified requirements. Federal licensing and permitting agencies must obtain a section 401 certification when issuing general licenses or permits, and the final rule accounts for the potential variation of future projects or activities that may be covered under the general license or permit. The final rule provides slightly modified requirements to account for differences between individual and general licenses and permits in the water quality certification context.

### a. Certification Request for a General License or Permit

The Agency took comment on whether federal agencies seeking certification for a general license or permit should be subject to the same or different “certification request” submittal requirements as other project proponents seeking certification for an individual license or permit. A few commenters stated that federal agencies should follow the same procedures as other project proponents for submitting certification requests. Another commenter encouraged the EPA to revise the elements of a certification request to provide flexibility for general licenses or permits, because the type, means, and methods used to monitor the future discharges that may be authorized in the future may not be known. The final rule includes specific requirements for certification requests for the issuance of general licenses or permits.

Where a federal agency is seeking to issue a general license or permit, the EPA expects the federal agency to follow the requirements of section 121.5(c) of the final rule. Section 121.5(c) of the final rule includes a list of documents and information required for “certification request for issuance of a general license or permit,” similar to the list that was included in the proposed rule as an alternative approach:

1. identify the project proponent(s) and a point of contact;
2. identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;
3. include the draft or proposed general license or permit;
4. estimate the number of discharges expected to be authorized by the proposed general license or permit each year;
5. include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
6. contain the following statement: *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief’*; and
7. contain the following statement: *‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’*

The list in section 121.5(c) is similar to the list in section 121.5(b) of the final rule, including the two new requirements (a statement that all information contained in the request is true, accurate,

and complete to the best of the project proponent's knowledge, and documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request), but with some differences to account for the distinctions between issuing a general license or permit and issuing a license or permit for a specific project, with respect to the available information at the time of certification. The Agency has made these changes regarding how general licenses and permits are handled under this final rule to improve clarity and for consistent administration of section 401 for all general licenses and permits.

b. Information Requirements for General License or Permit Certification  
Conditions and Denials

Consistent with commenters and other federal agency concerns regarding the need to account for the differences between individual and general license and permits, the final rule contains additional language in sections 121.7(d) and 121.7(e) to ensure that the rule can be consistently and appropriately applied to certifications issued for the issuance of general licenses and permits. Section 121.7(d)(1) of the final rule provides the information requirements for certification conditions that apply when a project proponent has requested certification for an individual license or permit that may result in a specific discharge or set of discharges into waters of the United States. *See* section III.C of this notice. The final rule includes a new section 121.7(d)(2), which provides slightly different information requirements for certification conditions for issuance of general licenses and permits. Certifications for issuance of general permits and licenses must include the information requirements in section 121.7(d)(2) of the final rule.

For each certification condition on issuance of a general license or permit, section 121.7(d)(2) of the final rule requires:

- (i) A statement explaining why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements; and
- (ii) A citation to federal, state, or tribal law that authorizes the condition.

Similarly, section 121.7(e)(1) of the final rule provides the information requirements for certification denials that apply when a project proponent has requested certification for an individual license or permit that may result in a specific discharge or set of discharges into waters of the United States. *See* section III.G.2.c of this notice. The final rule also includes a new section 121.7(e)(2), which provides slightly different information requirements for denials for general licenses and permits. For each certification denial for issuance of a general license or permit, section 121.7(e)(2) of the final rule requires:

- (i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;
- (ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and
- (iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

Although these are both new provisions in the final rule, the substance of these information requirements is very similar to the information requirements for certification conditions and denials for individual licenses and permits that were included in the proposed rule. The EPA made only slight changes to these proposed provisions to facilitate their application in the general licensing and permitting context. Certification denials for a general license or permit must contain the information in section 121.7(e)(2) of the final rule.

