

The EPA Administrator, Andrew R. Wheeler, signed the following proposed rule on 8/8/2019, and the EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. It is not a proposed rule, and it is not the official version of the rule for purposes of public notice and comment under the Administrative Procedure Act. 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 proposed rule the official version will be published 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 (<https://www.regulations.gov>) in Docket No. EPA-HW-OW-2019-0405. 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-9997-82-OW]**

**RIN 2040-AF86**

### **Updating Regulations on Water Quality Certification**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is publishing for public comment a proposed rule providing updates and clarifications to 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 proposed activity that requires a federal license or permit and may result in a discharge to waters of the United States. This proposal is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.

**DATES:** Comments must be received on or before *[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** Submit your comments, identified by Docket ID No. **EPA-HQ-OW-2019-0405**, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**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) 564-3351; 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 EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <https://www.regulations.gov> to view public comments as they are submitted and posted, 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 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. Under what legal authority is this proposed rule issued?*

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

*C. How should I submit comments?*

Throughout this document, the EPA solicits comment on a number of issues related to the proposed rulemaking. Comments on this proposed rulemaking should be submitted to Docket ID No. EPA-HQ-OW-2019-0405 at <https://www.regulations.gov> per the online instructions for submitting comments and the information provided in ADDRESSES, above.

As discussed in section II.C in this preamble, this proposed rule is the outgrowth of extensive outreach efforts, including requests for recommendations, and the EPA has taken recommendations received into account in developing this proposal. In developing a final rule, the EPA will be considering comments submitted on this proposal. Persons who wish to provide views or recommendations on this proposal and have them considered as part of this rulemaking process must provide comments to the EPA as part of this comment process. To facilitate the processing of comments, commenters are encouraged to organize their comments in a manner that corresponds to the outline of this proposal.

## **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 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 existing water quality requirements or waives the certification requirement. As described in greater detail below, section 401 envisions a robust state and tribal role in the federal licensing or permitting process where local authority may otherwise be preempted by federal law, but places 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 in this preamble.

The plain language of 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. The statute only grants as much time as is reasonable, and federal licensing or permitting

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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 proposal uses “waters of the United States” throughout. The EPA is currently in the process of revising the definition of waters of the United States via rulemaking and expects the final definition of the term to control in all CWA contexts.

<sup>2</sup> “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).

agencies, in their discretion, may establish a period of time shorter than one year if the federal licensing and permitting agencies determine that a shorter period is “reasonable.” 33 U.S.C. 1341(a)(1). The CWA provides that the timeline for action on a section 401 certification begins “upon 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 as determined by the federal licensing and permitting agencies, section 401 authorizes the federal licensing and permitting agencies to find that the state or tribe waived the section 401 certification requirement and issue the federal license or permit. *Id.* at 1341; 40 CFR 121.16(b). 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 condition, or deny section 401 certification has no legal force or effect.

Section 401 authorizes states and tribes to certify that a discharge to 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<sup>3</sup> and other limitations, and monitoring requirements” that are necessary to assure that the applicant for a federal license or permit will

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<sup>3</sup> This proposal does not interpret “effluent limitations” to be synonymous with “effluent limitation guidelines”, the pollution control technology-based limits developed under section 304, 306, and 307 of the CWA, but also does interpret the term to include, for example, water quality based effluent limits required under sections 301 and 303.

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>4</sup>, the EPA is responsible for developing a common 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 at 40 CFR part 121 a common framework for implementing the certification provisions pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948 (FWCPA), but the EPA never updated that framework to reflect the 1972 amendments to the FWCPA (commonly known as the Clean Water Act or CWA), which created 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.

In April 2019, the President issued Executive Order 13868 titled *Promoting Energy Infrastructure and Economic Growth*, which directed the EPA to engage with states, tribes, and federal agencies and update the Agency’s outdated guidance and regulations, including the existing certification framework. Consistent with Executive Order 13868 and the modern CWA, this proposal provides an updated common framework that is consistent with the modern CWA and which seeks to increase predictability and timeliness.

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

On April 10, 2019, the President issued Executive Order 13868 titled *Promoting Energy Infrastructure and Economic Growth*. Its purpose is to encourage greater investment in energy

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<sup>4</sup> The EPA co-administers section 404 with the Corps.



infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty. The Executive Order identifies the EPA's outdated federal guidance and regulations as one source of confusion and uncertainty hindering the development of energy infrastructure. As noted above, the EPA's current certification regulations (codified at 40 CFR part 121) have 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 titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, which had not been updated since it was released in 2010 and therefore no longer reflected the current case law interpreting CWA section 401.

The Executive Order directed the EPA to review CWA section 401 and the EPA's existing certification regulations and interim guidance, issue new guidance to states, tribes, and federal agencies within 60 days of the Order, and propose 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.

As part of its review, the Executive Order directed the EPA to take into account the federalism considerations underlying section 401 and to focus its attention on the appropriate scope of water quality reviews and conditions, the scope of information needed to act on a certification request in reasonable period of time, and expectations for 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 documents. 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 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 existing certification regulations and guidance are relevant to all water quality certifications.

Additional information on the EPA's state and tribal engagement is discussed in section II.C in this preamble, and additional information on the EPA's updated guidance document is discussed in section II.D in this preamble.

### *C. Pre-proposal Stakeholder Engagement*

Prior to the release of Executive Order 13868 *Promoting Energy Infrastructure and Economic Growth*, the Agency's 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions announced 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. While the Agency has decided to issue this proposal instead of the notice, that entry was the first indication to the public of the Agency's interest in revising its section 401 certification process.

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 Wetlands Managers, the National Tribal Water Council, and the National Tribal Caucus indicating the Agency's interest in engaging on potential clarifications to the section 401 process. The Agency discussed section 401 at several association meetings and calls in Fall 2018 and Spring 2019 and received correspondence from several stakeholders between Fall 2018 and Spring 2019. Early stakeholder feedback received prior to the issuance of the Executive Order, as well as 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 the 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, the EPA's next steps, and solicited feedback from states and tribes consistent with the Executive Order. Shortly thereafter, the EPA initiated formal consultation efforts with states and tribes regarding provisions that require clarification within section 401 of the CWA and related federal regulations and guidance. Consultation occurred from April 24, 2019 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 section V in this preamble 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 Governor's 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 proposed rule. The EPA engaged with federal agencies that issue permits or licenses subject to section 401, including the United States Department of Agriculture, Federal Energy Regulatory Commission, Army Corps of Engineers, Alcohol and Tobacco Tax and Trade Bureau, and Nuclear Regulatory Commission 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 areas of section 401 that may require updating or benefit from clarification, including timeframe, scope of certification review, and coordination among certifying authorities, federal licensing or permitting agencies, and project proponents. The EPA requested input on issues and process improvements that the EPA might consider for a future rule. 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.

Tribes provided several specific recommendations regarding the proposed rulemaking. First, some tribes requested the EPA better clarify its responsibilities under CWA section 401(a)(2). These tribes expressed the importance of considering impacts to neighboring jurisdictions during

the section 401 certification process. Tribes also emphasized that section 401 certification decision-making should not be prolonged such that section 401 certifications delay implementation of updated water quality standards. Tribes also requested that any changes to the section 401 certification process should maintain tribal authority and sovereignty. Finally, tribes emphasized the importance of meaningful consultation and engagement throughout the rulemaking process.

The EPA received several specific recommendations regarding process improvements for section 401 certifications. First, states, cross-cutting state organizations, and industry groups expressed support for pre-application meetings and information-sharing among project proponents, certifying authorities, and federal licensing and permitting agencies. Additionally, state officials, tribal officials, and cross-cutting state organizations cited deficient certification applications as a primary cause for delays in the certification decision-making process. Permit applicants suggested the lack of clear state processes and prolonged information requests contributed significantly to the delay in the 401 certification process. The Agency was also made aware of relatively low staffing availability in many state and tribal 401 certification programs. Stakeholders suggested that pre-application meetings as well as explicit state processes and checklists could increase the quality of certification applications.

Additionally, state and tribal officials as well as cross-cutting state organizations cautioned the Agency against mandating a specific reasonable period of time (e.g., 60 days) that would apply to all types of projects. These recommendations encouraged the EPA to maintain the authority of federal licensing and permitting agencies to determine the appropriate reasonable period of time.

Finally, the EPA received pre-proposal recommendations covering a wide variety of viewpoints on the certifying authority's scope of certification review. The EPA considered all of this information and stakeholder input, including all 72 recommendations submitted to the docket during development of this proposed rule, and feedback received prior to the initiation of and during the formal consultation period.

*D. Guidance Document*

Pursuant to Executive Order 13868, the Agency released updated section 401 guidance on June 7, 2019, 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 new guidance, EPA rescinded the 2010 document titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (“Interim Handbook”). The 2010 Interim Handbook had not been updated or revised since its release in 2010, and therefore no longer reflected the current case law interpreting CWA section 401, nor had it been finalized.

The updated guidance provides 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 guidance focuses on aspects of the certification process, including the timeline for review and decision-making and the appropriate scope of review and conditions. Additionally, the guidance provides 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*, or simply, the “One Federal Decision” policy. For major infrastructure

projects, the One Federal Decision policy 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.

The new guidance is not a regulation, nor does it change or substitute for any applicable regulations. Therefore, it does not impose legally binding requirements on the EPA, states, tribes, other federal agencies, or the regulated community. The EPA expects its final regulation, once promulgated, will provide the clarity and regulatory certainty expected by the Executive Order and additional guidance will not be necessary to implement section 401. The Agency therefore requests comment on whether it should rescind its June 7, 2019 guidance upon completion of this rulemaking or whether separate guidance would be helpful on implementation of the provisions that are finalized in this proposal.

*E. Effect on Existing Federal, State, and Tribal Regulations*

Section 3.d. of Executive Order 13868 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” EPA’s final section 401 regulations and “the policies set forth in section 2 of [the Executive Order].” According to the Executive Order, these subsequent federal agency rulemaking efforts will follow an EPA-led interagency review and examination of existing federal guidance and regulations “for consistency with EPA guidance and regulations.” As the EPA understands the Executive Order, the other federal agencies that issue permits or licenses subject to the certification requirements of section 401 are expected to ensure that 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

plans to review its own National Pollutant Discharge Elimination System (NPDES) regulations to ensure its program certification regulations are also consistent with the Agency's final regulations under this proposal. The EPA will be working with its fellow section 401 implementing agencies to accomplish this goal.

The EPA recommends that states and authorized tribes update, as necessary, their own CWA section 401 regulations to provide procedural and substantive requirements that are consistent with those the EPA eventually promulgates. Regulatory consistency across both federal and state governments with respect to issues like timing, waiver, and scope of section 401 reviews and conditions will substantially contribute towards ensuring that section 401 is implemented in an efficient, effective, transparent, and nationally consistent manner and will reduce the likelihood of protracted litigation over these issues.

The EPA solicits comments from state and tribal governments, and the public at large regarding the need for, and potential benefits of, a consistent, national and state regulatory approach to section 401 and how the EPA may best promote such consistency.

#### *F. Legal Background*

This proposal initiates the EPA's first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401. The Agency's existing certification regulations at 40 CFR part 121 pre-date the 1972 CWA amendments. This proposal therefore provides the EPA's first holistic analysis of the statutory text, legislative history, and relevant case law informing the implementation of the CWA section 401 program by the Agency and our federal, state, and tribal partners. The proposal, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by policy considerations where necessary to address certain ambiguities in the statutory text. The following sections



describe the basic operational construct and history of the modern CWA, how section 401 fits within that construct, and certain core administrative legal principles that guide agency decision-making in this context. This legal background is intended to inform the public’s review of the proposed regulation by summarizing the legal framework for the proposal.

## 1. The Clean Water Act

Congress amended the CWA<sup>5</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, the ability to control and redress water pollution in the nation’s waters largely fell to the U.S. Army Corps of Engineers (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 water of the United States,<sup>6</sup> or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.” 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), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required states to develop water

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<sup>5</sup> The FWPCA is 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.

<sup>6</sup> The term “navigable water of the United States” is a term of art used to refer to waters 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).

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 they ultimately proved 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. Warren Co. v. Maine Bd. of Envtl. 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>7</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,”

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<sup>7</sup> 33 U.S.C. 1370 also prohibits authorized states from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

*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 4154, 4157 (Feb. 14, 2019) (discussing non-regulatory program provisions); 83 FR 32227, 32232 (July 12, 2018) (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 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 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 hoped 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>8</sup>

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 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. Dombek*, 172 F.3d 1092, 1096 (9th Cir. 1998) (observing that 1972 amendments “largely supplanted” earlier version of CWA “by replacing water quality standards with point source effluent limitations”).

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<sup>8</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. For further discussion, see 83 FR at 32232 and 84 FR at 4157.

Under this statutory scheme, the states<sup>9</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 water quality standards and must submit those TMDLs to the EPA for approval. *Id.* at 1313(d). And, central to this proposed 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 may result in a discharge to 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 (either under a 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 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

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<sup>9</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).

or permit for an activity that may result in a discharge to waters of the United States, unless the appropriate certification 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 discharge location to the receiving waters 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 permits issued by the Corps, hydropower and pipeline licenses issued by Federal Energy Regulatory Commission (FERC), and RHA sections 9 and 10 permits issued by the Corps.

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 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 “a condition” 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 issue. *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 . . . after receipt of such request.” *Id.*

Perhaps with the exception of section 401,<sup>10</sup> the EPA has developed comprehensive, modern regulatory programs designed to ensure that the CWA is fully implemented as Congress intended. 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 “objective” is “something worked toward or aspired to: Goal”). The Agency therefore recognizes a distinction between the specific word choices of Congress, including 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 83 FR at 32237 and 84 FR at 4168-69.

Congress’ authority to regulate navigable waters, including those 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

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<sup>10</sup> As noted in section II.F in this preamble, the EPA’s existing certification regulations were promulgated prior to the 1972 CWA Amendments and have not been updated to reflect the current statutory text.



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 and rooted 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 envisioned by the CWA. *See* 33 U.S.C. 1251(b), 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 state’s “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 opinion) (“[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. In doing so, Congress specifically sought to avoid “federal encroachment upon a traditional state power.” *Id.* at 173. The Court in *SWANCC* found that “[r]ather than expressing a desire to readjust the federal-state balance in this manner, 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.* 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) (“this 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 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 at 4165 and 83 FR at 32234.

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 State’s denial of section 401 certification violated the dormant commerce clause and dormant foreign commerce clause). In *Lake Carriers Association v. EPA*, 652 F.3d 1 (D.C. Cir. 2011), a court of appeals found that the section 401 statutory scheme of delegation to states itself does not create an impermissible burden on interstate commerce; however actions taken by states pursuant to section 401 are not insulated from 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.”). Accordingly, EPA seeks comment on whether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress’ goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce.

## 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>11</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 section 401. Second, the EPA will act as the certifying authority where the discharge would originate on lands of exclusive federal jurisdiction.<sup>12</sup>

The EPA also coordinates the opportunity for neighboring jurisdictions to raise concerns and recommendations where their water quality may be affected by a discharge subject to section 401 certification. *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 concerns. Where the EPA Administrator determines that a discharge subject to section 401 “may affect” the water quality

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<sup>11</sup> See 33 U.S.C. 1251(d), 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *California Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997).

<sup>12</sup> The federal government may obtain exclusive federal jurisdiction over lands in multiple ways, including where the federal government purchases lands with state consent 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). Examples of lands of exclusive federal jurisdiction include Denali National Park.

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 any 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 the hearing, the EPA will submit its evaluation and recommendations. The federal agency will consider the jurisdiction’s and the EPA’s recommendations, and any additional evidence presented at the hearing. The federal agency “shall condition such license or permit in such manner as may be necessary to insure compliance with the applicable water quality requirements” of the neighboring jurisdiction. *Id.* If the conditions cannot ensure compliance, the federal agency may 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 applicable effluent limitations, standards, regulations, requirements, or water quality criteria.

Finally, the EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. The EPA’s current water quality certification regulations were promulgated in 1971,<sup>13</sup> prior to the 1972 amendments that enacted CWA section 401.

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<sup>13</sup> The EPA’s existing water quality certification regulations are found at 40 CFR part 121, 36 FR 22487 (November 25, 1971). 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; 48 FR 14264 (April 1, 1983). This proposed rule does not address the NPDES regulations, and the Agency will make any necessary conforming regulatory changes in a subsequent rulemaking.