#### c. Other Provisions of the Final Rule Also Apply to Certifications for General Licenses or Permits

As mentioned in sections III.B and III.I of this notice, the EPA expects that all of the procedural and substantive requirements in this final rule will apply to entities seeking

certification for a general license or permit. As discussed in section III.I of this notice, section 401(a)(2) provides a mechanism for the EPA to notify a State or an authorized Tribe where the EPA has determined that the discharge from a certified project may affect the quality of that State's or Tribe's waters. The Act requires federal agencies to notify the EPA of certifications and associated federal licensing or permitting applications. 33 U.S.C. 1341(a)(2). This statutory obligation extends to any circumstance where a federal agency receives a certification, including where the federal agency receives certification for issuance of a general license or permit.

The EPA is finalizing a pre-filing meeting requirement that requires all project proponents, including federal agencies when they seek certification for general licenses or permits, to request a meeting with a certifying authority at least 30 days prior to submitting a certification request, as discussed in section III.B of this notice.

#### **IV. Economic Analysis**

Pursuant to Executive Orders 12866 and 13563, the Agency conducted an economic analysis to better understand the potential effects of this final rule on certifying authorities and project proponents. While the economic analysis is informative in the rulemaking context, the EPA is not relying on the analysis as a basis for this final rule. *See, e.g., Nat'l. Assn. of Homebuilders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012). The analysis is contained and described more fully in the document *Economic Analysis for the Clean Water Act Section 401 Certification Rule* ("the Economic Analysis"). A copy of this document is available in the docket for this action.

Section 401 certification decisions have varying effects on certifying authorities and project proponents. The Agency has limited data regarding the number of certification requests submitted and the outcome of those certifications. To make the best use of limited information to assess the potential impacts of this final rule on project proponents and certifying authorities, the

Economic Analysis provides a qualitative analysis of the section 401 certification process under the 1971 certification regulations and under the final rule. In particular, the Economic Analysis focuses on the revisions to the time period for review, the scope of review, and the pre-filing meeting request requirement.

This final rule will help certifying authorities, federal agencies, and project proponents understand what is required and expected during the section 401 certification process, thereby increasing transparency and reducing regulatory uncertainty. The EPA concludes that improved clarity concerning the time period for review and the scope of review may make the certification process more efficient for project proponents and certifying authorities.

## **V. Statutory and Executive Order Reviews**

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

### *A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the Agency prepared an analysis of potential costs and benefits associated with this action. This analysis is contained in the Economic Analysis, which is available in the docket and is briefly summarized in Section IV of this notice. While economic analyses are informative in the rulemaking context, the Agency is not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this final rule.

### *B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*



Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this final rule is a deregulatory action. See the Economic Analysis for further discussion about the potential effects of this rule.

### *C. Paperwork Reduction Act*

The information collection activities in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2603.05 (OMB Control No. 2040-0295). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until they are approved by OMB.

The information collected under this ICR is used by certifying authorities for reviewing proposed projects for potential water quality impacts from discharges from an activity that requires a federal license or permit, and by the EPA to evaluate potential effects on downstream or neighboring jurisdictions. Except for when the EPA is the certifying authority, information collected under section 401 is not directly collected by or managed by the EPA. The primary collection of information is performed by States and Tribes acting as certifying authorities. Information collected directly by the EPA under section 401 in support of the section 402 program is already captured under existing EPA ICR No. 0229.22 (OMB Control No. 2040-0295).

The final rule clarifies the information that project proponents must provide to request a section 401 certification and introduces a pre-filing meeting request requirement for all project proponents. The final rule also removes information requirements related to certification modifications and section 401(a)(2) procedures for neighboring jurisdictions, and provides

additional transparency by identifying, unambiguously, information necessary to support certification actions. The EPA expects this final rule will provide greater clarity on section 401 requirements, reduce the overall preparation time spent by a project proponent on certification requests, and reduce the review time for certifying authorities.

In the interest of transparency and public understanding, the EPA has provided here relevant portions of the burden assessment of the final rule. More information about the burden assessment can be found in the supporting statement for the ICR.

Respondents/affected entities: Project proponents, State and Tribal reviewers (certifying authorities)

Respondent's obligation to respond: required to obtain 401 certification (33 U.S.C. 1341(a)(1))

Estimated number of respondents: 97,119 per year

Frequency of response: one per federal application

Total estimated burden: 931,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$58 Million (per year), includes \$8 Million annualized capital or operation & maintenance costs.

The final rule results in an estimated marginal burden decrease of 136,000 hours. This marginal decrease is associated with the reduction of information requirements in the final rule and a projected decrease in certifying authority review times associated with the clearer scope of certification in section 121.3 of the final rule. A full description of the analysis is available in the supporting statement accompanying this information collection request.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB

control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the Federal Register and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

#### *D. Regulatory Flexibility Act*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule.

Under section 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the State or authorized Tribe where the discharge would originate (or the EPA, in certain circumstances described above) either (1) issues a section 401 water quality certification finding compliance with applicable water quality requirements or (2) waives certification. Under section 401 and this final rule, the applicant for the federal license or permit (the project proponent) is required to request and obtain a water quality certification. This action provides project proponents with greater clarity and regulatory certainty on the substantive and procedural requirements for obtaining a water quality certification. This action also provides procedural clarity to certifying authorities and Federal licensing and permitting agencies. The Agency anticipates this action will result in faster, more efficient and more transparent decision-making by certifying authorities. As discussed in the Economic Analysis accompanying this final rule, the Agency concludes that

improved clarity concerning the scope and reasonable period of time for certification review may make the certification process more efficient for project proponents, including small entities, and does not expect the cost of the rule to result in a significant economic impact on a substantial number of small entities.

#### *E. Unfunded Mandates Reform Act*

This action does not contain an unfunded mandate of \$100 million or more as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, and does not contain any regulatory requirements that significantly or uniquely affect small governments. While this action creates enforceable duties for the private sector, the cost does not exceed \$100 million or more. This action does not create enforceable duties for State and Tribal governments. See Section IV of this notice for further discussion on the Economic Analysis.

#### *F. Executive Order 13132: Federalism*

Executive Order 13132, titled “Federalism” (64 FR 43255, August 10, 1999), requires federal agencies to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” The Executive Order defines “policies that have federalism implications” to include regulations that have “substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” The Agency concludes that the final rule may have federalism implications because it may impact how some States have historically implemented water quality certification programs. This final rule makes the EPA’s CWA section 401 regulation consistent with the statutory language, and acknowledges that States may modify their practices to be consistent with this regulation. The EPA provides the following federalism summary impact statement.

The Agency consulted with State and local government officials, or their representative national organizations, during the development of this action as required under the terms of Executive Order 13132 to permit them to have meaningful and timely input into the proposed rule's development. On April 24, 2019, the Agency initiated a 30-day Federalism consultation period prior to proposing this rule to allow for meaningful input from State and local governments. The kickoff Federalism consultation meeting occurred on April 23, 2019; attendees included representatives of intergovernmental associations and other associations representing State and local governments. Organizations in attendance included: National Governors Association, U.S. Conference of Mayors, National Conference of State Legislatures, the Environmental Council of the States, National League of Cities, Council of State Governments, National Association of Counties, National Association of Towns and Townships, Association of Clean Water Administrators, Western States Water Council, Conference of Western Attorneys General, Association of State Wetland Managers, and Western Governors' Association. Additionally, one in-person meeting was held with the National Governors Association on May 7, 2019. The Agency also held an informational webinar for States and Tribes on May 8, 2019. At these webinars and meetings, the EPA provided a presentation and sought input on areas of section 401 that may require clarification, including timeframe, scope of certification review, and coordination among project proponents, certifying authorities, and federal licensing or permitting agencies. See section II.C of this notice for more information on outreach with States prior to Federalism consultation.

Letters and webinar attendee feedback received by the Agency before and during Federalism consultation may be found on the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855, available at <https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0855>).

0855). These webinars, meetings, and letters provided a wide and diverse range of interests, positions, and recommendations to the Agency. Following publication of the proposed rule, the Agency held two additional in-person meetings with State representatives to answer clarifying questions about the proposal and to discuss implementation considerations. The Agency has prepared a report summarizing its consultation and additional outreach to state and local governments and the results of this outreach. A copy of the final report is available in the docket (Docket ID No. EPA-HQ-OW-2019-0405) for this final rule. Correspondence received from State and local governments and their representative national associations during the public comment period can be found in Docket ID No. EPA-HQ-OW-2019-0405, available at <https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0405>.