The EPA's 1971 regulations were designed to implement an earlier version of the certification requirement that was included in the pre-1972 version of the FWPCA. The legislative history reveals Congress added the 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.*

Prior to 1972, the certification provision 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 1972 amendments retained the pre-existing water quality certification requirements but modified the requirements to be consistent with the overall restructuring of the CWA so that a water quality certification would assure that the "*discharge will comply*" with effluent limitations and other enumerated regulatory provisions of the Act, and with "any other appropriate requirement" of state or tribal law. 33 U.S.C. 1341(a), (d) (emphasis added). Because the EPA's existing certification regulations were promulgated prior to the 1972 CWA amendments, they contain language from the pre-1972 FWPCA that Congress changed in those amendments. In contrast to the language in CWA section 401, the EPA's existing certification regulations direct

authorities to certify that there is “*reasonable assurance 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 have caused confusion for states, tribes, stakeholders, and courts reviewing section 401 certifications, and a primary goal for this proposal is to update and clarify the Agency’s regulations to ensure that they are consistent with the CWA.

### 3. The EPA’s Existing Certification Regulations

The EPA’s existing certification regulations require certifying authorities to act on a certification request within a “reasonable period of time.” 40 CFR 121.16(b). The regulations provide 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 existing certification regulations also provide 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).

When the EPA is the certifying authority, the existing certification regulations at 40 CFR part 121 establish different requirements, including specific information to be included in a certification request and additional procedures. When the EPA is providing certification, the



project proponent must 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 will 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 is submitted to the EPA, the Regional Administrator must 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 determines that there is “reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,” the Regional Administrator shall issue the certification.<sup>14</sup> *Id.* at 121.24.

The existing certification regulations identify a number of requirements that all certifying authorities must include in a section 401 certification. *Id.* at 121.2. For example, a section 401 certification shall include the name and address of the project proponent. *Id.* at 121.2(a)(2). The certification shall also 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

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<sup>14</sup> Use of the terms “reasonable assurance” and “activity” in this operative provision of the EPA’s existing certification regulation is an artifact of the pre-1972 statutory language and those terms are not used in the operative provision of CWA section 401. *See* Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970).

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). 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 the certifying authority deems appropriate.<sup>15</sup> *Id.* at 121.2(a)(4)-(5).

The existing certification regulations at 40 CFR part 121 also establish a process for the EPA to provide neighboring jurisdictions with an opportunity to comment on a certification that is similar to that provided in the modern CWA section 401(a)(2). Under the existing certification regulations, the Regional Administrator is 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 determines there is “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 is required to notify each affected state within thirty days of receipt of the application materials and certification. *Id.* at 121.13. If the documents provided are insufficient to make the determination, the Regional Administrator may 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 holds a public hearing on the objection raised by a neighboring jurisdiction, notice of such objection shall 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

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<sup>15</sup> The term “desirable” is also not used in CWA section 401.

Administrator shall submit an evaluation and “recommendations as to whether and under what conditions the license or permit should be issued.” *Id.* at 121.15.

The existing certification regulations establish that the Regional Administrator “may, and upon request shall” provide federal licensing and permitting agencies, certifying authorities, and project proponents with information regarding water quality standards, status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id.* at 121.30.

Finally, the existing certification regulations establish an oversight role for the EPA when a certifying authority modifies a prior certification. The regulation provides for a certifying authority to 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 preamble, the EPA’s existing certification regulations were promulgated prior to the 1972 CWA amendments and they do not reflect the current statutory language in section 401. In addition, the EPA’s existing certification regulations at 40 CFR part 121 do not address some important procedural and substantive components of section 401 certification review and action. This proposal 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 47 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 have also addressed certain elements of section 401 certifications. This section summarizes the U.S. Supreme Court decisions and major lower court decisions.

a. U.S. Supreme Court Decisions

i. P.U.D. 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 and City of Tacoma v. Washington Department 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 and some states and tribes to significantly broaden the scope of section 401 beyond its plain language 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.” *Id* 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 “other appropriate state law requirements.” The Court concluded that, consistent with the EPA’s implementing regulations, 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.”<sup>16</sup> *Id.* at 712. The Court cited the EPA’s certification regulations at 40 CFR 121.2(a)(3) with approval and 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.” *Id.* (citing EPA, *Wetlands and 401 Certification* 23 (April 1989)).

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.’” *Id.* 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 regulations and guidance. *Id.* at 713.

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<sup>16</sup> The Court apparently failed to identify or understand that the EPA’s regulations were promulgated prior to the 1972 CWA amendments and that the exact provision the Court was analyzing contained outdated terminology, including the term “activity” from the pre-1972 versions of the Act.

Although this decision has been interpreted by some to broadly expand state authority under section 401—beyond assessing water quality impacts from the discharge and allowing 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 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.” *Id.* (emphasis added).

On the scope of section 401, the dissenting opinion 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 Court’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 Court’s conclusion “effectively eliminates the constraints of § 401(a)(1).” *Id.* at 726. 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 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 and concluded that because “other appropriate requirements of state law” is included in a list of more specific discharge-related CWA provisions, that the “appropriate” requirements are “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 Court’s reliance, at least in part, on the EPA’s regulations and its application of *Chevron* deference in this case without first identifying ambiguity in the statute and, where the government apparently did not seek deference on an interpretation of section 401(d). *Id.* The dissent noted that there was no EPA interpretation directly addressing the language in sections 401(a) and (d), and that the only existing EPA regulation that addresses conditions “speaks exclusively in terms of limiting discharges.”<sup>17</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

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<sup>17</sup> The EPA’s amicus brief filed 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, 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 EPA’s amicus brief also did not inform the Court that the Agency’s implementing regulations included language from the prior version of the Act.

conducted a plain language analysis of the CWA and concluded that, “under the literal terms of 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 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 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 Board of Environmental Protection et al.*, 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>18</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 the potential for a discharge” and, therefore, section 401 is triggered. *Id.* at 373. In so holding, the Court observed that, “[t]he alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines,” and 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 385-86. 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.* at 386. This sentence when read in isolation could be 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 beyond 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 to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with *water quality*

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<sup>18</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)).

*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,’ by imposing conditions on federal licenses for activities that may result in a discharge.” *Id.* (emphasis added). 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 proposed rule, if finalized, 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 begins upon “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 D.C. Circuit has also recently analyzed the statutory timeline for review of a certification and 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). The court also noted that the EPA— “the agency charged with administering the CWA”—has regulations that allow it to find that a state has waived certification of an NPDES permit application after only six months. *Id.*

In *Hoopa Valley Tribe*, the D.C. Circuit also 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>19</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 Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2002); *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1133–34 (9th Cir. 2002); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997). Other courts have concluded that FERC has an affirmative obligation to determine

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<sup>19</sup> Two decisions from the Second Circuit Court of Appeals 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 Env’tl. Conservation v. FERC*, 884 F.3d at 456; *Constitution Pipeline v. N.Y. State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 94 (2d Cir. 2018). However, in neither case did the court consider the merits or opine on the legality of such an arrangement.

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, 622-623, 625 (D.C. Cir. 1991) (while 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 affirmed 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 110-111. This 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 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 condition. *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’ Association v.*

*EPA*, 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that petitioners’ request for additional notice and comment procedure 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 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 “therefore need not consider whether EPA has authority to reject state conditions under such circumstances.”)). But 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.F in this preamble affirming a role for federal agencies to confirm whether certifications comply with the requirements of section 401.

This proposal is intended to provide clarity to certifying authorities, federal agencies, and project proponents, as it addresses comprehensively and for the first time some 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 proposal, it is useful to understand some key governing principles of administrative law. In general, administrative agencies can

only exercise authority provided 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., Inc. 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, where the court must defer to the agency's “reasonable” interpretation. *Id.* at 844.

*Chevron* deference relies on the straightforward 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). Indeed, courts 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 as long as the stationary source—the facility as a whole—did not increase its pollution emissions.

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 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, 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>20</sup>

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 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

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<sup>20</sup> For other instructive applications of *Chevron*’s interpretative principles, see *Entergy Corp. v. Riverkeeper, Inc.* 556 U.S. 208, 222-223 (2009) (statutory silence interpreted as “nothing more than a refusal to tie the agency’s hands”); *Zuni Pub. School Dist. v Dep’t of Edu.* 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”).

degree of discretion the ambiguity allows.” *Brand X*, 545 U.S. at 982 (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)). Indeed, 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 that the Commission could not permissibly construe the Communications Act the way that it did based on the Court’s earlier precedent. *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.

The entire “point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agencies.” *Id.* at 981 (quoting *Smiley*, 517 U.S. at 742). The Supreme Court emphasized that courts cannot override an agency’s interpretation of an ambiguous statute based on judicial precedent. *Id.* at 982. Instead, as a “better rule,” a reviewing court only can rely 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 produces anomalous results because the controlling interpretation would then turn on whether a court or the agency interprets the statutory provision

first. *See id.* at 983. Congress delegated authority to agencies to interpret statutes and that authority “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. Legal Construct for the Proposed Rule

As the preceding summary of the statutory, regulatory and judicial history demonstrates, the most challenging aspects of section 401 concern the scope of review and action on a certification request, and the amount of time available for a certifying authority to act. The Agency is proposing a regulation that would clarify these aspects and provide additional regulatory certainty for states, tribes, federal agencies, and project proponents. This subsection summarizes some of the core legal principles that inform this proposal, and the following section (section III) describes how the Agency is applying those legal principles to support the proposed regulation.

### a. 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 proposes to interpret 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 the CWA and EPA-approved state and tribal CWA regulatory program provisions.

Since at least 1973, the EPA has issued memoranda and guidance documents and filed briefs in various court cases addressing section 401. Only a handful of these documents address the scope of section 401, and they were not the product of a holistic examination of the statute or its legislative history and, as a result, included little 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 EPA’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 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 on behalf of the EPA in the *PUD No. 1* case. The EPA’s brief asserted that petitioners were “mistaken” in their contention that the minimum flow condition is outside the scope of section 401 because it does not address a discharge, but the brief provided no analysis to support this position. The EPA’s brief also did not offer an affirmative interpretation to harmonize the different language in sections 401(a) and 401(d). More than a decade later, the EPA’s amicus brief in the *S.D. Warren* case simply adopted 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.

This proposed rulemaking marks 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 proposed regulation is informed by this holistic review and presents a framework that EPA considers to be most consistent with congressional

intent. The Agency solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification.

i. Water Quality

The EPA proposes to conclude that the scope of a section 401 review or action must be limited to considerations of water quality. The Congressional purpose of the CWA is to protect and maintain water quality, and there is no suggestion in either the plain language or 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.

The EPA is aware that 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 included conditions not related directly to water quality in section 401 certifications, including requiring 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 creating public access for fishing along waters of the United States. Certifying authorities have also attempted to address all potential impacts from the operation or subsequent use of products generated by a proposed federally licensed or permitted project that may be identified in an environmental impact statement or environmental

assessment, 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 proposes to conclude that expanding the scope of section 401 to include consideration of effects and the imposition of conditions unrelated to water quality would, at a minimum, invoke the outer limits of power Congress delegated under the CWA. There is nothing in the text of the statute or its legislative history that signals that Congress intended to impose federal regulations on anything more than water quality-related impacts to waters of the United States. Indeed, Congress knows how to craft statutes to require consideration of multi-media effects, *see* 42 U.S.C. 4321 *et seq.* (NEPA), and has enacted specific statutes addressing impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act), by way of example.<sup>21</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 intended section 401 of the CWA to authorize consideration or the imposition of certification conditions based on air quality concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts, it would have provided a clear statement to that effect. Neither the CWA nor section 401 contain any such clear statement. In fact, Congress

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<sup>21</sup> *See, e.g.*, 42 U.S.C. 7401 *et seq.* (Clean Air Act); 42 U.S.C. 6901 *et seq.* (Resource Conservation and Recovery Act); 16 U.S.C. 1531 *et seq.* (Endangered Species Act); and 16 U.S.C. 470 *et seq.* (National Historic Preservation Act).

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>22</sup> Agencies must avoid interpretations of the statutes they implement to avoid pressing the envelope of constitutional validity absent a clear statement from Congress to do so. *See SWANCC*, 531 U.S. at 172-73; *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). That includes interpretations of the statute that would provide states, tribes and the EPA the ability to regulate interstate commerce beyond the four corners of the CWA. *See* discussion *supra* at section II.F.1 in this preamble. The Agency proposes to conclude that inclusion of the phrase “other appropriate requirements of state law” in section 401(d) lacks that clear direction from Congress.<sup>23</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 to 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 other “appropriate requirements” of state or tribal law. 33 U.S.C.

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<sup>22</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). 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>23</sup> The Agency also proposes to conclude that the use of the term “applicant” in 401(d) creates ambiguity in the statute. See section II.F.6.a.ii in this preamble for discussion on the use of the term “applicant” in section 401(d).



1341(a)(1), (d). The enumerated CWA provisions identify requirements to ensure that discharges of pollutants do not degrade water quality,<sup>24</sup> and specifically referenced throughout section 401 is the 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>25</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 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 that should be considered as part of a section 401 review, and 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). Indeed, 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 potential interpretation of this clause in

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<sup>24</sup> For example, 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 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>25</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).

section 401(d) could be to authorize the imposition of conditions or veto authority over a federal license or permit based on non-water quality related impacts if those requirements are based on existing state law. But such an interpretation could authorize the EPA as a certifying authority to push the constitutional envelope of its delegated authority into regulatory arenas more appropriately reserved to the states, “powers with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461 (describing the “plain statement rule”).

More importantly, the Agency does not believe that Congress intended the phrase “any other appropriate requirements of State law” to be read so broadly. Instead, the principle *ejusdem generis* helps to inform the appropriate interpretation of the 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 Washington State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383-85 (2003). Here, the general term “appropriate requirement” 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. Given the text, structure, purpose, and legislative history of the CWA and section 401, the EPA proposes to interpret “appropriate requirements” for section 401 certification review to include those provisions of state or tribal law that are EPA-approved CWA regulatory programs that control discharges, including provisions that are more stringent than federal law. *See S. Rep. No. 92-414*, at 69 (1971) (“In addition, this 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 CWA provisions that regulate point source discharges to waters of the United States, and those discharge-related restrictions referenced in Justice Thomas’s dissent, are the “regulatory provisions of the CWA.” When states or tribes enact CWA regulatory provisions as part of a state or tribal program, including those designed to implement the section 402 and 404 permit programs and those that are more stringent than federal requirements, those provisions require EPA approval before they become effective for CWA purposes. Because the EPA interprets “appropriate requirements” to mean the regulatory provisions of the CWA, it follows that those would necessarily be EPA-approved provisions. The EPA requests comment on whether this interpretation is a reasonable and appropriate reading of the statute and related legal authorities.

ii. Activity versus Discharge

Based on the text, structure, and legislative history of the CWA, the EPA proposes to conclude 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 allows the certifying

authority to include conditions “to assure that *any applicant*<sup>26</sup> for a Federal license or permit will comply” (emphasis added) with applicable provisions of the CWA and other appropriate requirements of state or tribal law. The use of this different term in section 401(d) 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 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>27</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 ...”

Broadly interpreting the use of “applicant” in section 401(d) to authorize certification conditions

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<sup>26</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).

<sup>27</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.”)

that are unrelated to the discharge would expand section 401 beyond the scope of federal regulatory authority integrated throughout the core regulatory provisions of the modern CWA—the ability to regulate discharges to waters of the United States. The Agency is not aware of any other instance that 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 and believes a better interpretation would be to align its meaning with its plain language roots.

The Agency therefore proposes to interpret the use of the term “applicant” in section 401(d), consistent with its use in section 401(a) and other areas of the CWA, as identifying the person or entity responsible for obtaining and complying with the certification and any associated conditions. Throughout the CWA, the term “applicant” is used to identify the person or entity responsible for compliance with the federal regulatory provisions of the CWA, all of which remain focused on controlling discharges of pollutants to waters of the United States.<sup>28</sup> The legislative history of section 401, discussed below, provides 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 in this preamble. Two important phrases were modified between the 1970 and the 1972 versions of section 401 that help inform 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). The 1972 version was modified to require an authority to certify “that any such *discharge* shall comply with the applicable provisions of [the CWA].” 33 U.S.C. 1341(a)

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<sup>28</sup> For example, section 404 provides that after an applicant requests a permit, the Corps “may issue [a] permit[], after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. 1344(a).