During Federalism consultation and engagement efforts and in the State and local government comments on the proposed rule, many States expressed concern that the proposed rule would adversely impact State authority and States' ability to protect state waters. Commenters raised several concerns, including concerns about the federal agency review role in the certification process; constraints on the certification review process, including the scope, timeframe, and information to start the statutory review clock; information requirements to act on a certification request; State enforcement role in certification; and the potential impact on existing State regulations and law.

The Agency acknowledges that the final rule may change how States administer the section 401 program, but has made adjustments in the final rule to account for many of the concerns raised by states. The Agency has made certain changes in response to comments, including comments from States and local governments. The final rule preserves the robust State role in the certification process in a manner consistent with the CWA. As discussed in section III.G of this

notice, the final rule does not provide federal agencies with a role in substantively reviewing State certification decisions. Additionally, the final rule expands the pre-filing meeting requirement to all project proponents and allows States, in their discretion, to meet with project proponents to discuss information needs and concerns prior to starting the reasonable period of time. The final rule notice also clarifies that certifying authorities may request additional information during the reasonable period of time, and the final rule preserves certifying authorities' ability to deny certification requests if they have inadequate information to determine whether a discharge complies with water quality requirements. The final rule definition of "water quality requirements" no longer limits other appropriate requirements of State law to requirements that are EPA-approved; rather, the definition captures State or Tribal regulatory requirements for point source discharges into waters of the United States. The final rule also removes the requirement for certifying authorities to provide a statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

As required by Section 8(a) of Executive Order 13132, the EPA included a certification from its Federalism Official stating that the EPA had met the Executive Order's requirements in a meaningful and timely manner. A copy of this certification is included in the official record for this final action.

*G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, Nov. 9, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This action has Tribal implications. However,

it will neither impose substantial direct compliance costs on federally recognized Tribal governments nor preempt Tribal law.

During Tribal consultation and engagement efforts and in Tribal comments on the proposed rule, many Tribes expressed concern that the proposed rule would adversely impact Tribal waters. The final rule may affect how Tribes with treatment in a similar manner as a state (TAS) for CWA section 401 administer their section 401 program, but will not have an administrative impact on Tribes for whom the EPA certifies on their behalf. The Agency has made changes in the final rule in response to comments, including comments from Tribes. The final rule maintains the ability for Tribes to provide input in the certification process and preserves the robust Tribal role in the certification process in a manner consistent with the CWA.

The Agency consulted with Tribal officials at the beginning of rule development to permit meaningful and timely input, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes. The EPA initiated a Tribal consultation and coordination process before proposing this rule by sending a “Notification of Consultation and Coordination” letter dated April 22, 2019, to all 573 Federally recognized Tribes. The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process. The Agency held two identical webinars on this action for Tribal representatives on May 7 and May 15, 2019. The Agency also presented on this action at the Region 9 Regional Tribal Operations Committee Spring meeting on May 22, 2019. Additionally, Tribes were invited to two webinars for States, Tribes, and local governments on April 17, 2019 and May 8, 2019. Tribes and Tribal organizations sent 15 pre-proposal recommendation letters to the Agency as part of the consultation process. All Tribal and Tribal organization letters and webinar



feedback may be found on the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855). The Agency met with four Tribes at the staff-level.

The Agency continued engagement with Tribes after the end of the formal consultation period. Following the publication of the proposed rule, the Agency held two in-person meetings with Tribal representatives to answer clarifying questions about the proposal, and to discuss implementation considerations and Tribal interest in the section 401 water quality certification process. In addition, the Agency continued to meet with individual Tribes requesting consultation or engagement following publication of the proposed rule, holding staff-level meetings with 11 Tribes and leader-to-leader level meetings with two Tribes post-proposal. In total, the Agency met with 14 individual Tribes requesting consultation, holding leader-to-leader level consultation meetings with two individual Tribes and staff-level meetings with 13 individual Tribes (the Agency met with some Tribes more than once). The Agency has prepared a report summarizing the consultation and further engagement with Tribal nations. This report, *Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Certification Rule* (Docket ID No. EPA-HQ-OW-2019-0405), is available in the docket for this final rule.

As required by section 7(a), the EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

*H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*J. National Technology Transfer and Advancement Act*

This action is not subject to the National Technology Transfer and Advancement Act of 1995 because the rule does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

This action is not subject to Executive Order 12898 (59 FR 7629, February 11, 1994) because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low income populations, and/or indigenous populations, as specified in Executive Order 12898.

*L. Congressional Review Act*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR part 121**

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, EPA is revising 40 CFR part 121 as follows:

## **PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT**

### **Sec.**

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## Subpart E—Consultations

### 121.16 Review and advice

**Authority:** 33 U.S.C. 1251 *et. seq.*

## Subpart A—General

### § 121.1 Definitions.

- (a) *Administrator* means the Administrator of the Environmental Protection Agency or an authorized representative.
- (b) *Certification* means a water quality certification issued in accordance with Clean Water Act section 401 and this part.
- (c) *Certification request* means a written, signed, and dated communication that satisfies the requirements of § 121.5(b) or (c).
- (d) *Certified project* means a proposed project that has received a certification or for which the certification requirement has been waived.
- (e) *Certifying authority* means the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.
- (f) *Discharge* for purposes of this part means a discharge from a point source into a water of the United States.
- (g) *Federal agency* means any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401.
- (h) *License or permit* means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in a discharge.

- (i) *Neighboring jurisdiction* means any other state or authorized tribe whose water quality the Administrator determines may be affected by a discharge for which a certification is granted pursuant to Clean Water Act section 401 and this part.
- (j) *Project proponent* means the applicant for a license or permit or the entity seeking certification.
- (k) *Proposed project* means the activity or facility for which the project proponent has applied for a license or permit.
- (l) *Reasonable period of time* means the time period during which a certifying authority may act on a certification request, established in accordance with § 121.6 of this part.
- (m) *Receipt* means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.
- (n) *Water quality requirements* means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.

## **Subpart B—Certification Procedures**

### **§ 121.2 When certification is required.**

Certification is required for any license or permit that authorizes an activity that may result in a discharge.

### **§ 121.3 Scope of certification.**

The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.

### **§ 121.4 Pre-filing meeting request.**

- (a) At least 30 days prior to submitting a certification request, the project proponent shall request a pre-filing meeting with the certifying authority.
- (b) The certifying authority is not obligated to grant or respond to the pre-filing meeting request.
- (c) If the certifying authority grants the pre-filing meeting request, the project proponent and the certifying authority are encouraged to discuss the nature of the proposed project and potential water quality effects. The project proponent is encouraged to provide a list of other required state, interstate, tribal, territorial, and federal authorizations and to describe the anticipated timeline for construction and operation.
- (d) After receiving the pre-filing meeting request, the certifying authority is encouraged to contact the Federal agency and to identify points of contact to facilitate information sharing between the certifying authority and Federal agency throughout the certification process.

**§ 121.5 Certification request.**

- (a) A certification request shall be submitted to the certifying authority and to the Federal agency concurrently.
- (b) A certification request for an individual license or permit shall:
  - (1) Identify the project proponent(s) and a point of contact;
  - (2) Identify the proposed project;
  - (3) Identify the applicable federal license or permit;
  - (4) Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
  - (5) Include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;

- (6) Include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
  - (7) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
  - (8) Contain the following statement: *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief’*; and
  - (9) Contain the following statement: *‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’*
- (c) A certification request for issuance of a general license or permit shall:
- (1) Identify the project proponent(s) and a point of contact;
  - (2) Identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;
  - (3) Include the draft or proposed general license or permit;
  - (4) Estimate the number of discharges expected to be authorized by the proposed general license or permit each year;
  - (5) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
  - (6) Contain the following statement: *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief’*; and

- (7) Contain the following statement: *'The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'*