(emphasis added). On its face, this modification makes the 1972 version of section 401 consistent with the overall framework of the amended statutory regime, which focuses on eliminating discharges and attaining water quality standards.

Second, the 1972 version included section 401(d) for the first time, which 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.

Together, these provisions: 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 they were made intentionally and with the purpose of making the new section 401 consistent with the new framework of the Act. Indeed, the 1971 Senate Report provides 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).

The EPA 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, to David K. Sabock, North Carolina Department of Natural Resources (November 12,

1985).<sup>29</sup> In its analysis, the EPA characterized the legislative history quoted above as “not very explicit,” and characterized the new section 401 language as “not altogether clear.” *Id.* Based on this analysis, the EPA 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 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 proposes to adopt the reasonable interpretation that the 1972 version of section 401 made specific changes to ensure that *discharges* were controlled and in compliance with the modern CWA regulatory programs, and appropriate requirements of state law implementing the same. For the reasons noted above in section II.F.1 in this preamble, 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 the “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 used the term “applicant” which, based upon its plain ordinary meaning, identifies the person seeking the certification and the related federal license or

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<sup>29</sup> Available at <https://www.epa.gov/sites/production/files/2015-01/documents/standards-marinas-memo.pdf>.

permit. When Congress enacted the 1972 CWA amendments, it used the term “discharge” to frame the scope of the certification requirement under the Act. As a result, the Agency now considers a more natural 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 proposes to conclude that this interpretation is a reasonable and appropriate reading of the statute and related legal authorities and seeks public comment on this proposed interpretation.

As described in detail in section II.F.4.a.i in this preamble, the Supreme Court in *PUD No. 1* considered the scope of a state’s authority to condition a section 401 certification and concluded that, once the 401(a) “discharge to navigable water” triggers the requirement for certification, section 401(d) authorizes a certifying authority to impose conditions on “the applicant,” meaning the activity as a whole and not just the discharge. In its discussion of the CWA, the Supreme Court relied on its own interpretation of the scope of section 401 and 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. *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 certification regulations at 40 CFR 121.2(a)(3) and related guidance at that time , but did not have before it the EPA’s interpretation of how section 401(a) and 401(d) could be harmonized. *Id.* In fact, the Court either was not aware of or did not mention that the EPA 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 existing certification regulations are consistent with the text of the pre-1972 CWA, and they require 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, the federal government did not seek *Chevron* “deference for the EPA’s regulation in [the *PUD No. 1* case]” or for EPA’s interpretation of section 401. *Id.* at 729 (Thomas, J., dissenting). In fact, the EPA’s amicus brief 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, at 12 n. 2. The EPA’s amicus brief asked the Court to analyze the two undisputed discharges from the proposed federally licensed project and determine whether they would cause violations of the state’s water quality standards.

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 own reasonable reading of the statute, *PUD No. 1* does not foreclose the Agency’s proposed interpretation of section 401 in this document. *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>30</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 apply “*Chevron*-style” deference to the agency’s interpretation. *Id.* That is exactly what the EPA is doing in this proposal. EPA has for the first time, holistically interpreted the text of section 401(a) and (d) to support this proposed update to the EPA’s existing certification regulations while ensuring consistency with the plain language of the 1972 CWA. The Agency solicits comment on its proposed interpretation of the CWA and the prevailing case law as discussed above in section II.F.1 and II.F.4 in this preamble.

The Agency also solicits comment on an alternate interpretation of the text of section 401(d) suggested by language in the *PUD No. 1* majority opinion. At page 712, the Court observes that,

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<sup>30</sup> The EPA is not proposing to modify or alter 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 the designated use of the water does not comply with the applicable water quality standards.” 511 U.S. at 714-15 (emphasis in original).

“[a]lthough 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded.” (emphasis added). The Court does not define the precise limits of State authority under section 401(d). However, the Court goes on to say that “[t]he State 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.’ 33 U.S.C. 1341(d).” In the previous discussion, we explained why the most reasonable interpretation of the “bounds” set by the statutory text is that it limits the imposition of effluent limitations, limitations, and other certification conditions to “the discharge,” and not “the activity as a whole.” However, EPA is also seeking comment on an alternate interpretation of the text that would allow imposition of effluent limitations and other similar conditions that address the water quality-related effects of “the activity as a whole,” and not just “the discharge,” provided such effluent limitations and other conditions are based on “water quality requirements” as defined in this proposal.

iii. 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, and supporting case law, the EPA proposes to conclude 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 associated with a proposed federally licensed or permitted project. The text of section 401(a) clearly specifies that certification is required 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>31</sup>

As described in section II.F.1 in this preamble, 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 to 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, 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

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<sup>31</sup> In the section 404 context, point source includes bulldozers, mechanized land clearing equipment, dredging equipment, and the like. *See, e.g., Avoyelles Sportsman’s League, Inc. v. March*, 715 F.2d 897, 922 (5th Cir. 1983).

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. 172 F.3d 1092. 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 non-point discharges to non-waters of the United States once the requirement for the section 401 certification is triggered. Specifically, in the EPA’s now-withdrawn 2010 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 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 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.

EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, 5, 26 (2010) (citations omitted). To support the first referenced paragraph on the scope of waters, the Interim Handbook cited to section 401(d), presumably referring to the use of the term “applicant” rather than “discharge” used in section 401(a).<sup>32</sup> To support the second paragraph on the scope of discharges, the Interim Handbook cited to the *PUD No. 1* and *S.D. Warren Co.* Supreme Court decisions. It appears that both paragraphs from the Agency’s 2010 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>33</sup>

For many of the same reasons that the Agency proposes to avoid interpreting the word “applicant” in section 401(d) as broadening the scope of certification beyond the discharge itself, the Agency also proposes to decline to interpret section 401(d) as broadening the scope of waters and the types of discharges to which the CWA federal regulatory programs apply. Were the Agency to interpret the use in section 401(d) of the term “applicant” instead of the term

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<sup>32</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.’” In other words, in this footnote the EPA was advising states that, while section 401(d) could perhaps be interpreted to expand the scope of federal regulatory and enforcement authority beyond navigable waters (but without citation to any case law to support that proposition), the Army Corps of Engineers may reject a certification in its entirety that is outside the statutory authority provided by the CWA.

<sup>33</sup> The *S.D. Warren* decision did not analyze or adopt the *PUD No. 1* Court’s analysis of section 401(a) and 401(d).

“discharge” as authorizing the federal government to implement and enforce CWA conditions on non-waters of the United States, 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. *See, e.g., SWANCC*, 531 U.S. at 172-73.

As described in section II.F.4.a.i in this preamble and pursuant to its authority to reasonably interpret ambiguous statutes to fill gaps left by Congress, the EPA is proposing to interpret section 401 differently than the Supreme Court did in *PUD No. 1*. The Court’s prior interpretation of sections 401(a) and 401(d) was not based on the plain unambiguous text of the statute, but rather was based on the Court’s own reasonable interpretation (see section II.F.4.a.i in this preamble). The EPA’s proposed interpretation is also based on a reasonable interpretation of the text, structure and legislative history of section 401 and the Agency’s current proposal is not foreclosed by the Court’s prior interpretation. *See Brand X*, 545 U.S. at 982.

For the reasons above, the EPA proposes to conclude that section 401 is a regulatory provision that creates federally enforceable requirements and its application must therefore be limited to point source discharges to waters of the United States. This proposed 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. The Agency solicits comment on this revised interpretation of the CWA and associated case law discussed in this section.

b. Timeline for Section 401 Certification Analysis

Based on the language of the CWA and relevant case law, the EPA proposes to conclude 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 Agency requests comment on this plain language interpretation of the statute.

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, 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—generally finds a state’s waiver after only six months. *See* 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 agency] will not frustrate the Federal application.” H.R. Rep. No. 92-911, at 122 (1972).

The timeline for action on a section 401 certification begins upon receipt of a certification request. *Id.* The CWA does not specify any legal requirements for what constitutes a request or otherwise define the term. The EPA has long recommended that a project proponent requiring federal licenses or permits 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 needs.

The CWA does not contain provisions for pausing or delaying the timeline for any reason, including to request or receive additional information from a 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 by the federal licensing and permitting agencies. For further discussion, see section III.F in this preamble. The proposed revisions to the EPA's regulations in this proposal are intended to provide greater clarity and certainty and address some of the delays and confusion associated with the timing elements of the section 401 certification process.

### **III. Proposed Rule**

This proposed 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 proposes these revisions to replace the entirety of the existing certification regulations at 40 CFR part 121. The following sections explain the Agency's rationale for the proposed rule and provides detailed explanation and analysis for the substantive changes that the Agency is proposing.

The EPA's existing certification regulations were issued almost 50 years ago in 1971, when the Agency was newly formed and the CWA had not yet been amended to include the material revisions to section 401.<sup>34</sup> In modernizing 40 CFR part 121, this proposal recognizes and responds to the changes to the CWA that occurred after the current regulations were finalized, especially the 1972 and 1977 amendments to the CWA.

Updating the existing certification regulations to clarify expectations, timelines, and deliverables also increases efficiencies. Some aspects of the existing regulations have been

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<sup>34</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.

implemented differently by different authorities, likely because the scope and timing of review are not clearly addressed by the EPA's existing certification 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 explicit limitations on when and how states and tribes may exercise this particular authority. Modernizing and clarifying the EPA's regulations 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. The Agency requests comment on all aspects of this effort to modernize and clarify its section 401 regulations, including any specific suggestions on how any of the proposed definitions or other requirements might be modified to implement Congress' intent in enacting section 401.

The EPA's existing certification regulations at 40 CFR part 121 do not fully address the public notice requirements called for under CWA 1341(a)(1). The EPA solicits comment on whether the Agency should include additional procedures in its final regulations to ensure that the public is appropriately informed of proposed federally licensed or permitted projects, potential discharges, and related water quality effects. At a minimum, such procedures could include public notice and hearing opportunities, but they could also include mechanisms to ensure that the certifying authority is in a position to appropriately inform the public, as required by section 401(a)(1). Such mechanisms could focus on how and when the certifying authority is notified of potential certification requests and what information may be necessary for the certifying authority to act on a request. If the EPA were to include such additional procedures in its final regulations, they could be the same as or similar to the procedures currently proposed to apply when EPA is the certifying authority (see proposed sections 121.12 and 121.13). The

Agency also solicits 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.

*A. When Section 401 Certification is Required*

The EPA proposes that 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.<sup>35</sup> This proposal is consistent with the Agency's longstanding interpretation and is not intended to alter the scope of applicability established in the CWA. Consistent with section 401(a)(1), the EPA is proposing 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 in accordance with this part.

Based on the text of the statute, the EPA proposes that section 401 is triggered by the potential for a discharge to occur, rather than an actual discharge. This is different from other parts of the Act<sup>36</sup> and is intended to provide certifying authorities with a broad opportunity to review proposed federally licensed or permitted projects that may result in a discharge to waters

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<sup>35</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 permits or licenses and therefore does not trigger section 401 certification. This 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>36</sup> See e.g., *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (Interpreting section 402 in the context of CAFOs, courts said the CWA gives EPA jurisdiction to require permits for only actual discharges).

of the United States within their borders. This proposal does not identify a process for certifying authorities or project proponents to determine whether a federally licensed or permitted project has a potential or actual discharge. However, 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 certification. The EPA requests certifying authorities and project proponents to 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 requests 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. Finally, the EPA requests comment on how project proponents may establish for regulatory purposes that there is no potential discharge and therefore no requirement to pursue a section 401 certification. This request is intended to solicit mechanisms for project proponents to generate a record for themselves that no 401 certification was required; this is not intended to propose a process for project proponents to seek or require concurrence from the certifying authority.

The EPA also proposes 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). This interpretation flows from the plain text of the statute, is supported by the legislative history, and is consistent with other CWA regulatory program requirements that are triggered by discharges into waters of the United States, not 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 II.F.6.a.iii for discussion on discharges to waters of the United States.

Unlike other CWA regulatory programs, however, the EPA proposes that section 401 be triggered by any unqualified discharge, rather than by a discharge of pollutants. This interpretation 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 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 specifically define the term,<sup>37</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 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 Co.*, 547 U.S. at 380-81. For further discussion on *S.D. Warren* see section II.F.4.a.ii and for further discussion on discharges see section II.F.6.a.ii-iii in this preamble. The Court held that discharges from the dam trigger section 401 because "reading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended." *S.D. Warren Co.*, 547 U.S. at 387. The EPA's interpretation in support of this proposal is therefore consistent with the Court's conclusion.

Finally, the EPA proposes that to trigger section 401, a discharge must be from a point source. This is consistent with case law from the Ninth Circuit, which concluded that the word

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<sup>37</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)

“discharge” as used consistently throughout the CWA refers to the release of effluent from a point source, and that use is also appropriate for section 401. *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1099. Because this proposed interpretation is consistent with the structure of the Act and with the other CWA regulatory programs (see section II.F above), the EPA adopted the Ninth Circuit’s interpretation and has consistently implemented that interpretation of section 401.<sup>38</sup>

The CWA does not list specific federal licenses and permits that are subject to section 401 certification requirements, instead providing that section 401 applies when *any activity that requires a federal license or permit* may result in a discharge into waters of the United States. The most common examples of licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits for the discharge of dredged or fill material, RHA sections 9 and 10 permits issued by the Corps, and hydropower and interstate natural gas pipeline licenses issued by FERC. The Agency is not proposing to further define this list but requests comment identifying other federal licenses or permits that may trigger the section 401 certification requirement.

#### *B. Certification Request/Receipt*

Under this proposal, to initiate an action under section 401, a project proponent must submit a certification request to a certifying authority. The statute limits the time for a certifying authority to act on a request as follows:

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<sup>38</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).

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). Although the plain language of the Act requires the reasonable period of time to begin upon receipt of a certification request, the statute does not define those terms. Because they are not defined and their precise meaning is ambiguous, these terms are susceptible to different interpretations, which have resulted in inefficiencies in the certification process, individual certification decisions that have extended beyond the statutory reasonable period of time, and regulatory uncertainty and litigation. See section II.F in this preamble. Given the number of certification requests submitted each year<sup>39</sup> and the statutory requirement that those requests be acted on within a reasonable period of time not to exceed one year, it is important that the certifying authorities, project proponents, and federal agencies have a clear understanding of what the terms “request” and “receipt” mean.

The CWA does not address (and therefore is ambiguous regarding) whether a certification request must be in writing, must be signed and dated, or if it must contain specific kinds of information. The EPA’s prior section 401 guidance (the now-withdrawn 2010 Interim Handbook) indicated that the timeline for action begins upon receipt of a “complete application,” as determined by the certifying authority, even though section 401 does not use the term “complete application” or prescribe what an “application” would require. The reference by the EPA to a “complete application” without explaining what an “application” must include has led to 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.

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<sup>39</sup> See Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking at XX.

Certification request requirements vary from state to state (e.g., location maps and topographical maps versus latitude/longitude or GPS locations). For example, some states have open-ended and broad submittal requirements (e.g., “all information concerning water resource impacts”) which create the potential for certifying authorities to conclude (sometimes repeatedly) that a submittal is incomplete. Additionally, if a certifying authority requires additional information to be submitted before it will review and act on a certification request, it may be unclear whether the certifying authority considers the request to be “complete” and whether the statutory clock has started to run. Further, differences in the contents of a request or required supporting materials can create special challenges for project proponents and federal agencies working on large interstate projects that require certification from multiple states.

The CWA also does not define the term “receipt,” which has led to different states, tribes, and project proponents, as well as different courts, using 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 the certifying authority (see section II.F in this preamble). 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.

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). To address the particular challenges identified above, the EPA is proposing to define “certification request” and “receipt,” which Congress left undefined and ambiguous. By



establishing uniform definitions for “certification request” and “receipt,” EPA hopes to eliminate confusion about when the statutory reasonable period of time begins and ends. *See id.* at 843.

Consistent with the text of the CWA, the EPA is proposing that the statutory timeline for certification review starts upon receipt by the certifying authority of a “certification request,” rather than the receipt of a “complete application” or “complete request” as determined by the certifying authority. To increase consistency, the EPA’s proposed definition of “certification request” includes an enumerated list of documents and information that must be included in a certification request:

*Certification request* means a written, signed, and dated communication from a project proponent to the appropriate certifying authority that:

1. identifies the project proponent(s) and a point of contact;
2. identifies the proposed project;
3. identifies the applicable federal license or permit;
4. identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters;
5. includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge;
6. includes 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; and
7. contains the following statement: ‘*The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable timeframe.*’

The EPA anticipates that a certification request that contains each of these components will provide the certifying authority with sufficient notice and information to allow it to begin to evaluate and act on the request in a timely manner. The EPA solicits comment on whether this list of documents and information is appropriately inclusive, whether it is specific enough to inform project proponents of the submittal requirements, and whether it is clear enough to avoid subjective determinations by a certifying authority of whether submittal requirements have been

satisfied. 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 EPA solicits comment on whether the fourth and fifth items proposed to be required in a certification request are sufficiently broad to capture all potential federal licenses or permits. The EPA also acknowledges that some certifying authorities may charge a fee to process certification requests. The Agency solicits comment on whether it should include “any applicable fees” in the definition of certification request. Pre-proposal recommendations to the EPA also requested that the Agency require project proponents to include existing documentation or reports showing prior contamination at the proposed federally licensed or permitted project site. The EPA solicits comment on whether this would be an appropriate requirement for all certification requests, or whether this information is best requested on a case-by-case basis by the certifying authority. Additionally, the EPA solicits comment on whether such documentation or reports would be appropriate if the permit or license is being reissued or amended, or only for initial license or permit processes.

The EPA intends that the term “*certification request*” means only written requests for certification. In addition, EPA intends that any written request for certification include the specific information identified in the definition. Providing this new definition is intended to ensure that the certifying authority and the project proponent understand what is required to start the statutory reasonable time period. The proposed requirement that a request include the following statement—“*The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable timeframe.*”—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 “request for

certification” that triggers the statutory timeline. The EPA also solicits comment on whether the Agency should generate a standard form that all project proponents can use to submit certification requests. A standard form could help project proponents provide all necessary information and help certifying authorities quickly identify all components of the certification request. If the EPA promulgated a standard form, it could include all seven items included in the proposed definition of certification request.

This proposal requires a project proponent to identify the location of a 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 discharge locations, as shown on design drawings and plans. Project proponents should consider, but are not limited to, using the following formats:

- 1) ArcGIS File Geodatabase with accompanying Feature Classes
- 2) ArcGIS Shapefile
- 3) DXF or DWG (CAD files) projected to WGS 84 Decimal Degrees
- 4) KMZ/KML (Google Earth)

Alternatively, the project proponent might consider identifying discharge locations on readable maps. The EPA solicits comment on whether the location of all potential discharges from proposed federally licensed or permitted projects can be identified with such specificity or if other methods may be more appropriate for different types of activities.

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 proposed “certification request” requirements listed above. The EPA recommends that, following establishment of final EPA regulations defining “certification request” and “receipt,” certifying authorities update their existing section 401 certification regulations to ensure consistency with the EPA’s regulations. Additionally, the EPA encourages certifying authorities 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 certification in more than one state.

In some cases, federal agencies may be project proponents for purposes of section 401, for both individual projects and activities and for general federal licenses or permits (e.g., Corps general permits). The Agency requests comment on whether federal agencies should be subject to the same “certification request” submittal requirements as proposed, or if they require different considerations and procedures than section 401 certification requests by other non-federal agency project proponents. Specifically, the Agency requests comments on an alternative approach for federal agencies that issue general federal license or permits whereby “certification request for a general permit or license” would mean a written, signed, and dated communication from a Federal agency to the appropriate certifying authority that:

- (1) identifies the Federal agency and a point of contact;
- (2) identifies the proposed categories of activities to be authorized by general permit for which general certification is requested;
- (3) includes the proposed general permit;
- (4) estimates the number of discharges expected to be authorized by the proposed general permit or license each year;
- (5) includes a general description of the methods and means used or proposed to monitor the discharge and the equipment or measures employed or planned for the treatment or control of the discharge;
- (6) identifies the reasonable period of time for the certification request; and

(7) contains the following statement: *'The federal agency 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 upon “receipt of such request.” The EPA is proposing to define the term “receipt” as follows:

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

The EPA understands that some certifying authorities have established general procedures for project proponents to follow when seeking state or tribal licenses or permits and encourages the use of consistent procedures for all submittals, including section 401 certification requests. The proposed requirement that certification requests be documented as received “in accordance with applicable submission procedures” is intended to recognize that some certifying authorities may require hard copy paper submittals and some may require or allow electronic submittals. If the certifying authority accepts hard copy paper submittals, 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 section 401 certification request. If the certifying authority allows for electronic submittals, EPA recommends that the project proponent set up an electronic process to confirm receipt of the request. The EPA recommends that project proponents retain a copy of any written or electronic confirmation of submission or receipt for their records. The Agency solicits comment on whether these new definitions will provide sufficient clarity and regulatory certainty or if additional procedures or requirements may be necessary, and if so, what those procedures or requirements might be.

### *C. Certification Actions*

Consistent with the text of the CWA, the EPA proposes that a certifying authority may take four potential actions pursuant to its section 401 authority: it may grant certification, grant with conditions, deny, or waive its opportunity to provide a certification. These actions are reflected in § 121.5 of the proposed regulatory text.

Granting a section 401 certification demonstrates that the authority has concluded that the discharge to waters of the United States from the proposed activity will be consistent with the listed CWA provisions and appropriate state or tribal water quality requirements (as defined at § 121.1(p) of this proposal). Granting certification allows the federal agency to proceed with processing the application for the license or permit.

If the certifying authority determines that the discharge from a proposed activity would be consistent with applicable water quality requirements only if certain conditions are met, the authority may include such conditions in its certification. Any conditions must be necessary to assure compliance with water quality requirements. The EPA proposes that water quality related conditions that meet the requirements in this proposed rule and that are placed on a section 401 certification must become conditions of the resulting federal license or permit if it is issued. 33 U.S.C. 1341(d).

A certifying authority may choose to deny certification if it is unable to certify that the proposed activity 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 activity. *Id.* at 1341(a).

Finally, a certifying authority may waive the requirement for a certification in two different ways. First, the certifying authority may waive expressly by issuing a statement that it is waiving the requirement. Second, the certifying authority may implicitly waive by failing or refusing to

act in accordance with section 401. *Id.* As discussed throughout this preamble, a certifying authority has a reasonable period of time, not to exceed one year, to complete its section 401 certification analysis. If the 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.* Where section 401 certification has been waived—expressly or implicitly—the federal agency may issue the license or permit. *Id.* This proposal is consistent with the Agency’s longstanding interpretation of what actions may be taken in response to a certification request. The EPA solicits comment on this interpretation and continued approach in this proposed rule.

*D. Appropriate Scope for Section 401 Certification Review*

Section 401 of the CWA provides states and tribes with additional authority to protect water quality within their jurisdictions that complements the other regulatory programs and the nonregulatory grant and planning programs established by the CWA. CWA section 401(a) does so by authorizing states and tribes to certify that a potential discharge to waters of the United States that may result from a proposed activity will comply with applicable provisions of certain enumerated sections of the CWA, including effluent limitations and standards of performance for new and existing sources (sections 301, 302, and 306 of the CWA), water quality standards and implementation plans (section 303), and toxic pretreatment effluent standards (section 307). 33 U.S.C. 1341(a)(1). When granting a section 401 certification, states and tribes are authorized by CWA section 401(d) to include conditions, including effluent limitations, other limitations and monitoring requirements that are necessary to assure that the applicant for a federal license or permit will comply with appropriate provisions of CWA sections 301, 302, 306, and 307, and with any other appropriate requirement of state law. *Id.* at 1341(d). In addition to the specific enumerated sections of the CWA referenced throughout section 401, the focus of section 401(a)

on the compliance of “any such discharge,” and the substance of the enumerated CWA sections in section 401(d), e.g., to ensure compliance with “effluent limitations” under sections 301 and 302 and any “effluent standard” under section 307, underscore that Congress intended this provision to focus on the protection of water quality.

Although the text, structure, and legislative history of the CWA (including the name of the statute itself—the Clean Water Act) clearly demonstrate that section 401 of the CWA is intended to focus on addressing *water quality* impacts from discharges from federally licensed or permitted projects, there continues to be some confusion and uncertainty over the precise scope of a certifying authority’s review under section 401 and the scope of appropriate conditions that may be included in a certification (see section II.F in this preamble). This proposal is intended to provide clarity on these issues.

Section 401 contains several important undefined terms that, individually and collectively, can be interpreted in varying ways to place boundaries on the scope of a certifying authority’s review and authority. Discerning the meaning, both individually and in context, of terms like “discharge,” “activity,” “applicant,” “other limitations,” and “any other appropriate requirements of State law” with respect to a state or tribe’s certification authority without clear regulatory guidance, presents a challenge to project proponents, certifying authorities, federal agencies, and the courts. The challenge is exacerbated by the fact that nowhere in section 401 did Congress provide a single, clear, and unambiguous definition of the section’s scope, a gap the Agency is proposing to remedy in this proposal. *See Chevron*, 467 U.S. at 843-44.

The phrase “any other appropriate requirement of State law” in section 401(d) is illustrative of this ambiguity. Congress did not intend that the scope of a certifying entity’s authority to impose conditions to be unbounded. *PUD No. 1 of Jefferson County and City of Tacoma v.*



*Washington Department of Ecology*, 511 U.S. 700, 712 (1994). Presumably, that is why Congress added the modifier “appropriate” in the phrase “any other appropriate requirements of State law.” In this context, the exact meaning of “appropriate” and how it modifies the preceding term “any other” or the following phrase “requirements of State law” are important, but undefined by Congress. The Agency, as the federal entity charged with administering the CWA, has authority under *Chevron* and its progeny to address these ambiguities through notice and comment rulemaking.

To provide needed clarity regarding the scope of a certifying entity’s authority to grant and condition a certification, the EPA is proposing a clear and concise statement of the scope of certification, as well as clear regulatory definitions for the terms “certification,” “condition,” “discharge,” and “water quality requirement.”

As explained in section II.F.6.a.iii in this preamble, 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 with point source discharges to waters of the United States by requiring compliance with the CWA as well as EPA-approved state and tribal CWA regulatory programs. This proposal includes for the first time a well-defined scope for section 401 certification that reflects the EPA’s holistic interpretation of the statutory language, which is based on the text and structure of the Act. As the Agency charged with administering the CWA, the EPA is authorized to interpret by rulemaking the appropriate scope for a CWA section 401 certification. 33 U.S.C. 1361(a). The EPA proposes to establish the “scope of certification” as follows:

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 proposed scope of certification is consistent with the plain language of section 401 and is intended to provide clarity to certifying authorities, federal agencies, and project proponents about the extent of environmental review that is expected, the type of information that may reasonably be needed to review a certification request, and the scope of conditions that are appropriate for inclusion in a water quality certification.

The proposed scope of certification differs from the EPA's existing regulations, which require a certification to include 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." *See* 40 CFR 121.2(a)(3). The "reasonable assurance" language in the EPA's existing regulations is an artifact from the pre-1972 version of the statute 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 proposed scope could be considered more stringent than the EPA's existing certification regulations because, consistent with the 1972 CWA amendments, it requires certifying authorities to conclude that a discharge "will comply" with water quality requirements (as defined at § 121.1(p) of this proposal), rather than providing "reasonable assurance."

Section 401 is triggered by a proposed federally licensed or permitted project that may result in any *discharge* into waters of the United States. The term "discharge" is not defined in section 401, and the only definition in the CWA provides that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C.

1362(16). Consistent with the analysis above concerning the scope of section 401 and the need to provide greater clarity, the Agency is proposing to define the term “discharge” as follows:

*Discharge* for purposes of this part means a discharge from a point source into navigable waters.

The Agency solicits comment on whether this definition is necessary, whether it provides appropriate clarification, or whether the EPA’s proposed regulations would be sufficiently clear without including this new definition. The Agency also solicits comment on whether an alternate definition of “discharge” may provide greater clarity and regulatory certainty.

Section 401(d) requires a certification 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 [enumerated provisions of the CWA], and with any other appropriate requirement of State law” and that these requirements “shall become a *condition* on any Federal license or permit subject to the provisions of this section” (emphasis added). As described in section II.F.6.a.i in this preamble, the EPA interprets “appropriate requirement of state law” to mean applicable provisions of those EPA-approved state and tribal CWA regulatory programs (e.g., state water quality standards, NPDES program provisions). To provide greater clarity, the EPA proposes to define the term “water quality requirements” as follows:

*Water quality requirements* means applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.

The term “water quality requirements” appears throughout section 401, but it is not defined in the statute. The EPA’s interpretation of this term and the proposed definition are intended to

align section 401 program implementation with the text of the statute, which specifically identifies those provisions of the Act enumerated in the proposed definition. The term “EPA-approved state or tribal CWA regulatory programs” in the proposed definition is intended to include those state or tribal provisions of law that are more stringent than federal law, as authorized in 33 U.S.C. 1370. The legislative history supports the interpretation in this proposal. *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.”). The CWA provisions that regulate point source discharges to waters of the United States are the “regulatory provisions of the CWA.” When states or tribes enact CWA regulatory provisions as part of a state or tribal program, including those designed to implement the section 402 and 404 permit programs and those that are more stringent than federal requirements, those provisions require EPA approval before they become effective for CWA purposes. Because the EPA interprets “appropriate requirements” to mean the “regulatory provisions of the CWA,” it follows that those would necessarily be EPA-approved provisions.

The EPA solicits comment on whether this proposed definition is clear and specific enough to provide regulatory certainty for certifying authorities and project proponents. The EPA also solicits comment on whether additional specificity should be added to the proposed definition, for example that the term *does not* include non-water quality related state or local laws. In an alternate approach, the EPA may consider defining the term “appropriate requirement of State law” to provide additional clarity concerning the scope of section 401. Under this alternate approach, the EPA solicits comment on whether that term should be defined similar to or more broadly or narrowly than “EPA-approved state or tribal Clean Water Act regulatory program

provisions” as proposed in this rulemaking.

The scope of certification established in this proposal also informs the scope of conditions that may be included in a certification. The statute does not define “condition,” but 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); *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); *FERC*, 952 F.2d at 548 (“FERC may not alter or reject conditions imposed by the states through section 401 certificates.”). The EPA is not proposing to modify this plain language interpretation of the CWA concerning the inclusion of certification conditions in federal licenses and permits. However, the EPA is proposing to define the term “condition” to address ambiguity in the statute and provide clarity and regulatory certainty. *See Chevron*, 467 U.S. at 843-44.

Although the structure and content of section 401(d) provide helpful context for what should be included as conditions in a federal license or permit, the CWA does not define that operative term. Because this term is not defined in the statute, its meaning has been susceptible to different interpretations. 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, concerns about environmental media other than water, or they might have been related to state laws, policies, or

guidance that make decisions or recommendations unrelated to the regulation of point source discharges to waters of the United States. As the Agency charged with administering the CWA, the EPA is authorized to interpret by rulemaking what the term “condition” means in the context of a CWA section 401 certification. Under the *Chevron* doctrine, courts presume “that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.” *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 315 (2014). Congressional silence is read “as a delegation of authority to EPA to select from among reasonable options.” *EPA v. EME Homer City Generation*, 572 U.S. 489, 515 (2014).

The EPA recognizes that the majority of certification actions reflect an appropriately limited interpretation of the purpose and scope of section 401. However, the Agency is also aware that some certifications have included conditions that may be unrelated to water quality, including 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. 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. 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. During pre-proposal stakeholder engagement, the EPA also heard from federal agencies that, because several court decisions have concluded that they 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 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. The Agency solicits comment on other examples of certification conditions that may have been unrelated to water quality.

This proposal includes three elements designed to address the issues described above. First, the proposal defines the term “condition” as follows:

*Condition* means a specific requirement included in a certification that is within the scope of certification.