**§ 121.6 Establishing the reasonable period of time.**

- (a) The Federal agency shall establish the reasonable period of time either categorically or on a case-by-case basis. In either event, the reasonable period of time shall not exceed one year from receipt.
- (b) Within 15 days of receiving notice of the certification request from the project proponent, the Federal agency shall provide, in writing, the following information to the certifying authority:
- (1) The date of receipt;
  - (2) The applicable reasonable period of time to act on the certification request; and
  - (3) The date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.
- (c) In establishing the reasonable period of time, the Federal agency shall consider:
- (1) The complexity of the proposed project;
  - (2) The nature of any potential discharge; and
  - (3) The potential need for additional study or evaluation of water quality effects from the discharge.
- (d) The Federal agency may extend the reasonable period of time at the request of a certifying authority or a project proponent, but in no case shall the reasonable period of time exceed one year from receipt.



- (1) Any request by a certifying authority or project proponent to the Federal agency to extend the reasonable period of time shall be in writing.
- (2) If the Federal agency agrees to extend the reasonable period of time, the Federal agency shall notify the certifying authority and project proponent in writing.
- (e) The certifying authority is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time other than specified in § 121.6(d).

**§ 121.7 Action on a certification request.**

- (a) Any action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification, must be completed within the reasonable period of time, and must otherwise be in accordance with section 401 of the Clean Water Act. Alternatively, a certifying authority may expressly waive certification.
- (b) If the certifying authority determines that a discharge from a proposed project will comply with water quality requirements, it may issue or waive certification. If the certifying authority cannot certify that the discharge from a proposed project will comply with water quality requirements, it may deny or waive certification.
- (c) Any grant of certification shall be in writing and shall include a statement that the discharge from the proposed project will comply with water quality requirements.
- (d) Any grant of certification with conditions shall be in writing and shall for each condition include, at a minimum:
  - (1) For certification conditions on an individual license or permit,

- (i) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and
  - (ii) A citation to federal, state, or tribal law that authorizes the condition.
- (2) For certification conditions on issuance of a general license or permit,
  - (i) A statement explaining why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements; and
  - (ii) A citation to federal, state, or tribal law that authorizes the condition.
- (e) Any denial of certification shall be in writing and shall include:
  - (1) For denial of certification for an individual license or permit,
    - (i) The specific water quality requirements with which the discharge will not comply;
    - (ii) A statement explaining why the discharge will not comply with the identified water quality requirements; and
    - (iii) If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.
  - (2) For denial of certification for issuance of a general license or permit,
    - (i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;

- (ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and
  - (iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.
- (f) If the certifying authority determines that no water quality requirements are applicable to the waters receiving the discharge from the proposed project, the certifying authority shall grant certification.

**§ 121.8 Effect of denial of certification.**

- (a) A certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part.
- (b) Where a Federal agency determines that a certifying authority's denial satisfies the requirements of § 121.7(e), the Federal agency must provide written notice of such determination to the certifying authority and project proponent, and the license or permit shall not be granted.

**§ 121.9 Waiver.**

- (a) The certification requirement for a license or permit shall be waived upon:

- (1) Written notification from the certifying authority to the project proponent and the Federal agency that the certifying authority expressly waives its authority to act on a certification request; or
- (2) The certifying authority's failure or refusal to act on a certification request, including:
  - (i) Failure or refusal to act on a certification request within the reasonable period of time;
  - (ii) Failure or refusal to satisfy the requirements of § 121.7(c);
  - (iii) Failure or refusal to satisfy the requirements of § 121.7(e); or
  - (iv) Failure or refusal to comply with other procedural requirements of section 401.
- (b) A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to satisfy the requirements of § 121.7(d).
- (c) If the certifying authority fails or refuses to act, as provided in this section, the Federal agency shall provide written notice to the Administrator, certifying authority, and project proponent that waiver of the certification requirement or condition has occurred. This notice must be in writing and include the notice that the Federal agency provided to the certifying authority pursuant to § 121.6(b).
- (d) A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain certification.
- (e) Upon issuance of a written notice of waiver, the Federal agency may issue the license or permit.

**§ 121.10 Incorporation of certification conditions into the license or permit.**

- (a) All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.
- (b) The license or permit must clearly identify any certification conditions.