As described above, the lack of a statutory definition for the term “condition,” despite its central use in section 401(d), creates ambiguity and uncertainty over the types of conditions that may be included in a certification. *See Chevron*, 467 U.S. at 843-44. For example, does section 401(d) authorize certifying authorities to include any kind of limitation or requirement in a certification? Or it is more limited, and if so, how limited?

As used in section 401(d), the term is most logically read to refer to those “effluent limitations and other limitations, and monitoring requirements necessary to assure” compliance with certain enumerated provisions of the CWA and with “any other appropriate requirements of State law.” The statute mandates that these kinds of limitations and monitoring requirements “shall become a condition” on a federal license or permit subject to section 401. Thus, based on the plain language of the statute for these limitations or requirements to become a license or permit “condition” through operation of section 401(d), they must be of a certain character. That is, they must be necessary to assure compliance with water quality requirements (as defined at § 121.1(p) of this proposal). That is why EPA’s proposed definition of “condition” would require

that it be a limitation or requirement within the statute’s “scope of certification.” If it purports to require something beyond the appropriate scope of section 401, the limitation or requirement offered by the certifying authority would not be a “condition” as that term is used in section 401(d).

Providing a clear definition of “condition” addresses the ambiguity in section 401 and provides regulatory certainty to certifying authorities, project proponents, and federal agencies. Although this would be a new provision in the EPA’s regulations, the Agency presumes that the majority of certification conditions included by states and tribes are consistent with the authority granted by Congress. The EPA expects this proposed definition, however, to provide much needed clarity to federal agencies and regulatory certainty to project proponents that have been subjected to delays and project denials as a result of the lack of regulatory certainty in this area.

Second, to assure that such “conditions” are appropriately tailored to the scope and authorized by law, this proposal would require the following information be provided for each condition included in a certification:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
2. A citation to federal, state, or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

The EPA intends this provision to require citation to specific state or tribal law or CWA provision that authorizes the condition, and that 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. These proposed requirements are intended to ensure that any limitation or requirement added to a certification is within the “scope of certification” and is,



thus, a true section 401(d) “condition.”

These proposed requirements might create new obligations for some certifying authorities, but the EPA anticipates 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. Stakeholders in pre-proposal engagement expressed concern that federal agencies do not enforce the certification conditions incorporated in their federal licenses or permits. Providing a citation to the legal authority underpinning a federally enforceable permit condition is one way to address these concerns. In fact, federal agencies during pre-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 authority that the certifying authority is relying on to require the condition. This information will help the project proponent assess whether the condition is within the statute’s lawful scope and what recourse it might have to challenge or appeal it. Overall, the EPA believes that the benefits of providing this information will significantly outweigh any additional administrative burden that certifying authorities may incur because of these new requirements. The Agency solicits comment on the proposed information needed to support each condition, particularly on the utility of such information for the certification process. In an alternate approach, the Agency may define the third requirement as “a statement of whether and to what extent a more or less stringent condition could satisfy applicable water quality requirements,” or remove the third requirement altogether. The Agency also requests comment on these alternate approaches.

Third, this proposal would specifically provide federal agencies the ability to determine

whether certification conditions meet the new regulatory definition for condition, and whether the state or tribe has provided the information required for each condition. If a condition satisfies these requirements, under this proposal it would have to be included in the federal license or permit; if a condition does not satisfy these requirements, it may not be included in the federal license or permit. See section III.J in this preamble for more discussion on the federal licensing or permitting agency's enforcement responsibility and discretion. The EPA expects that the proposed requirements are clear and specific enough that a federal agency would not need to have water quality expertise to determine if a certification condition meets the proposed requirements.<sup>40</sup> The Agency solicits comment on whether the proposed requirements for conditions need to be further refined to allow federal agencies other than the EPA to appropriately determine compliance. Although this 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).

This proposal would require other federal agencies to review and determine whether certification conditions are within the "scope" articulated in the proposed implementing regulations. This is 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. 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

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<sup>40</sup> Additionally, section 401 provides that federal agencies may request EPA advice on "any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria" and compliance methods. 33 U.S.C. 1341(b).

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 53, 67-68 (D.C. Cir. 2006) (citing 33 U.S.C. 1341(a)(1)). The court went on to explain that even though the federal licensing or permitting agency did not need to “inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] to at least confirm that the state has facially satisfied the express requirements of section 401.” *Id.* at 68. This proposal provides that, if a federal agency determines that a certifying authority included a condition in a certification that is beyond the scope of certification, as defined in the proposed regulation, or that the state has not provided the specific information necessary to support each condition, that condition may not be included in the federal license or permit and it does not become federally enforceable.

As noted above, the EPA is not proposing to modify prior case law interpreting the plain language of the CWA to require certification conditions to be included in federal licenses and permits. *See, e.g., City of Tacoma*, 460 F.3d at 67; *Am. Rivers Inc.*, 129 F.3d at 107; *FERC*, 952 F.2d at 548; *Sierra Club*, 909 F.3d at 645. The EPA is proposing to maintain that requirement for conditions that are consistent with section 401 and necessary to assure compliance with the Act and with other appropriate requirements of state law. The statute does not define the term “condition” and the EPA proposes to fill the gap left by Congress and define the term to address ambiguity in the statute and provide clarity and regulatory certainty. *See Chevron*, 467 U.S. at 843-44.

This proposal would also provide federal agencies an opportunity to allow a certifying authority to remedy a condition that the federal agency determines exceeds or conflicts with the

scope of section 401 authority under certain circumstances. If a federal agency determines that a condition does not satisfy the proposed requirements for a condition and the reasonable period of time has not yet expired, this proposal would allow the federal agency to notify the certifying authority and provide an opportunity to remedy the defective condition, either by modifying the condition to conform to the scope of certification, or by providing the information required in the proposed regulation. A federal agency would not be required to provide this opportunity to the certifying authority, but if it does, this proposal nonetheless would require the certifying authority to provide the corrected condition or required information within the original reasonable period of time, which shall not exceed one year from receipt. Under this proposal, any federal agency determination on whether to allow a certifying authority to remedy a deficient condition would have to occur within the original reasonable period of time. Under this proposal, if the certifying authority fails to remedy the deficiencies within the reasonable period of time, the condition would not be included in the federal license or permit. Deficient conditions do not invalidate the entire certification, nor do they invalidate the remaining conditions in the certification. The EPA solicits comment on whether the regulatory text should clarify that deficient conditions do not invalidate the entire certification or the remaining conditions. The EPA also solicits comment on whether the proposed opportunity to remedy deficient conditions would be helpful and an appropriate use of federal agency resources, whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of EPA authority to establish through regulation. The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient conditions, even if the reasonable period of time has not expired.

The proposed regulations clarify the EPA’s interpretation that the appropriate scope of review under section 401(a) is limited to the potential water quality impacts caused by the point source discharge from a proposed federally licensed or permitted project to the waters of the United States. This is consistent with the statutory language in sections 401(a) and 401(d) and is supported by the legislative history. *See* S. Rep. No. 92-414, at 69 (1971) (providing that authorities must certify that “any such discharge will comply with [CWA] Sections 301 and 302” and 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”), 41 (describing CWA section 301 as prohibiting the discharge of any pollutant except as permitted under CWA sections 301, 302, 306, 307 or 402, and identifying point sources of pollution as the regulatory target), 46 (describing CWA section 302 to authorize water quality based effluent limits “for the affected point sources at a level which can reasonably be expected to contribute to the attainment or maintenance of such a standard of water quality”). The scope of certification also 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 proposed federally licensed or permitted project will comply with water quality requirements, as defined at § 121.1(p) of this proposal.

The EPA solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification. The EPA solicits comment on the extent to which project proponents have received non-water quality related conditions in certifications. The EPA also solicits comment on whether this proposal regarding the scope of certification and conditions is an appropriate and useful way to ensure that federal licenses will not contain non-water quality related certification decisions and

conditions, or if there are other more useful and appropriate tools or mechanisms the EPA should consider to address these concerns. In particular, the EPA solicits comment on what it means for a certification or its conditions to be “related to water quality” and how direct that relationship to water quality must be to properly define a certification or condition as within the appropriate scope of section 401.

In addition, the EPA solicits comment on its interpretation of the phrase “any other appropriate requirements of State law” as limited to requirements in EPA-approved state and tribal CWA regulatory programs. In particular, EPA solicits comment on whether EPA should interpret that phrase more broadly to include *any* requirement of State law, *any water quality-related requirement* of State law (regardless of whether it is part of an EPA-approved program), or any different universe of state or tribal requirements (reflecting, or not, CWA sections or programs) that might be broader or narrower in scope than this proposal. The EPA also solicits comment on its interpretation of sections 401(a) and 401(d) as limiting the scope of state and tribal section 401 review and conditions to impacts from potential “discharges,” or whether the state or tribe may also consider a different and broader universe of impacts, such as impacts from the licensed project or activity as a whole, or some other universe of potential impacts to water quality. The EPA also solicits comment on whether this proposal will facilitate enforcement of certification conditions by federal agencies, or whether there are other approaches the Agency should consider beyond requiring a citation to state, tribal, or federal law or explaining the reason for a condition.

Pre-proposal recommendations identified concerns with certain types of conditions that have created regulatory uncertainty for project proponents, including conditions that extend the effective date of a certification out beyond the reasonable period of time and conditions that

authorize certifications to be re-opened. To better understand these concerns, the Agency solicits comment on whether, given the explicit limitations on conditions in this proposal, it may still be necessary or appropriate to expressly preclude these or other types of conditions that may create regulatory uncertainty.

The EPA is also soliciting comment on an alternate approach that it is considering taking whereby the Agency would interpret CWA sections 401(a) and 401(d) as providing two different scopes for action on a certification request. Specifically, section 401(a) could be read to authorize review of a section 401 certification only on the basis of determining whether the discharge would comply with the enumerated sections of the CWA; and section 401(d) could be read to authorize consideration of “any other appropriate requirement of State law” only for purposes of establishing conditions once the certifying authority has determined to grant certification. Under this alternate approach, a certification request could be denied only if the certifying authority cannot certify that the discharge will comply with applicable provisions of CWA sections 301, 302, 303, 306 and 307. This proposal would also define the term “any other appropriate requirement of State law” to mean EPA-approved state or tribal CWA regulatory program provisions (e.g., state water quality standards, NPDES program provisions). The EPA solicits comment on this alternate interpretation. The EPA also solicits comment on whether establishing two different scopes for action under section 401 would clarify the certification process or if it could cause further confusion or potential delays in processing certification requests.

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

The EPA proposes to reaffirm 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. The CWA also provides that if a certifying authority fails or refuses to act within that reasonable period of time, the certification requirement is waived; however, the CWA does not define the term “*fails or refuses to act.*” This proposal provides additional clarity on what is a “reasonable period,” how the period of time is established, and for the first time defines the term “*fails or refuses to act*” to provide additional clarity and regulatory certainty.

Section 401 does not include a tolling provision. Therefore, 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 section 401 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 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.<sup>41</sup> *See id.* at 1101. This concern was also raised in stakeholder recommendations received during the pre-proposal outreach period. 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, EPA is proposing to amend the Agency’s regulations in a manner consistent with the *Hoopa Valley* holding as follows:

The 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.

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<sup>41</sup> This is a concern shared by the EPA. The Agency has recently 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 EPA action. Memorandum from David P. Ross 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 Agency proposes this clear statement to reflect the plain language of section 401, which as described above, is supported by legislative history. The Agency expects this clarification will reduce delays and help ensure that section 401 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. 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. The Agency solicits comment on whether there is any legal basis to allow a federal agency to extend the reasonable period of time beyond one year from receipt.

During the pre-proposal recommendation period, stakeholders also expressed concern about the effect of potentially limited certification review timeframes on state and tribal resources. The Agency has similar concerns regarding its own resources. This proposal therefore would 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 its information needs with the project proponent (see section III.G in this preamble). This pre-filing meeting process is intended to occur before the statutory timeframe begins. The Agency solicits comment on whether the pre-filing meeting process would be helpful for other certifying authorities, whether it is an appropriate mechanism to promote and encourage early coordination between project proponents and certifying authorities, and if there are other options that may also be appropriate from a regulatory perspective. The EPA also solicits comment on whether the Agency has the authority to propose similar requirements on state and tribal certifying authorities through this rulemaking. The Agency also heard concerns from certifying authorities on staffing challenges, agency priorities, and the need for additional federal funding to support timely action on

certification requests. To better understand these concerns, the Agency solicits comment from certifying authorities on the extent to which section 401 programs are funded by states and tribes and the number of full or part time employees that are assigned to evaluate and take action on certification requests.

The EPA recognizes that federal agencies are uniquely positioned to promote pre-application coordination among federal agencies, certifying authorities, and project proponents to harmonize project planning activities and promote timely action on certification requests. For instance, early coordination between the certifying authority and the federal agency could decrease duplication of materials that need to be prepared and submitted by the project proponent. The EPA encourages federal agencies to notify certifying authorities as early as possible about potential projects that may require a section 401 certification. Additionally, the EPA encourages federal agencies to respond timely to requests from certifying authorities for information concerning the proposed federal license or permit, and to provide technical and procedural assistance to certifying authorities and project proponents upon request and to the extent consistent with agency regulations and procedures. The Agency solicits comment on the responsibilities of federal agencies, ways to facilitate technical and procedural information sharing among federal agencies, project proponents, and certifying authorities, and ways to provide technical and procedural assistance to project proponents and certifying authorities.

The EPA also proposes to reaffirm that the federal agencies determine the reasonable period of time for a certifying authority to act on a certification request. Some existing federal agency regulations specify a reasonable period of time that applies across all permit types. For instance, 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.” Similarly, 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.” Executive Order 13868 directed these agencies to update their existing regulations to promote consistency across the federal government upon completion of the EPA’s current rulemaking to modernize its certification regulations.

In setting the reasonable period of time for a certification—either on a project-by-project basis or categorically through a rulemaking—the EPA proposes to require federal agencies to consider:

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

The EPA solicits comment on whether these factors are appropriate and whether there are other factors that a federal agency should consider when establishing the reasonable period of time (e.g., permit type within a federal agency, certifying authority resources and capacity to review).

The EPA also solicits comment on whether the Agency should establish reasonable periods of time for different federal permit types on a categorical basis in its final rule. For example, the EPA could establish that section 401 certifications for CWA section 404 permits that disturb a certain acreage threshold must be completed in a prescribed period of time. As another example, the EPA could establish that for interstate pipelines that will cross a certain number of states or transport a certain volume of material, certification must be completed within a specific period of

time. The EPA understands that the federal agencies that implement their own permitting programs are experts in those areas, however, the Agency also understands that establishing a clear national framework for section 401 certifications may help create efficiencies in the process and therefore provide greater regulatory certainty.

The Agency is also soliciting comment on an alternate approach that it is considering taking whereby the EPA would retain the language in its existing certification regulations that specifies a reasonable period of time “shall generally be considered to be 6 months, but in any event shall not exceed 1 year.” 40 CFR 121.16(b). In the event the EPA pursues this alternate approach, the Agency requests comment on whether six months is an appropriate general rule, if a longer or shorter period of time would be more appropriate as a general rule, and whether having such a general rule is appropriate. Such alternate approach would retain the federal agencies ability to determine the reasonable period of time but would allow for a default reasonable period of time in the event that a federal agency fails to establish a reasonable period of time or prefers to rely on the default.

This proposal also intends to clarify 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. Under this proposal, upon submittal of the request for certification, the project proponent would contact the federal agency to provide notice of the certification request. Within 15 days of receiving a notice of the certification request from the project proponent, the federal agency would provide, in writing, the following information to the certifying authority: the applicable reasonable period of time to act on the request, the date of receipt, and the date upon which

waiver will occur if the certifying authority fails to act. 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 potential additional burden. The EPA also expects the federal agencies will quickly routinize this process, 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 solicits comment on whether the proposed process is the most efficient way to provide clarity and transparency, or if there are other procedural or administrative mechanisms that may be more effective. In an alternate approach the EPA could require federal agencies to post the reasonable period of time notification on a public website, instead of requiring it be sent to the certifying authority. The EPA solicits comment on whether this alternate approach would provide greater efficiency and transparency in the certification process, or if there are concerns with this approach.

The EPA also solicits comment on whether, if a federal agency promulgates reasonable periods of time categorically based on project type, the notification process in this proposal would still be necessary. For example, FERC has promulgated regulations for hydropower projects that require the license or permit applicant to file with FERC either a copy of the certification, a copy of the request for certification, including proof of the date that the certifying authority received the request, or evidence of waiver. 18 CFR 4.34(b)(5)(i). In its permitting processes, FERC allows certifying authorities to take the full year provided in section 401, and its regulations clearly state, “A certifying agency is deemed to have waived the certification requirements . . . 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.” 18 CFR

4.34(b)(5)(iii). The EPA solicits comment on whether FERC’s hydropower regulations, or other existing federal regulations, provide clear enough procedure and transparency that the additional notice to the certifying authority proposed in this rule would be redundant, unnecessary, or a waste of resources.

The EPA also proposes to clarify that section 401 does not prohibit a federal agency from modifying an established reasonable period of time, provided the modified time period is reasonable and does not exceed one year from receipt. The EPA does not expect periods of time to be modified frequently, but this proposal is intended to provide federal agencies with additional flexibility for unique circumstances that may reasonably require a longer period of time than was originally established. In such cases, the modified time period would be communicated in writing to the certifying authority and the project proponent to ensure all parties are aware of the change. In all cases, the reasonable period of time would not exceed one year from the original receipt of the certification request.

To ensure that the section 401 certification process does not unreasonably delay the federal licensing and permitting processes, the plain language of section 401(a)(1) provides that the requirement to obtain a certification 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 Act does not define the term “fails or refuses to act.” This term is ambiguous and the lack of a statutory definition has resulted in different interpretations of when the period of time for review expires and inefficiencies in the certification process. It has also resulted in significant regulatory uncertainty and litigation. See section II.F in this preamble. As the Agency charged with administering the CWA, the EPA is authorized to interpret by

rulemaking what these terms mean in the context of a request for a CWA section 401 certification. *See Chevron*, 467 U.S. at 843-44.

The phrase “fails or refuses to act” lends itself to at least two interpretations. One interpretation of the “fails or refuses to act” language in section 401 is that a certifying authority took no action, or refused to take any action, on a section 401 certification request within the reasonable period of time. Such lack of action would be understood as triggering a waiver. Alternatively, when read in the larger context of the section, “fails or refuses to act” could also mean that—while the certifying authority took some action in response to the request—the action it took was outside the statute’s permissible scope and thus the certifying authority failed or refused to act in a way Congress intended, and that such failure amounts to a failure or refusal to act, triggering a waiver. To resolve this ambiguity, under this proposed definition, if a certifying authority either takes no action at all within the reasonable period of time, or acts outside the scope of certification, as defined in this proposal, the federal agency may determine that waiver has occurred and issue the federal license or permit. Accordingly, this proposal includes the following definition:

*Fail or refuse to act* means the certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time.

A certifying authority actually fails or refuses to grant or deny certification when it states its intention unambiguously in writing or takes no action within the reasonable period of time. A certifying agency constructively fails or refuses to grant or deny certification when it acts outside the scope of certification as defined in the proposed rule.

The EPA expects that for the majority of circumstances where states and tribes issue section 401 certifications, this new definition will have little practical implication because they will have



acted on certification requests within the scope of CWA section 401. However, the EPA is aware of circumstances where 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>42</sup> The EPA's existing certification regulations at 40 CFR part 121 are silent on this point and thus when a certifying authority acts beyond the scope of authority granted by Congress in section 401, the project proponent has two options: (1) walk away from the proposed federally licensed or permitted project because certification has been denied, or (2) challenge the certification denial in court. Under this proposal, the Agency intends to clarify that a denial based on factors outside the scope of authority under section 401 amounts to a "fail[ure] or refus[al] to act." The burden is thus placed on the certifying authority to act within the proper scope of authority granted by Congress, or otherwise risk having the certification denial being set aside by the federal agency. If that were to happen, under this proposal, a certifying authority that disagrees that its action was outside the scope of section 401 could consider its options for legal or administrative review against the federal agency for issuing the license or permit without considering its certification denial. The EPA intends that this proposed definition of "fails or refuses to act" will encourage certifying authorities to act within the scope of certification and promote timely and CWA-consistent action on certification requests. As discussed in section III.D in this preamble, an entire certification is not considered waived if a certifying authority grants certification with

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<sup>42</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 401 certification because "FERC failed to consider or quantify the effects of downstream [greenhouse gas emissions] in its environmental review of the Project").

deficient conditions. In those circumstances, the deficient conditions are addressed by the federal agency but the remainder of the certification remains in place.

Alternatively, the Agency seeks comment on an approach that would not define “*fails or refuses to act*” as a separate term. In the event the Agency pursues that alternate approach, the Agency solicits comment on other tools or mechanisms to encourage certifying authorities to act timely and within the scope of certification, consistent with the text of the CWA as defined in this proposal.

This proposal also includes a process by which, if a certifying authority denies certification on grounds outside the scope of certification, and the reasonable period of time has not yet expired, the federal agency may provide an opportunity for the certifying authority to remedy the deficient denial, so long as the remedy occurs within the original reasonable period of time. This process is intended to promote actions by certifying authorities that are within the scope of certification and provide an ability to remedy deficient denials so long as it does not extend the reasonable period of time, and therefore does not delay the federal licensing or permitting process. The Agency solicits comment on whether the opportunity to remedy deficient certifications or conditions would be helpful and appropriate, or if it could create additional delays in the federal licensing or permitting process. The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient denials, even if the reasonable period of time has not expired. The Agency also solicits comment on whether there are other mechanisms that may also promote timely and appropriate action on certification requests.

#### *F. Contents and Effect of a Certification*

The CWA does not define the term “certification” or offer a definitive list of its contents or elements. Accordingly, the EPA under section 501(a) may reasonably interpret the statute to add content to that term. *See* 33 U.S.C. 1251(d); 33 U.S.C. 1361(a); *Chevron*, 467 U.S. at 843-44. While the EPA’s existing regulations at 40 CFR 121.2(a) identify certification requirements that might have made sense in 1971, in this proposal the EPA seeks to update those requirements and also address more fully the effects of certification decisions. Among other things, the EPA is proposing that any action on a certification request be in writing and clearly state whether the certifying authority has chosen to grant, grant with conditions, or deny certification. The EPA is also proposing that any express waiver of the certification requirement by the certifying authority also be in writing.

In circumstances where certification is granted, with or without conditions, the EPA is proposing that the written certification include a statement that the discharge from the proposed federally licensed or permitted project will comply with applicable water quality requirements, as defined at § 121.1(p) of this proposal. Where the certifying authority has granted without conditions, the federal agency could continue processing the license or permit in accordance with its implementing regulations. Where the certifying authority is granting certification with conditions, the federal agency could continue processing the license or permit and would include those conditions as terms in the federal license or permit. Under the proposal, the certification would include specific supporting information for each condition that will be included in the certification, including at a minimum: a statement explaining why the condition is necessary to assure that the discharge resulting from the proposed federally licensed or permitted project will comply with applicable water quality requirements; a citation to federal, state, or tribal law that authorizes the condition; and a statement of whether and to what extent a less stringent condition

could satisfy applicable water quality requirements. See section III.D in this preamble for information about the scope of appropriate conditions and for information about how conditions could be written to ensure enforceability by federal agencies.

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). In circumstances where certification is denied, the EPA is proposing that the written notification include the reasons for denial, including the specific water quality requirements with which the proposed federally licensed or permitted project will not comply, a statement explaining why the proposed project will not comply with the identified water quality requirements, and the specific data, information, or project modifications, if any, that would be needed for the certifying authority to determine that the discharge will comply with water quality requirements. In circumstances where a certifying authority is unable to certify that a discharge will comply with the Act, EPA is proposing that the certifying authority may deny certification or waive the requirement for certification. The EPA notes that there may be multiple reasons why a certifying authority may be unable to certify, including a lack of resources for reviewing the certification request, other more pressing priority work that the agency must attend to, or because the information provided to the agency demonstrates that the discharge will not comply with the Act. Under the former circumstances, waiver may be appropriate and under the latter circumstance, denial would be appropriate. The statute does not prevent a project proponent from reapplying for a section 401 certification if the original request is denied, and this proposal reaffirms the ability of a project proponent to submit a new certification request. 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 to meet applicable water quality requirements upon submittal of a new request for certification.

Where a federal agency determines that a certifying authority's denial satisfied the requirements of section 401, the EPA proposes that the federal agency provide written notification to the certifying authority and the project proponent that the denial was consistent with section 401 and that the license or permit will not be granted. A project proponent may explore its options to challenge a denial in court, or alternatively, it may submit a new request for certification that addresses the water quality issues identified in the denial in addition to the other requirements for a request for certification, as discussed in section III.B in this preamble.

Where a federal agency determines that a certifying authority's denial failed to meet the requirements of section 401, the EPA proposes that the federal agency provide written notification to the certifying authority and the project proponent and indicate which provision(s) of section 401 the certifying authority failed to meet. If the federal agency receives the certifying authority's certification decision prior to the end of the reasonable period of time, the federal agency may provide the certifying authority an opportunity to remedy the deficiencies within the remaining period of time. In such circumstances, if the certifying authority does not provide an updated certification decision by the end of the reasonable period of time, under the proposal the federal agency would treat the certification in a similar manner as waiver. The EPA solicits comment on whether this opportunity to remedy a deficient denial would be helpful and an appropriate use of federal agency resources, whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of Agency authority to establish through regulation.

EPA’s proposed regulations at sections 121.6 (Effect of denial of certification), 121.7 (Waiver), and 121.8 (Incorporation of conditions in the license or permit) contemplate that the licensing or permitting agency would review and make appropriate determinations about the adequacy of certain aspects of a 401 certification. Establishing such a role for federal licensing or permitting agencies is a reasonable interpretation of the CWA. 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] to 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).<sup>43</sup>

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<sup>43</sup> Cases like *Sierra Club*, 909 F.3d at 645; *Snoqualmie Indian Tribe*, 545 F.3d at 1218; and *FERC*, 952 F.2d at 548 are not to the contrary. These cases do not stand for the proposition that licensing agencies have no role to play in reviewing and implementing state or tribal certifications. Although the courts’ language is at times strong (e.g., “FERC may not alter or reject conditions”), a closer reading shows that these holdings are more nuanced. In *Sierra Club*, the court faulted FERC for replacing a state certification condition with a different, alternative

In circumstances where certification is waived, under this proposal, the federal agency may continue processing the license or permit in accordance with its implementing regulations. As discussed in section III.E and section III.F in this preamble, under this proposal a certifying authority may waive its opportunity to certify, either expressly by issuing a statement that it is waiving its opportunity to certify or by failing or refusing to act within the reasonable period of time and in accordance with section 401.

The EPA's existing certification regulations recognize the role of the federal agency to determine whether a waiver has occurred. 40 CFR 121.16(b); *see also Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d at 700-701 (acknowledging that a project proponent can ask the federal agency to determine whether a waiver has occurred). As discussed in section III.E in this preamble, the federal agency also determines the reasonable period of time for a certifying authority to act on a request for certification. The EPA proposes to reaffirm that it is the federal agency that also determines whether a waiver has occurred.

The EPA is also proposing to clarify the procedures for a federal agency to notify a certifying authority that a waiver has occurred. If the certifying authority fails or refuses to act before the date specified by the federal agency, as explained in section III.E in this preamble, the federal

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condition *FERC thought was more protective*. In *Snoqualmie*, the court allowed FERC to require additional license conditions *that did not conflict with or weaken* the protections provided by the state's certificate. In *FERC*, the court upheld FERC's hydroelectric facility license, observing that "we have no reason to doubt that any *valid* conditions imposed by West Virginia in its section 401 certificates must and will be respected by the Commission." (Emphasis added). Even *American Rivers*, 129 F.3d at 110-111, recognized that FERC "may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period." To the extent any of these cases arguably stand for the proposition that licensing agencies lack the authority or discretion to make appropriate determinations regarding the adequacy of certain aspects of a state's or authorized tribe's certification, EPA disagrees.

agency would be required to communicate to the certifying authority and project proponent in writing that waiver has occurred. The communication would also include the original notification from the federal agency to the certifying authority of the reasonable period of time.

As discussed in section III.E in this preamble, the practice of withdrawing and resubmitting the same request for certification does not pause or reset the clock for purposes of determining whether a waiver has occurred. In *Hoopa Valley Tribe*, the Court of Appeals for the D.C. Circuit held that waiver occurred where the applicant and certifying authority coordinated to repeatedly resubmit the same certification request for over a decade. 913 F.3d 1099.

This proposal reaffirms the ability of a state to expressly or affirmatively waive the requirement to obtain a section 401 certification. Although the statute does not explicitly provide for express or affirmative waiver, such waivers are consistent with the certification authority's ability to waive through failure or refusal to act. An express or affirmative decision to waive certification does not provide the certifying authority's determination of whether or not the section 401 certification request will comply with the Act. Instead, an express or affirmative waiver indicates that the certifying authority has chosen not to act on a certification request. *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."). Additionally, express or affirmative waiver enables the federal agency to proceed with processing an application 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.

The Agency solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, waiving, and denying a section 401 certification,



and whether the proposed approach also effectively addresses those circumstances where certification is sought for general permits issued by the federal agencies (e.g., 33 U.S.C. 1344(e)).

*G. Certification by the Administrator*

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, there are two scenarios where the EPA acts as the certifying authority: (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. As discussed in section II.F.1 in this preamble, 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 proposed on tribal land. The Agency solicits comment on whether additional information on the TAS process for section 401 certifications would be helpful and how the Agency could best communicate that information to the public.

The federal government may obtain exclusive federal jurisdiction in multiple ways, including where the federal government purchases land with state consent 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). Considering the potential for jurisdictional overlap between certifying authorities at certain project sites (e.g., boundary between tribal land and a state), the Agency encourages project proponents to engage in pre-application communications with certifying authorities and federal agencies to ensure project proponents submit a request for certification to the appropriate certifying authority.

The EPA's existing certification regulations discuss circumstances where the Administrator certifies instead of a state, tribe, or interstate authority. The Agency proposes to modernize and clarify these regulations, and withdraw the text in 40 CFR 121.21 in its entirety and replace it with the following text:

Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements will be 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 existing regulation provides the EPA with an advisory role. 40 CFR 121.24. The statute does not explicitly provide for this advisory role, and therefore this proposal does not include a similar provision. However, the Agency believes that this advisory role may not be inconsistent with the Agency's technical advisory role provided at 33 U.S.C. 1341(b). In an alternate approach, the Agency may reaffirm the Agency's advisory role when it certifies for water bodies without water quality requirements. The Agency solicits comment on its interpretation of the EPA's advisory role under Section 401 and the utility of maintaining such a role for the EPA.

This proposal includes three procedural requirements that would apply when the Administrator is the certifying authority: clarified public notice procedures, a pre-filing meeting

process, and specific timelines and requirements for the EPA to request additional information to support a certification request. Each of these is discussed below and would be contained in proposed sections 121.11 through 121.13.

### *1. 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. The courts have held that this includes a requirement for public notice itself. *City of Tacoma*, 460 F.3d at 68. As discussed above in section III.B in this preamble, the timeframe for making a certification decision begins upon receipt of request, and not when the public notice is issued. The existing regulations at 40 CFR part 121.23 describe the EPA's procedures for public notice after receiving a request for certification.

The EPA proposes to update these regulations to provide greater clarity to project proponents, federal agencies, and other interested parties on the EPA's procedures for public notice when it is acting as the certifying authority. Under the proposal, the Agency would provide appropriate public notice within 20 days of receipt of a certification request to parties known to be interested, such as tribal, state, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations. If the EPA in its discretion determines that a public hearing is appropriate or necessary, the Agency would, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony at a public hearing.

When acting as a certifying authority, the EPA is subject to the same timeframes and section 401 certification requirements as other certifying authorities. The Agency requests comment on

whether providing public notice within 20 days of receipt is appropriate or whether more or less time would be appropriate.

## *2. Pre-filing Meeting Procedure*

This proposal also includes for the first time a requirement that the project proponent request a pre-filing meeting with the EPA when the Agency is the certifying authority. The Agency solicits comment regarding whether 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 request is imminent. The fact that the statute requires the certifying authority to act on a request within a relatively short time (no longer than one year and possibly much less) or else waive, provides some justification in this context to interpret the term “request for certification” to also include a pre-filing meeting process.

In order to facilitate early engagement and coordination, and using its discretion to interpret the term “request” as applied to its own certification procedures, the EPA is proposing a regulatory requirement for a 30-day pre-filing meeting process. Under this proposal, a project proponent would be required to request in writing a pre-filing meeting with EPA as the certifying authority at least 30 days before submitting a certification request. As proposed, the EPA would be required to promptly accommodate the meeting request or respond in writing that such a meeting is not necessary. This proposed pre-filing meeting process would give the EPA the option to meet with project proponents before a certification request is received to learn more about a proposed federally licensed or permitted project. Alternatively, the EPA would have the option to decline the meeting request. The EPA expects to take advantage of this proposed pre-

filing meeting process for larger or more complex projects and may choose to decline the request for more routine and less complex projects.

The EPA is proposing to require this pre-filing meeting process to trigger early communication with the EPA about important aspects of section 401 certification requests *before* the project proponent submits its certification request. The period prior to submitting a certification request provides an opportunity for the project proponent to verify whether a section 401 certification is required and for the EPA to identify potential information, in addition to the request requirements proposed in this rule, that may be necessary to evaluate the certification request. This will be particularly important if the EPA anticipates requesting additional information from the project proponent.

Pre-filing meetings could be particularly helpful for complex projects. In all cases, the EPA recommends that preliminary discussions between the project proponent and the EPA begin well before submittal of a certification request. Early engagement and coordination, including participation in a pre-filing meeting or other pre-filing procedures, may also help increase the quality of application materials and reduce the need for the EPA to request additional information during the CWA section 401 review period. For further discussion, see section III.E in this preamble.

Many states and tribes have indicated how valuable pre-filing communication between the project proponent and the certifying authority can be. The Association of Clean Water Administrators also reports that many states either require or encourage pre-filing meetings with project proponents and observes that many states work with project proponents through early engagement to ensure project proponents are aware of the state's information needs. During pre-proposal outreach for this rulemaking, stakeholders identified and recommended specific

opportunities for early coordination among the project proponent, certifying authority, and relevant federal agencies. For instance, some stakeholders encouraged pre-filing meetings, and others encouraged early information sharing between federal agencies and certifying authorities.

The EPA's existing section 401 certification regulations do not address pre-filing consultation with the EPA or any other certifying authority. However, other federal agencies provide for pre-filing discussions in their regulations. For example, FERC regulations provide that "[b]efore it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies. . . ." 18 CFR 5.1(d)(1). Additionally, the Corps regulations state "[t]he district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation." 33 CFR 325.1(b).

The Agency encourages states and tribes to engage in early communications with project proponents and federal agencies, including participation in pre-filing meetings that federal agencies may require for their licensing or permitting processes, as these meetings may provide significant advance notice and additional information about proposed federally licensed or permitted projects and upcoming or future certification requests. However, this proposal would only require a pre-filing meeting process when the EPA is the certifying authority. The EPA received recommendations from many states and tribes during the pre-proposal process that additional pre-filing procedures would be valuable for them as well, and the EPA would like to be responsive to these comments. The EPA seeks comment on the proposed pre-filing meeting process. The EPA is particularly interested in comments related to existing state, tribal or federal agency pre-filing notice or meeting requirements and whether such requirements have favorably

affected the review and disposition of certification requests, particularly with respect to timely receipt of information relevant for reaching informed section 401 certification decisions. The EPA also solicits comment on whether states, tribes and project proponents would like this pre-filing meeting process to be required for all certification requests, including those where the EPA is not the certifying authority, and what legal authority the EPA would have to impose such requirements on states and tribes through this rulemaking. The EPA also solicits comment on whether such pre-filing meeting process, if adopted nationwide, should be mandatory or discretionary. If such pre-filing meeting process were mandatory, the EPA also solicits comment on the regulatory effect of a project proponent or certifying authority failing to participate in this process.

### *3. Requests for Additional Information*

The definition of a certification request in this proposal identifies the information that project proponents would be required to provide to certifying authorities when they submit a request for certification. However, in some cases, the EPA and other certifying authorities may conclude that additional information is necessary to determine that the proposed activity will comply with water quality requirements (as defined at § 121.1(p) of this proposal). Section 401 does not expressly address the issue of whether and under what conditions a certifying authority may request additional information to review and act on a certification request. Given the importance of this issue, it is reasonable and consistent with the CWA's statutory framework that EPA when acting as a certifying authority be afforded the opportunity to seek additional information necessary to do its job. However, consistent with the statute's firm timeline, it is also reasonable to assume that Congress intended there to be some appropriate limits placed on the timing and nature of such requests. This proposal fills the statutory gap and provides a structure for the EPA

as the certifying authority to request additional information and for project proponents to timely respond. The structure in this proposal includes procedural processes and timeframes for action and is intended to provide transparency and regulatory certainty for the EPA and project proponents.

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 earlier, the proposed pre-filing meeting process is intended to ensure that the EPA has an opportunity to engage with the project proponent early, learn about the proposed federally licensed or permitted project, and consider what information might be needed from the project proponent to act on a certification request. The EPA is also proposing that the Agency would have 30 days after the receipt of a certification request to seek additional information from the project proponent. Additional information may include more detail about the contents of the potential discharge from the proposed federally licensed or permitted project or specific information about treatment or waste management plans or, where the certification will also cover a federal operation permit, additional details about discharges associated with the operation of the facility.

The EPA is also proposing that the Agency would only request additional information that can be collected or generated within the established reasonable period of time. Under this proposal, in any request for additional information, the EPA would include a deadline for the project proponent to respond. The deadline must be required to allow sufficient time for the Agency to review the additional information and act on the certification request within the established reasonable period of time. The EPA is proposing that project proponents would be required to submit requested information by the EPA's deadline. If the project proponent fails to



submit the requested information, the EPA may conclude that it does not have sufficient information to certify that the discharge will comply with applicable water quality requirements. The EPA may also use its expertise to evaluate the potential risk associated with the remaining information or data gap and consider issuing timely certification with conditions to address those potential risks. The EPA expects these proposed procedures to provide clarity and regulatory certainty to the EPA and project proponents.

This proposal is intended to address concerns that the EPA heard from stakeholders during the pre-proposal period concerning the desire for pre-filing procedure and additional information requests. The EPA recognizes the advantages of working cooperatively with project proponents to secure the information needed to conduct an informed review of a certification request. This proposal provides additional procedures to assure the EPA will have an opportunity to request additional information to make informed and timely decisions on certification requests.

This proposal is also intended to address other issues that have caused delays in certifications and project development and that have resulted in protracted litigation. 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 begin review of the certification request.<sup>44,45</sup> Consistent with the plain

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<sup>44</sup> See e.g., *Exelon Generation Co. v. Grumbles*, 2019 WL 1429530 (D.D.C. 2019) (describing how the State of Maryland’s request for a multi-year sediment study resulted in Exelon withdrawing and resubmitting its certification request multiple times to prevent waiver while the company completed the study).

<sup>45</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 June 7, 2019 guidance, the EPA recommends that certifying authorities not 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.

language of section 401, under this proposal such requests from the EPA would not be authorized because they would extend the statutory reasonable period of time, which is not to exceed one year. This proposal 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 EPA to act.

The EPA is aware that some states have regulations addressing timeframes within which states must request additional information after the receipt of a request for certification. For instance, the California Code of Regulations states that, “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. Although the CWA does provide flexibility for certifying authorities to follow their own administrative processes, particularly for public notice and comment, *see* 33 U.S.C. 1341(a), these processes cannot be implemented in such a manner to violate the plain language of the CWA. The Act

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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, the NEPA process has historically taken more than one year to complete and 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 require 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 decouple the NEPA review from the section 401 process to ensure timely action on section 401 certification requests.

requires the timeline for review to begin upon receipt of a certification request and requires certifications to be processed within a reasonable period of time, not to exceed one year.

A number of stakeholders submitted recommendations to the pre-proposal docket that the EPA propose procedural requirements for certifying authorities' requests for additional information. Some stakeholders recommended certifying authorities be required to request additional information within 90 days of receipt, and that project proponents must be required to respond within 60 days. The EPA appreciates these recommendations but notes that those timelines would not be workable if the federal agency establishes the reasonable period of time as, for example, 60 days from receipt.<sup>46</sup> The EPA understands that providing only 30 days from receipt for the EPA to request additional information may seem short but the proposed pre-filing meeting process is a way for the Agency to understand more about the proposed federally licensed or permitted project before the certification request is submitted. The EPA solicits comment on whether 30 days would be too long in cases with a 60-day reasonable period of time for a certifying authority to act on a request. The EPA also solicits comment on other appropriate timelines for requesting additional information that would be consistent with the reasonable period of time established by the federal agency.

The EPA solicits comment on whether nationally consistent procedures for requesting and receiving additional information to support a certification request would provide additional clarity and regulatory certainty for certifying authorities and project proponents. The EPA solicits comment on whether the procedures in this proposal should be encouraged or required

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<sup>46</sup> The Army Corps' existing federal regulations require certifications to be completed within 60 days unless circumstances require more or less time. 33 CFR 325.2(b)(1)(ii).

for all certifying authorities, not just the EPA, and under what authority the Agency could require states and tribes to comply with these procedures.

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

Section 401(a)(2) provides a mechanism for the EPA to coordinate input from 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 existing pre-1972 certification regulations establish procedural requirements for this process but require updating to align with the modern CWA section 401 and establish additional clarity. Additionally, pre-proposal stakeholder input identified section 401(a)(2) as an area of the regulations in need of procedural clarification.

This proposal affirms the EPA's interpretation that section 401(a)(2) establishes a discretionary authority for the Agency to determine if a water quality certification and related federal license or permit may impact the water quality in a neighboring jurisdiction. Where the Agency in its discretion has determined that the certified license or permit "may affect" the quality of water in any other state or authorized tribal jurisdiction, the Act requires the EPA to coordinate input from the affected jurisdictions and make recommendations to the federal agency.

This proposal modifies the EPA's existing certification regulations to mirror the CWA in describing 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 only triggered 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 EPA with respect to all certifications and licenses, rather it applies where—at its discretion—EPA has determined that the discharge in question “may affect” a neighboring jurisdiction’s waters. This proposal provides updated language to increase clarity regarding EPA’s discretionary determination.

The EPA also proposes to clarify the section 401(a)(2) notification process in this proposal, as such procedures are not described in sufficient detail in the existing regulations. 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, certifying authority, and federal agency within 30 days of receiving the notice of the certification request from the federal agency. If the EPA in its discretion does not determine that the discharge may affect neighboring waters, the EPA would not provide section 401(a)(2) notice.

The EPA is proposing that its notification to neighboring jurisdictions be in writing, dated, and state that the affected 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 § 121.1(p) of this proposal) 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 EPA is also proposing that, if an affected jurisdiction requests a hearing, the federal agency forward the hearing notice to the EPA at least 30 days before the hearing takes place. The EPA would then provide its recommendations on the federal license or permit at the hearing. After considering the EPA and affected jurisdiction’s input, the federal agency would under this proposal be required to condition the license or permit as necessary to assure that the discharge from the

certified project will comply with applicable water quality requirements. Under this proposal, if additional conditions cannot assure that the discharge from the certified project will comply with water quality requirements, the federal agency would not issue the license or permit. The proposed regulation 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. The EPA solicits comments on this approach and whether additional process or clarification is needed to explain the EPA's role in determining the effects on neighboring jurisdictions.

#### *I. EPA's Role in Review and Advice*

This proposal reaffirms the EPA's important role in providing advice and assistance. Section 40 CFR 121.30 of the existing regulations specifically highlight the EPA's role in assisting federal agencies as they assess project compliance with conditions of a license or permit. Although this proposal aims to provide greater clarity on section 401 implementation, the Agency recognizes its role in providing advice and assistance as needed. For example, the EPA proposes to change the term "water quality standards" —as currently appearing in 40 CFR 121.30—to "water quality requirements" in 121.15(a) to align its regulations with the scope of review and the scope of conditions specified in section III.D in this preamble. This change is not intended to preclude federal agencies from seeking support in interpreting applicable water quality standards or requirements and evaluating the appropriate scope of review and conditions for particular projects and certification.

The EPA also proposes to clarify that 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. Additionally, the EPA proposes that a certifying authority, federal agency, or project proponent may request assistance from the Administrator to evaluate whether

a certification condition is intended to address potential water quality impacts caused by the discharge from a proposed federally licensed or permitted project into waters of the United States. See section III.D in this preamble for further discussion on the appropriate scope of certification conditions. The Agency solicits comment on whether this proposal is tailored for the EPA to provide appropriate technical assistance to certifying authorities, federal agencies and project proponents, or if the EPA should offer or provide assistance in other specific or additional circumstances.

#### *J. Enforcement*

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); *see also Am. Rivers*, 129 F.3d at 111 (“The CWA . . . expressly requir[es] [federal agencies] to incorporate into its licenses state-imposed-water-quality-conditions.”). However, the EPA’s existing certification regulations do not discuss the federal agency’s responsibility to enforce such conditions after they are incorporated into the permit. Under this proposal and consistent with the Act, a federal agency would be responsible for enforcing conditions included in a certification that are incorporated into a federal license or permit. The EPA requests comment on these provisions, and whether additional enforcement procedures may be appropriate to further define the federal agency’s enforcement obligations. In limited circumstances, the EPA’s existing certification regulations require the Agency to provide notice of a violation and allow six months for a project proponent to return to compliance before pursuing further enforcement. *See* 40 CFR 121.25. The Agency solicits comment on whether specific procedures such as these would be reasonable to include in section 401 regulations, or whether the general enforcement provisions of the CWA provide sufficient notice and procedure.

The Agency notes that section 401 does not provide an independent regulatory enforcement role for certifying authorities for conditions included in federal licenses or permits. The role of the certifying authority is to review the proposed project and either grant certification, grant with conditions, deny, 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, that role is reserved to the federal agency issuing the federal license or permit. The Agency solicits comment on this interpretation and whether clarification on this point may be appropriate to include in the regulatory text.

Enforcement plays an essential role in maintaining robust compliance with section 401 certification conditions and a critical part of any strong enforcement program is the appropriate use of enforcement discretion. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”). 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. *Sierra Club v. Whitman*, 268 F.3d 898 (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 the action is likely to succeed, (2) assess whether the enforcement action requested fits the agency’s policies, and (3) determine whether they have enough resources to undertake the action. *See Heckler*, 470 U.S. at 831. Further, federal agencies’ decisions not to enforce generally are not subject to judicial review, because they involve balancing several factors. *Id.* These factors include “whether a violation has occurred, ...whether agency resources



are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular action requested best fits the federal agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

Section 401(a)(4) and the EPA's existing regulations at 40 CFR part 121.26 through 121.28 describe circumstances where the certifying authority may inspect a facility that has received certification prior to operation<sup>47</sup> and notify the federal agency to determine if the facility will comply with applicable water quality requirements. 33 U.S.C. 1341(a)(4). The Agency proposes to update these regulations to reflect the scope of certification review under the modern CWA in the proposed regulations at § 121.9 (see section III.D in this preamble). Additionally, consistent with section 401, the EPA proposes to expand this inspection function to all certifying authorities and clarify the process by which certifying authorities should notify the federal agency and project proponent of any concerns.

Consistent with section 401, this proposal provides certifying authorities the opportunity to inspect the project facility or activity prior to operations, in order to determine if the discharge from the certified project will comply with the certification. After an inspection, the certifying authority would be required to notify the project proponent and federal agency in writing if the discharge from the certified project will violate the certification. The certifying authority would also be required to specify recommendations of measures that may be necessary to bring the certified project into compliance with the certification. The Agency solicits comment on whether there are additional procedures or clarifications that would provide greater regulatory certainty for certifying authorities, federal agencies, and project proponents.

#### *K. Modifications*

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<sup>47</sup> The Agency notes that operation may include implementation of a certified project.

Section 401 does not provide an express oversight role for the EPA with respect to the issuance or modification of individual water quality certifications by certifying authorities, other than the requirement that the EPA provide technical assistance under section 401(b) and the limited role the EPA is expected to play for ensuring the protection of other states' waters under section 401(a)(2). However, the EPA's existing certification regulations provide the Agency a unique oversight role in the context of a modification to an existing water quality certification. 40 CFR 121.2(b). The EPA is proposing to remove this provision from the regulatory text as it is inconsistent with the Agency's role for new certifications. In the alternative, the Agency requests comment on whether it should maintain the existing oversight provision for certification modifications to provide a regulatory backstop for ensuring consistency with the CWA, given the relative infrequency of occurrence and the unique nature the circumstances giving rise to a modification request.

The Agency also solicits comment on the appropriate scope of the EPA's general oversight role under section 401, 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 also requests comment on the legal authority for a more involved oversight role in individual water quality certifications or modifications. In addition, in light of the statute's one-year time limit for acting on a section 401 certification, the EPA solicits comment on whether and to what extent states or tribes should be able to modify a previously issued certification, either before or after the time limit expires, before or after the license or permit is issued, or to correct an aspect of a certification or its conditions remanded or found unlawful by a federal or state court or administrative body.

#### **IV. Economic Analysis**

Pursuant to Executive Orders 12866 and 13563, the Agency conducted an economic analysis to better understand the potential effects of this proposal 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 proposed 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 Proposed Clean Water Act Section 401 Rulemaking*. 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 Economic Analysis provides a qualitative analysis of the current and proposed section 401 certification process to make the best use of limited information to assess the potential impacts of this proposed rule on project proponents and certifying authorities. Using the current practice as the baseline, the document assesses the potential impacts to certifying authorities and project proponents from the proposed revisions to the section 401 certification process. In particular, the Economic Analysis focuses on the proposed revisions to the time period for review, the scope of review, and the proposed process requirements applicable when the EPA is the certifying authority. The Economic Analysis explores these changes in more detail through four case studies.

This proposal will help certifying authorities, federal agencies, and project proponents understand what is required and expected during the section 401 certification process, thereby reducing regulatory uncertainty. The Economic Analysis concludes that improved clarity on the scope and reasonable period of time for certification review may make the certification process more efficient for project proponents and certifying authorities.

The Agency solicits comments on all aspects of the analysis, including assumptions made and information used, and requests any data that may assist the Agency in evaluating and characterizing the potential impacts of the proposed revisions to the section 401 certification process. The Agency also solicits comment on the utility of using case studies to inform the Agency's analysis, the utility of the specific case studies selected, and if there are other examples that could also serve as informative case studies.

## **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 13771: Reducing Regulation and Controlling Regulatory Costs*

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this proposed rule is expected to be a deregulatory action. Although the proposed revisions in certain circumstances may limit the authority of some states and tribes relative to current practice, the Agency believes the net effect of the proposal on the certification process will likely be deregulatory. See *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking* for further discussion about the potential effects of this rule.

### *B. 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

document *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, which is available in the docket and briefly summarized in section IV in this preamble. Because of the limitations in data availability and uncertainty in the way in which certifying authorities and project proponents may respond following a change in the section 401 certification process, the potential effects of the proposed rule are discussed qualitatively. While economic analyses are informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this proposed action.

### *C. Paperwork Reduction Act*

The information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2603.02 (OMB Control No. XXXX).

The information collected under section 401 is used by the 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 states and tribes. Except for when the EPA evaluates potential downstream impacts and acts as a 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 other federal agencies and 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).

The revisions in the proposed rule clarify the information project proponents must provide to request a section 401 certification, introduce a preliminary meeting requirement for project proponents where the EPA acts as the certifying authority. The proposed revisions also remove information requirements in the certification modification and 401(a)(2) contexts and provide additional transparency by identifying information necessary to support certification actions. The EPA expects these proposed revisions to 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. The EPA solicits comment on whether there are ways it can increase clarity, reduce the burden, or improve the quality or utility of the collection of information in general.

In the interest of transparency and public understanding, the EPA has provided here relevant portions of the burden assessment associated with the EPA's existing certification regulations. The EPA does not expect any measurable change in information collection burden associated with the proposed changes.

Respondents/affected entities: Project proponents, state and tribal reviewers (certifying authorities)

Respondent's obligation to respond: required to obtain 401 certification

Estimated number of respondents: 41,000 per year

Frequency of response: per federal application

Total estimated burden: 328,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$ 18,000,000 (per year)

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.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov), Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than [insert date 30 days after publication in the Federal Register]. The EPA will respond to any ICR-related comments in the final rule."

#### *D. Regulatory Flexibility Act*

The Agency certifies 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. Section 401 requires federal license or permit project applicants to request certification from the certifying authority. This action will provide project applicants with greater clarity and certainty on the contents of and procedures for a request for certification.

The Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, requires Federal agencies to consider the impact of their regulatory proposals on small entities, to analyze alternatives that minimize those impacts, and to make their analyses available for public comments. The RFA addresses three types of small entities: small businesses, small nonprofits, and small government jurisdictions.

These entities have the following definitions under the RFA: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (see 13 CFR 121.201); (2) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its fields; or (3) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000.

The RFA describes the regulatory flexibility analyses and procedures that must be completed by federal agencies unless they certify that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. This certification must be supported by a statement of factual basis, such as addressing the number of small entities affected by the proposed action, expected cost impacts on these entities, and evaluation of the economic impacts.

These revisions to section 401 do not establish any new requirements directly applicable to regulated entities. This rule may impact states and authorized tribes that implement section 401 in the form of administrative burden and cost. States and tribes are not small entities under the RFA. As such, this rule will not result in impacts to small entities.

*E. Unfunded Mandates Reform Act*



This proposed rule 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. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. The proposed rule does not contain regulatory requirements that significantly or uniquely affect small governments.

*F. Executive Order 13132: Federalism*

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 (64 FR 43255, August 10, 1999). 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 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 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 the 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 in this preamble 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). These webinars, meetings, and letters provided a wide and diverse range of interests, positions, and recommendations to the Agency. See section II.C in this preamble for a summary of recommendations.

This action may change how states administer the section 401 program. Under the technical requirements of Executive Order 13132, the Agency has determined that this proposed rule may not have federalism implications, but believe that the requirements of the Executive Order have been satisfied in any event.

*G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

The Agency consulted with tribal officials during the development of this action to permit meaningful and timely tribal 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 14 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 three Tribes at the staff-level. See the section II.C on “Pre-proposal engagement” for a summary of recommendations.

This action may change how tribes with TAS for section 401 administer the section 401 program, but will not have an administrative impact on tribes for whom EPA certifies on their behalf. The proposal will not impose substantial direct compliance costs on federally recognized tribal governments nor preempt tribal law.

*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 proposed rule does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The human health or environmental risks addressed by this action will not have potential 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 (59 FR 7629, February 11, 1994).

**List of Subjects in 40 CFR part 121**

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

## Updating Regulations on Water Quality Certification (page 149 of 163)

Dated: \_\_\_\_\_.

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Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 121 as follows:

1. Revise part 121 to read as follows:

## **PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT**

### **Section Contents**

#### Subpart A—General

§ 121.1 Definitions

#### Subpart B—Certification Procedures

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§ 121.3 Scope of certification

§ 121.4 Establishing the reasonable period of time

§ 121.5 Action on a certification request

§ 121.6 Effect of denial of certification

§ 121.7 Waiver

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§ 121.9 Enforcement and compliance of certification conditions

#### Subpart C—Determination of Effect on Other States

§ 121.10 Determination of effects on neighboring jurisdictions

#### Subpart D—Certification by the Administrator

§ 121.11 When the Administrator certifies

§ 121.12 Pre-request procedures

§ 121.13 Request for additional information

§ 121.14 Notice and hearing

#### Subpart E—Consultations

§ 121.15 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 the appropriate Regional Administrator to whom the Administrator has delegated Clean Water Act section 401 authority.
- (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 from a project proponent to the appropriate certifying authority that:
- (1) Identifies the project proponent(s) and a point of contact;
  - (2) Identifies the proposed project;
  - (3) Identifies the applicable federal license or permit;
  - (4) Identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters;
  - (5) Includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge;
  - (6) Includes 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; and

- (7) Contains 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.*’
- (d) *Certified project* means a proposed project that has received a Clean Water Act section 401 certification or for which the certification requirement has been waived.
- (e) *Certifying authority* means the agency designated by law to certify compliance with applicable water quality requirements in accordance with Clean Water Act section 401.
- (f) *Condition* means a specific requirement included in a certification that is within the scope of certification.
- (g) *Discharge* for purposes of this part means a discharge from a point source into navigable waters.
- (h) *Fail or refuse to act* means the certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time.
- (i) *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.
- (j) *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.
- (k) *Neighboring jurisdictions* 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.
- (l) *Project proponent* means the applicant for a license or permit.



(m) *Proposed project* means the activity or facility for which the project proponent has applied for a license or permit.

(n) *Reasonable period of time* means the time period during which a certifying authority may act on a certification request, established in accordance with § 121.4.

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

(p) *Water quality requirements* means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.

## **Subpart B—Certification Procedures**

### **§ 121.2 When certification is required.**

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 in accordance with this part.

### **§ 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 Establishing the reasonable period of time.**

(a) The Federal agency shall establish the reasonable period of time categorically or on a case by case basis, which shall not exceed one year from receipt.

(b) Upon submittal of a certification request, the project proponent shall contact the Federal agency in writing to provide notice of the certification request.

- (c) 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 applicable reasonable period of time to act on the certification request;
  - (2) The date of receipt of 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.
- (d) In establishing the reasonable period of time, Federal agencies shall consider:
- (1) The complexity of the proposed project;
  - (2) The potential for any discharge; and
  - (3) The potential need for additional study or evaluation of water quality effects from the discharge.
- (e) The Federal agency may modify an established reasonable period of time, but in no case shall it 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 modify the reasonable period of time, it shall notify the certifying authority and project proponent in writing.
- (f) The 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.

**§ 121.5 Action on a certification request.**

(a) Any action to grant, grant with conditions, or deny a certification request must be within the scope of certification and completed within the established reasonable period of time.

Alternatively, a certifying authority may expressly waive the certification requirement.

(b) If the certifying authority determines that the discharge from a proposed project will comply with water quality requirements it may issue a 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) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
- (2) A citation to federal, state, or tribal law that authorizes the condition; and
- (3) A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

(e) Any denial of certification shall be in writing and shall include:

- (1) The specific water quality requirements with which the proposed project will not comply;
- (2) A statement explaining why the proposed project will not comply with the identified water quality requirements; and

- (3) 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.
- (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 or waive certification.

### **§ 121.6 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 Clean Water Act section 401 and §§121.3 and 121.5(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.
- (c) Where a Federal agency determines that a certifying authority's denial did not satisfy the requirements of Clean Water Act section 401 §§121.3 and 121.5(e), the Federal agency must provide written notice of such determination to the certifying authority and indicate which provision(s) of Clean Water Act section 401 and this part the certifying authority failed to satisfy.
- (1) If the Federal agency receives the certifying authority's certification decision prior to the end of the reasonable period of time, the Federal agency may offer the certifying authority the opportunity to remedy the identified deficiencies in the remaining period of time.

- (2) If the certifying authority does not provide a certification decision that satisfies the requirements of Clean Water Act section 401 and this part by the end of the reasonable period of time, the Federal agency shall treat the certification in a similar manner as waiver.

#### **§ 121.7 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 it 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.
- (b) If the certifying authority fails or refuses to act, the Federal agency shall provide written notice to the Administrator, certifying agency, and project proponent that waiver has occurred. This notice must be in writing and include the notice that the Federal agency provided to the certifying authority pursuant to §121.4(c).
- (c) A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain a certification.
- (d) Upon issuance of a written notice of waiver, the Federal agency may issue the license or permit.

#### **§ 121.8 Incorporation of conditions into the license or permit.**

- (a) All conditions that satisfy the definition of § 121.1(f) and meet the requirements of § 121.5(d) of this part shall be incorporated into the license or permit and shall be federally enforceable.

(1) If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f) of this part and meet the requirements of § 121.5(d) of this part, such condition shall not be incorporated into the license or permit. The Federal agency must provide written notice of such determination to the certifying authority and indicate which conditions are deficient and why they do not satisfy provisions of this part.

(2) If the Federal agency receives a certification with conditions that do not satisfy the definition of § 121.1(f) and the requirements of § 121.5(d) prior to the end of the reasonable period of time, the Federal agency may notify the certifying authority and provide an opportunity in the remaining period of time for the certifying authority to remedy the deficient conditions. If the certifying authority does not remedy the deficient conditions by the end of the reasonable period of time, the Federal agency shall not incorporate them in the license or permit.

(b) The license or permit must clearly identify any conditions that are based on the certification.

#### **§ 121.9 Enforcement and compliance of certification conditions.**

(a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the proposed discharge location for the purpose of determining if the discharge from the certified project will comply with the certification.

(b) If the certifying authority, after an inspection, 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—Determination of Effect on Other States**

#### **§ 121.10 Determination of effects on neighboring jurisdictions.**

- (a) Upon receipt of a federal license or permit application and the related certification, the Federal agency shall notify the Administrator.
- (b) Within 30 days of receipt of the notice provided by the Federal agency, 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 shall notify the affected neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent, and the federal license or permit may not be issued pending the conclusion of the processes in this paragraph and paragraph (d) of this section.
- (1) Notification from the Administrator shall be in writing, dated, identify the materials provided by the Federal agency, and inform the affected 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, object to the issuance of the federal license or permit, and request a public hearing from the Federal agency.

- (2) Notification of objection from the neighboring jurisdiction shall be in writing, shall identify the receiving waters it determined will be affected by the discharge and the specific water quality requirements it determines will be violated by the certified project, and state whether the neighboring jurisdiction requests a hearing.
- (d) If the affected neighboring jurisdiction requests a hearing in accordance with this paragraph, the Federal agency shall hold a public hearing on the affected neighboring jurisdiction's objection to the license or permit.
- (1) The Federal agency shall provide the hearing notice to the Administrator at least 30 days before the hearing takes place.
  - (2) At the hearing, the Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.
  - (3) 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 if additional conditions are necessary to assure that the discharge from the certified project will comply with water quality requirements.
  - (4) If additional conditions cannot assure that the discharge from the certified project will comply with water quality requirements, the Federal agency shall not issue the license or permit.

#### **Subpart D—Certification by the Administrator**

##### **§ 121.11 When the Administrator certifies.**



- (a) Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements will be 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 the Clean Water Act section 401 and this part.
- (c) For purposes of this subpart, the certifying authority is the Administrator.

**§ 121.12 Pre-request procedures.**

- (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 shall timely grant the pre-filing meeting request or provide written notice to the project proponent that a pre-filing meeting is not necessary.
- (c) At the pre-filing meeting, the project proponent and the certifying authority shall discuss the nature of the proposed project and potential water quality effects. The project proponent shall provide a list of applicable state and federal licenses and permits and describe the anticipated timeline for construction and operation.
- (d) After the pre-filing meeting, the certifying authority shall contact the Federal agency and identify points of contact at each agency to facilitate information sharing throughout the certification process.

**§ 121.13 Request for additional information.**

- (a) The certifying authority shall have 30 days from receipt to request additional information from the project proponent.

- (b) The certifying authority shall only request additional information that is within the scope of certification and directly related to the discharge from the proposed project and its potential effect on the receiving waters.
- (c) The certifying authority shall only request information that can be collected or generated within the established reasonable period of time.
- (d) In any request for additional information, a certifying authority shall include a deadline for the project proponent to respond.
  - (1) Project proponents shall comply with deadlines established by the certifying authority.
  - (2) The deadline must allow sufficient time for the certifying authority to review the additional information and act on the certification request within the established reasonable period of time.
- (e) Failure of a project proponent to timely provide the certifying authority with additional information does not modify the established reasonable period of time.

**§ 121.14 Notice and hearing.**

- (a) Within 20 days of receipt of a certification request, the Administrator shall provide appropriate public notice of receipt of such request, including to parties known to be interested in the proposed project or the receiving waters into which the discharge may occur, such as tribal, state, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations.
- (b) If the Administrator in his or her discretion determines that a public hearing is appropriate or necessary, the agency 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 a public hearing

### **Subpart E—Consultations**

#### **§ 121.15 Review and advice.**

- (a) The Administrator may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases and in specific circumstances concerning a discharge from a proposed project or a certified project.
- (b) A certifying authority, Federal agency, or project proponent may request assistance from the Administrator to evaluate whether a condition is intended to address water quality effects from the discharge.