**§ 121.11 Enforcement of and compliance with certification conditions.**

- (a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the facility or activity for the purpose of determining whether the discharge from the certified project will violate the certification.
- (b) If the certifying authority, after an inspection pursuant to subsection (a), determines that the discharge from the certified project will violate the certification, the certifying authority shall notify the project proponent and the Federal agency in writing, and recommend remedial measures necessary to bring the certified project into compliance with the certification.
- (c) The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.

**Subpart C—Other Jurisdictions**

**§ 121.12 Determination of effects on neighboring jurisdictions.**

- (a) A Federal agency shall within 5 days notify the Administrator when it receives a license or permit application and the related certification.
- (b) Within 30 days after the Administrator receives notice in accordance with § 121.12(a), the Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction. In making this determination and in accordance with applicable law, the Administrator may request copies of the certification and the federal license or permit application.

(c) If the Administrator determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator, within 30 days after receiving notice in accordance with § 121.12(a), shall notify that neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent. The federal license or permit may not be issued pending the conclusion of the processes in this paragraph.

- (1) Notification from the Administrator shall: be in writing, be dated, and identify the materials provided by the Federal agency. The notification shall inform the neighboring jurisdiction that it has 60 days to notify the Administrator and the Federal agency, in writing, whether it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the federal license or permit, and to request a public hearing from the Federal agency.
- (2) Notification of objection and request for a hearing from the neighboring jurisdiction shall: be in writing; identify the receiving waters it determined will be affected by the discharge; and identify the specific water quality requirements it determines will be violated by the certified project.
- (3) If the neighboring jurisdiction requests a hearing in accordance with § 121.12(c)(2), the Federal agency shall hold a public hearing on the neighboring jurisdiction's objection to the license or permit.
  - (i) The Federal agency shall provide the hearing notice to the Administrator at least 30 days before the hearing takes place.
  - (ii) At the hearing, the Administrator shall submit to the Federal agency his or her evaluation and recommendation(s) concerning the objection.

- (iii) The Federal agency shall: consider recommendations from the neighboring jurisdiction and the Administrator, and any additional evidence presented to the Federal agency at the hearing; and determine whether additional certification conditions are necessary to assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements.
- (iv) If additional certification conditions cannot assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements, the Federal agency shall not issue the license or permit.

#### **Subpart D—Certification by the Administrator**

##### **§ 121.13 When the Administrator certifies.**

- (a) Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements is required where no state, tribe, or interstate agency has authority to give such a certification.
- (b) In taking action pursuant to this paragraph, the Administrator shall comply with the requirements of Clean Water Act section 401 and 40 CFR part 121.

##### **§ 121.14 Request for additional information.**

- (a) If necessary, the Administrator may request additional information from the project proponent, provided that the initial request is made within 30 days of receipt.
- (b) The Administrator shall request only additional information that is within the scope of certification and is directly related to the discharge from the proposed project and its potential effect on receiving waters.

- (c) The Administrator shall request only information that can be collected or generated within the reasonable period of time.
- (d) In any request for additional information, the Administrator shall include a deadline for the project proponent to respond.
  - (1) The project proponent shall comply with the deadline established by the Administrator.
  - (2) The deadline must allow sufficient time for the Administrator to review the additional information and to act on the certification request within the reasonable period of time.
- (e) Failure of a project proponent to timely provide the Administrator with additional information does not extend the reasonable period of time or prevent the Administrator from taking action on a certification request.

#### **§ 121.15 Notice and hearing.**

- (a) Within 20 days of receipt, the Administrator shall provide appropriate public notice of receipt, including to parties known to be interested in the proposed project or in the receiving waters into which the discharge may occur.
- (b) If the Administrator in his or her discretion determines that a public hearing is appropriate or necessary, the EPA shall: schedule such hearing at an appropriate time and place; and, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony in person or by other means at the hearing.

#### **Subpart E—Consultations**

#### **§ 121.16 Review and advice.**



This document is a prepublication version, signed by EPA Administrator Andrew R. Wheeler on June 1, 2020. EPA is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*.

The Administrator may, and upon request shall, provide Federal agencies, certifying authorities, and project proponents with relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements.