2023 Final Clean Water Act Section 401 Water Quality Certification Improvement Rule
Response to Comments Document

This Response to Comments Document, together with the preamble to the final Clean Water Act Section 401 Water Quality Certification Improvement Rule, presents responses of the U.S. Environmental Protection Agency (EPA) to the comments received on the proposed rule, 87 FR 35318.

In finalizing the proposed rule, the Agency reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the certification process, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule. EPA fully considered these comments and addressed all significant issues raised therein, including revising the rule to reflect the best interpretation of the text of section 401, provide clarity, and support an efficient certification process that is consistent with the water quality protection and cooperative federalism principles central to Clean Water Act section 401.

To prepare this document, the Agency summarized comments by 16 topics and developed responses to the summarized comments. In this document, the Agency's responses appear in bold text. The responses presented in this document respond to comments that are not otherwise addressed in the preamble and, in some instances, supplement the preamble's responses to key issues raised in comments. Some commenters resubmitted comments from previous rulemakings (i.e., 2019 proposed rule) and/or input in response to the Agency's Notice of Intention (NOI) to Revise the 2020 Rule. EPA summarized this previous input and addressed it as necessary in this Response to Comments Document. However, the Agency notes that some prior input is now out of scope or otherwise not relevant to the current rulemaking.

Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself is the definitive statement of the Agency's rationale for the final rule. To the extent a response in this document could be construed as in conflict with the preamble of the final rule, the language in the final rule preamble and regulatory text controls and should be used for purposes of understanding the requirements and basis of the final rule.

In many instances, responses presented in this Response to Comments Document include cross-references to responses on similar or related issues located in the preamble to the final rule, the Economic Analysis for the Final Rule, and/or other sections of the Response to Comments Document. Accordingly, this Response to Comments Document, together with the preamble to the final rule, the Economic Analysis for the Final Rule, and the rest of the administrative record should be considered collectively as EPA's response to all of the significant comments submitted on the proposed rule.

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1 WHEN CERTIFICATION IS REQUIRED (SECTION 121.2)

1.1 Triggers for CWA section 401

1.1.1 Addition of the Phrase "From a Point Source"

Several commenters supported the proposed change to 40 CFR 121.2 to add the phrase "from a point source." These commenters stated that the change is consistent with applicable case law and the text and structure of the Clean Water Act (CWA). In addition, these commenters appreciated that EPA clarified that section 401 was triggered by a discharge from a point source versus a discharge from a nonpoint source. One of these commenters stated that the rule needs to be explicit that point sources include discharges from CWA section 404 dredge and fill activities because this added clarification would reduce unnecessary water quality impacts that occur and are addressed with after-the-fact permits and/or enforcement actions.

One commenter recommended that the Agency should retain the definition for "discharge" from the 2020 Rule in section 121.1 and incorporate equipment and construction activities associated with the discharge of dredged or fill material that have an immediate and direct potential water quality impact into the definition.

On the other hand, other commenters opposed the change to 40 CFR 121.2 that added the phrase "from a point source." These commenters pointed out that while EPA is not proposing to define "discharge" or "point source" in the regulations, EPA refers to the definition of point source at 33 U.S.C. § 1362(14) when discussing the trigger for section 401 certification, which defines "point source" to mean a discrete conveyance from which "pollutants are or may be discharged." Thus, by adding the phrase "from a point source," the commenters asserted that EPA is implicitly requiring the addition of a pollutant to trigger 401 certification, which is inconsistent with *SD Warren* where the Court concluded that the meaning of "discharge" in section 401 is broader than "discharge of a pollutant." The commenters stated that the addition of the phrase "from a point source" creates confusion given that EPA has already recognized that a discharge does not require the addition of pollutants to trigger section 401 and appears to conflict with EPA's concurrent proposal that the scope of review is restored to the "activity as a whole." The commenters recommended that EPA remove the phrase "from a point source" from the final version of 40 CFR 121.2. One commenter asserted that the phrase was unnecessary and could create confusion over which projects require certification and suggested keeping section 121.2 in line with the statutory language. Another commenter suggested striking "from a point source" and adding "with or without pollutants" after discharge. A couple of commenters suggested that if EPA did not strike the phrase "from a point source," the rule should state that certification is triggered regardless of whether the discharge from a point source results in an addition of pollutants.

Further, many commenters urged EPA to revise the regulation to include discharges from both point and nonpoint sources. These commenters stated that the term "discharge" as used throughout the CWA means something broader than discharges from point sources (citing *SD Warren*) given that the goal of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *See* 33 U.S.C. 1251(a). The commenters asserted that revising the regulation to include nonpoint sources will

ensure that states and Tribes are able to exercise their section 401 authority to protect water quality at federally licensed or permitted activities that would result in a nonpoint source discharge. One commenter asserted that not including nonpoint sources ignores the threat that diffuse runoff poses to waterways, while another commenter stated that nonpoint sources could account for threats that agricultural and similar runoff pose to waterways. Another commenter stated that the statute says clearly that it applies to "any applicant for a federal license or permit for" any activity that may result in "any discharge," and therefore encompasses permitted nonpoint source discharges. Similarly, a different commenter encouraged the Agency to use the statutory language in section 401(a)(1) to describe the type of activity that triggers 401 and asserted that limiting discharges to point sources has no basis in the statutory text. One commenter asserted that the Federal government and the Supreme Court recognized that all discharges trigger section 401. Another commenter argued that the Agency looked away from Congress's obvious intent and relied on the Ninth Circuit cases, even though it cannot stand in the place of the Supreme Court's more expansive definition of "discharge." The commenter suggested that EPA should add nonpoint sources to the regulatory text, or in the alternative, strike the reference to a point source. One commenter said that states and Tribes should have the ability to review all federally authorized activities, which include activities that only involve nonpoint source pollution.

Many commenters supported the change to clarify that a discharge triggering a 401 certification does not require an addition of pollutants. On the other hand, there were some commenters who stated that the proposed change goes beyond the plain language of CWA section 401 by eliminating the requirement that there be an addition of pollutants to trigger the discharge requirement. These commenters stated that the proposed change would lead to uncertainty and is too broad.

> **<u>Agency's Response</u>: EPA is finalizing the text at section 121.2, including the phrase "from a point source," because it is consistent with the case law (as discussed in section IV.A.2 of the final rule preamble) and the Agency's longstanding approach, and because it provides greater clarity about the nature of discharges that trigger the need for section 401 certification or waiver. However, just as the Agency is not defining in regulation the term "discharge" for purposes of section 401, the Agency is not providing a distinct definition of the term "point source." Rather, the Agency will continue to rely on the definition of "point source" in section 502(14) of the CWA. For example, courts have concluded that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are "point sources" for purposes of the CWA. *See, e.g., Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd,* 852 F.2d 189 (6th Cir. 1988). On the other hand, courts have concluded that a water withdrawal is not a point source discharge and therefore does not require a water quality certification. *See, e.g., North Carolina v. FERC,* 112 F.3d 1175, 1187 (D.C. Cir. 1997) (holding that withdrawal of water from lake does not constitute discharge for CWA section 401 purposes).**
>
> **Although the Agency is retaining the same interpretation of "discharge" as the 2020 Rule, to simplify the regulation, the Agency is removing the definition of "discharge" and instead incorporating those definitional concepts into the regulatory text at final rule section 121.2, which discusses when certification is required. This simpler approach will provide greater**

clarity about the nature of discharges that trigger the need for section 401 certification or waiver.

EPA disagrees with commenters asserting that the definition of "point source" located at 33 U.S.C. 1362(14) implicitly requires the addition of pollutants. The CWA provides that a point source is a conveyance "from which pollutants are or may be discharged." 33 U.S.C. 1362(14). Given the language of the statute, it is reasonable for EPA to conclude that a discharge of pollutants is not required for a conveyance to be considered a point source. The Agency also disagrees that the requirement of a point source discharge to trigger section 401 conflicts with the scope of review. As discussed in section IV.E of the final rule preamble, once there is a prerequisite potential for a point source discharge into waters of the United States, then the certifying authority may evaluate and place conditions on the "activity," which includes consideration of water quality-related impacts from both point sources and nonpoint sources. EPA appreciates commenter suggestions regarding regulatory text that states that a point source does not need to result in an addition of pollutants. EPA is declining to add such language in the regulatory text and instead relying on the statutory definition of "point source." However, EPA has emphasized this point throughout section IV.A of the final rule preamble and will continue to do so in implementation of the final rule.

The Agency disagrees that the term "discharge" as used in CWA section 401 means something broader than discharges from point sources or that it has no basis in the statutory text. As discussed in section IV.A.2 of the final rule preamble, the *ONDA* court held that the "term 'discharge' in [section 401] is limited to discharges from point sources." *Or. Natural Desert Ass'n (ONDA) v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998). EPA also disagrees that the Federal government has recognized that all discharges trigger section 401. This was the Federal government's position before the Ninth Circuit in *ONDA*, and EPA has consistently implemented this view in rulemaking, guidance, and through its actions pursuant to CWA section 401. EPA emphasizes that this final rule does not prevent or limit certifying authorities from protecting their water quality from federally licensed or permitted activities that would result in nonpoint source discharges. *See* 33 U.S.C. 1370. With respect to using section 401 certifications to address nonpoint source discharges, certifying authorities may consider water quality-related impacts from nonpoint source discharges after determining that the project satisfies the prerequisite potential for a point source discharge into waters of the United States.

EPA strongly disagrees that the plain language of section 401 requires that any discharge triggering section 401 include an addition of pollutants. The CWA provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. 1362(16). The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* at

1362(12).[1] EPA and the Corps have long interpreted the definition of "discharge" in way that gives meaning to the word "includes" in the definition. EPA and the Corps have interpreted the definition of "discharge" to be distinct from the term "discharge of pollutant" and therefore encompassing both the discharge without the addition of pollutants and the "discharges of pollutants." Additionally, as discussed in section IV.A.2 of the final rule preamble, this interpretation is consistent with the text of the statute as interpreted by the U.S. Supreme Court. The Agency also observes that the final rule's interpretation of discharge is not a change from longstanding practice, including the 2020 Rule. *See* 85 FR 42237 ("The EPA has concluded that unlike other CWA regulatory provisions, section 401 is triggered by the potential for any unqualified discharge, rather than by a discharge of pollutants.").

1.1.2 Potential to Discharge

Most commenters supported the proposed rule preamble's clarification that section 401 is triggered by a discharge as well as a potential to discharge. Conversely, a few commenters, seeming to refer to the proposal preamble as opposed to regulatory text, expressed concern that the addition of the word "potential" will change the universe of projects requiring 401 certification.

Agency's Response: EPA disagrees with commenters asserting that section 401 is not triggered by the potential to discharge. The phrase "may result" contemplates that both the presence of, and/or potential for, any discharge triggers the requirement for a section 401 certification. EPA's approach is consistent with the plain language of the statutory phrase "may result in any discharge." This approach is also consistent with the Agency's longstanding implementation of section 401. *See, e.g.*, 85 FR 42236 ("Under this final rule, the requirement for a section 401 certification is triggered based on the potential for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States."); 2010 Handbook at 4 (rescinded in 2019) ("It is important to note that [section] 401 is triggered by the potential for a discharge; an actual discharge is not required.").

1.1.3 "License or Permit" the Potential to Discharge

Some commenters expressed support for the clarification in the proposed rule preamble that section 401 is not triggered by state or Tribal licenses or permits because it helps to ensure that project proponents do not go through unnecessary permitting processes beyond the scope of the CWA.

Several commenters requested clarification that the section 401 certification process only applies to individual Federal licenses or permits. These commenters requested that EPA affirmatively state that the section 401 certification process does not apply to verifications of Federal general permit actions; instead,

[1] The CWA, including section 401, uses the term "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). This final rule uses the term "waters of the United States" interchangeably with "navigable waters".

the certification process should occur at the time the Federal general permit is issued. Another commenter said that it is not clear how the proposed rule would apply to nationwide permits (NWPs) and state programmatic permits, and further suggested that these water quality certifications be exempted from the proposed rule.

At least one commenter supported EPA's decision not to explicitly list Federal authorizations that trigger section 401 certification.

Agency's Response: The CWA is clear that the license or permit prompting the need for a section 401 certification must be a Federal license or permit, that is, one issued by a Federal agency. As discussed in section IV.A.2 of the final rule preamble, Section 401 certification is not required for licenses or permits issued by a state or Tribe that administers a federally approved permit program (e.g., section 402 National Pollutant Discharge Elimination System (NPDES) permitting program or the section 404 dredge and fill permitting program). Permits issued by states or Tribes pursuant to their authorized or approved program are not subject to section 401 of the CWA as the programs operate in lieu of the Federal program, under state or Tribal authorities. The state or Tribal permit is not a "Federal" permit for purposes of section 401.

EPA disagrees with commenters asserting that the section 401 certification process only applies to individual Federal licenses or permits, or that general permits, such as NWPs, could be exempted from section 401 and this final rule. Section 401 is not limited to individual Federal licenses or permits, but also extends to general Federal licenses and permits such as CWA section 404 general permits (including Nationwide General Permits, Regional General Permits, and State Programmatic General Permits) and CWA section 402 general permits (including the Pesticide General Permit, Multi-Sector General Permit for stormwater discharges associated with industrial activity, and the Construction General Permit for stormwater discharges associated with construction activity). General Federal licenses or permits that may result in a discharge into waters of the United States are subject to the same requirements under section 401 as an individual Federal license or permit. Section 401 does not provide an exemption for any Federal licenses or permits that may result in a discharge into waters of the United States. Additionally, both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification. *See U.S. v. Marathon Development Corp*., 867 F.2d 96, 100 (1st Cir. 1989) ("Neither the language nor history of section 404(e) of the Clean Water Act . . . suggests that states have any less authority in respect to general permits than they have in respect to individual permits."); 40 CFR 121.5(c), 121.7(d)(2), 121.7(e)(2) (2020) (describing requirements for certification on the issuance of a general license or permit); 2010 Handbook at 29-30 (rescinded in 2019) (discussing the application of section 401 to general permits). Accordingly, EPA cannot adopt commenter suggestions to exempt general permits from the certification process.

Federal agencies must seek certification on general permits before the permits are issued. In response to commenters suggesting that the certification process should occur at the time

the Federal general permit is issued, final rule section 121.5 provides the minimum content requirements for all requests for certification, including certification for the issuance of a general Federal license or permit. If a certifying authority grants or waives certification for either a CWA section 402 or 404 general permit, then entities seeking coverage under that general permit do not need to separately seek certification before doing so. When a certifying authority denies certification on a section 402 general permit, EPA can issue the general permit for the jurisdictions that granted or waived certification but cannot issue the permit for jurisdictions that denied certification. If a certifying authority grants certification with conditions on an EPA-issued general permit, then the certification with conditions becomes part of the general permit applicable within the certifying authority's jurisdiction. When a certifying authority denies certification for a CWA section 404 Nationwide or Regional General Permit, the Corps allows specific projects to be covered by the Nationwide or Regional General Permit if the project proponent obtains certification from the certifying authority for that project. In that instance, a project proponent would submit a request for certification in accordance with final rule section 121.5 for individual Federal licenses or permits. When a certifying authority grants certification with conditions on a Nationwide or Regional General Permit, the Corps may either incorporate the conditions into a state- or Tribe-specific version of the general permit or require the project proponent to obtain certification from the certifying authority for that project to qualify for the general permit.

The Agency is not providing an exclusive list of Federal licenses and permits that may be subject to section 401. The CWA itself does not list specific Federal licenses and permits that are subject to section 401 certification requirements. Although the Agency is not providing an exclusive list of all Federal licenses or permits subject to section 401, EPA recognizes that there is an array of licenses and permits that may trigger the need to seek certification. *See* section IV.A.3 of the final rule preamble for further discussion on the types of Federal licenses or permits subject to section 401.

1.1.4 Other Comments Related to 40 CFR 121.2

One commenter voiced support for EPA clarifying in the proposed rule's preamble that withdrawals from navigable waters are not discharges and therefore do not trigger Section 401, including citing court precedent from *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997). This commenter wrote that EPA should include that clarification in the final regulatory text of the final rule.

<u>Agency's Response</u>: As discussed in section IV.A.2 of the final rule preamble, courts have concluded that a water withdrawal is not a point source discharge and therefore does not require a water quality certification. However, as explained above, the Agency is not providing a distinct definition of the term "point source" or actions that do not qualify as point sources. Rather, the Agency will continue to rely on the definition of "point source" in section 502(14) of the CWA.

1.2 Whether EPA Should Establish a Process to Determine Whether an Activity May Result in a Discharge

Some commenters asserted that EPA should develop a process for determining when a federally licensed or permitted activity may result in a discharge and require section 401 certification. One commenter stated that such a process would allow for consistent implementation of section 401. Another commenter asserted that a clear process is necessary because the proposed rule would significantly increase the number of projects requesting certification. A few of these commenters recommended specific procedures for determining when an activity requires a section 401 certification. One commenter suggested a minimum three-step process as follows: first, the project proponent must contact the Federal agency; second, the Federal agency must determine whether the point source discharge will impact a water of the United States and require a Federal license or permit, and determine whether a section 401 certification has been categorically granted by the certifying authority; third, if the Federal agency determines that the certifying authority did not categorically certify the activity, then the project proponent must request certification from the certifying authority. Another commenter suggested that any procedures should explicitly exclude unanticipated impacts to waters of the United States and projects that do not directly discharge into a water of the United States and implement best management practices for minimizing a discharge of pollutants into waters of the United States. The same commenter asserted that the proposed rule did not clearly state how a project proponent can determine whether a project may result in a discharge into a water of the United States and classify or quantify unanticipated impacts. The commenter further argued that the use of the term "may" is problematic when considering the probability of a project to discharge into a water of the United States and asserted that project proponents will have difficulty estimating impacts that are not accounted for in project planning and design and will submit incomplete or inadequate information to the certifying authority, ultimately delaying issuance of a certification.

One commenter recommended developing regulatory text that would allow, but not require, the relevant certifying authority, Federal agency, and EPA Regional Administrator to develop a process for determining when section 401 certification is required. Another commenter stated that the Agency should provide a public notice and comment opportunity on any procedure to determine when certification is required.

A few commenters suggested that EPA should develop a guidance document for project proponents that clarifies when a federally licensed or permitted activity may result in a discharge.

Some commenters asserted that EPA should not develop a process for determining when a federally licensed or permitting activity may result in a discharge and require section 401 certification. These commenters argued that certifying authorities and/or Federal agencies have well-established practices and experience determining whether an activity will require a section 401 certification, including one commenter who asserted that an EPA-defined process could disrupt established efficiencies.

> **<u>Agency's Response</u>: Based on comments, the Agency is not developing a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow to determine whether a federally licensed or permitted activity may result in a discharge and therefore require section 401 certification. After more than 50 years of implementing**

section 401, EPA's experience is that Federal agencies and certifying authorities are well-versed in the practice of determining which Federally licensed or permitted projects may result in discharges. Ultimately, the project proponent is responsible for obtaining all necessary permits and authorizations, including a section 401 certification. If there is a potential for a project to discharge into "waters of the United States," a Federal agency cannot issue the Federal license or permit unless a section 401 certification is granted or waived by the certifying authority. EPA recommends that project proponents engage in early discussions with certifying authorities and Federal agencies to determine whether their federally licensed or permitted activity will require section 401 certification.

1.3 Input Received on Prior Rulemakings

1.3.1 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

One stakeholder asserted that the 2020 Rule illegally defined the term "discharge" to mean a "discharge of pollutants" and that such an interpretation had already been rejected by the Supreme Court.

One stakeholder requested that EPA should clarify that withdrawals from navigable waters do not trigger the section 401 process, nor are they discharges whose impacts may be addressed by certification conditions. The stakeholder requested that EPA clarify that this remains the Agency's position, citing the 2020 Rule.

<u>Agency's Response</u>: *See* the Agency's Response to Comments in Section 1.1.1; *see also* Section IV.A of the final rule preamble.

2. PRE-FILING MEETING REQUESTS (SECTION 121.4)

2.1 General Comments on the Pre-Filing Meeting Request Requirement

Almost all commenters that addressed the proposed pre-filing meeting request requirement acknowledged that pre-filing meetings can be a tool for certifying authorities and project proponents to discuss details and the information needed before the request for certification is submitted. Several commenters recognized the value of pre-filing meetings in the case of large or complex projects. Multiple commenters said pre-filing meetings have the potential to streamline the certification process by facilitating early coordination. One commenter noted that being able to allocate resources to priority projects in states like Michigan and New York, which receive 5,000 and 4,000 certification requests per year, respectively, will be critical, while also noting that pre-filing meetings will allow project proponents to receive critical information from the certifying authority (i.e., information needed for a complete request, time for review, water quality impacts the certifying authority wants addressed).

Some commenters expressed concern about the proposed approach and stated that the pre-filing meeting request requirement was unnecessary. These commenters said that the proposed approach would add process without substantive benefit and create unnecessary delays and administrative burden. Another commenter outlined an example of their concerns with delays and administrative challenges. One commenter questioned whether there had been sufficient experience with pre-filing meeting request requirement, given that the requirement has been in effect for a short period of time.

Most of the commenters addressing alternative approaches for the pre-filing meeting request provisions recommended not having a requirement. Instead, the commenters said EPA should encourage early coordination but keep the pre-filing meeting request optional to avoid delays and not strain resources. One commenter suggested that the pre-filing meeting request requirement should be discretionary.

A couple of commenters suggested renaming "pre-filing meeting request" as "pre-filing project notification" to characterize the submittal more appropriately.

> **Agency's Response: EPA disagrees with commenters asserting that the final rule's approach to pre-filing meeting requests would not provide substantive benefit or create unnecessary delays. Rather, EPA agrees with commenters who acknowledged the utility and value of the pre-filing meeting, including the potential to streamline the certification process. EPA encourages certifying authorities to make their requests for certification requirements and the applicable submission procedures transparent to project proponents, especially in instances where the pre-filing meeting request requirement was waived, so that submission of the request for certification goes smoothly in cases where there is no early coordination through the pre-filing meeting process.**
>
> **The Agency also disagrees with commenters suggesting that the Agency should remove the pre-filing meeting provision or make it optional. EPA finds that the final rule's approach to the pre-filing meeting request requirement both facilitates early coordination in the certification process while recognizing that states and Tribes are in the best position to determine whether a particular project (or class of projects) would benefit from such early coordination. Accordingly, this final rule enables a certifying authority to shorten or waive the pre-filing meeting request requirement on a case-by-case or categorical basis. For example, certifying authorities may categorically waive or shorten the pre-filing meeting request requirement for less complex, routine projects, as these projects most likely would not benefit from early engagement between the project proponent and certifying authority as large, complex projects would. This flexibility reflects both cooperative federalism principles and the reality that not every project will meaningfully benefit from a pre-filing meeting.**
>
> **The Agency finds that there has been sufficient experience with the pre-filing meeting request requirement. As discussed in section IV.B.2 of the final rule preamble, the pre-filing meeting request provision was introduced in the 2020 Rule. The final rule's approach to the pre-filing meeting request process best reflects both the Agency's 2 years of experience implementing this provision, as well as public input.**

EPA appreciates commenter suggestions to rename "pre-filing meeting request" as "pre-filing project notification." However, the Agency finds the term "pre-filing meeting request" to be a more accurate characterization of the submittal from a project proponent to a certifying authority. Section 121.4 requires a project proponent to "request a pre-filing meeting with the certifying authority" and not merely notify the certifying authority of its intention to submit a request for certification. Accordingly, EPA is retaining the phrase "pre-filing meeting request" in section 121.4.

2.2 Support Greater Flexibility in Pre-Filing Meeting Request Process

Many commenters supported the proposed approach to allowing certifying authorities to waive the pre-filing meeting request requirement or shorten the time between requesting a pre-filing meeting and requesting certification. These commenters noted that it would allow certifying authorities to speed up certification decisions.

Some commenters stated that certifying authorities should have the flexibility to decide whether pre-filing meeting requests are needed based on project complexity and to efficiently utilize their time and resources. One commenter who supported the proposed approach to the pre-filing meeting requirement noted that it receives over 1,600 401 certification applications per year and that the 2020 Rule's approach to pre-filing meeting requests created unnecessary delays for certain projects. Several commenters stated that the proposed provision is reasonable and will streamline the certification process, especially with respect to simpler projects. One commenter observed that it will increase early stakeholder engagement and allow certifying authorities to anticipate and plan for future workload to act once a certification request is received. Another commenter noted that discretionary pre-filing meetings would promote efficiency and adaptability within the certification process, may avoid delays when a project requires emergency authorization, and would reduce the administrative burden on the certifying authority and project proponent when a proposed project would have minor impacts to aquatic resources. Another commenter stated that for those projects that benefit from a pre-filing meeting, questions and concerns regarding the project can often be adequately addressed during the meeting and the project proponent can submit the certification request shortly after the meeting.

A couple of commenters recommended that EPA should make clear that certifying authorities may waive the proposed pre-filing meeting request requirement for all projects. One commenter suggested the rule should enable certifying authorities to issue blanket waivers of the pre-filing meeting request, with the option to reinstate the requirement on a case-by-case basis.

<u>Agency's Response</u>: The Agency agrees with commenters that certifying authorities should have the flexibility to decide whether pre-filing meeting requests are needed. Accordingly, this final rule provides certifying authorities with the flexibility to waive or shorten the requirement on a case-by-case or categorical basis. For example, certifying authorities could either require or waive the pre-filing meeting request requirement for all projects, specific types of projects (e.g., projects under 300 linear feet), or types of Federal licenses or permits (e.g., general permits). EPA recommends that certifying authorities clearly

communicate to project proponents their expectations for pre-filing meetings requests and waivers (e.g., whether they may grant waivers, either categorically or on an individual basis, and any procedures and/or deadlines for submission of requests and the grant of waivers) so that project proponents may clearly and efficiently engage in the certification process. EPA also recommends that certifying authorities make this information readily available to project proponents in an easily accessible manner to allow for a transparent and efficient process (e.g., posting a list of project types that require a pre-filing meeting request on the certifying authority's website).

2.3 Comments on the Default Timeline

A few commenters supported retaining the default 30-day time period between the pre-filing meeting request and request for certification. One commenter said that if the pre-filing meeting requirement is not waived by the certifying authority, the maximum (not minimum) period between the written request for a pre-filing meeting and the time for filing the certification request should not exceed 30 days. One commenter stated that they would prefer if certifying authorities set timelines or defaults to timelines between requesting a pre-filing meeting and requesting certification in regulation but noted that if EPA retained the pre-filing meeting request requirement, the 30-day timeline is an acceptable minimum timeline between the submission of a pre-filing meeting request and certification request. However, the same commenter asserted that EPA should allow certifying authorities to adjust the timelines where needed (e.g., for urgent or emergency actions) or waive the need for a pre-filing meeting request based on permit type.

Several commenters recommended either reducing the 30-day default time period between the pre-filing meeting request and certification request or removed entirely. One commenter asserted that the proposed rule's 30-day wait time between the pre-filing meeting request and certification request could extend the project schedule by a few weeks or months. A different commenter suggested reducing the default time period to 15 days or upon notification by the certifying authority that they do not require a pre-filing meeting. Another commenter supported shortening the default time period to avoid lengthening the certification process without any benefit to the Federal agency or the project proponent. The same commenter asserted that projects should not need to wait 30 days if it qualifies as a critical project (e.g., project needed to maintain grid reliability and resiliency). Another commenter recommended removing the 30-day pre-filing meeting request requirement and argued that it is unnecessary for smaller projects, added more time and workload for states, confused applicants, and delayed certification application submissions.

<u>Agency's Response</u>: This final rule enables a certifying authority to shorten or waive the pre-filing meeting request requirement on a case-by-case or categorical basis. If a certifying authority does not communicate whether it wants to waive or shorten the pre-filing meeting request requirement, the Agency agrees with commenters that the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification.

The Agency does not find it necessary to shorten the default time frame between requesting a pre-filing meeting and requesting certification, because the final rule enables certifying

authorities to waive or shorten the pre-filing meeting request requirement. EPA finds that the final rule's approach to the pre-filing meeting request requirement both facilitates early coordination in the certification process while recognizing that states and Tribes are in the best position to determine whether a particular project (or class of projects) would benefit from such early coordination. In the event the certifying authority does not communicate whether it wants to waive or shorten the timeframe, the final rule provides a known backstop to stakeholders since the 30-day wait period existed under the 2020 Rule.

The Agency also disagrees with commenters asserting that there is no benefit of the pre-filing meeting request process; see the Agency's response to comments in section 2.1.

2.4 Timing of the Pre-Filing Meeting Request in Relation to the Federal License or Permit Process

A few commenters provided input on the timing of the pre-filing meeting request in relation to the Federal licensing or permitting process. One commenter suggested that EPA should clarify that the pre-filing meeting request process should occur after the Federal agency determines whether the activity is covered by an existing certification. The commenter stated that under the 2020 Rule, project proponents request pre-filing meetings before providing the permit that the project will be issued under, and thus coverage under an existing certification is unknown. In cases where the Corps later determines the activity is covered under a certified NWP, the commenter stated that it expends scarce time and resources on pre-filing meetings and requests for certification that prove to be unnecessary. Another commenter asserted that limiting pre-filing meetings until after the Federal agency has drafted the Federal license or permit may reduce coordination between states and Federal agencies. As a result, the commenter asserted that states would not be engaged until the end of the Federal license or permit process rather than at the beginning and throughout the process.

Agency's Response: As discussed in section IV.C of the final rule preamble, if the request for certification is for an individual Federal license or permit, the request for certification must include a copy of the Federal license or permit application and any readily available water quality-related materials that informed the development of the application. If the request for certification is for the issuance of a general Federal license or permit, then the request for certification must include a copy of the draft Federal license or permit and any readily available water quality-related materials that informed the development of the draft Federal license or permit. Accordingly, a project proponent may not request a pre-filing meeting until it has provided the Federal license or permit application to the Federal agency (for an individual license or permit) or until the Federal agency has developed the draft license or permit (for the issuance of a general license or permit). However, nothing in this final rule prevents certifying authorities, project proponents, and Federal agencies from coordinating and engaging prior to the pre-filing meeting request process or during the certification process as a whole.

Although the final rule provides a bright line for the earliest point in time that a project proponent may request a pre-filing meeting, EPA declines to define when a project

proponent must submit a pre-filing meeting request. However, EPA recommends that certifying authorities clearly communicate to project proponents their expectations for pre-filing meetings requests and waivers (e.g., whether they may grant waivers, either categorically or on an individual basis, and any procedures and/or deadlines for submission of requests and the grant of waivers) so that project proponents may clearly and efficiently engage in the certification process. EPA also recommends that certifying authorities make this information readily available to project proponents in an easily accessible manner to allow for a transparent and efficient process (e.g., posting a list of project types that require a pre-filing meeting request on the certifying authority's website).

2.5 Project Proponent Participation in Pre-Filing Meeting Need

Some commenters expressed support for the project proponent participating in determining the need for a pre-filing meeting. These commenters suggested that project proponents are most familiar with the complexity of project and in most cases know when early coordination is necessary. Some of the commenters also stated that project proponent participation would help minor projects that do not require additional coordination to move more quickly through the certification process and avoid unnecessary delays. A commenter expressed support for the alternative approach of allowing a project proponent to request a waiver of the pre-filing meeting and the certifying authority to grant a waiver or the meeting. There were also commenters who said the Federal agency and the project proponents should be involved in determining the need for a pre-filing meeting.

Several commenters opposed project proponent participation in the pre-filing meeting process and asserted that the certifying authority should maintain sole discretion on whether to shorten or waive the pre-filing meeting request. One commenter suggested that allowing project proponents any authority in determining the need for a pre-filing meeting would diminish the authority of states and Tribes under Section 401.

Agency's Response: After considering public comments, EPA is not requiring the participation of the project proponent when determining the need for a pre-filing meeting request. However, the Agency encourages certifying authorities to engage with project proponents early in the process as they can inform decisions based on their knowledge of the project.

2.6 Pre-Filing Meeting Requests Procedures

2.6.1 Defining Procedures for a Pre-filing Meeting

A few commenters asserted that there should be pre-filing meeting requests procedures. Some commenters supported the idea that EPA provide a list of minimum information to include as part of pre-filing meeting request. These commenters asserted that this would provide more clarity, nationwide consistency and a standard approach for project proponents working with a wide range certifying authorities. One commenter suggested that EPA should require that certifying authorities provide project proponents with a list of requirements for information needed for the pre-filing meeting. Another

commenter recommended that EPA modify the proposed section 121.4 to require the certifying authority to set forth what elements must be in a project proponent's request for certification.

Some commenters opposed the idea of EPA establishing any submission procedures for the pre-filing meeting, indicating that it would not be useful and instead suggested allowing certifying authorities flexibility. Several of the commenters indicated that certifying authorities have already established submission procedures and such a requirement was unnecessary and would not provide any more certainty as the existing procedures are readily available. A couple of commenters recommended that EPA should make clear that certifying authorities can adopt or modify applicable submission procedures to fit with existing state processes. One commenter suggested that EPA could develop guidelines to assist certifying authorities that do not have submission procedures in place but should not establish requirements for those that already have them in place. One commenter suggested EPA should prohibit certifying authorities from requiring anything but the most basic information as part of the pre-filing meeting request such as the project proponent's name, the project activity, and the type of license or permit.

Agency's Response: EPA is not defining by regulation the process or manner for project proponents to submit pre-filing meeting requests or hold pre-filing meetings (e.g., identifying meeting subject matter or meeting participants). EPA finds that certifying authorities are best equipped to determine their procedures and needs for pre-filing meetings and requests. Accordingly, EPA intends the term "applicable submission procedures" to mean the submission procedures deemed appropriate by the certifying authority.

EPA recommends that certifying authorities provide clear expectations for pre-filing meetings to ensure they are used efficiently and effectively. Although EPA is not defining the process or manner for pre-filing meeting requests or pre-filing meetings, section IV.B provides several recommendations that are good practices for all certifying authorities. First, regarding the contents of a pre-filing meeting request when EPA acts as the certifying authority, EPA would generally find the following submission procedures to be appropriate. EPA recommends that project proponents submit a pre-filing meeting request to the Agency in writing. As discussed in section IV.B in the final rule preamble, the project proponent must submit documentation that a pre-filing meeting was requested as a component of its request for certification when EPA is acting as the certifying authority (or where a state or Tribe does not have defined request for certification requirements), unless the pre-filing meeting request requirement was waived. In light of this requirement, EPA recommends that pre-filing meeting requests to the Agency be submitted in writing. The Agency also recommends that project proponents include the following information, as available, in any written request for a pre-filing meeting with EPA:

1. A statement that it is "a request for CWA section 401 certification pre-filing meeting,"
2. The name of the project proponent and appropriate point of contact,
3. The name of the Tribe or jurisdiction for which EPA is serving as the certifying authority,

4. The planned project location (including identification of waters of the United States into which any potential discharges would occur),
5. A list of any other necessary licenses/permits (e.g., state permits, other Federal permits, etc.),
6. The project type and a brief description of anticipated project construction and operation activities, and
7. The anticipated start work date.

Second, regarding the subject matter of the pre-filing meeting, EPA encourages project proponents and certifying authorities to use the pre-filing meeting to discuss the proposed project, as well as determine what information or data is needed (if any) as part of the request for certification to enable the certifying authority to take final action on the request for certification within the reasonable period of time. During the pre-filing meeting, project proponents could share a description and map of the proposed project location and timeline, as well as discuss potential water quality-related impacts from the activity. Certifying authorities could use the meeting as an opportunity to provide information on how to submit requests for certification (e.g., discuss procedural requirements for submission of a request for certification). Certifying authorities should also consider including the Federal agency in the pre-filing meeting process for early coordination where the Federal agency is not otherwise legally precluded. Additionally, the final provision provides flexibility for the certifying authority to determine whether the pre-filing meeting request requirements are fulfilled by any pre-application meetings or application submissions to the Federal licensing or permitting agency.

2.6.2 Exclusion of Particular Project Types from the Pre-Filing Meeting Request Requirement

Most commenters were in favor of providing exclusions from the pre-filing meeting requirement for certain types of projects or activities, such as activities with minor impacts such as NWPs, maintenance and operation activities, and simple and routine projects. Many of these commenters suggested that emergency projects should be excluded from the pre-filing meeting requirements. One commenter suggested that the rule should explicitly state that certifying authorities have the authority to categorically exclude certain types of projects regardless of the permit type.

A few commenters asserted that there should be no exemptions to the pre-filing meeting request requirement, while a few other commenters suggested that exemptions should only be provided for emergency projects.

<u>Agency's Response</u>: This final rule enables a certifying authority to shorten or waive the pre-filing meeting request requirement on a case-by-case or categorical basis. For example, certifying authorities may categorically waive or shorten the pre-filing meeting request requirement for less complex, routine projects, as these projects most likely would not benefit from early engagement between the project proponent and certifying authority as large, complex projects would. Certifying authorities may also shorten or waive the pre-

filing meeting request requirement for other reasons, such as emergency projects as noted by commenters.

The Agency agrees with commenters that the Agency should not establish categorical exemptions for all certifying authorities. Accordingly, the Agency is not providing an exclusive list of reasons that a certifying authority may waive or shorten the pre-filing meeting request requirement, nor does this final rule limit the reasons for waiving or shortening the requirement. However, the Agency does not agree with commenters that certifying authorities should not be able to determine when waivers are appropriate. The final rule approach recognizes that states and Tribes are in the best position to determine whether a particular project (or class of projects) would benefit from such early coordination and reflects the reality that not every project will meaningfully benefit from a pre-filing meeting.

2.6.3 Certifying Authority Written Response Within Five Days

No commenters objected to the idea that certifying authorities should respond in writing with regards to the need for a pre-filing meeting. Several commenters suggested that EPA should explicitly require a written response within five days to inform the project proponent of the need to have a pre-filing meeting and establish the timeline for the pre-filing meeting if required. One commenter suggested that the rule should include a provision that if the certifying authority does not provide a written response within five days or is unable to hold the meeting within the 30-day time period, then the requirement for the pre-filing meeting requirement is waived. Conversely, a few commenters argued that five days was not sufficient time, including a few commenters who suggested that written response should be provided within 5 – 10 business days.

<u>Agency's Response</u>: The Agency is not adding a requirement that a certifying authority must respond in writing within five days of receipt of the pre-filing meeting request. Instead, similar to the 2020 Rule, this final rule does not require certifying authorities to grant or respond to a pre-filing meeting request. *See* 40 CFR 121.4(b) (2020). However, the Agency is finalizing removal of the 2020 Rule provision stating that the certifying authority is not obligated to grant or respond to a pre-filing meeting request because the regulatory text at section 121.4 does not compel any action by the certifying authority. Accordingly, the Agency does not find it necessary to expressly reiterate what the certifying authority is not obligated to do. If a certifying authority fails to communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification. Generally, EPA expects that it will provide written acknowledgement that the pre-filing meeting request has been received within five days of receipt. In its written response, the Agency will also state whether it has determined that the pre-filing meeting will be waived or when (if less than 30 days) the project proponent may submit the request for certification.

2.7 Input Received on Prior Rulemakings

2.7.1 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

Some stakeholders expressed support for pre-application meetings to ensure efficient and timely certification process. One of these stakeholders said that EPA should leave the process and format up to states. A couple of other stakeholders recommended that EPA encourage certifying authorities to create formal or informal processes that facilitate the early coordination efforts and identify during pre-filing meetings commonly requested information to reduce the need to issue information requests after the certification request has been submitted. These stakeholders further recommended that EPA clarify that a certifying authority cannot prohibit or delay the submission of a certification request following a pre-filing meeting.

One stakeholder said that the pre-filing meeting request requirement has not been in effect that long in regard to discussions of the benefits of these meetings.

Some stakeholders expressed concern with the pre-filing meeting request requirement. One stakeholder said to make the pre-filing meeting request optional and eliminate the 30-day waiting period. A couple of stakeholders said that EPA should remove the requirement and make both the pre-filing meeting request and the meeting voluntary to provide flexibility for various circumstances including any emergency actions. Another stakeholder called for EPA to move quickly to replace to the 2020 Rule to end harm from the rule, including the pre-filing meeting request requirement that the commenter asserts has upset existing state procedures and has led to delays.

A stakeholder stated that while early communication has been positive, EPA is not authorized to impose such a requirement on states and Tribes. The stakeholder said that EPA can recommend that project proponents ask to meet with their certifying authority before submitting a request for certification.

> **<u>Agency's Response</u>: *See* the Agency's Response to Comments in Sections 2.1-2.6; *see also* Section IV.B of the final rule preamble.**
>
> **In response to the input regarding EPA authority to impose a pre-filing meeting request requirement, the Agency disagrees. The 2020 Rule introduced the pre-filing meeting request requirement to encourage early coordination between parties to identify needs and concerns before the start of the reasonable period of time. EPA interpreted, and continues to interpret, the term "request for certification" in CWA section 401(a)(1) as being broad enough to include an implied requirement that a project proponent shall also provide the certifying authority with advance notice that a certification request is imminent. The time (no longer than one year) that certifying authorities are provided under the CWA to act on a certification request (or else waive the certification requirements of section 401(a))**

provided additional justification in this context to interpret the term "request for certification" to allow EPA to require a pre-filing meeting request.

3. REQUEST FOR CERTIFICATION (SECTION 121.5)

3.1 Defining the Contents of a Certification Request

3.1.1 2020 Rule Approach to Request for Certification

3.1.1.1 Support 2020 Rule Approach

Several commenters asserted that the 2020 Rule's contents of a request for certification located at 40 CFR 121.5 provide certifying authorities with sufficient information to evaluate potential impacts to water quality and opposed the proposed revisions to section 121.5. A few of these commenters asserted that the 2020 Rule's approach provides clear expectations about when the reasonable period of time begins and eliminates any confusion regarding whether the project proponent requested certification.

Another commenter stated that the 2020 Rule's definition of a certification request is consistent with the statute and sets a clear deadline. The commenter further added that if EPA would like the inclusion of additional information, the 2020 Rule could be amended to require inclusion of the license or permit application. A few commenters also observed that the 2020 Rule does not prevent a certifying authority from requesting additional information after receiving a request for certification but reiterated that such request should not impact the start of the reasonable period of time (e.g., provide a basis to restart the clock).

Agency's Response: EPA disagrees with commenters asserting that the 2020 Rule's contents of a request for certification provides all certifying authorities with sufficient information to evaluate potential impacts to water quality. Rather, EPA finds that defining an exclusive list of components for requests for certification for all certifying authorities, as was done in the 2020 Rule, could inhibit a comprehensive review under section 401 in the reasonable period of time. The diverse nature of Federal licenses and permits and the variety of potential water quality impacts from those different types of activities do not lend themselves to a one-size-fits-all approach. Indeed, to define an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies. Specifically, a framework requiring the reasonable period of time to begin before the certifying authority has essential information that it has transparently publicized as necessary to make its own certification decision would be inconsistent with the language, goals, and intent of the statute. Congress clearly did not intend section 401 reviews to turn on incomplete applications, and the reasonable period of time and one-year backstop were added by Congress to ensure that "sheer inactivity by the State…will not frustrate the Federal application." H.R. Rep. No. 92-911, at 122 (1972).

As discussed in section IV.C.2 of the final rule preamble, the final rule's approach to the request for certification will allow for a transparent and timely process that respects the

role of state and Tribal certifying authorities under the cooperative federalism framework of section 401. First, EPA finds that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining minimum contents for all requests for certification. EPA finds this approach best respects longstanding state and Tribal processes familiar to stakeholders and enables states and Tribes to determine their specific information needs. However, EPA is also finalizing additional contents for requests for certification to EPA or state and Tribes that fail to define such additional contents to provide stakeholders with greater certainty and predictability in the certification process. The final rule establishes an approach that provides efficiency for requests for certification, while staying consistent with cooperative federalism principles and case law.

Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent. 33 U.S.C. 1341(a) ("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."). The statute does not define either "request for certification" or "receipt." While the Agency agrees with commenters that the 2020 Rule did not prevent certifying authorities from requesting additional information after receiving a request for certification, the final rule's approach to the request for certification is consistent with the intent of the Act, is reasonable, is responsive to concerns and considerations raised through the public comment process, and ultimately is the most efficient path forward.

3.1.1.2 Do Not Support 2020 Rule Approach

A few commenters generally discussed challenges with implementation of the 2020 Rule's approach to a certification request. One commenter asserted that the 2020 Rule constrained certifying authorities' ability to obtain information prior to commencing the reasonable period of time. The commenter also stated that the 2020 Rule's certification request requirements led to increased confusion in the regulated community because it did not contain the same requirements as the state's water quality certification application. One commenter argued that 2020 Rule's approach to request for certification was inadequate and led to a significant disconnect between Federal and state or Tribal language regarding the minimum requirements of a certification request, leaving both vulnerable to legal challenges. Another commenter remarked that the 2020 Rule hampered their longstanding cooperative process with the U.S. Army Corps of Engineers for section 401 certification reviews of individual CWA permit applications by allowing for potential disparities between what is certified and what is permitted. The same commenter stated that a Memorandum of Agreement (MOA) ensured their involvement in the permitting process and that proposed plans and compensatory mitigation for a project would align with what was being permitted by the Federal permitting or licensing agency.

<u>Agency's Response</u>: The Agency appreciates commenter input on the challenges associated with implementation of the 2020 Rule's approach to a certification request. As noted in the Agency's response to comments in Section 3.1.1.1, the Agency recognizes that defining an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies, such as those identified by these commenters.

3.1.2 Inclusion of a Draft License or Permit in a Request for Certification

<u>3.1.2.1 Support Inclusion of Draft License or Permit</u>

Some commenters supported the inclusion of the draft license or permit in the request for certification. Several commenters asserted that the draft license or permit would provide certifying authorities with information essential to acting on a request, such as the Federal agency's terms and conditions. One of these commenters also noted that the information available at the time a draft license or permit is available would also be helpful in acting on a request (e.g., monitoring data, environmental assessment, environmental impact statement).

Several commenters also asserted that providing certifying authorities with a draft license or permit will lead to a more efficient, non-duplicative process, because the certifying authority will know what preliminary conditions the Federal agency may require and identifies a clear point in time when the certification request may be submitted. A few of these commenters provided examples to substantiate why they believed a draft license or permit would lead to a more efficient process. One commenter noted that administrative inefficiencies currently exist because of the lack of a draft license or permit flagging that some states routinely deny certifications on Federal Energy Regulatory Commission (FERC) licenses in instances where the certification request is filed prior to FERC's draft environmental impact statement (EIS). Another commenter noted that their state was able to issue certification decisions on general permits in a reasonable time because they receive certification requests after the draft permit is available. Another commenter posited that inclusion of the draft license or permit would reduce the number of denials or the need to withdraw and resubmit certification requests due to insufficient information on hydropower projects. A few commenters also expressed support for the idea that inclusion of the draft license or permit would allow certifying authorities to include more targeted, effective certification conditions. One of these commenters noted that seeing how Federal agencies plan to mitigate effects may resolve certifying authority concerns. One commenter stated that they supported improving the permitting process by requiring a draft FERC license prior to section 401 certification review. The commenter stated that currently, FERC review (which could take several years to complete) may lead to the expiration of a state's one-year deadline to act on a certification request or force the state to act with incomplete information.

Some commenters asserted that the inclusion of the draft license or permit in the request for certification would prevent or reduce incidences where the certifying authority reviews a project that significantly changes after submission of the application or is improperly characterized in the application. For example, several of these commenters discussed issues with pipeline projects. One commenter provided an example where a state had to deny certification on a pipeline project because the project proponent submitted its

request for certification before it identified a preferred pipeline route, while a few other commenters noted that requesting certification before FERC has provided its preferred license alternative and its environmental analysis of that alternative is premature. A few other commenters noted that sometimes project proponents request certification before obtaining the license or permit application number, request certification on the wrong Federal permit, or the Federal agency will switch the permit type while the certifying authority is reviewing the request (i.e., change from a general permit to an individual permit).

A few commenters that supported the draft license or permit requirement reflected on the challenges associated with incorporating it into current Federal licensing or permitting processes, including one commenter who asserted that Federal agencies would need to make substantial changes to their processes. One commenter observed that EPA did not explain how it would ensure that Federal agencies who do not currently issue draft licenses or permits (e.g., FERC, Corps) or begin the certification process at an earlier point in time would align their processes with the proposed rule. However, another commenter argued that changes to FERC and the Corps' practice would be beneficial for water quality protection, citing an instance where the Corps failed to provide meaningful opportunities for public engagement by refraining from sharing its project analysis until the permit was issued. This commenter further asserted that inclusion of the draft license or permit in the request for certification would ensure that the certifying authorities have the benefit of the Federal agency's analysis and ensure that the Federal agency's decision-making is better informed by those whose waters might be most affected by a project, including environmental justice communities and Tribes. Another commenter suggested that if the request for certification includes a copy of the draft license or permit, EPA should propose a mechanism to help Federal agencies review and revise their procedures in a timely manner. A couple of commenters recommended that FERC could instead publish its staff's preferred alternative as part of the draft EIS. One commenter suggested modifying the regulatory text to allow for a copy of the draft license or permit or its equivalent.

One commenter asserted that even though the proposed rule would initiate the certification process after the availability of a draft license or permit, it should not excuse project proponents from engaging with the certifying authority and Federal agencies early in the application process. Another commenter recommended that EPA should explicitly state that requiring a draft license or permit does not preclude earlier engagement with the certifying authority.

A few commenters supported the proposal to require a copy of the draft Federal permit or license in the certification request, but only in limited cases. These commenters suggested that a draft license or permit should be included when a Federal agency requests certification on Federal general permits (e.g., Corps' Nationwide General Permits).

One commenter said that EPA should move forward with the Federal agency, not the project proponent, providing the copy of the draft license or permit to the certifying authority when it is not otherwise already publicly available. The commenter argued that this action should be considered waived after a reasonable period, such as 30 days, since this action is non-project proponent input. This commenter also suggested that for projects that have longer timeframes, the Federal agency be the one required to send the pertinent water quality concerns for a project within a timeframe such as 90 days after the pre-filing meeting.

<u>Agency's Response</u>: EPA appreciates commenter input on the proposed inclusion of a draft license or permit in all requests for certification. After consideration of all public comments, EPA decided to partially change the requirement in the final rule to require that all requests for certification on an *individual* Federal license or permit include the Federal license or permit application at a minimum, instead of the draft Federal license or permit. See 40 CFR 121.5(a)(1). Many commenters opposed the inclusion of a draft license or permit in a request for certification for various reasons, including but not limited to possible impacts to certifying authority practice and relationships, concerns over potential delays, and concerns over how the proposed approach would work in instances where a Federal agency does not develop a draft license or permit, particularly for individual Federal licenses or permits. See Section 3.1.2.2 of this Response to Comments for further discussion of commenter concerns with the proposed approach.

EPA recognizes that with respect to *general* Federal licenses and permits, there often is no formal "application," and for that reason the final rule allows the Federal agencies issuing those general Federal licenses and permits to submit the draft general Federal license or permit to the certifying authority instead of a Federal license or permit "application." See 40 CFR 121.5(a)(2). EPA's bifurcated approach for requests for certification for *individual* Federal licenses or permits and for the issuance of *general* Federal licenses or permits promotes clarity and should minimize delays in the licensing and permitting process, since EPA anticipates most stakeholders are familiar with starting the section 401 certification process with a Federal license or permit application (for individual licenses or permits) or with a copy of the draft Federal license or permit (for the issuance of a general license or permit). Additionally, this bifurcation is modeled on the separate lists for the contents of requests for certification included in the 2020 Rule.

In response to commenter assertions that providing the draft license or permit identifies a clear point in time when the certification request may be submitted, EPA finds that the final rule's bifurcated approach to the request for certification also provides a clear point in time when the certification request may be submitted. That is, a request for certification on an individual license or permit may not be submitted until the project proponent has submitted the proposed project's application to the Federal licensing or permitting agency, while a request for certification on the issuance for a general license or permit may not be submitted until the project proponent has a draft license or permit.

In response to commenter assertions regarding early engagement and regarding the level of information available with a copy of the draft license or permit (e.g., preliminary conditions, monitoring data), EPA observes that nothing in this final rule prevents a certifying authority from engaging in early coordination with Federal agencies to learn more about preliminary conditions that the Federal agency may require. Similarly, the final rule encourages early coordination with project proponents through pre-filing meetings. To reduce the incidences where the certifying authority reviews a project that significantly changes after submission or is improperly characterized, certifying authorities may

leverage pre-filing meetings to discuss the proposed project, as well as determine what information or data is needed (if any) as part of the request for certification to enable the certifying authority to take final action on the request for certification within the reasonable period of time. During the pre-filing meeting, project proponents could share a description and map of the proposed project location and timeline, as well as discuss potential water quality-related impacts from the activity. Certifying authorities could use the meeting as an opportunity to provide information on how to submit requests for certification. *See* Section IV.B of the final rule preamble for further discussion on the pre-filing meeting process and implementation recommendations. Additionally, to ensure certifying authorities receive information essential to acting on the request for certification at the beginning of the certification process, the final rule requires the project proponent to include any readily available water quality-related materials that informed the development of the application in all requests for certification on an individual license or permit, which may include monitoring data. Certifying authorities may also define additional contents in a request for certification relevant to the water quality-related impacts from the activity. If the certifying authority determines that additional information is necessary to inform its analysis during the certification process, nothing in this final rule prevents a certifying authority from requesting such additional information.

In response to commenter concerns regarding incidences where project proponents request certification before obtaining the license or permit application number or the Federal agency switches the permit type, the final rule requirements for all requests for certification on an individual license or permit should reduce the likelihood of this occurrence. Specifically, the project proponent must include a copy of the Federal license or permit application submitted to the Federal agency in any request for certification for an individual license or permit. EPA also recommends that certifying authorities leverage pre-filing meetings to ensure parties develop a common understanding regarding the proposed project, such as whether the permit type is appropriate.

In response to commenter concerns regarding incidences where project proponents request certification on the wrong federal permit, EPA observes that a Federal agency may not issue a Federal license or permit until it obtains a certification or waiver from the certifying authority. If the project proponent requests certification on the wrong Federal permit, or the Federal agency changes the license or permit type during the certification process, the project proponent must resubmit a request for certification for the appropriate Federal permit.

EPA disagrees with the commenter asserting that the Federal agency should provide a copy of a draft license or permit and pertinent water quality concerns to the certifying authority, instead of the project proponent. Section 401(a)(1) requires the applicant, not the Federal agency, to provide certification on a proposed project. *See* 33 U.S.C. 1341(a)(1). While the Federal agency may, in some instances, act as the project proponent (i.e., issuance of general licenses or permits), EPA does not find it appropriate nor necessary to shift the statutory duty of requesting certification onto the Federal licensing or permitting agency in

all cases. Furthermore, EPA rejects the suggestion that the Federal agency should solely identify and provide information regarding pertinent water quality concerns. Rather, both the statutory text and legislative history emphasize that certifying authorities, and not Federal agencies, are responsible for determining compliance with their applicable water quality requirements. While Federal agencies may provide useful information during the certification process to inform a certifying authority's analysis, this final rule recognizes that states, territories, and tribes are best equipped to identify information needs and water quality concerns for their waters.

In response to the commenter asserting that certification decisions should be deemed waived after a 30-day reasonable period of time, see the Agency's response to comments in section 4 for further discussion on the reasonable period of time and section 7 for further discussion on waivers of certification.

3.1.2.2 Do Not Support Inclusion of Draft License or Permit

Many commenters did not support the inclusion of the draft license or permit in the request for certification. Several commenters asserted that the requirement was impractical and would create confusion for stakeholders. One commenter argued that EPA failed to consider the practical and legal complications of this requirement.

Agency's Response: After consideration of all public comments, EPA decided to partially change the requirement in the final rule to require that all requests for certification on an *individual* Federal license or permit include the Federal license or permit application at a minimum, instead of the draft Federal license or permit. *See* 40 CFR 121.5(a)(1). Many commenters opposed the inclusion of a draft license or permit in a request for certification for various reasons, including but not limited to possible impacts to certifying authority practice and relationships, concerns over potential delays, and concerns over how the proposed approach would work in instances where a Federal agency does not develop a draft license or permit, particularly for individual Federal licenses or permits. *See* the Agency's Response to Comments in this section for further discussion on specific commenter concerns and the Agency's responses.

3.1.2.2.1 Timing Concerns related to Statutory Text

Several commenters argued that inclusion of a draft license or permit in a request for certification was inconsistent with CWA section 401(a)(1). A few of these commenters asserted that it was at odds with the one year timeline, asserting that Congress did not intend for certifying authorities to have one year to act on a request for certification after the Federal agency develops a draft license or permit. One commenter argued that it would nullify the purpose of the reasonable period of time, because it would extend the time that it takes the Federal agency to produce a draft. A few commenters explained the requirement would be inconsistent with the congressional objective that the certification process not unreasonably delay the Federal licensing or permitting process, citing to Congressional history (115 Cong. Rec. 9264 (1969); H.R. Rep. No. 92-911, at 122 (1972)).

A few other commenters also asserted that section 401(a)(1) makes it clear that the certification informs development of the Federal license or permit, and not vice versa, including one commenter who argued that certification is not intended to supplant or second-guess the licensing or permitting process after the Federal agency has completed its review. One of these commenters noted that CWA section 401(d) requires any certification condition to be included in the license or permit. Another commenter argued that it would limit the conditions that could be imposed pursuant to CWA section 401(d) because the Federal agency would have already completed its review and decision-making process.

> **Agency's Response: EPA disagrees that the inclusion of a draft Federal license or permit in a request for certification is inconsistent with the statutory language or Congressional intent. Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent. 33 U.S.C. 1341(a) ("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."). The statute does not define either "request for certification" or "receipt." Nevertheless, in light of commenter concerns described above and throughout this section, the Agency is not finalizing the inclusion of a draft Federal license or permit in all requests for certification. Instead, the Agency is only requiring the inclusion of a draft Federal license or permit for requests for certification on the issuance of *general* Federal licenses or permits, consistent with longstanding practice.**

3.1.2.2.2 Timing Concerns related to Other Federal Processes, Coordination, and Efficiency

Several commenters raised issues with the draft license or permit requirement in relation to other Federal statutes, regulations, or memorandum of agreement. One commenter stated that EPA ignored its existing regulations for certification on EPA-issued NPDES permits, which allow project proponents to request certification before issuance of the draft permit. Another commenter argued that EPA failed to acknowledge that Federal agency procedures are based on important policy considerations and that Federal agencies are the best suited to determining procedures to meet their statutory mandates. One commenter argued that the draft license or permit requirement contravenes the 1976 EPA-NRC "Second Memorandum of Understanding Regarding Implementation of Certain NRC and EPA Responsibilities," 40 FR 60,115 (Dec. 31, 1975), which states that EPA will work to ensure that certifications are issued before the NRC issues its final EIS. The commenter went on to note that this happens well before the draft license or permit is available and the proposed approach would prevent NRC from considering the certification in the final EIS. Several commenters discussed the National Environmental Protection Act (NEPA), including one commenter who asserted that issuing a draft permit before appropriate reviews are completed could circumvent the NEPA process. Another commenter argued having the certification during the NEPA process can provide valuable information for the Federal agency to consider and pointed to NRC regulations which require the NRC's NEPA evaluations to consider compliance with water quality requirements. The same commenter also argued that it is unlikely that the draft license or permit would contain information that would lead to quicker, fewer conditioned certifications for NRC

projects because CWA section 511 prevents NRC from imposing its own effluent limitations or reviewing a certification. Another commenter noted that NEPA requires consultation with certifying authorities and asserted that EPA's proposal is telling certifying authorities to opt out of the process and would give certifying authorities the ability to upend the environmental review process. A few commenters argued that this requirement is contrary to long-standing government policies to encourage concurrent Federal and state reviews under NEPA. One commenter also argued that delaying the request for certification until the draft license or permit would prevent NRC from having information to inform its NEPA analysis and lead to duplicative efforts that Congress sought to avoid, citing to 33 U.S.C. 1251(f).

Several commenters expressed concern that inclusion of the draft license or permit in the request for certification would negatively impact existing coordination processes between Federal agencies, certifying authorities, and/or project proponents, which would delay the certification process. A few commenters noted that their states currently use joint permit applications (JPAs) or coordination procedures for Corps projects pursuant to state regulations or law and expressed concern that the proposed process would be impossible to integrate into their current procedures. Several commenters noted that the proposed approach is a departure from the longstanding practice of how certifying authorities and Federal agencies concurrently process certification requests and license or permit applications, including some certifying authorities and Federal agencies that use combined applications for certification and the Federal license or permit. One of these commenters argued that it is more expeditious to process certifications in this fashion. A few commenters argued that the proposed provision does not consider longstanding streamlining memorandums of agreement and would increase delays without any environmental benefit. One commenter argued that not providing an opportunity for certifying authorities and Federal agencies to coordinate their reviews could lead to unanticipated certification denials. One commenter requested additional clarity on whether the proposed rule would invalidate the JPA process, which the commenter argued would weaken the collaborative nature of section 401 certification reviews.

Many of the commenters who did not support the inclusion of the draft license or permit in the request for certification expressed concerns over the potential delays associated with this requirement, including concern that it would create inefficiencies by delaying both the certification and Federal licensing permitting process. One commenter acknowledged the potential value of seeing conditions in a draft license or permit but expressed concern that this requirement (in addition to other, undefined aspects of the proposal) would create significant delays and uncertainty for the project proponent because Federal agencies can take months to years to develop a draft license or permit. Another commenter asserted this proposed approach would cause significant delays because the Corps and EPA would have to complete a rulemaking process to provide a final draft permit before they could request certification on general permits. A few commenters argued that contrary to the Agency's claim, inclusion of the draft license or permit would not speed up the certification process because of the time it could take to develop a draft license or permit. One commenter asserted that while it is reasonable to ensure the certifying authority has complete information to make a decision, it does not necessarily require waiting until the end of the permitting process and there is no regulatory requirement to do as such, while another commenter noted that there may still be information needs even after a draft license or permit is developed. One commenter stated that the timing of the certification decision at the end of the Federal permitting process can result in the Federal agency being forced to restart the environmental review process in circumstances where the

certifying authority imposes conditions that are in conflict with the Federal agency's findings. The commenter asserted that it would be appropriate for the certification decision to be concurrent with the NEPA review performed by the Federal agency, so that the Federal agency can consider input from the certifying authority during this process. The commenter argued that this approach would provide consistency, efficiency, and integrity to the Federal decision-making process.

> **Agency's Response: EPA appreciates commenter concerns about possible impacts on longstanding practice and interagency relationships and has modified this final rule to require the Federal license or permit application, as opposed to draft Federal license or permit, for requests for certification on an *individual* Federal license or permit. The certifying authority's review of the proposed activity should be free from Federal agency influence, allowing it to review discrete activities with potential discharges into waters of the United States, and inform the development of a draft Federal license or permit, as opposed to reviewing the draft Federal license or permit itself. That said, for *general* Federal licenses or permits, the final rule retains the inclusion of the draft Federal license or permit for requests for certification on the issuance of a general Federal license or permit. As mentioned previously, general Federal licenses and permits may not have a formal application, and thus it is the draft general Federal license or permit that likely will provide the certifying authority with the most pertinent information in those cases. Furthermore, this is consistent with the longstanding approach to requests for certification on the issuance of general Federal licenses or permits and should be familiar to stakeholders. Ultimately, EPA's bifurcated approach is consistent with longstanding certifying authority practices, is reasonable, efficient, and should work well for both individual Federal licenses or permits as well as for the issuance of general Federal licenses or permits.**
>
> **In response to the commenter who asserted that the proposed approach would require the Corps and EPA to complete a rulemaking process to provide a final draft permit before they could request certification on general permits, EPA disagrees and notes that Federal agencies have requested certification on the issuance of a general license or permit using draft general licenses or permits for over 50 years, including under the 1971 Rule and the 2020 Rule. This final rule simply adopts an approach that is longstanding and should be familiar to stakeholders. See also the Agency's response to comments in Section 3.1.2.4 for further discussion on the term "draft license or permit."**

3.1.2.2.3 Cooperative Federalism Principles

Several commenters asserted that the draft license or permit requirement contravened the cooperative federalism objectives of the CWA and/or section 401. A few of these commenters argued that it would dilute the certifying authority's role as the primary authority for determining which water quality conditions will ensure the activity will comply with water quality standards, and do not need to rely on the Federal agency to anticipate these conditions. A few commenters also asserted that the proposed approach prefers the Federal agency's decision over the certifying authority's decision, with a few commenters arguing that it would make the certification a "rubber stamp" of the draft Federal license or permit. One commenter argued that Congress intended the certifying authority to have a role in the early

planning process (e.g., siting, design, operation of the activity) and not an after the fact role, citing S. Rep. 91-351, at 8 (1969). Another commenter further explained that state certification was not an afterthought, but rather certifying authorities had to conduct their own review of a project's likely effects and determine whether they would comply with state water quality standards, citing *Constitution Pipeline Co*., 868 F.3d at 101. One commenter argued that the certifying authority's review of the proposed activity must remain free from Federal agency influence, while another commenter asserted that the certifying authority's role is to review discrete activities with potential discharges to a water of the United States and not Federal licenses or permits. A different commenter said that the draft license or permit could be used as leverage against adding requirements by the certifying authority, especially if the certifying authority was not involved in earlier discussions.

> **Agency's Response: EPA appreciates commenter concerns regarding the impact of including a copy of the draft Federal license or permit in all requests for certification on achieving the cooperative federalism principles central to section 401. Although EPA disagrees that the proposed approach would dilute or otherwise diminish a certifying authority's role, the Agency has modified this final rule to require the Federal license or permit application, as opposed to the draft Federal license or permit, for requests for certification on an individual Federal license or permit. *See* also the Agency's response to comments in section 3.1.2.2.3.**

3.1.2.2.4 Burden on Project Proponents

Several commenters expressed concern that potential delays from this proposed requirement would place a burden on project proponents, including project delays, duplication of efforts, additional costs, and could impact project viability or require costly design changes. One commenter asserted that the proposal ignored the potential for the project proponent and Federal agency to waste time and resources if the certifying authority ultimately denied the request for certification. Another commenter asserted that the requirement would specifically burden small entities, who attempt to satisfy financial and legal requirements associated with a project concurrently to achieve efficiency, rather than in a linear fashion as the proposal suggests. Some commenters discussed potential delays associated with infrastructure projects due to the proposed requirement, including a few commenters who asserted that the requirement would delay projects with public safety and health implications (e.g., flood infrastructure, water supply), further burden the supply chain, and impact American workers. Several of these commenters asserted that the requirement is contrary to the Biden Administration's infrastructure development goals and the Permitting Action Plan, including one commenter who argued that inclusion of the draft license or permit would result in construction delays and cost impacts for infrastructure projects needed to meet clean energy goals. Another commenter cited recent Council on Environmental Quality data which revealed that the average time to complete an EIS was 4.5 years and over 6 years for some infrastructure projects and argued that if the Federal agency waits to issue a draft permit until the EIS is completed, certification could be delayed by another year on top of the NEPA process.

Several commenters also expressed concern over delays associated with changes to the draft license or permit after receiving the certification, such as instances where the certification contains new or significant information that requires an update to the draft license or permit or supplemental information

(e.g., NEPA documentation). A few of these commenters argued that modifications to the draft license or permit may require a new public notice or modifications to the project that would in turn require a new section 401 certification.

Agency's Response: *See* the Agency's response to comments in section 3.1.2.2.

3.1.2.2.5 Burden on Certifying Authorities

A few commenters argued that delays associated with inclusion of the draft license or permit would impact the certifying authority. One commenter asserted that the certifying authority would have added pressure to expedite reviews, while another commenter noted that its state already struggles to complete the certification process within one year. Another commenter argued that delays would result in Federal intrusion into state and local control of water resources. Another commenter noted that some states expressed concern that the proposed requirement would circumvent state permitting and approval processes and ultimately place a burden on them. One commenter expressed concern that the inclusion of a draft license or permit in the request for certification would force the state to have three different public notice and potential hearing opportunities that could not be consolidated.

Some commenters also expressed concern that the proposed requirement would preclude the certifying authority from participating in early project development or coordination with Federal agencies and project proponents. For example, one of these commenters argued that by the time there is a draft license or permit, it is too late to address water quality issues addressed in the early planning stage. As another commenter noted, this may introduce new concerns that could have otherwise been addressed earlier in the planning process. Several commenters expressed concern that this could be particularly problematic for certifying authorities that rely on certifications to implement their regulations and do not have a corresponding state authorization requirement.

A few commenters also expressed concern that the proposed requirement would invite conflict between the certifying authority and Federal agency and further delay the certification process. For example, one commenter argued that the certifying authority would have to either agree or disagree with the representations the Federal agency made to the project proponent in the draft license or permit. Accordingly, as another commenter asserted, that it would put an improper burden on the certifying authority if they required design changes to the proposed activity after the project proponent and Federal agency already invested time and effort. Similarly, another commenter noted that the certifying authority's review of the project may lead to modifications that diverge from the project described in the Federal permit application, and further delay the process.

Several commenters also asserted that the proposed requirement was inconsistent with current state laws or regulations. For example, one commenter noted that requiring a draft license or permit in the certification request would force project proponents to delay submitting their state applications to comply with state application deadlines, while a few other commenters noted it could lead to states receiving certification requests that do not comply with state water quality regulations because of differences in state and Federal requirements. One commenter noted their state explicitly prevents the state from requiring a Federal permit for their application. A few commenters expressed concern that requiring the

draft license or permit in the request for certification would decouple the section 401 review from the state's Coastal Zone Management Act (CZMA) review process, which requires a copy of the Federal license or permit application.

> **Agency's Response: EPA appreciates commenter concerns about the impact of the proposed approach to the request for certification on certifying authorities and has modified this final rule to require the Federal license or permit application, as opposed to draft Federal license or permit, for requests for certification on an individual Federal license or permit. *See* the Agency's response to comments in Section 3.1.2.2.3. Nevertheless, EPA disagrees with commenter assertions that the inclusion of a draft license or permit in the request for certification would preclude the certifying authority from participating in early project development or coordination with Federal agencies and project proponents. Nothing in this final rule precludes certifying authorities from coordinating with Federal agencies or project proponents prior to the certification process. In fact, section 121.4 requires a project proponent to request a pre-filing meeting with a certifying authority regardless of the type of license or permit, unless the pre-filing meeting request requirement is waived by the certifying authority. The Agency also disagrees that it would be too late to address water quality issues if the request for certification included a draft license or permit. A Federal license or permit may not be issued until the certifying authority either issues a certification or waives certification. If a certifying authority evaluates an application or a draft license or permit and determines that a proposed project will not comply with applicable water quality requirements, the certifying authority may condition the project to ensure compliance or deny the request for certification.**

3.1.2.2.6 Practicality of Inclusion of the Draft License or Permit

Many commenters argued that inclusion of the draft license or permit in the request for certification was impractical because Federal agencies either do not produce a draft license or permit. A few commenters noted that Federal agencies typically rely on the certification to develop their draft license or permit, including one commenter asserting that the draft license or permit would be inaccurate without the certification. A few commenters noted that the proposed rule did not address situations where Federal agencies do not provide draft licenses or permits and that it was unclear how Federal agencies could issue draft permits, or whether they would be subject to public notice. A few commenters also noted that requiring Federal agencies to change their license or permit process to develop a draft license or permit would cause several issues, including creating confusion, delaying the licensing or permitting process, be burdensome, and not be the best use of agency resources. One commenter argued that EPA failed to justify how it could force Federal agencies to change their rules and internal procedures to comply with the draft license or permit requirement. Several commenters specifically stated that Corps projects (including CWA section 404 individual and general permits, Rivers and Harbors Act (RHA) section 10 permits, and civil works projects) and FERC licenses do not include a draft license or permit. When discussing Corps permits, one commenter asserted that requiring the Corps to produce a public, draft permit may raise legal issues, while another commenter argued that the Corps needs a certification to ensure discharges comply with 40 CFR 230.10(b). A few commenters also indicated other Federal licenses or permits that do not have and/or require a draft license or permit include United States

Department of Agriculture (USDA) Forest Service authorizations, mineral authorizations, EPA-issued NPDES permits, and Tennessee Valley Authority (TVA) permits.

A few commenters provided feedback regarding the requirement for a draft Federal license in the context of FERC licensing. A commenter described the FERC licensing process of hydropower facilities and stated that the requirement for a draft Federal license prior to section 401 certification review would be inconsistent with FERC's hydropower licensing procedures. The commenter stated that applicants are legally and factually precluded from obtaining a copy of a draft license since FERC does not issue a draft license as part of its process. The commenter stated that this requirement would be infeasible in the hydropower licensing context since FERC has often not finalized the EIS or Environmental Assessment (EA) prior to the regulatory deadline to submit section 401 certifications. The commenter also stated that delaying a certification request until the Natural Resource Commission (NRC) has developed a draft license would not provide certifying authorities with additional information relevant to their decision and extend project risk. Another commenter asserted that requiring a draft license for FERC hydropower projects would not speed up the certification process for those projects because FERC's default reasonable period of time is one year; alternatively, the commenter asserted that even if FERC changed their default reasonable period of time to 60 days, certifying authorities would likely deny certification.

A few commenters also asserted that the draft license or permit is unnecessary because certifying authorities have acted on a request for certification for the last 50 years without it. A commenter stated that draft Federal license or permit applications had been sufficient to set the reasonable period of time in their experience and asserted that it would be unnecessary and unduly problematic to require a draft license or permit, especially in instances where the Federal agency does not have a process for issuing draft licenses or permits. Another commenter also asserted that the draft license or permit would not provide any additional information to the certifying authority because Federal agencies refrain from including water quality conditions in their permits because they know it is not their primary role. One commenter noted that in their experience in California, the state has been able to process requests for certification without a draft permit. Another commenter noted that in the last 50 years, certifying authorities have not unnecessarily denied or overly conditioned certification because of not knowing the contents of a Federal permit, and argued that the Agency's concerns about lack of information are unfounded because certifying authorities already know what conditions the Federal permits will contain because most are issued according to standard permits.

Several commenters argued that the license or permit application is preferred over the draft license or permit because the application contains more helpful water quality information (e.g., detailed project description, mitigation). For example, one commenter argued the draft license or permit is not a substitute for an application, because the application includes methods and means to address potential water quality impacts. Another commenter noted that NRC applications for renewed licenses include an environmental report that contains an array of information, such as discussion of the impact of the proposed action on the environment, while Bureau of Ocean Energy Management requires a detailed construction and operation plan that describes how activities could affect water quality. Discussing certification on FERC interstate natural gas pipelines, another commenter noted there are ample analytical and technical studies available for the certifying authority when the project proponent currently files its request for certification. Another commenter stated that certifying authorities can request both information that the project proponent

already provided the Federal agency, as well as information developed by the Federal agency as part of their review.

> **Agency's Response: EPA appreciates commenter concerns about existing Federal agency processes and recognizes that some Federal agencies do not produce a draft license or permit for individual licenses or permits. EPA agrees that requiring submission of the draft Federal license or permit with all requests for certification may not be worthwhile in cases where an application contains more pertinent, water quality-related information to inform a certifying authority's review, such as on an individual Federal license or permit. Furthermore, in addition to being able to request additional information after receiving a request for certification, this final rule includes other provisions to ensure certifying authorities can obtain necessary information to inform their decision-making (e.g., ability to establish additional requirements for a request for certification). *See* Section IV.C.2 of the final rule preamble for further discussion on additional contents in a request for certification. However, in the case of general Federal licenses or permits, EPA disagrees with commenters that the draft Federal license or permit would not provide any real benefit, as there would typically be no formal application to submit in those cases. The draft general Federal license or permit will likely provide the certifying authority with the most pertinent information in those cases. Furthermore, as noted in the Agency's response to comments above, inclusion of the draft license or permit in a request for certification on the issuance of a general Federal license or permit is consistent with the longstanding approach to requests for certification and should be familiar to stakeholders. This is why EPA has decided to finalize the bifurcated approach with different requirements for individual Federal licenses or permits and the issuance of general Federal licenses or permits.**

3.1.2.3 Neutral Opinion on Draft License or Permit

A few commenters did not express explicit support or opposition to the draft license or permit requirement. These commenters acknowledged that the requirement was well-intentioned but noted there could be challenges associated with the requirement.

> **Agency's Response: *See* the Agency's response to comments Section 3.1.2.1.**

3.1.2.4 General Comments on Draft License or Permit

Several commenters expressed concern and confusion over the term "draft permit or license" in the proposed rule and requested that EPA define the term to clarify the appropriate level of detail. One commenter suggested that EPA define the term to mean the draft license or permit is ready for issuance if it receives certification and require project proponents to submit its correspondence with the Federal agency that authorizes the project proponents to use the draft in its request for certification. Another commenter suggested that EPA define the term to mean the license or permit would be ready for issuance by the Federal agency if the certifying authority grants certification. One commenter interpreted the term "draft permit or license" to mean the final draft permit.

One commenter asked the Agency a series of questions related to the differences between a draft and final license or permit, including whether the Federal agency must submit a new request for certification if it revises the draft, or whether the certifying authority can revoke its certification if the final permit is different from the draft, and questioned whether the benefits discussed in the proposal associated with inclusion of the draft license or permit could be realized (e.g., expediting the process). Another commenter asserted that under their state regulations, a request for certification on the issuance of a general license or permit must include the final general license or permit.

A few commenters asked the Agency to clarify what it means for a Federal agency to be "legally precluded" from providing a draft license or permit. One commenter noted that it was unclear what the phrase included, while another commenter argued that it set an excessively high standard that ignored the difficulties associated with procuring a draft license or permit. A couple commenters provided suggestions on how the Agency should clarify the term "legally precluded," including exempting licenses or permits from Federal agencies who do not routinely release draft licenses or permits or who do not provide drafts in a timely fashion or exempting draft permits for Federal permits that do not require Federal agency notification.

One commenter stated that the Federal agency, as opposed to the project proponent, should provide the certifying authority with the copy of the draft license or permit to ensure they receive the right draft, or otherwise the efficiency and predictability of the certification process would be reduced. Another commenter recommended that EPA add a provision that would require the project proponent to provide a copy of relevant correspondence with the Federal agency in which the Federal agency authorizes the project proponent to use the draft license or permit in its request for certification.

> **Agency's Response: The Agency does not find it necessary to define "draft license or permit" for purposes of this rulemaking, in part because stakeholders should be familiar with requesting certification on these Federal licenses or permits and Federal agencies will be acting as the "project proponent" in these instances. The Agency observes that this final rule does not require a Federal agency seeking certification on the issuance of a general Federal license or permit to seek certification immediately upon publication of the draft Federal license or permit. Rather, the Federal agency must request certification after publication of the draft Federal license or permit. For example, the Corps is required to request certification on the NWPs when they are renewed every five years. First, the Corps proposes the draft NWPs and takes comment on the proposal, and later finalizes the NWPs after considering public comment. Under this final rule, the Corps may request certification on the NWPs after it receives and considers public comment on the proposal but before finalizing the NWPs. In that scenario, the Corps would provide the non-finalized NWP to the certifying authority as the draft permit in its request for certification to satisfy the regulatory requirements. EPA encourages Federal agencies and certifying authorities to work together to determine the point in time at which a request would be most appropriate to allow for an informed and efficient certifying authority review. Such coordination could also avoid questions or concerns arising over significant changes to the draft Federal license or permit post-request. However, EPA observes that there may always be a degree of uncertainty or possibility for project changes when it comes to certifying any project**

because a Federal agency must obtain a certification prior to issuing a Federal license or permit. EPA encourages certifying authorities to engage early and often with project proponents and Federal agencies and develop certification conditions that allow for "adaptive management" in the event a project changes.

Because the Agency is not finalizing the requirement for draft license or permit in all requests for certification, the Agency is not including the term "legally precluded" in the final rule text at section 121.5. Accordingly, the Agency is declining to define the term "legally precluded" in this final rule.

EPA disagrees with the commenter asserting that the Federal agency should provide a copy of a draft license or permit to the certifying authority, instead of the project proponent. Section 401(a)(1) requires the applicant, not the Federal agency, to provide certification on a proposed project. See 33 U.S.C. 1341(a)(1). While the Federal agency may, in some instances, act as the project proponent (i.e., issuance of general licenses or permits), EPA does not find it appropriate nor necessary to shift the statutory duty of requesting certification onto the Federal licensing or permitting agency in all cases.

In response to the commenter who recommended that EPA add a provision that would require the project proponent to provide a copy of the relevant correspondence with the Federal agency in which the Federal agency authorizes the project proponent to use the draft license or permit in its request for certification, the Agency does not find it necessary to add such a provision. As discussed in Section IV.C of the final rule preamble, the Agency has modified this final rule to require the Federal license or permit application, as opposed to draft Federal license or permit, for requests for certification on an individual Federal license or permit. Although a draft Federal license or permit is required for requests for certification on the issuance of a general Federal license or permit, the Federal agencies will be acting as the "project proponent" in these instances. Accordingly, the Agency does not find it necessary to add the recommended provision.

3.1.2.5 Alternatives to Inclusion of the Draft License or Permit

Many commenters supported an alternative of including either a license or permit application or a copy of the draft license or permit. One commenter added that this would give the states and Tribes discretion to determine the information they need. Another commenter said they were supportive of the proposed approach as well as the alternative approach where the project proponent may submit either a copy of the submitted license or permit application or a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project. The commenter said these approaches would provide clarity and regulatory certainty. Another commenter said that they did not disagree with the alternative approach of having the license or permit application or the draft license or permit in the request for certification, but they added that the six components are duplicative and unnecessary since the license or permit application would have that information.

Commenters added they would support an alternative approach where the applicant would submit a copy of license or permit to the certifying authority when it becomes available, and the certifying authority would be able to begin its review upon receiving the application. Another commenter said that EPA should require the submission of the license or permit application if it is not feasible for a copy of the draft license or permit to be submitted with the request for certification.

Some commenters supported the alternative approach of including the license or permit application in the request for certification, instead of the draft license or permit. Several of these commenters cited various reasons for preferring the alternative, including arguing that it would maintain establish practices, avoid regulatory delays, promote efficiencies, and ensure the certifying authority has the same information as the Federal agency. One commenter asserted that inclusion of the application would best achieve early coordination and consistency with the Biden Administration's Permitting Action Plan. Another commenter asserted that to the extent EPA requires more detailed information on the license or permit, the application is more consistent with Congress's statutory timeline. Another commenter also noted that the Federal license or permit application would satisfy the current requirements located at 40 CFR 121.5(b)(4) and (5). A few commenters that preferred the alternative approached requested EPA clarify that only a complete application as determined by the Federal agency should be allowed to satisfy this requirement.

A couple of commenters expressed concern with the inclusion of the Federal license or permit application as part of the certification request. One of these commenters argued that applications can be hundreds of pages with many technical documents, detailed figures, and complicated calculations, making it not as simple as it may seem. The commenter also expressed concern over the inclusion of confidential information in the application package and recommended that EPA includes authorization for the project proponent to redact confidential information from the application if it adopts the alternative approach. Another commenter asserted that EPA had not adequately explained why any detailed Federal licensing or permitting information must be included in a request for certification or how its consistent with cooperative federalism objectives. The commenter also stated that the certifying authority can request the application during the review process, as opposed to being a prerequisite to trigger review.

Several commenters also suggested different alternatives to including either just the draft license or permit, or the application. One commenter suggested requiring project proponents to identify the specific Federal permit they are seeking. Another commenter suggested requiring both the draft license or permit and the Federal application. One commenter suggested a previous license or permit for license or permit renewals where there are minimal or no water quality impacts. Another commenter suggested the current list of items at 40 CFR 121.5 and the application. A few commenters specifically discussed Corp section 404 general permits, suggesting either a pre-construction notice or the general permit number, while another commenter suggested the public notice should suffice for CWA section 404 projects. One commenter suggested allowing a final EA or EIS could substitute for a draft license or permit for FERC project, while another commenter suggested a draft EIS could suffice for FERC projects because it includes the staff's preferred license alternative. A different commenter said that the submittal of a license or permit application or a draft license or permit should be optional rather than mandatory and include authorization for project proponents to redact any confidential information.

Several commenters suggested that the Agency should provide greater flexibility if it opted to retain the draft license or permit requirement, including inserting the word "if available" in the regulatory text, or making it clear that either an application or draft license or permit would suffice. One commenter suggested that the Agency should include a procedure where the Federal agency fails to provide a draft license or permit. Similarly, another commenter suggested that the requirement for a draft license or permit should be waived if the Federal agency fails to produce it after a sensible, standard period of time. Another commenter suggested allowing the Federal agency to waive the requirement for a draft license or permit if it does not typically issue one or if it determines, in its sole discretion, that it is not feasible. One commenter suggested only requiring the draft license or permit for Federal agencies with a standard period of time to develop a draft permit (or promulgate a rulemaking), and otherwise waive the requirement for larger projects or have the Federal agency provide relevant water quality considerations to the certifying authority.

Agency's Response: EPA appreciates the various alternative recommendations provided by commenters on this topic. After reviewing public comments, EPA decided to partially change the requirement in the final rule to require that all requests for certification on an individual Federal license or permit include the Federal license or permit application at a minimum, instead of the draft Federal license or permit. Allowing a project proponent to submit a request for certification on an individual Federal license or permit with only the application may result in the reasonable period of time starting earlier in the Federal licensing or permitting process in most circumstances, thus avoiding or minimizing any delay in the overall Federal licensing or permitting process. EPA also agrees with commenters that this approach would maintain established practices, avoid regulatory delays, promote efficiencies, and ensure the certifying authority has the same information as the Federal agency.

With respect to general Federal licenses and permits, as stated above, there is no formal application, nor is there a similar event preceding the issuance of the general Federal license or permit at which time EPA could logically tie with the submission of a request for certification. EPA's bifurcated approach for requests for certification for individual Federal licenses or permits and for the issuance of general Federal licenses or permits promotes clarity and should minimize delays in the licensing and permitting process, since EPA anticipates most stakeholders are familiar with starting the section 401 certification process with a Federal license or permit application (for individual licenses or permits) or with a copy of the draft Federal license or permit (for the issuance of a general license or permit).

The Agency does not view the application and any subsequent draft license or permit to be interchangeable for purposes of this final rule. While nothing in this final rule precludes a project proponent from providing the certifying authority with a copy of the draft license or permit for an individual license or permit, where available, it is not a mandatory requirement for a request for certification on an individual license or permit for reasons discussed in Section 3.1.2 of the Agency's Response to Comments. Indeed, EPA encourages project proponents to communicate early and often with certifying authorities to determine

information needs and provide any other relevant water quality-related information during the certification process where such other information is not already required by this final rule. Such coordination and facilitation of information sharing could support a more efficient certification process.

The Agency disagrees with commenters who suggested different alternatives to including either the draft license or permit or the application, or suggested that the Federal license or permit application or draft Federal license or permit should be optional. The Agency finds that a Federal license or permit application (for requests for certification on individual licenses or permits), or the draft Federal license or permit (for requests for certification on the issuance of general licenses or permits) is reasonable for an informed, efficient certification review process, as discussed in more detail below.

EPA appreciates commenter concerns with the inclusion of the Federal license or permit application as part of the request for certification, but finds this information is reasonably necessary for a certifying authority to conduct a fully informed review of a request for certification within the reasonable period of time and to achieve the cooperative federalism principles central to section 401. Allowing for standardized minimal requirements, such as the Federal license or permit application, will improve the quality of section 401 reviews, particularly for certifying authorities with limited resources. The minimal components also contain essential water quality-related information. The Federal license or permit application may contain, for example, information on project design, specifications, location, and potential discharges that are critical to a certifying authority's review for compliance with water qualtiy requirements. The final rule also requires project proponents to provide any readily available water quality-related materials that informed the application or draft general license or permit, which recognizes the importance of providing certifying authorities with critical information to inform their analysis while at the same time considering important implementation details. First, this requirement provides a predictable endpoint for project proponents because it is limited to existing data or information that was used in the development of the license or permit application or the draft general license or permit. Second, consistent with the scope of review under this final rule, this requirement limits any such materials to "water quality-related materials," which will ensure that project proponents provide certifying authorities with pertinent water quality-related information to fully inform their certification analyses. While EPA acknowledges that nothing in this final rule prevents certifying authorities from requesting more information after receiving a request for certification, the minimal contents defined at section 121.5(a) of this final rule will allow for more predictable, efficient certification reviews.

In response to commenter concerns regarding inclusion of confidential information in an application, EPA has clarified in the final rule preamble that project proponents may redact or exclude personally identifiable information (e.g., personal addresses, personal finance information) and/or other sensitive information. *See* Section IV.C.2 of the final rule preamble.

In response to the commenter that requested EPA clarify that only a complete application as determined by the Federal agency should be allowed to satisfy this requirement, the final rule requires the project proponent to submit a copy of the license or permit application that was submitted to the Federal agency. EPA encourages certifying authorities to communicate with project proponents and Federal agencies (i.e., through a pre-filing meeting) to discuss what information or data is needed (if any) as part of the request for certification to enable the certifying authority to take final action on the request for certification within the reasonable period of time, such as complete applications.

3.1.3 Inclusion of "Any Existing and Readily Available Data or Information related to Potential Water Quality Impacts from the Proposed Project"

3.1.3.1 Support Inclusion of "Any Existing and Readily Available Data or Information"

Several commenters supported the requirement that the request for certification include "any existing and readily available data or information related to potential water quality impacts from the proposed project." A few of these commenters noted that this information is important for decision-making and allows certifying authorities to better evaluate potential impacts of a project. Another commenter noted that this requirement by itself is more than adequate for an informed decision. One commenter suggested that the Agency should clarify that project proponents should not use the phrase "readily available" as an excuse to fail to provide the certifying authority with what it reasonably needs to begin the review process.

A few commenters asserted that while they supported the requirement, the Agency should not limit certifying authorities to "any existing and readily available" and suggested deleting the phrase or clarifying that it should not be construed to restrict a certifying authority from requesting new, additional, or not-yet available data related to the proposed activity.

Agency's Response: EPA intended that providing certifying authorities with any existing and readily available data or information related to potential water quality impacts from the proposed project, such as studies or an EIS or EA or other water quality monitoring data, would reduce the need for duplicative studies and analyses. In response to commenter concerns, as summarized in section 3.1.3.2 below, EPA is adjusting the regulatory text in the final rule to read "any readily available water quality-related materials that informed" the application or draft general Federal license or permit. See 40 CFR 121.5(a)(1)(ii), 121.5(a)(2)(ii). EPA recognizes the importance of providing certifying authorities with necessary information to inform their analysis while at the same time considering important implementation details. First, this revision provides a predictable endpoint for project proponents because it is limited to existing data or information that was used in the development of the Federal license or permit application or the draft general Federal license or permit. Second, consistent with the scope of review under this final rule, this revision limits any such materials to "water quality-related materials." This will ensure that project proponents provide certifying authorities with pertinent water quality-related information to fully inform their certification analysis. EPA also finds that limiting such

materials to "water quality-related" should clarify that project proponents may redact or exclude personally identifiable information (e.g., personal addresses, personal finance information) and/or other sensitive information.

EPA appreciates commenter concerns regarding the exclusion of information on the proposed activity that may be unavailable (e.g., data). However, as discussed above, EPA finds it reasonable and appropriate for the Agency to balance certifying authority information needs with legitimate implementation concerns by limiting the default requirements to existing, readily available information. If there are other materials that did not necessarily "inform the development" of the application or draft Federal license or permit (e.g., section 402 permit factsheets, permit description presentations, etc.), the certifying authority is free to define such materials in its additional contents for a request for certification, *see* discussion *infra*, or request such additional information after receiving a request for certification. A project proponent is also welcome to include any additional information in the request for certification. Furthermore, certifying authorities are encouraged to use the pre-filing meeting request process to further communicate appropriate water quality-related materials that would be helpful in reviewing a request for certification on an individual Federal license or permit.

3.1.3.2 Do Not Support Inclusion of "Any Existing and Readily Available Data or Information"

Many commenters did not support the requirement that the request for certification include "any existing and readily available data or information related to potential water quality impacts from the proposed project," arguing that it was unclear and would be difficult to implement. A few commenters argued that the requirement would lead to unintended consequences, create confusion, and delay the certification process. One commenter asserted that the requirement is inconsistent with section 401(a)(1) because it does not state or imply that a "request for certification" must include information beyond the request itself. Another commenter argued that EPA lacks authority to dictate states and Tribes' information needs in administering a section 401 program, asserting that the requirement has no support in statutory text or purpose and is inconsistent with EPA's prior recognition that states and Tribes should be empowered to determine what information is necessary to start the certification process, citing the 1989 Guidance.

Several commenters asserted that the "any existing and readily available data" requirement was vague and ambiguous and expressed concern that the open-endedness could invite certifying authorities to subjectively determine when submissions are or are not requests for certification. One of these commenters asserted that some states would expansively construe what data may be "readily available" and immoderately define what "impacts" are "related" to the proposed project based on their prior experience, while another commenter expressed concern that such a requirement would lead to disputes regarding completeness. One commenter expressed concern that the requirement would allow certifying authorities to require project proponents to conduct additional research and delay projects. Another commenter argued that the requirement exceeded the scope of section 401 because it would require information related to potential water quality effects from the proposed project, rather than just the discharges for which certification is required. The commenter further asserted that there is no need to require this information because it is in the applicant's benefit to provide the certifying authority with

such information and the certifying authority can always deny the request if they are missing information. One commenter stated that the requirement to submit "existing and readily available data" is vague and would cause significant licensing delays because the applicant has no way to confirm what a complete submission would require.

A few commenters sought clarification from EPA as to what is expected for this requirement beyond the examples provided in the preamble. Some commenters expressed concern over the examples EPA provided in the proposal when discussing "any existing and readily available data." One commenter asserted that waiting until a NEPA document is available would cause significant delays. Another commenter stated that the proposed rule preamble inconsistently used different examples throughout and asserted that it could cause uncertainty for project proponents and certifying authorities.

Several commenters recommended that EPA define the term "any existing and readily available data or information related to potential water quality impacts from the proposed project." One commenter asserted that "existing" is too broad because some facilities have existed for decades and may have immense amounts of data than is necessary for certification. Similarly, another commenter expressing similar concerns recommended using "current and most relevant" in lieu of "any" to ensure certifying authorities use the most appropriate data. A few commenters suggested that EPA should specify the types of documents or information that would fit this requirement to ensure transparency and consistency, while another commenter suggested that it should be limited to information the project proponent has in their possession when they submit the request. A few commenters asserted that the term was insufficient and suggested that EPA should either require the project proponent to accurately identify the extent of waters affected by a proposed project or identify measures to mitigate or eliminate violation of water quality standards.

One commenter opposed the inclusion of "any existing and readily available data or information related to potential water quality impacts from the proposed project," but stated that if EPA decides to require additional information, then they would not object the alternative of requiring a copy of the license or permit application.

> **<u>Agency's Response</u>: EPA appreciates commenter concerns regarding the inclusion of the term "any existing and readily available data or information related to potential water quality impacts from the proposed project." In response to these comments, EPA is adjusting the regulatory text in the final rule to read "any readily available water quality-related materials that informed" the application or draft general Federal license or permit. See the Agency's Response to Comments in section 3.1.3.2. EPA does not find it necessary to define the term "any readily available water quality-related materials that informed" the application or draft general Federal license or permit since the term is clearly limited to existing water quality-related data or information that was used in the development of the Federal license or permit application or the draft general Federal license or permit. Examples of these readily available materials include maps, studies, or a reference to a website or literature that contain information that informed the development of the application or draft license or permit. The Agency provided these examples in the final rule preamble and clarified that they are materials that are in the project proponent's**

possession or easily obtainable. In response to commenters requesting that the Agency should require the project proponent to accurately identify the extent of waters affected by a proposed project or identify measures to mitigate or eliminate violations (i.e., exceedances) of water quality standards, the Agency notes that this final rule allows certifying authorities to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. As such, certifying authorities may define additional information, such as information suggested by commenters, to the extent it is consistent with this final rule (i.e., additional information that is relevant to the water quality-related impacts from the activity and identified prior to when the request for certification is made).

EPA disagrees with the commenter asserting that project proponents should only be required to provide information related to potential water quality effects from the discharges for which certification is required. *See* Section IV.E of the final rule preamble and Section 5 of the Agency's Response to Comments for further discussion on the activity scope of certification. EPA also disagrees with the commenter's assertion that EPA does not need to require such information in a request for certification. Although the Agency agrees with the commenter that it is to the applicant's benefit to provide the certifying authority with such information and the certifying authority can always deny the request if they are missing information, EPA finds that defining some minimum components of a request for certification increases clarity and efficiency in the certification process.

EPA disagrees with the commenter asserting that EPA lacks authority to define any contents in a state or Tribes' request for certification or the suggestion that this final rule does not empower states and Tribes to determine what information is necessary to start the certification process. The text of section 401 does not define the contents of a "request for certification" or specify at what point in the Federal licensing or permitting process such a request must or may be submitted to the certifying authority. As discussed in Section IV.C.2 in the final rule preamble, EPA finds that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining minimum contents for all requests for certification. In order to effectuate Congress' goals and directives for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. EPA finds this approach best respects longstanding state and Tribal processes familiar to stakeholders and enables states and Tribes to determine their specific information needs.

3.1.4 Certifying Authorities' Ability to Define Additional Contents in a Request for Certification

3.1.4.1 Support Certifying Authorities Defining Additional Contents

Many commenters supported the proposed approach of allowing certifying authorities to define the contents of a request for certification. Commenters provided a variety of reasons why they supported this approach, including asserting that it will ensure a comprehensive review under section 401 in the reasonable period of time and enable states and Tribes to ensure they have needed information to determine whether a project will protect water quality. As a result, these commenters asserted that the certification process will be more efficient and predictable. Some commenters argued that it was unreasonable to start the reasonable period of time before the certifying authority has all the necessary information to make the certification decision. A few commenters argued that this approach aligns with cooperative federalism principles and certifying authorities are best equipped to determine what information they need, including one commenter who noted that many states already have regulations or guidance documents detailing what they need to make a certification decision. A few other commenters also noted that this approach allows states to determine what constitutes a request in accordance with their administrative requirements. One commenter noted that this approach would allow states to synchronize section 401 certification review with CZMA consistency review, while another commenter asserted that this approach would allow states or Tribes to incorporate elements addressing state or Tribal water quality standards, codes, or hydrology.

Several commenters argued that the proposed approach was an improvement over the 2020 Rule's "one-size fits all" approach to request for certification. These commenters asserted that the 2020 Rule upended decades of practice, promoted inefficiencies, and prevented certifying authorities from having critical information to make certification decisions. A few commenters noted that the 2020 Rule's approach would force unnecessary certification denials due to lack of information.

Several commenters requested that the Agency clearly state where the certifying authority has identified required contents of a request for certification, a request for certification must comply with those requirements. One commenter noted that proposed section 121.5(b) does not include an express reference to where the certifying authority has identified contents of a request for certification. One commenter asserted that EPA could provide certifying authorities with the flexibility to identify additional information on an application-by-application basis. A few commenters suggested that the final rule should clarify that certifying authorities may require environmental review documents before the start of the reasonable period of time, such as jurisdictional determinations or the information required for a complete Federal application. Another commenter suggested that the Agency should add a provision that allows the certifying authority to identify any additional information reasonably necessary to determine the potential water quality impacts of the proposed project and appropriate methods and means to address such impacts. One commenter requested EPA expressly define certification request to include any applicable requirements by a certifying authority.

Some commenters asserted that by allowing the certifying authority to set the minimum requirements, and requiring those minimum requirements to be in regulation, the project proponent, the certifying authority,

and the public would be fully informed of when the reasonable period of time begins and ends. One commenter agreed that certifying authorities should explain in advance the expected contents of certification requests, however, providing some information responsive to those expectations should not establish that a certification request has been received sufficient to initiate the reasonable period of time. Accordingly, the commenter asserted that the certifying authority is authorized to request any additional information necessary to clarify the information provided in the application before deeming a certification request complete. The commenter noted that the approach would result in more efficient section 401 decisions as project proponents would be incentivized to promptly respond to requests for information to "complete" their certification requests and initiate the "reasonable period of time," and certifying authorities would not be forced to use limited resources processing requests without the information they need.

Several commenters disagreed that certifying authorities should be limited to defining the contents of a request for certification in regulation. One commenter asserted that such an approach was not supported by the plain language of the CWA. A few commenters asserted that the request does not need to be in a regulation to be transparent or publicly available, while a few commenters urged EPA to consider that some state processes are well-known to the regulated community or have been used for 50 years. A few of these commenters argued that states use different approaches to defining the contents of a certification request, including statute, policy documents, application forms, and guidance. These commenters asserted that placing the contents of a request in regulation was an unnecessary burden, time consuming (e.g., may require legislature approval before going into effect), and interferes with a state's ability to describe the information in certification request. Another commenter suggested that the required elements should be identified during pre-filing meetings. One commenter suggested that EPA should seek information about state and Tribal rulemaking processes first. Another commenter observed that EPA did not discuss a grace period for states to identify regulatory gaps, while a different commenter suggested that EPA should provide a transition period for states and Tribes without regulations so they can initiate the rulemaking process. A few commenters suggested either removing the regulatory requirement, modifying the regulatory text to read "regulation or other state law requirement," or clearly requiring project proponents to comply with applicable state administrative procedures.

<u>Agency's Response</u>: EPA agrees with commenters that certifying authorities are best suited in determining their information needs for making their certification decisions. Allowing certifying authorities to identify additional required contents relevant to the water quality-related impacts from the activity prior to when the request for certification is made is consistent with the proposal and the intent of the Act, is reasonable, responsive to concerns and considerations raised through the public comment process, and ultimately is the most efficient path forward.

The Agency finds it is reasonable for states and Tribes to have the authority to determine what information is necessary to initiate the certification process under section 401 in compliance with their own water quality requirements. In order to effectuate Congress' goals for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed

the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. EPA agrees with commenter assertions regarding the 2020 Rule's approach to the contents of a request for certification (i.e., defining an exclusive list of components for all requests for certification). Defining an exclusive list of components for requests for certification for all certifying authorities could inhibit a comprehensive review under section 401 in the reasonable period of time. The diverse nature of Federal licenses and permits, and the variety of potential water quality impacts from those different types of activities, does not lend itself to a one-size-fits-all approach. Indeed, to define an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies. Specifically, a framework requiring the reasonable period of time to begin before the certifying authority has essential information that it has transparently publicized as necessary to make its own certification decision would be inconsistent with the language, goals, and intent of the statute. Congress clearly did not intend section 401 reviews to turn on incomplete applications, and the reasonable period of time and one-year backstop were added by Congress to ensure that "sheer inactivity by the State…will not frustrate the Federal application." H.R. Rep. No. 92-911, at 122 (1972). Moreover, this approach should be familiar to project proponents who would have followed specific requirements established by states and Tribes during the last approximately 50 years. The Agency's final approach will allow for a transparent and timely process that respects the role of state and Tribal certifying authorities under the cooperative federalism framework of section 401.

EPA has made changes regarding to the manner in which certifying authorities may define additional contents for a request for certification. The Agency originally proposed that the contents of a request for certification be established by a state or authorized Tribe in regulation. After considering public comments, the Agency is not requiring a state or Tribe to define additional contents of a request for certification in regulation. The Agency agrees that that the required contents of a request do not need to be specifically in a regulation to be transparent, publicly available, and provide project proponents with adequate notice. The critical inquiry for state and Tribal certifying authorities to consider is whether the method of identifying the required contents in a request for certification is clear, objective, and authoritative such that notions of fairness and notice are served. The Agency notes that some of the state and Tribal processes are already well known to the regulated community, have been used for 50 years, and are not in regulation. As a practical matter, states and Tribes use different approaches to define the required contents of a request for certification, including statutes, regulations, policy documents, application forms, and guidance. The burden of putting the contents of a request in regulation can be time consuming (e.g., may require legislature approval before going into effect), and may interfere with certifying authorities' ability to describe the information they expect in a request for certification.

EPA appreciates commenter suggestions regarding additional contents. While EPA is not including additional contents aside from those listed in section 121.5(b), the Agency emphasizes that certifying authorities are free to define additional contents for their

requests for certification. As discussed in section IV.C.2 of the final rule preamble, EPA has adjusted the language in the final rule to increase flexibility for certifying authorities to define the additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification. However, EPA emphasizes that such additional contents should be communicated clearly and transparently for project proponents to be aware of before submitting a request for certification. For example, EPA finds that an additional component that "requires a project proponent to submit any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements" by itself would be too vague and would not provide project proponents with a clear, predictable requirement for a request for certification.

In response to the commenter who requested that EPA should provide certifying authorities with the flexibility to identify additional information on an application-by-application basis, the Agency notes that nothing in this final rule precludes a certifying authority from defining different lists of additional components by project type, project size, etc. However, a certifying authority must define such additional components before a request for certification is made. If the certifying authority fails to identify such additional components before the request for certification is made, the project proponent must submit the additional components defined at section 121.5(b). If the certifying authority later determines that additional information would be helpful to inform its decision-making on a request for certification, this final rule does not preclude the certifying authority from asking for additional information after a certification request is submitted. But the certifying authority cannot require additional components, aside from contents listed at section 121.5(a) and 121.5(b), in a request for certification, if it did not already define such additional components prior to receiving the request for certification. As discussed above, the final rule's approach ensures that certifying authorities communicate additional components in a way that is transparent, publicly available, and provides project proponents with adequate notice.

Relatedly, the Agency disagrees with the commenter asserting that certifying authorities should be able to request *any* additional information necessary to clarify the information provided in the application before deeming a request for certification complete. While the Agency recognizes the importance of ensuring certifying authorities being able to define additional information that is necessary to make an informed decision, the Agency also recognizes the importance of providing project proponents with clear and adequate notice of the required contents in a request for certification. The Agency's final rule requires certifying authorities to clearly communicate additional components to project proponents and encourages certifying authorities to utilize the pre-filing meeting process to convey how the project proponent may satisfy such additional components. As noted above, nothing precludes the certifying authority from asking for additional information after a certification request is submitted, but that is separate from the issue of what information is required.

In response to commenters, the Agency restructured section 121.5 to clarify which components are required for all requests for certification versus which components depend on the certifying authority. Section 121.5(c) clarifies that if the certifying authority is a state or authorized Tribe that has identified additional contents for a request for certification, then the project proponent must include those additional contents in a request for certification.

3.1.4.2 Do Not Support Certifying Authorities Defining Additional Contents

Some commenters did not support the proposed approach of allowing certifying authorities to define the contents of a request for certification and asserted that EPA should define a uniform list of contents for all requests for certification. One commenter stated that the Federal regulations should provide an unambiguous, well-defined definition for request for certification so that project proponents, certifying authorities, and Federal agencies know what entails a "proper" certification request. A few commenters asserted that the proposed approach would allow certifying authorities to issue regulations that broadly expand the contents of a request for certification without any oversight or limits. A commenter provided an example in which a certifying authority deemed a certification request for a proposed pipeline project to be incomplete for reasons other than potential water quality impacts.

Some commenters argued that EPA is inviting certifying authorities to engage in the types of practices that were rejected by the Second Circuit in *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018). Some commenters asserted that certifying authorities would vaguely or broadly define the minimum contents or require information that was currently unavailable to stall the start of the reasonable period of time. A few commenters expressed concern over the approach and its departure from the 2020 Rule. One of these commenters asserted that certifying authorities may not clearly identify what information is needed for a certification request and the proposed rule could not enforce any transparency requirements against certifying authorities. The same commenter also argued that the 2020 Rule sought to curb actions, such as certifying authorities using vague and shifting demands for information on fossil fuel infrastructure projects to prolong the application process, and that EPA should not allow these practices to return. Another one of these commenters asserted that EPA knows some certifying authorities subjectively define the contents in a certification request to prolong the review process and asserted they will continue to do so under this proposed approach without any oversight or minimal guidelines. The commenter cited *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38, n.44 (2019) and *State ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992) to support the proposition that certifying authorities will continue to ask for more data to lengthen the time to review a request for certification in contravention of Congressional intent. The same commenter argued that EPA's proposed approach was arbitrary and capricious because EPA did not associate a single adverse environmental outcome with the 2020 Rule's approach. Some commenters argued the result would be a multi-jurisdictional patchwork of different requirements placing undue burdens on project proponents, especially for projects that span across multiple states, and that certain certifying authorities would veto multi-state projects. One commenter asserted that EPA should define one list applicable to all certifying authorities to avoid unwarranted delays and promote predictability, arguing that prior to the 2020 Rule, deferring to certifying authorities led to subjective treatment of projects, scope creep, unwarranted delays and denials, and litigation. The commenter also requested that EPA clarify and support the statement that

the 2020 Rule requirements "resulted in the state issuing more denials due to project proponents not submitting information necessary for project evaluation," arguing that the 2020 Rule did not prevent certifying authorities from asking for more information.

One commenter asserted that EPA cannot delegate the ability to define additional requirements for a certification request to certifying authorities, arguing that deference is owed to EPA, not certifying authorities, because Congress gave EPA regulatory power in the CWA. The commenter also asserted that allowing a certifying authority to determine when it has received sufficient information to begin the reasonable period of time provides essentially no limitation on the review period, in comparison to the Federal Rules of Civil Procedure, and argued that a complete certification request is a separate question from whether a request is submitted. The commenter continued to explain that Congress made it clear that the review period is premised on a request and not detailed information, and that the proposal is contrary to clear Congressional intent, implicates Due Process concerns, and would hinder the permitting process and frustrate infrastructure development.

Another commenter asserted that the proposed approach would allow certifying authorities to require certification requests to include information unrelated to CWA section 404's purpose to regulate the discharge of dredged or fill material and would lead to a more burdensome request process. The commenter also asserted that states and Tribes have other laws and regulations to ensure Federal approvals subject to section 401 are reviewed.

A few commenters who did not support the proposed approach of allowing certifying authorities to define the contents of a request for certification suggested EPA should put boundaries on such abilities. For example, one commenter suggested boundaries to remain consistent with legal precedent and avoid exhaustive or vague lists that a certifying authority could continually deem incomplete. Another commenter asserted that Due Process and basic fairness require certifying authorities to publish such contents clearly and authoritatively and asserted that EPA should clarify that certification request requirements and receipt timing cannot be tied to procedures or requirements that are not adopted and published as regulations. Similarly, another commenter requested that EPA direct certifying authorities to publish detailed requirements for a completed request for certification and timelines for review, asserting that it would promote transparency and consistency. Another commenter suggested that EPA must take steps to ensure certifying authorities' additional requirements are objective, predictable, consistent, and transparent, and asserted that EPA should approve certifying authority additional requirements to ensure they do not become overly burdensome or complicated. The same commenter also suggested that EPA should establish a lead agency to ensure projects move forward while allowing states to develop their own certification request requirements (e.g., monitoring if applications are continuously being sent back, then it could suggest that additional requirements are too high of a threshold for project proponents). Another commenter suggested EPA establish guidelines around what is a complete application to protect states with limited staffing capacity.

One commenter recommended that EPA consider other alternatives such as requiring states and Tribes to alter their requirements for requests for certifications to match those of the Federal agency. The commenter argues this would ensure the information submitted to the Federal agency matches the information provided to states and Tribes.

Some commenters argued that a certifying authorities' ability to request additional information coupled with their ability to deny a request renders the right to specify contents unnecessary. These commenters argued that project proponents have a strong incentive to avoid denial and provide all requested necessary information. A few of these commenters argued that nothing but the request itself is permitted under the statute.

Agency's Response: As an initial matter, the Agency disagrees with commenter assertions that EPA is somehow "delegating" any authority provided under the Act to certifying authorities or that section 401 clearly defines what a "request for certification" entails. Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent. 33 U.S.C. 1341(a) ("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."). The statute does not define either "request for certification" or "receipt." As discussed in Section IV.C.2 in the final rule preamble, EPA finds that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining minimum contents for all requests for certification. In order to effectuate Congress' goals and directives for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. EPA finds this approach best respects longstanding state and Tribal processes familiar to stakeholders and enables states and Tribes to determine their specific information needs.

Relatedly, the Agency also strongly disagrees with the commenter assertions that allowing certifying authorities to define additional contents would "provide[] essentially no limitation on the review period" or that a complete request for certification is a different question from when a request is submitted. Although commenters are correct in that the reasonable period of time begins once a certifying authority receives a request for certification, the commenters fail to explain how anything other than the Agency's approach in the final rule would achieve Congress' goals and directives provided in section 401. Indeed, in order to effectuate Congress' goals and directives for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity.

One commenter also asserted that allowing certifying authorities to define additional contents in a request for certification would hinder the permitting process and frustrate infrastructure development; yet the opposite is true. The commenter fails to address or reconcile the reality that defining an exclusive list of components for requests for certification for all certifying authorities could inhibit, and in fact has inhibited, a comprehensive and efficient review under section 401 in the reasonable period of time. *See, e.g.,* the comment summaries and the Agency's response to comments in Section 3.1.1. The diverse nature of Federal licenses and permits and the variety of potential water quality impacts from those different types of activities do not lend themselves to a one-size-fits-all approach. Indeed, to define an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies. Specifically, a framework requiring the reasonable period of time to begin before the certifying authority has essential information that it has transparently publicized as necessary to make its own certification decision would be inconsistent with the language, goals, and intent of the statute. Congress clearly did not intend section 401 reviews to turn on incomplete applications, and the reasonable period of time and one-year backstop were added by Congress to ensure that "sheer inactivity by the State…will not frustrate the Federal application." H.R. Rep. No. 92-911, at 122 (1972). Moreover, this approach should be familiar to project proponents who followed specific requirements established by states and Tribes during the last approximately 50 years. The Agency's final approach will allow for a transparent and timely process that respects the role of state and Tribal certifying authorities under the cooperative federalism framework of section 401.

EPA agrees with the commenter who asserted that the proposed approach would allow certifying authorities to consider information unrelated to CWA section 404. CWA section 401 applies to *any* Federal license or permit that may result in any discharge into waters of the United States, which includes but is not limited to CWA section 404 permits. However, the Agency disagrees that this would lead to a more burdensome request process. Under the final rule, project proponents are required to provide a request for certification that, at a minimum, includes a copy of the license or permit application and any readily available water quality-related materials that informed the development of the application. This information should not require any additional, independent development by the project proponent since it includes information the project proponent has already developed for the license or permit application process. Certifying authorities are allowed to define additional contents in a request for certification, subject to several guardrails, as discussed further below. The Agency anticipates that these guardrails will prevent a more burdensome process because they ensure the additional contents are predictable and limited to water quality-related impacts, as discussed in more detail below.

EPA also disagrees with commenters asserting that EPA is inviting certifying authorities to engage in the types of practices that were rejected by the Second Circuit in *NYSDEC*. In *NYSDEC*, the Second Circuit never addressed the separate question of whether EPA or certifying authorities have the underlying authority to establish—in advance of receiving a

request for certification—a list of required contents for such a request. Accordingly, the court's holding that the reasonable period of time begins after "receipt" does not preclude the Agency from establishing such a list of minimum "request for certification" requirements, or from allowing certifying authorities to add requirements to EPA's list or develop their own lists of request requirements. Because the statute does not expressly define the term "request for certification," EPA and other certifying authorities are free to do so in a reasonable manner that establishes—in advance of receiving the request—a discernable and predictable set of requirements for a request for certification that starts the reasonable period of time. The Agency knows of no legal authority that has squarely considered this issue of a state or Tribe's underlying authority to identify requirements for a request for certification and come to the opposite conclusion. The Agency decides, consistent with principles of cooperative federalism enshrined in the Act, to continue this lawful, familiar, and time-tested practice.

In response to commenters who discussed concerns over certifying authorities using the proposed approach to define requirements that are overly broad, vague, and/or unavailable, the Agency acknowledges these concerns and has incorporated reasonable changes in the final rule that it anticipates impose sufficient guardrails to prevent those practices, while also allowing certifying authorities to act on a request for certification in a timely and informed manner. First, EPA added text at final rule section 121.5(c) that such additional contents are "relevant to the water quality-related impacts from the activity," consistent with the scope of this final rule. EPA finds that contents of requests for certification that are substantively beyond the scope of water quality-related impacts cannot be reasonably necessary to make an informed decision regarding the potential water quality-related impacts from the activity, and thus would not be in conformity with the regulation. Second, section 121.5(c) itself limits the ability of a certifying authority to request materials to those "identified prior to when the request for certification is made." Although the Agency is allowing states and authorized Tribes to define their own additional requirements for a request for certification, the rule provides a backstop for those states or authorized Tribes that either do not identify those additional requirements prior to when the request for certification is made or change their requirements after the request for certification is made. In other words, certifying authorities cannot subsequently modify or add to the required contents of a request for certification after the request was submitted. This does not mean a certifying authority could not ask for additional information after a request for certification is made; rather, a certifying authority cannot alter the required contents of a request for certification after it is received. Indeed, the Agency finds this approach creates a bright line for project proponents seeking to avoid unexpected shifts and identify the necessary contents for a request for certification with certainty. Some certifying authorities rely on a "complete application" to start the certification review process. In the Agency's view, a state requirement for submittal of a complete application, when the contents of such complete application are clearly identified ahead of time, is not inherently subjective and can be defined by the information requested by regulation or on a form. Establishing such a list of required elements in advance is consistent with the rationale of

NYSDEC **that criticized the state for relying on its "subjective" determination following submission regarding whether the request was "complete."**

The Agency expects that those states and authorized Tribes that choose to identify additional contents in a request for certification will do so clearly enough to provide project proponents with full transparency as to what is required. Relatedly, to remain consistent with legal precedent, states and authorized Tribes should avoid non-exhaustive or vague lists that a certifying authority could continually deem incomplete. When developing their lists of additional contents in a request for certification, EPA recommends that other certifying states and authorized Tribes look to section 121.5(b) for the list of contents EPA has outlined for requests for certification when it acts as a certifying authority as a guide to help the certifying state or authorized Tribe develop its own list. Although one commenter suggested that EPA establish guidelines around what is a complete application, the Agency finds such guidelines unnecessary in light of the expectations for additional components discussed above and in the final rule preamble.

EPA disagrees with the commenters who asserted that the Agency's proposed approach to the additional contents in a request for certification was arbitrary and capricious and disagrees that the ability to request additional information either obviates the need to define additional contents in a request for certification or reduces the risk for more denials under the 2020 Rule. First, as discussed above, the Agency finds its approach in this final rule best effectuates Congress' goals and directives for section 401 in the limited amount of time provided by the Act. Second, as discussed in section 3.1.1, commenters identified several challenges with the 2020 Rule's approach to the request for certification, which further justifies and supports the Agency's approach in this final rule. While the commenter is correct that nothing in the 2020 Rule prevented a certifying authority from requesting more information during the reasonable period of time, that is not tantamount to requiring such information in a request for certification. Indeed, under both the 2020 Rule and this final rule, a project proponent is only required to provide the contents defined in a request for certification to start the reasonable period of time. While it may be in the project proponent's best interest to provide such information, neither the 2020 Rule nor this final rule compel the project proponent to provide additional information requested after the reasonable period of time begins.

The Agency acknowledges that its approach at section 121.5 may result in different requirements for a request for certification across jurisdictions. However, as discussed above, defining an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies. ***See*** **discussion above. The Agency disagrees that this approach would place undue burdens on project proponents. Rather, this approach should be familiar to project proponents who followed specific requirements established by states and Tribes during the last approximately 50 years. The Agency's final approach will allow for a transparent and timely process that respects the role of state and Tribal certifying authorities under the cooperative federalism framework of section 401. In response to commenter assertions that the final rule's approach to the**

request for certification would somehow lead to "vetoes" of multi-state projects, the Agency observes that section 401 explicitly authorizes certifying authorities to deny section 401 certification for projects that will not comply with water quality requirements. These commenters fail to explain how the contents of a request for certification would increase the likelihood of this clear statutory outcome for multi-state jurisdiction projects. In fact, the Agency finds that providing states and authorized Tribes with the ability to define additional contents of a request for certification should ultimately reduce the need for certifying authorities to request additional information from project proponents after the request for certification has been submitted. In turn, this could allow for a more efficient certification process that would benefit all projects, both those in one jurisdiction and those that span across multiple jurisdictions. The Agency recommends that project proponents, certifying authorities, and Federal agencies work together to determine the most efficient and effective means of communication before the certification process begins to ensure a common understanding of the contents of a request for certification.

EPA disagrees with the commenter suggestion that EPA should establish a lead agency to oversee if the final rule's approach to additional contents of a request for certification is working. EPA finds that the guardrails placed on a certifying authority that wishes to define additional contents in a request for certification (as discussed above) are sufficient to ensure an efficient and transparent process consistent with section 401.

EPA declines to adopt the recommendation from one commenter that the final rule should require states and Tribes to alter their request for certification requirements to match the Federal agency. As discussed above, the Agency reads the term "request for certification" in a way that best effectuates Congress' goals and directives for section 401 in the limited amount of time provided by the Act. The Agency does not find that the commenter's suggestion is necessary to meet that objective. However, EPA observes that this final rule does not preclude certifying authorities from coordinating with Federal agencies to determine if there are similar or identical information needs. For example, if the Federal license or permit application typically contains certain water quality information that the state or Tribe intends to rely upon to act on the request for certification, the certifying authority may not need to include such information in its additional contents because the application will already be included in the request for certification for an individual license or permit under this final rule. EPA encourages certifying authorities to determine to what extent the minimum contents for requests for certification cover the potential information needs they may have in analyzing a request for certification. This could obviate, or reduce, the need to define or extent of additional contents (because they would already be included with the application).

The Agency also disagrees with the commenter who asserted that states and Tribes should rely on other laws or regulations to ensure Federal approvals subject to section 401 are reviewed. Section 401 authorizes certifying authorities to certify or deny any federally licensed or permitted activity that may result in any discharge into waters of the United States. Nowhere in section 401 did Congress suggest that section 401 review should be

supplanted or displaced by reviews pursuant to other laws or regulations. In fact, such a result could lead to redundant review efforts that slow down, rather than speed up, the Federal licensing or permitting process.

3.1.5 EPA Defining the Minimum Components, Including Additional Components Where a Certifying Authority Does Not Define Additional Components

3.1.5.1 Support Proposed Default List of Contents

Some commenters supported EPA's inclusion of minimum certification request requirements for all certifying authorities and argued that it would provide predictability and transparency for stakeholders. Several of these commenters expressed support for this minimum list of requirements and the flexibility for certifying authorities to define other components. A few commenters recommended that EPA extend the minimum requirements proposed at section 121.5(c) to all requests for certification, and one of these commenters recommended adding a sixth element that requires project proponents to "include information that addresses all applicable project-specific information required by the certifying authority to ensure compliance with water quality requirements under 40 CFR §121.1(m)," and asserted that certifying authorities would be required to develop clear guidance to describe the types of additional information that would be required. Another commenter recommended that the Agency should revise proposed section 121.5(a) to be clear that these are minimum requirements for a request for clarification.

A few commenters agreed that EPA's additional contents for a request for certification should be the default if a certifying authority does not have such a list. One commenter recommended that EPA should allow certifying authorities to determine whether a project proponent has satisfied the requirements proposed at section 121.5(c) when it applies.

One commenter suggested that the minimum requirements for the request for certification should provide the certifying authority with the information it needs to make a certification decision at the outset of the reasonable period of time and asserted that the vast majority of delays in processing applications arise from the failure of project proponents to provide the certifying authority with sufficient information to evaluate the proposed project.

Agency's Response: EPA agrees with commenters that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining the minimum contents for all requests for certification. EPA finds this approach best respects longstanding state and Tribal processes familiar to stakeholders and enables states and Tribes to determine their specific information needs. However, EPA is also finalizing additional contents for requests for certification to EPA or states and Tribes that fail to define such additional contents to provide stakeholders with greater certainty and predictability in the certification process. The final rule establishes an approach that provides efficiency for requests for certification, while staying consistent with cooperative federalism principles and case law. *See also* the Agency's response to comments in Section

3.1.4 for further discussion on certifying authority ability to define additional contents in a request for certification.

In this final rule at section 121.5(b), EPA is finalizing a slightly different list of additional contents in a request for certification than what was proposed that combines components proposed and offered as alternatives in the preamble to the proposed rule, due to the feedback received in the public comments and the removal of a draft Federal license or permit from the minimum contents for all requests for certification. The final list of additional contents for a request for certification when EPA is the certifying authority (or when states or Tribes fail to define such additional contents) includes seven components derived from the proposed approach and the alternative approach. *See* section 121.5(b); *see also* the Agency's response to comments in Section 3.1.5.2.

This final rule does not create the presumption that the contents identified at section 121.5(b) will be sufficient for all scenarios and all certifying authorities. Rather, the Agency is providing a list of minimum contents as a baseline and allowing state and Tribal certifying authorities to define additional contents for each request for certification. As discussed in Section IV.C.2 of the final rule preamble, the additional contents in section 121.5(b) would not apply where a certifying authority has established its own list of requirements for a request for certification. However, EPA recommends that certifying authorities wishing to establish their own lists of additional contents of requests for certification consider the requirements outlined by the Agency in section 121.5(b), as these contents reflect the additional information deemed necessary by EPA for the Agency to initiate its analysis of a certification request on a Federal license or permit application.

In response to the commenter who recommended that the Agency should revise proposed section 121.5(a) to be clear that these are minimum requirements for a request for clarification, the Agency restructured section 121.5 to clarify which components are required for all requests for certification versus which components depend on the certifying authority.

In response to the commenter who recommended that EPA allow certifying authorities to determine whether a project proponent has satisfied the requirements proposed at section 121.5(c), final rule section 121.6(a) provides that "the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in [section] 121.5, in accordance with the certifying authority's applicable submission procedures." This approach provides certifying authorities with a role in determining when the clock starts (i.e., by defining additional contents of a request for certification and applicable submission procedures), while also providing transparency and consistency around the process for requesting certification and starting the reasonable period of time for project proponents.

3.1.5.2 Do Not Support Default List of Contents

Several commenters took issue with EPA defining the minimum contents of a request for certification. A few commenters asserted that it is unnecessary for EPA to define what information the state or Tribe needs to act on a certification application in a timely and informed manner, including one commenter who noted that their state's certification request provision has allowed the state to make multiple informed and timely certification decisions. Another commenter argued that the proposed section 121.5 does not ensure a certifying authority has all the information it needs to address state water quality standards and recommended that the final rule should allow certifying authorities to define this information to ensure they have all necessary information to render a decision under applicable Federal and state law. Another commenter asserted that EPA should not define minimum requirements for certifying authorities, aside from EPA, and should not describe certifying authority's requirements as additional requirements. One commenter asserted that EPA does not have the authority to set procedures to be followed by states in reviewing requests for certification. Another commenter argued that the proposed minimum requirements for a certification request contravenes EPA's stated intent to further cooperative federalism and asserted that EPA failed to explain why the minimum requirements are essential to a certifying authority's request. The commenter asserted that EPA conflated the information necessary for a request with the information certifying authorities may request in their review. One commenter argued that a draft permit, alone, does not provide all the information necessarily required for a certifying authority's review, noting that states such as California and New York require other environmental review documents under their state administrative procedures. The commenter suggested that EPA should require project proponents to provide a complete application pursuant to state administrative procedures.

Several commenters expressed concern that EPA's default list of additional certification request components was inadequate and did not capture all the items a state may need for its analysis. One commenter expressed concern over the list because it would take time for states to go through the rulemaking process and make their own additional requirements and asserted that under the 2020 Rule, the reasonable period of time was too short to ensure certifying authorities could request additional information. Another commenter expressed concern that EPA's default additional components create a presumption that EPA's list is sufficient for a request for certification, even though the commenter asserts that such an interpretation is misplaced and inconsistent with the structure and intent of section 401. The commenter suggested that EPA should make it clear that states and Tribes have the authority to specify the contents of certification requests. A different commenter stated that EPA should not define other elements as minimum requirements and should instead set a maximum burden that certifying authorities may place on project proponents. One commenter expressed concern that proposed section 121.5 did not describe a process for requesting supplemental information.

Some commenters provided suggestions for the default additional contents. Another commenter suggested that all requests should include a detailed analysis for stormwater and how the project design will protect waters from stormwater pollution. The same commenter also suggested that requests for CWA section 404 projects should include a detailed sampling and analysis plan to ensure contaminated materials are properly disposed. Another commenter stated that state and Tribal regulations and public statements have identified the types of information necessary for certification review and the request, including: (1) information on all of the project's potential impacts to water quality, including effects on

the water's chemical, physical, and biological integrity; (2) whether and to what extent the project might involve multiple discharges into the same receiving waters that could have cumulative effects; (3) methods of construction and operating procedures; (4) description of compensatory mitigation actions to offset foreseen impacts; and (5) preconstruction monitoring or assessment data of resource condition. One commenter suggested the following minimum requirements: (1) all discharges, including their volumes, locations, potential to contain pollutants, and chemical, physical, and biological characteristics; (2) all receiving waters, including their locations, classifications, designations, impairments, and maps delineating such waters; (3) environmental impacts caused by the project as a whole; (4) cumulative effects; (5) alternatives to the project and discharges; (6) a description of how the applicant will monitor effects; and (7) a list of avoidance and mitigation practices as well as restoration/remediation plans. Another commenter specified that EPA should require additional information on discharges including: (1) designation of the waterway; (2) volume of the discharge; (3) how and to what extent the discharge might impair the waterway and its existing designation; and (4) whether and to what extent the project might result in more than one discharge in the same waterway that could have cumulative effects. A few commenters provided detailed, lengthy lists of additional information that may be requested by certifying authorities, including but not limited to various plans, photographs, field surveys, construction methods, and maps. Another commenter asserted that a request should include the requirements for a complete application that are at least as stringent as Federal agencies making similar determinations, such as the Corps' requirements for complete CWA section 404 permit applications.

A few commenters recommended supplementing the default additional request components with the six additional components listed in the preamble, and as suggested by one of these commenters, revising as appropriate to address any duplication. While mostly agreeing with the six alternative additional components EPA listed, a commenter provided the following edit to the sixth component to include mitigation: "Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements such as, but not limited to, an appropriate mitigation plan, demonstration of compliance with best management practices, etc." However, one commenter asserted that the six alternative additional components would not provide sufficient information without a draft license or permit. One commenter who supported the additional request components listed in the preamble recommended modifying the sixth component to read "Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements such as, but not limited to, an appropriate mitigation plan, demonstration of compliance with best management practices, etc." The same commenter asserted that the list with this addition would be sufficiently clear and transparent to stakeholders and ensure certifying authorities have the materials necessary to make a decision.

One commenter asserted that EPA's default list of additional components was flawed because the more detailed description of that information was limited to facts about discharges instead of the project activity, such as "any additional information to inform whether any discharge from the proposed project will comply with applicable water quality requirements." The same commenter suggested that EPA should ensure the rule does not cause additional challenges for certifying authorities seeking information to inform their analysis.

One commenter recommended that the project proponent provide a copy of the draft permit application and the draft permit, any existing and readily available data or information related to potential water quality impacts from the proposed project, and a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge.

A few commenters did not find the additional requirements for the alternative approach to be necessary because the information would already be included in the application or under current state requirements. One of these commenters asserted that these requirements were not applicable to hydropower projects and generally focused on dredge and fill projects. One of these commenters expressed confusion over whether the additional requirements for the alternative approach applied to all requests for certification or just to EPA. Another commenter who found the additional requirements for the alternative approach to be unnecessary recommended that EPA only require the submission of a license or permit application and no additional contents if the certifying authority has established its own definition of request for certification in its own regulations.

Agency's Response: The Agency disagrees with commenters asserting that it is unreasonable for the Agency to define minimal information needs for a request for certification or that it contravenes cooperative federalism principles (some commenters said "unnecessary" but the relevant inquiry is whether doing so is "reasonable," not whether it is "necessary"). EPA finds that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining minimum contents for all requests for certification. EPA finds this approach best respects longstanding state and Tribal processes familiar to stakeholders and enables states and Tribes to determine their specific information needs. EPA is also finalizing additional contents for requests for certification to EPA or state and Tribes that fail to define such additional contents to provide stakeholders with greater certainty and predictability in the certification process. The final rule establishes an approach that provides efficiency for requests for certification, while staying consistent with cooperative federalism principles and case law. Relatedly, EPA disagrees with the commenter suggesting that the Agency should set a maximum burden that the certifying authority may place on a project proponent, as opposed to defining a minimum list of contents for a request for certification. EPA finds that such an approach would not support the cooperative federalism principles that underlie the CWA and section 401. The final rule approach promotes cooperative federalism while also providing a clear and efficient certification process (i.e., clearly defined minimum contents for all requests for certification and clearly defined additional contents for requests for certification in the event a certifying authority fails to define any additional contents for a request for certification prior to receiving a request).

EPA disagrees with commenters asserting that the minimum requirements and/or additional components required when EPA is the certifying authority are not adequate. To provide transparency and predictability, the final rule requires project proponents seeking certification from a state or authorized Tribe that has not identified additional contents of a

request for certification to submit the additional contents identified at section 121.5(b). *See* section 121.5(d). However, this final rule does not create the presumption that the contents identified at section 121.5(b) will be sufficient for all scenarios and all certifying authorities. Rather, the Agency is providing a list of minimum contents as a baseline and allowing state and Tribal certifying authorities to define additional contents for each request for certification. As discussed in section IV.C.2 of the final rule preamble, the additional contents in section 121.5(b) would not apply where a certifying authority has established its own list of requirements for a request for certification. EPA recommends that certifying authorities wishing to establish their own lists of additional contents of requests for certification consider the requirements outlined by the Agency in section 121.5(b), as these contents reflect the additional information deemed necessary by EPA for the Agency to initiate its analysis of a certification request on a Federal license or permit application.

To be clear, this final rule does not preclude certifying authorities from asking for more information after they receive a request for certification and the reasonable period of time begins, if the certifying authority determines additional information would help inform its decision-making on the request for certification. The Agency is not defining a process for requesting additional information after the reasonable period of time begins. However, these requests for additional information by a certifying authority should be targeted to information relevant to the potential water quality-related impacts from the activity. EPA also encourages certifying authorities and project proponents to discuss the necessary information that must be part of the request for certification during the pre-filing meeting process.

In response to the commenter who expressed concern over the time it would take for states to develop additional contents through rulemaking, the Agency is no longer requiring a state or authorized Tribe to define additional contents of a request for certification in regulation. *See* the Agency's response to comments in section 3.1.4.

EPA does not agree with commenters asserting that the additional components were unreasonable. While some commenters said doing so was unnecessary, as noted above, the relevant inquiry is whether EPA's inclusion of the additional components is "reasonable," not whether it is "necessary". EPA anticipates that the list of additional required contents at section 121.5(b) is appropriate for EPA as a certifying authority and as a default list for those other certifying authorities that have not identified additional required contents for requests for certification. EPA also does not intend for this list to be duplicative. Accordingly, EPA has added text at final rule section 121.5(b) to clarify that a project proponent only needs to provide the additional components where such components are not already included in the minimal contents of a request for certification defined at section 121.5(a). For example, if a map or diagram of the proposed activity site is part of the Federal license or permit application, the project proponent would not be required to submit a second copy of the map or diagram.

The Agency appreciates commenter suggestions regarding alternative components that should be included in EPA's request for certification and in state or Tribal certifying authority requests where the state or Tribe fails to define additional components for a request for certification. EPA is finalizing a slightly different list of additional contents in a request for certification than what was proposed that combines components proposed and offered as alternatives in the preamble to the proposed rule, due to the feedback received in the public comments and the removal of a draft Federal license or permit from the minimum contents for all requests for certification. The Agency has revised the list of additional contents to reduce duplication between the minimal contents of a request for certification. Additionally, the Agency recognizes that some of the components listed at section 121.5(b) may not be applicable if the project proponent is a Federal agency seeking certification on the issuance of a general Federal license or permit. Accordingly, the Agency has added regulatory text at section 121.5(b) to clarify that only the applicable additional components need to be included in a request for certification to EPA. *See* Section IV.C.2.b for further discussion on the additional components included at final rule section 121.5(b) as well as those components that were not included in the final rule. Although the Agency did not include all suggested additional contents in this final rule, certifying authorities are free to define additional contents for their requests for certification. EPA has adjusted the language in the final rule to increase flexibility for certifying authorities to define the additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification. Such additional contents should be communicated clearly and transparently for project proponents to be aware of before submitting a request for certification.

3.1.6 Other Requirements for a Request for Certification

One commenter expressed support for including "a list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and current status of each authorization" in a request, noting that it is required under the 2020 Rule, would not be burdensome to project proponents, and would allow certifying authorities and the public to provide constructive comments on the request.

Another commenter expressed support for requiring requests for certification to contain identification of the applicable Federal license or permit.

A couple of commenters suggested that EPA should clarify that the project proponent should sign a request for certification to clarify who in proposed 40 CFR 121.5(a) should sign a request for certification.

<u>Agency's Response</u>: Similar to the 2020 Rule, the Agency is finalizing the requirement that the project proponent provide a list of other authorizations that are required for the proposed activity and the current status of such authorizations. This requirement will allow the Agency to assess how water quality impacts may be addressed through other Federal, state, or local authorizations and potentially reduce redundancies or inconsistencies

between the certified Federal license or permit and other authorizations. When the project proponent is a Federal agency seeking certification, the Agency does not expect the Federal agency to be able to produce such a list. Typically, when a Federal agency seeks certification, it is seeking certification on general Federal licenses or permits that would be used by future project applicants. Therefore, at the time of the request for certification, the Federal agency is likely unable to provide any information on which authorizations, if any, are required for such a future project.

Based on commenter recommendations, EPA is not finalizing the components of the proposed list that are expected to be captured by the requirements in section 121.5(a), such as the name and address of the project proponent, the project proponent's contact information, and identification of the applicable Federal license or permit, including the Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency. Although this type of background information was included in the 1971 Rule and the 2020 Rule, this information is unnecessary and redundant to both the Federal license or permit application and draft Federal license or permit.

The Agency appreciates commenter suggestions on how to increase clarity regarding the request for certification. Consistent with section 401(a)(1), this final rule clearly requires project proponents to obtain certification for any federally licensed or permitted activity that may result in any discharge from a point source into waters of the United States. The term "project proponent," which is defined at section 121.1(h), is meant to include the applicant for a Federal license or permit, as well as any other entity that may seek certification (e.g., agent of an applicant or a Federal agency, such as EPA when it is the permitting authority for a NPDES permit). Accordingly, the project proponent is responsible for providing a request for certification that complies with section 121.5, including signing the request for certification.

3.2 Receipt of a Request for Certification

3.2.1 Proposed Definition of "Receipt"

3.2.1.1 Support for Proposed Definition of "Receipt"

Some commenters supported EPA's proposed definition of receipt, specifically that the certifying authority and not the Federal agency is responsible for determining when a request for certification is received, and that the reasonable period of time begins upon receipt of a request by the certifying authority. Some commenters noted the proposed definition of receipt will ensure consistency between the rule and existing state and Tribal laws, and it will also allow states and Tribes to define "request for certification" in a manner that safeguards comprehensive state and Tribal review.

Some commenters asserted that due to the wide variety in the types of projects in need of certification, the regulations should not dictate when the review clock starts. Rather, the commenters asserted that states should determine when it starts, and when they have sufficient information to conduct a proper review,

provided all reviews fall within the statutory one year limit. Similarly, another commenter said that the process of obtaining the information needed is not entirely within the certifying authority's control, and therefore, a one-size-fits-all approach is not appropriate. A few commenters noted that states and Tribes are in the best position to identify when they have received a request for certification. Another commenter said that the benefits to states and Tribes of ensuring an adequate certification request is significant, because if states and Tribes do not have what they need to make certification decisions, they risk waiving their certification authority if they spend time trying to gather information while the clock for certification winds down. The same commenter noted that not having adequate information may lead to unnecessary denials, where states or Tribes could be forced to deny a certification because it lacks adequate information to make an informed certification decision. Another commenter stated that provisions defining "receipt" and "request" are much more reasonable interpretations of section 401 than the position taken in the 2020 Rule, because they seek to ensure that a certifying authority's time to review cannot begin without an adequate application. One commenter concluded that interpreting section 401 such that the clock starts to run after an applicant provides a set of materials to a certifying authority without regard for the specific needs of the state, does not benefit anyone.

A commenter noted that the largest source of delay in the certification process stems from the project proponent's failure to provide the certifying authority with requested information. The commenter stated that ensuring that project proponents know, in advance, what a state or Tribe expects of them will help cut down on delays, while also ensuring that states and Tribes are not put into an unjustifiable position of having the clock begin to run without a baseline of necessary information. The commenter asserted that clarity would also help to alleviate disputes between applicants and certifying authorities over what information is necessary, as was the case with the proposed Constitution Pipeline project in New York State. The commenter continued on to argue that had the company provided that information at the outset, it could have minimized delay and possibly avoided New York State's denial of its application. *See Constitution Pipeline Co., v. N.Y. State Dep't of Env't Conservation*, 868 F.3d 87 (2d Cir. 2017). Outside of the example of Millennium Pipeline, the commenter asserted that it was not aware of any instance in which a court held that a certifying authority caused undue delay by adopting an overly subjective definition of when an application is "complete," or what elements must be provided for a certifying authority to be in "receipt" of a request. Furthermore, the commenter argued that if there is any question that the submission practice requirements the state or Tribe is adopting are too subjective or broad, they may be challenged on their face in one proceeding, rather than application-by-application contests like the one in Constitution.

Some commenters agreed with EPA's position that the U.S. District Court of Appeals for the Second Circuit's decision in *New York State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) does not preclude a certifying authority from establishing procedures for effective filing of a certification request. One commenter noted that section 401 does not define "receipt."

Some commenters supported the "reasonable period of time" beginning when the certifying authority receives what it considers a "complete" application. A few commenters noted that the Second Circuit was not the only authority on this question and pointed to the Fourth Circuit's decision in *AES Sparrows Point LNG v. Wilson* in support of the reasonable period of time beginning when the certifying authority deems the application complete. 589 F.3d 721 (4th Cir. 2009). One of these commenters argued that Federal

agencies have interpreted section 401 as requiring an administratively complete application to trigger the waiver period and provided the example that the Corps' regulations require the district engineer to determine "that the certifying agency has received a valid request for certification" before determining whether waiver has occurred. 33 C.F.R. § 325.2(b)(1)(ii). The commenter offered the example that historically, the Corps interpreted the requirement for a "valid" request to mean a request "made in accordance with State laws" since "the state has the responsibility to determine if it has received a valid request." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986); *see AES Sparrows Point LNG*, 589 F.3d at 729-30 (upholding the Army Corps requirement for a "valid," interpreted synonymously with "complete" application). One commenter, discussing the Second Circuit case, asserted that it begged belief that Congress intended section 401 approvals to turn on incomplete—perhaps overwhelmingly incomplete—applications and that the statutory one-year backstop to the "reasonable period of time" was added to ensure that "sheer inactivity by the State…will not frustrate the Federal application"—not to prevent certifying authorities from obtaining in good faith the information needed to process the request. H.R. Rep. No. 92-911, at 122 (1972). Similarly, another commenter argued that they did not understand how the Second Circuit determined that denying certification on incomplete applications (instead of using a completeness standard) would make the certification process more efficient, asserting that the certifying authority's need for sufficient information should take precedence and citing *AES Sparrows Point*.

Another commenter noted that many states require a complete application to trigger public notice and comment, *see, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a), because a complete application is necessary to give the public a meaningful opportunity for review. *See, e.g., Ohio Valley Envt'l Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D.W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked"). The commenter concluded that only a complete application should trigger the reasonable period of time, to ensure that states can fully and lawfully exercise their authority under section 401.

One commenter described FERC's requirement for applicants to request water quality certification within 60 days of FERC's notice that it is ready to begin environmental analysis of the license application under NEPA. The commenter asserted that such a deadline does not necessarily coincide with the applicant's or the certifying authority's determination of when the record is sufficient enough for the purposes of a certification decision.

<u>Agency's Response</u>: The statute provides that the reasonable period of time begins "after receipt of such request." 33 U.S.C. 1341(a)(1). The statute does not define the term "receipt of such request," nor does it define how a request for certification must be received by a certifying authority. The Agency proposed to define "receipt" at section 121.1(k) to mean "the date that a request for certification, as defined by the certifying authority, is documented as received by a certifying authority in accordance with the certifying authority's applicable submission procedures." The final rule merely simplifies the proposed rule's approach to when the reasonable period of time begins by placing the definition of receipt in section 121.6(a).

EPA provides in the final rule at section 121.6(a) that "the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in [section] 121.5, in accordance with the certifying authority's applicable submission procedures." This approach provides certifying authorities with a role in determining when the clock starts (i.e., by defining additional contents of a request for certification and applicable submission procedures), while also providing transparency and consistency around the process for requesting certification and starting the reasonable period of time for project proponents. *See also* the Agency's Response to Comments in section 3.1.

The Agency recognizes that some certifying authorities rely on a "complete application" to start the certification review process. In the Agency's view, a state requirement for submittal of a complete application, when the contents of such complete application are clearly identified ahead of time, is not inherently subjective and can be defined by the information identified by regulation or on a form. Establishing such a list of required elements in advance is consistent with the rationale of *NYSDEC* that criticized the state for relying on its "subjective" determination following submission regarding whether the request was "complete."

While acknowledging the ruling in *NYSDEC*, the Agency also recognizes, as commenters above noted, that the Fourth Circuit ruled in support of the reasonable period of time beginning when the certifying authority deems the application complete. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009). The final rule approach is consistent with this decision in that regard, and not inconsistent with *NYSDEC*, as explained above.

In response to the commenter discussing FERC requirements for submission of a request for certification, EPA is aware that the Corps and FERC have separate section 401 implementation regulations addressing their respective Federal licensing or permitting programs. *See e.g.*, 33 CFR 325.2 (water quality certification on section 404 permits); 18 CFR 4.34 (water quality certification on FERC hydropower licenses). EPA expects that Federal agencies with existing section 401 implementing regulations will evaluate their regulations and other guidance documents to ensure consistency with this final rule. *See also* the Agency's Response to Comments in Section 3.1.

3.2.1.2 Do Not Support Proposed Definition of "Receipt"

Some commenters expressed concerned about EPA's proposed definition of receipt and asserted that allowing the certifying authority to determine whether it has received a "complete request" for certification would create variable standards for determining when the clock begins to run that could result in a lack of consistency among authorities about when a request is considered complete and when the reasonable period of time clock starts. Some commenters also argued this would cause significant uncertainty for project timelines, resulting in construction delays and cost increases. A few commenters expressed concern that the proposed definition would limit predictability and could allow certifying authorities to use the requirement to delay the certification process. One of these commenters argued that the value of having a timeline limitation would be unduly diluted if certifying authorities can consider

requests for certification to be incomplete, even if they contain all the requirements found in proposed section 121.5(c). The commenter recommended that the reasonable period of time should commence on the date that the project proponent fulfills their obligation to provide the information required by proposed section 121.5(c) to the certifying authority. A different commenter disagreed that the reasonable period of time could not start until after the draft license or permit, noting that EPA provided no timeline for such drafts or any assurance that other agencies will make draft licenses or permits available.

A few commenters asserted that the Agency should use the plain language meaning of receipt and remove the ability of certifying authorities to define a request for certification. One of these commenters asserted that the term "receipt" is unambiguous, and EPA's proposed definition contravened any commonsense construal of the term "receipt" so that the term is "wholly divorced from the act of receiving and instead refers to some indeterminable point after a certifying authority receives a certification request, reviews it, documents that it was received, and transmits that confirmation of receipt to the project proponent and federal agency." The commenter stated that FERC's longstanding position is that the reasonable period of time begins when an application for water quality certification is actually filed with a state agency, instead of the date when an application is accepted for filing in accordance with state law. *See* Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters, Order No. 533, FERC Stats. & Regs. ¶ 30,932 at 30,345-46 (1991). The same commenter stated that while the Agency is permitted to adopt a new policy position, it must give "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy," *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. at 515, and argued EPA has not done so. Another commenter asserted that the value of having a timeline limitation would be unduly diluted and a "complete application" threshold would allow certifying authorities to initiate inefficient, iterative request loops before the reasonable period of time can begin.

Some commenters stated that section 401 identifies that the period for a certifying authority's section 401 review is initiated upon "receipt of such request" and that the U.S. Court of Appeals for the Second Circuit recognized that by creating a "bright-line rule" that the "receipt" of a section 401 request is the beginning of review. *NYSDEC v. FERC*, 884 F.3d at 455. Similarly, some commenters argued that EPA's proposal to define the term "receipt" as "the date that a request for certification, as defined by the certifying authority, is documented as received" is inconsistent with the section 401, as interpreted by the courts, and opens the door to the practice that the Second Circuit rejected. A few commenters asserted that the Second Circuit held that allowing states to determine when requests are "complete" could create a "subjective standard" in violation of the bright line requirements of section 401. *NYSDEC*, 884 F.3d at 455-56.

One commenter argued that EPA's references to "completeness" determinations in other permitting programs are misplaced, arguing that the Federal permitting agency interprets the sufficiency of a permit application that it is legally required to act upon, whereas under Section 401, the certifying authority is not tasked with issuing a permit, reviewing a permit application, or even responding at all. The commenter argued that this review is not a permitting process and that certifying authorities do not need to dictate the contents of a section 401 certification request to protect their opportunity for meaningful review of proposed discharges.

Some commenters noted that if an applicant fails to provide adequate information or does not provide sufficient information during the section 401 review, the certifying authority can deny the request for certification. Furthermore, a few commenters highlighted that mandatory pre-filing meeting requests can identify any information needs and help ensure an adequate record for a certifying authority to conduct its review.

Agency's Response: While not retaining a definition of "receipt" in the final rule, EPA maintains that the reasonable period of time clock starts when the certifying authority has received a request for certification, as defined in section 121.5 of the final rule, in accordance with the certifying authority's applicable submission procedures. *See* 40 CFR 121.6(a). For reasons discussed in Section IV.C of the final rule preamble and throughout this section of the Agency's Response to Comments, EPA disagrees with commenters suggesting that the Agency remove the ability of certifying authorities to define a request for certification and finds that the final rule preamble and the Agency's Response to Comments document provide a reasoned explanation for the Agency's position.

EPA disagrees with commenter assertions that having the certifying authority determine when it has received a request for certification will lead to certifying authorities subjectively determining when a request for certification has or has not been submitted. Rather, this final rule expressly rejects such practices by limiting requests for certification from state and Tribal certifying authorities with additional required components to those that are identified prior to when the request for certification is made. *See* 40 CFR 121.5(c). This does not mean a certifying authority could not ask for additional information after a request for certification is made; rather, a certifying authority cannot alter the required contents of the request for certification after it is received.

The Agency strongly disagrees with the commenter asserting that the Agency's approach to receipt refers to an indeterminable point after a certifying authority receives a certification request, reviews it, documents that it was received, and transmits that confirmation of receipt to the project proponent and Federal agency. On the contrary, this final rule clearly defines the precise point in time when receipt occurs and the reasonable period of time begins – when the certifying authority has received a request for certification, as defined in section 121.5 of the final rule, in accordance with the certifying authority's applicable submission procedures. To be clear, the reasonable period of time does not start with the written confirmation from the certifying authority that it received a request for certification. Rather, consistent with section 401(a)(1), it begins on the date that the project proponent submitted the request for certification as defined in this final rule.

EPA also disagrees with commenter assertions that the final rule's approach to the request for certification and receipt would cause timeline uncertainty, delays, or increase costs. Under the final rule, project proponents are required to provide a request for certification that, at a minimum, includes a copy of the license or permit application and any readily available water quality-related materials that informed the development of the application (for individual licenses and permits). This information should not require any additional,

independent development by the project proponent since it includes information the project proponent has already developed for the license or permit application process. Certifying authorities are allowed to define additional contents in a request for certification, subject to several guardrails, as discussed in Section IV.C.2 of the final rule preamble and section 3.1.4 in the Agency's Response to Comments. The Agency anticipates that these guardrails will support a transparent and predictable certification process.

EPA also disagrees with commenters asserting that EPA is inviting certifying authorities to engage in the types of practices that were rejected by the Second Circuit in *NYSDEC*. In *NYSDEC*, the Second Circuit never addressed the separate question of whether EPA or certifying authorities have the underlying authority to establish—in advance of receiving a request for certification—a list of required contents for such a request. Accordingly, the court's holding that the reasonable period of time begins after "receipt" does not preclude the Agency from establishing such a list of minimum "request for certification" requirements, or from allowing certifying authorities to add requirements to EPA's list or develop their own lists of request requirements. Because the statute does not expressly define the term "request for certification," EPA and other certifying authorities are free to do so in a manner that establishes—in advance of receiving the request—a discernable and predictable set of requirements for a request for certification that starts the reasonable period of time. The Agency knows of no legal authority that has squarely considered this issue of a state or Tribe's underlying authority to identify requirements for a request for certification and come to the opposite conclusion. The Agency decides, consistent with principles of cooperative federalism enshrined in the Act, to continue this lawful, familiar, and time-tested practice.

The Agency also disagrees that the concept of "completeness" is inherently subjective. As discussed in Section IV.C.2 of the final rule preamble, having the certifying authority establish a list of additional required contents for a request for certification before receiving a request for certification, and therefore determine when the request has been received, is not at odds with the decision from the Second Circuit.

In response to the commenter asserting that references to "completeness" in the section 401 context are misplaced, the Agency finds that the commenter's efforts to distinguish complete section 401 requests for certification from complete applications in a permitting context are unpersuasive. Section 401 certification is predicated on receipt of an "application for certification," also known as a "request for certification." *See* 33 U.S.C. 1341(a)(1). Relying on a "complete" application to start a process is not a novel concept, nor is the use of a "completeness" standard for applications or similar documents a novel concept in CWA implementing regulations. Both EPA and the Corps have developed regulations setting out requirements for "completeness" or "complete applications" to initiate the permitting process. *See* 40 CFR 122.21(e) (describing "completeness" for NPDES applications); 33 CFR 325.1(d)(10) (describing when an application is deemed "complete" for section 404 permits). Neither CWA section 402 nor section 404 uses the word "complete" to modify the term "application" in the statute, yet the agencies have

reasonably interpreted the term "application" in those contexts to allow for a "completeness" concept that provides a clear and consistent framework for stakeholders involved in the section 402 and 404 permitting processes. The Agency is unaware of significant issues with the use of "complete applications" in either the section 402 or section 404 permitting processes or a concern that it has led to a "subjective standard." The Agency is not compelled by the commenter's argument that because a certifying authority may waive certification that somehow implies it should not receive a complete application or define what a complete application entails. The Agency is unaware of any legal authority making such a distinction.

While commenters are correct that a certifying authority may deny a request for certification due to lack of information, commenters fail to explain how such authority equates to or limits the ability of certifying authorities to define the contents of a request for certification. As discussed in section 3.1.4.2 of this response to comments, the ability to request additional information is not equivalent to requiring such information in a request for certification. Indeed, under both the 2020 Rule and this final rule, a project proponent is only required to provide the required contents defined in a request for certification to start the reasonable period of time. While it may be in the project proponent's best interest to provide such information (i.e., to avoid a denial), neither the 2020 Rule nor this final rule compels the project proponent to provide additional information requested after the reasonable period of time begins. Similarly, the Agency is equally uncompelled by other commenters' assertions that the pre-filing meeting should replace or obviate the need for certifying authorities to define the contents of a request for certification. While commenters correctly observe that pre-filing meetings provide an opportunity for certifying authorities to identify information needs, commenters incorrectly assume every request for certification will be preceded by a pre-filing meeting. As discussed in Section IV.B of this final rule, the pre-filing meeting request requirement may be waived by certifying authorities.

In response to the commenter highlighting FERC's position on "receipt" for purposes of section 401, the Agency notes that EPA, and not FERC, is the Federal agency tasked with administering and interpretating the CWA, *see* 33 U.S.C. 1351(d), 1361(a), including section 401, *see Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *NYSDEC*, 884 F.3d at 453, n.33.

***See also* the Agency's Response to Comments in Section 3.1.4, 3.2.1.1.**

3.2.1.3 Alternative Definitions for "Receipt"

Several commenters provided suggested revisions to the definition of "receipt." A few commenters requested that the term "receipt" be clearly defined and consistently referenced throughout the proposal. One commenter recommended revising "receipt" to say "the date that a request for certification that contains all the required elements described at 40 CFR §121.5, is documented as received by the certifying authority" stating that it would provide the necessary clarity and regulatory certainty to project

proponents, certifying authorities, and Federal permitting agencies on the certification process. One commenter suggested adding a reference to receiving the draft Federal license or permit in the definition for "receipt." Another commenter suggested revising "receipt" to read "receipt means the date that a request for certification, as defined by the certifying authority, and in accordance with the certifying authority's applicable submission procedures, as well as the draft Federal license/permit, is documented as received by a certifying authority." One commenter recommended modifying the proposed definition of "receipt" to remove the requirement that a request for certification be submitted in accordance with a certifying authority's applicable submission procedures.

A few commenters suggested revising the definition of "receipt" to clearly state that the reasonable period of time begins when a certifying authority receives a complete application. One of these commenters asserted that such a modification would make clear that requests with missing information do not determine the relevant date of receipt, and that the reasonable period of time does not begin until a complete request for certification has been received by the certifying authority. The commenter also emphasized that inclusion of the word "complete" in the definition would not run afoul of the Second Circuit's opinion as the concept of "completeness" is not inherently subjective and can be defined by the information requested by regulation or on a form. The commenter also asserted that in the event a project proponent has information that it fails to provide at the time of request, then that should render the previously determined "receipt" date invalid. Another commenter encouraged EPA to re-assert that the reasonable period of time only begins after the certifying authority is satisfied that it has received the information it needs, arguing that it will ensure that certifying authority resources are spent on projects that are certain.

A few commenters asserted that the proposed definition of "receipt" will likely lead to request processing conflicts or confusion and suggested removing ambiguity from the definitions.

> **<u>Agency's Response</u>: The Agency appreciates commenter suggestions on defining the term "receipt." As noted in the Agency's Response to Comments in Section 3.2.1.1, the final rule merely simplifies the proposed rule's approach to when the reasonable period of time begins by placing the definition of receipt in section 121.6(a). EPA provides in the final rule at section 121.6(a) that "the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in [section] 121.5, in accordance with the certifying authority's applicable submission procedures." This approach provides certifying authorities with a role in determining when the clock starts (i.e., by defining additional contents of a request for certification and applicable submission procedures), while also providing transparency and consistency around the process for requesting certification and starting the reasonable period of time for project proponents. EPA finds that placing the concept in section 121.6(a) should prevent stakeholder confusion and is unaware of any reason this final language should lead to processing conflicts or confusion. The Agency has also made revisions throughout the final rule regulatory text to refer to "the date that the request for certification was received" when referring to when the reasonable period of time begins, as opposed to using the term "receipt."**

The Agency declines to remove the term "applicable submission procedures" from the final rule requirements for when a request for certification is received. Applicable submission procedures describe the manner in which a certifying authority will accept a certification request, e.g., through certified mail or electronically. The Agency understands that certifying authorities may have different procedures for receiving certification requests (e.g., receiving certification in different formats or requiring the payment of fees), and as such is not limiting or defining a set of standard applicable submission procedures. The certifying authority may provide these applicable submission procedures in regulations or another appropriate manner, such as an official form used for requests for certification. In whichever way the certifying authorities provide their procedures, EPA encourages certifying authorities to communicate them transparently and publicly. EPA recommends that the certifying authority and project proponent communicate with each other (e.g., during any pre-filing meeting engagement) to discuss submission procedures and contents of the request for certification.

The Agency is also declining to add the word "complete" to section 121.6(a) because it is unnecessary and redundant in the final rule text. Under the final rule and consistent with section 401(a)(1), the reasonable period of time clock starts when the certifying authority has received a request for certification, as defined in section 121.5 of the final rule, in accordance with the certifying authority's applicable submission procedures. Accordingly, if a request for certification does not contain all the components provided at section 121.5, then the certifying authority has not received a request for certification. See also the Agency's Response to Comments in 3.1.4.

3.2.2 Comments on Defining Applicable Submission Procedures

Some commenters argued that EPA should define applicable submission procedures for all certifying authorities to prevent certifying authorities from subjectively deciding when a request is complete. A few commenters said EPA should provide a well-defined, unambiguous set of submission requirements so that project proponents, certifying authorities, and Federal agencies know what is required for a proper certification request. A commenter specifically recommended that EPA require all certifying authorities to publish their submission procedures on a website in an easily accessible and understandable format and that submission procedures be universally applicable (i.e., procedures should not change depending on the type of project for which a certificate is requested). One commenter recommended that EPA define "applicable submission procedures" as "the submission procedures deemed appropriate by the certifying authority," which the commenter stated EPA suggested in the proposal. The commenter interpreted the term to mean the form(s), address(es), and method(s) that a project proponent must use to submit a request for certification to the certifying authority.

A few commenters argued that EPA did not need to develop procedures for submitting requests to the certifying authorities. One commenter asserted that it did not believe EPA had the authority to set the procedures to be followed by states in reviewing water quality certification requests, but assuming EPA does have some authority to impose administrative procedures, the commenter argued that the proposal did not do enough to ensure that state agencies have sufficient information to make informed section 401

certification decisions. A few commenters asserted it would be sufficient to make submittal requirements publicly available as opposed to placing them in regulation.

Agency's Response: The Agency finds it unnecessary to define the term "applicable submission procedures" in this final rule. As noted above, the relevant inquiry is whether declining to do so is reasonable, i.e., not arbitrary and capricious, as opposed to whether doing so is necessary or unnecessary. As discussed in Section IV.C.2 of the final rule preamble, applicable submission procedures describe the manner in which a certifying authority will accept a certification request, e.g., through certified mail or electronically. The Agency understands that certifying authorities may have different procedures for receiving certification requests (e.g., receiving certification in different formats or requiring the payment of fees), and as such is not limiting or defining a set of standard applicable submission procedures. The certifying authority may provide these applicable submission procedures in regulations or another appropriate manner, such as an official form used for requests for certification. In whichever way the certifying authorities provide their procedures, EPA encourages certifying authorities to communicate them transparently and publicly. EPA recommends that the certifying authority and project proponent communicate with each other (e.g., during any pre-filing meeting engagement) to discuss submission procedures and contents of the request for certification.

The Agency recommends that project proponents, certifying authorities, and Federal agencies work together to determine the most efficient and effective means of communication before the certification process begins to ensure a common understanding of the contents of a request for certification. The final rule's pre-filing meeting process provides an opportunity for such early engagement to identify and discuss the appropriate request for certification requirements. EPA also recommends that certifying authorities make their additional contents for requests for certification and applicable submission procedures readily available and transparent to the regulated public. EPA also intends to support certifying authority efforts to make the requests for certification requirements transparent. For example, EPA could provide links to other certifying authorities' websites on EPA's website or maintain an up-to-date list of points of contact to connect project proponents with the appropriate certifying authority.

3.3 Timing of the Request for Certification

3.3.1 Timing of Request for Certification in Relation to the Federal Licensing or Permitting Process

One commenter recommended that the project proponent be encouraged or required to submit to the certifying authority a copy of the Federal permit application and the additional materials required by the state at the same time or very soon after the Federal permit application is submitted to the Federal agency. While the commenter supported the concept in the proposal that the draft Federal permit be submitted with the certification request, the commenter stated that it would be beneficial for the certifying authority to receive a copy of the Federal permit application and any other materials required by the state as early in

the process as possible before the draft Federal permit is ready. The commenter asserted that this would ensure in most cases that by the time that the draft Federal permit is submitted to the certifying authority and the reasonable period of time begins, the state certifying agency will have already begun its review and therefore will be in the best position to act within the reasonable period of time. Another commenter expressed support of the clarity on timing provided in the proposal by requiring a request for certification to include the draft Federal license or permit; however, the commenter also expressed concern that if the certifying authority is not provided information about the project before the draft permit is developed and certification is requested, it may not have sufficient time to review certification requests for detailed projects.

One commenter argued that nothing in section 401 suggests that EPA is authorized to dictate when a project proponent may or must request certification, and that the proposed rule's prohibition on requesting certification until an unknown point in time exceeds EPA's authority. The commenter argued that the only timing element of section 401 is for a certifying authority to act on a request within one year of receipt.

Another commenter stated that the 2020 Rule's certification requirements were mistimed relative to the Federal licensing or permitting process.

Agency's Response: *See* the Agency's Response to Comments in section 3.1.

Section 401 does not define the contents of a "request for certification" or specify at what point in the Federal licensing or permitting process such a request must or may be submitted to the certifying authority. The statutory text and the legislative history both clearly provide that the reasonable period of time begins once a certifying authority receives a "request for certification." EPA is the Federal agency tasked with administering and interpreting the CWA, *see* 33 U.S.C. 1351(d), 1361(a), including section 401, *see Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *NYSDEC*, 884 F.3d at 453, n.33. Accordingly, EPA is authorized to determine when the reasonable period of time begins once a certifying authority receives a "request for certification." EPA's determination supersedes any contrary position taken by a project proponent. For reasons discussed in Section IV.C of the final rule preamble and throughout Section 3 of this Response to Comments, the Agency's determination best effectuates Congress' goals and directives for section 401 in the limited amount of time provided by the Act.

3.3.2 Timing of Certifying Authority Notification of the Date of Receipt of the Certification Request

Some commenters supported the requirement for the certifying authority to send written confirmation of receipt of a request for certification to the Federal agency. A few commenters suggested that states should also communicate when they deem a certification application incomplete.

A few commenters argued that there should not be a specified timeframe for when the state must send written confirmation to the project proponent and Federal agency of the date of receipt of the request for

certification, with one of these commenters asserting that this should be determined by when the information requirements are met. Another commenter asserted that to the extent that EPA contemplates establishing any process or schedule for itself, when acting as the certifying authority, or for states and Tribes that do not adopt their own regulations on this question, that the process or timeline must be sufficiently flexible to allow for a reasonable back-and-forth with the applicant. The commenter further asserted that EPA should not set overly firm, pre-ordained deadlines for such requests, for example, by dictating that the certifying authority must complete all such follow-up within a particular number of days after receipt of a request. At a minimum, if EPA does set such a hard deadline, the commenter argued that it must allow for extensions where the certifying authority deems it necessary.

Conversely, few commenters recommended including a specific timeframe. One commenter suggested, as an example, within 5 days of receipt. Another commenter asserted that EPA should mandate that confirmation of receipt be in writing and must be sent within 15 business days of receipt. Another commenter asserted that a timeframe is justified because the two agencies (the certifying authority and Federal permitting agency) have only 30 days from receipt of the certification request to negotiate a reasonable period of time. Another commenter argued if the certifying authority receives an incomplete request for certification, and therefore is not in "receipt" of a request for certification, then the certifying authority would not be required to send written confirmation of the date of receipt to the Federal agency and project proponent, because receipt would not have occurred. The commenter recommended that EPA clarify this requirement and add a provision to require the certifying authority to notify the project proponent and Federal agency that the certifying authority is not in receipt of a request for certification because the project proponent has submitted an incomplete request for certification. The commenter also recommended that EPA specify that the certifying authority has 30 days to notify the project proponent and Federal agency of whether or not the certifying authority is in receipt of a complete request for certification.

One commenter recommended that a copy of the request for certification be provided to the Federal agency along with this written confirmation, to ensure that the request for certification is consistent with the permitting request made to the Federal agency. Another commenter recommended clarifying that the written confirmation should be emailed to or filed with the Federal agency.

A few commenters did not support the proposed removal of the 2020 Rule requirement that the Federal agency notify the certifying authority within 15 days of receiving notice from the project proponent of the certification request of: the date of receipt of the certification request, the reasonable period of time, and the date waiver will occur. One commenter, a certifying authority, asserted that this notice provides confirmation to both entities on the timeframes at play, is successfully implemented by the commenter, and should remain in the final rule.

> **<u>Agency's Response</u>: Once a certifying authority receives a request for certification, the certifying authority must send written confirmation to the project proponent and the Federal agency of the date that the request for certification was received. The Agency proposed similar language at section 121.5(d). However, the Agency has moved this provision to section 121.6(a) to better clarify that the reasonable period of time does not start with the written confirmation from the certifying authority. Rather, consistent with**

section 401(a)(1), it begins on the date that the project proponent submitted the request for certification. If a project proponent submits a request for certification that does not meet the requirements of section 121.5 of this final rule, the Agency recommends that the certifying authority promptly notify the project proponent that it did not submit a request for certification in accordance with section 121.5 of this final rule. However, certifying authorities and project proponents can avoid such outcomes by leveraging early engagement opportunities (*i.e.*, pre-filing meetings) to ensure a common understanding of the required contents of a request for certification.

EPA recognizes that the final rule no longer includes a strict period for negotiation on the length of the reasonable period of time between the certifying authority and the Federal agency at the start of the reasonable period of time, which means that the certifying authority may not promptly notify the project proponent and the Federal agency that the request for certification was received. Accordingly, the Agency is removing the regulatory text located at section 121.6(b) in the 2020 Rule, which required the Federal agency to communicate the date of receipt of the request for certification, the reasonable period of time, and the date waiver will occur. Under this final rule, the certifying authority is responsible for confirming the date of receipt of a request for certification with the project proponent and Federal agency. However, the final rule approach will not lead to the same level of confusion as the 2020 Rule requirement for the project proponent to submit the request for certification concurrently to the certifying authority and the Federal agency. Under the 2020 Rule, although the certifying authority was responsible for determining whether a request was received, a project proponent could submit a deficient certification request to the Federal agency and spur the Federal agency to communicate an inaccurate date of receipt for the request. The final rule approach avoids this potential miscommunication by relying on the certifying authority, rather than the project proponent, to communicate the date of receipt of a request for certification with the project proponent and Federal agency.

The Agency is declining to define the timing, contents, or manner of such written confirmation confirming the date the request for certification was received. However, the Agency encourages certifying authorities to use pre-filing meetings as an opportunity to provide information on how to submit requests for certification (e.g., discuss procedural requirements for submission of a request for certification) and the contents of a request for certification to ensure a common understanding between project proponents, Federal agencies, and certifying authorities. EPA encourages project proponents, certifying authorities, and Federal agencies to work together to determine the most efficient and effective means of communication, including the most efficient means of communicating if and when the request for certification is received.

3.4 General Comments on Request for Certification

3.4.1 Early Engagement, Generally

A few commenters discussed the importance of early engagement with project proponents when discussing the request for certification. One of these commenters asserted that the certification request process is dragged out because of insufficient early engagement by project proponents.

> **Agency's Response: EPA agrees that early engagement is important for an efficient and successful certification process. The Agency recommends that project proponents, certifying authorities, and Federal agencies work together to determine the most efficient and effective means of communication before the certification process begins to ensure a common understanding of the contents of a request for certification. The final rule's pre-filing meeting process provides an opportunity for such early engagement to identify and discuss the appropriate request for certification requirements.**

3.4.2 Certification Without Requests

One commenter asserted that EPA should clarify that states may waive the requirements for the contents of a certification request or may act in the absence of a formal request, such as when a project proponent unilaterally withdraws a section 401 request in an attempt to avoid an adverse decision or when a project proponent requires expedited review in an emergency situation.

> **Agency's Response: For purposes of section 401, EPA does not agree that a CWA section 401 certification can be issued in the absence of a project proponent requesting certification for a Federal license or permit that may result in any discharge into waters of the United States. *See* section IV.A in the final rule preamble for further discussion on when certification is required. EPA is aware that in some instances, certifying authorities use section 401 certifications as state permits under state law; however, this final rule does not address such practices. Similarly, if the certifying authority never received a request for certification or if the request for certification or Federal license or permit application was withdrawn, then the certifying authority is no longer responsible for acting on the request for certification because the pre-requisite "request" is absent. *See* section IV.D.2.c in the final rule preamble regarding the Agency's position on the legality of the practice of withdrawing and resubmitting requests for certification.**

3.4.3 Definitions

A couple of commenters suggested deleting the proposed definition at 40 CFR 121.1(c) (definition of "application"), because it does not appear useful for interpreting more substantive aspects of the rule.

One commenter recommended retaining the definition of "request for certification" currently found in section 121.1, with minor modifications to accommodate other proposed rule changes. Another commenter recommended including a definition for "request for certification" under 40 CFR 121.1

because they believed the use of the term in the definition for "receipt" may cause confusion during implementation. One commenter recommended adding a definition for "request for certification" that states that it means a written, signed, and dated communication that satisfies the requirements of proposed section 121.5(c).

A couple of commenters supported removing the definition of "certification request." One of these commenters said that an improvement to removing the definition of "certification request" is to clarify that a certifying authority is not allowed to stop or restart the clock by requesting additional information.

> **Agency's Response: The Agency has deleted the proposed definition of "application" proposed at section 121.1(c). *See* Final Rule Preamble Section IV.K for further discussion.**
>
> **The Agency is finalizing the removal of the definition of "certification request" located at section 121.1(c) of the 2020 Rule and finalizing the incorporation of those same definitional elements directly into section 121.5. The Agency finds that incorporating the definitional elements into the relevant regulatory section for request for certification will provide greater clarity about the contents of a request for certification. Instead of needing to refer to multiple sections of the regulatory text, the final rule allows stakeholders to refer to one section of the regulatory text.**

3.4.4 Data and Examples

Several commenters provided descriptions of their section 401 certification process. All of these commenters stated that they utilize a JPA process for state and Federal permits for proposed projects. Another commenter stated that in 2020, they developed section 401 certification procedures that identified items necessary for a "complete" application. The same commenter stated that determining whether a section 401 certification is complete can take between one and two months but described how an increase in the use of pre-filing meetings has resulted in an increase in first-pass application completeness. Similarly, another commenter stated that they had requirements for a complete section 401 certification application, via the adoption of an Antidegradation Statement as part of its water quality criteria, such as demonstration of no practical alternatives to degradation and demonstration of social or economic necessity.

> **Agency's Response: The Agency appreciates commenter input regarding certification processes. See section IV.C of the final rule preamble and the Agency's Response to Comments in sections 3.1-3.3 for further discussion of the requirements for a request for certification.**

3.4.5 General Permits and Licenses

A few commenters requested clarification from EPA on the impact of this rule on general licenses or permits. One commenter requested EPA confirm that project specific certifications can be provided under a general permit or license.

<u>Agency's Response</u>: First, with regards to project proponents seeking project-specific certification to obtain authorization under a Corps general permit, project proponents must submit the minimum contents defined at section 121.5(a)(1). For example, if a state or Tribe denied certification on the issuance of a Corps general permit, then to obtain authorization under that general permit, the project proponent would need to obtain a project-specific certification or waiver from the state or Tribe. In those cases, the "application" part of the request for certification may take the form of a NOI or a pre-construction notification (PCN). Second, with regard to individual projects that do not involve an "application" or a "license or permit" but still require certification, like Corps' civil works projects, the Agency expects the project proponent will provide documents in lieu of the application that are similar in nature, such as a "project study," when requesting certification. In both instances, the Agency expects the final rule's approach should be familiar to stakeholders who have previously sought certification on such Federal licenses or permits.

3.4.6 Who is the Certifying Authority

A few commenters requested EPA clarify the situations where distinct certifying authorities, such as a state, EPA, or a Tribe, would be the certifying authority.

Agency's Response: Section 401 requires a project proponent to provide the Federal licensing or permitting agency a certification from the state or authorized Tribe "in which the discharge originates or will originate." 33 U.S.C. 1341(a)(1). Pursuant to section 401 of the CWA, EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). Currently, EPA acts as the certifying authority in two scenarios: (1) on behalf of Tribes without "treatment in a similar manner as a state" (TAS) and (2) on lands of exclusive Federal jurisdiction in relevant respects. See section IV.H in the final rule preamble for further discussion on EPA's roles under Section 401. The Federal agency and project proponent may discuss any questions regarding jurisdiction with the certifying authority, or as needed, EPA in its technical assistance capacity under section 401(b).

3.5 Input Received on Prior Rulemakings

3.5.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

Several commenters asserted that the reasonable period of time should only be triggered by the receipt of a complete application so that the certifying authority can meaningfully evaluate requests and make informed decisions, including noting that at least one Federal agency requires such an approach. Otherwise, these commenters asserted that states may be forced to act on a request before the public notice process is complete or deny certification. One commenter noted that certifying authorities have limited resources and the 2019 proposed rule gives applicants an incentive to submit an incomplete

application and wait out the clock. Some commenters asserted that the 2019 proposed rule approach to the contents of the request for certification does not provide sufficient information to properly review and ensure compliance under section 401. One commenter argued that nothing in section 401 contemplates that the waiver provision was intended to artificially limit the information a state could require from an applicant so that the state can make an informed decision.

Several commenters asserted that the 2019 proposed rule would improperly intrude into the realm of state administrative procedures by specifying the contents of a section 401 request and state determination, notwithstanding whatever contrary procedural requirements states may have enacted, noting that several states have outlined in their own regulations the information an applicant must submit in order to allow for meaningful state review. Commenters also noted that section 401 requires states to establish, and adhere to, procedures for public notice on all applications for certification, and that requiring a complete application is necessary to provide public notice and obtain meaningful public comment.

One commenter asserted that the 2019 proposed rule's approach to a certification request conflicts with the text of the CWA, Congressional intent, and case law, and represented a radical departure from the Agency's longstanding position, citing the 1989 and 2010 guidance documents.

Conversely, other commenters asserted that the 2019 proposed rule approach to request for certification provided an appropriate balance between the certifying authority's need for sufficient information to evaluate the request and the permit applicant's ability to obtain and submit the information to initiate the reasonable period of time for review and the review process, and would provide regulatory certainty, clarity, and efficiency. These commenters argued section 401 does not specify that the reasonable period of time applies only for "complete" applications, citing N*.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d. Cir. 2018), and highlighted projects where states relied on a complete application to delay starting the reasonable period of time.

One commenter asserted that project proponents should provide certifying authorities with the best information reasonably available at the time the request is made, and requested that EPA clarify that the project proponent does not need to identify each and every location and type of any discharge that may result from a proposed project in a certification request. One commenter agreed that general permits require a different definition for certification requests, because the Federal agency may not have the same information available as a project proponent on an individually permitted project.

Commenters also requested that EPA clarify how additional information could be requested, including one commenter who requested clarification that such additional information would not invalidate the certification request or restart the clock. One commenter also discussed the scope of that additional information and how the reasonable period of time could be extended in those instances.

> **<u>Agency's Response</u>: *See* the Agency's Response to Comments in Sections 3.1-3.3; *see also* Section IV.C of the final rule preamble.**

3.5.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

Several stakeholders asserted that the reasonable period of time should not begin until the certifying authority receives a complete application as defined by the certifying authority. One of these stakeholders noted that several certifying authorities have regulations or guidance documents detailing the information that certifying authorities need to act on a request for certification. A few stakeholders requested that EPA provide certifying authorities with flexibility to identify or request additional information in a request for certification, including the ability to amend or expand requirements for such information. One of these stakeholders requested that EPA include requirements for a complete application that are at least as stringent as Federal agencies making similar determinations.

Several stakeholders stated that EPA's longstanding position recognized a complete application started the reasonable period of time, as well as case law in the Fourth Circuit. *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009). One of these stakeholders asserted that the Second Circuit failed to consider the Fourth Circuit's conclusion that the waiver provision in section 401 was ambiguous.

Several stakeholders asserted that the 2020 Rule requires certifying authorities to act on incomplete information, which one of the stakeholders noted EPA conceded that the request may not be enough for states and Tribes to make a certification decision. One stakeholder reiterated EPA's finding from the 2020 Rule that incomplete applications are the most common reason for certification delays and cited an example where a project proponent submitted an application for certification before it even identified a preferred route for the pipeline. Another stakeholder stated that when operating pursuant to pre-2020 Rule guidance, its state was able to issue the vast majority of certifications in under 60 days.

Several stakeholders discussed the consequences of acting on an incomplete request for certification. A few stakeholders asserted that incomplete information impedes certifying authority ability to protect water quality. These stakeholders also asserted that incomplete information could delay a project by forcing a certifying authority to deny certification or take action inconsistent with state laws and end up in litigation. Stakeholders also asserted that incomplete information would prevent certifying authorities from complying the section 401 public notice and comment requirements and force a certifying authority to act on an application before this public notice and comment process has concluded (or even commenced).

Conversely, several other stakeholders asserted that the 2020 Rule defines "certification request" appropriately, balancing the certifying authority's need for sufficient information to initiate a meaningful review and the permit applicant's ability to obtain and submit additional information as it becomes available. These stakeholders asserted that certifying authorities can request additional information if needed to complete its review. One of these stakeholders argued that the 2020 Rule's definition effectuates the time limits imposed by Congress and prevents certifying authorities from exceeding the one year maximum time limitation and using section 401 to delay projects, citing the Northern Access project as an example of such delays. The other stakeholder asserted that there is no rationale for a change

and that revisions would be contrary to Congress' clear intent, implicate Due Process, and dramatically hinder the permitting process. Another stakeholder stated that the 2020 Rule definition has increased clarity and transparency with respect to the statutory review period in a manner that is supported by the plain language of the Act and ensures the information is consistent with the scope of certification. One of these stakeholders also asserted that the Federal agency, and not the certifying authority, determines when the reasonable period of time begins, arguing that allowing the certifying authority to decide what should be in a request for certification would be tantamount to determining whether a request is compete and avoid the statutory one year limit. The stakeholder stated that EPA should clarify that a request for certification only requires the best information reasonably available to the project proponent at the time the request is made.

Agency's Response: *See* the Agency's Response to Comments in Sections 3.1-3.3; *see also* Section IV.C of the final rule preamble.

4. REASONABLE PERIOD OF TIME (SECTION 121.6)

4.1 Who Sets the Reasonable Period of Time

4.1.1 General Support for Federal Agency and Certifying Authority Jointly Setting the Reasonable Period of Time

Several commenters expressed general support for the proposed approach to the reasonable period of time because it was more consistent with cooperative federalism principles and allowed for collaboration between the certifying authority and Federal agency. One commenter asserted that because it is a mutually agreed upon deadline, it will provide certainty to project proponents. Another commenter asserted that the proposed approach would give certifying authorities more input and ensure a more accurate reasonable period of time since certifying authorities best know the length of time it will take them to review a request for certification. Similarly, another commenter noted that the process for setting the reasonable period of time should allow for consideration of state and Tribal requirements for public engagement and environmental review.

Commenters also expressed support for setting up MOAs between Federal agencies and certifying authorities to establish the reasonable period of time, including one commenter who recommended that certifying authorities should develop programmatic agreements with specific Federal agencies. Some commenters supported the collaborative approach, while asserting the approach is not efficient or predictable and encouraged MOAs for efficiency purposes, especially in such well-established permitting processes as section 401 certifications for section 404 permits. One commenter stated that categorical determinations would be a more efficient mechanism of determining reasonable periods of time. The commenter noted that they collectively issue approximately 1,000 certifications per year, so negotiating individual periods of time would be cumbersome. The commenter noted that categorical agreements could consider factors such as project type, location and scale of proposed projects, nature of discharge, potential need for additional study or evaluation of water quality effects, and the certifying authority's administrative procedures and notice requirements. One commenter said that the regulatory text should say that the Federal agency and certifying authority can establish the reasonable period of time on a

categorical basis. Similarly, another commenter suggested that EPA should clarify that categorical agreements, in addition to case-by-case agreements, are permissible, even if entered into prior to the date of receipt of the request for certification.

Some commenters asserted that the Federal agency should not be able to declare a fixed reasonable period of time. Several commenters disagreed with EPA's alternative to retain the 2020 Rule's approach, where the Federal agency is solely responsible for determining the reasonable period of time, for all the reasons that EPA laid out in the proposal to justify revising the 2020 Rule. Commenters were especially concerned that Federal agencies lack the authority to impose a shorter requirement on certifying authorities and stated that courts have found that Federal agencies do not have the authority to unilaterally impose a shorter timeframe on certifying authorities.

Agency's Response: EPA agrees with the above comments that the joint agreement approach promotes cooperative federalism and may increase certainty. Under this approach, Federal agencies and certifying authorities can offer each other their expertise relevant to determining what timeframe is reasonable. The Agency also recognizes that coordinating the reasonable period of time for reviewing requests for certification requires time and resources for Federal agencies and certifying authorities. Therefore, EPA encourages the creation of MOAs between Federal agencies and certifying authorities as appropriate to help reduce the need for determining the reasonable period of time on a case-by-case basis for every request. In fact, the final rule clarifies that Federal agencies and certifying authorities may set categorical reasonable periods of time through written agreements – for example, based on certain types of Federal licenses or permits.

The approach taken in the 1971 and 2020 Rules (i.e., relying on the Federal agency to set the reasonable period of time) is not compelled by the statutory text because CWA section 401(a)(1) is silent regarding who may or must determine the reasonable period of time. Nor does the statute imply that the Federal agency is the only entity that may establish the reasonable period of time. As such, and as described in Section IV.D.2 of the final rule preamble, EPA finds that the best reading of the statute is to allow both entities – the certifying authority and the Federal agency – to play a role in establishing the reasonable period of time, and only include the EPA-derived default of six months if they cannot come to an agreement.

The Agency appreciates commenter input on the alternative to retain the 2020 Rule's approach to setting the reasonable period of time. As discussed in Section IV.D of the final rule preamble, the Agency is finalizing the proposed approach that the Federal agency and certifying authority may collaboratively set the reasonable period of time on a project-by-project basis or categorical project type basis (e.g., through development of procedures and/or agreements), provided that it does not exceed one year. 40 CFR 121.6(b).

Although the Agency is not listing factors that Federal agencies and certifying authorities must consider when establishing the reasonable period of time that the certifying authority has to act on the request for certification, Federal agencies and certifying authorities might

consider factors such as project type, complexity, location, and scale; the certifying authority's administrative procedures; other relevant timing considerations (*e.g.*, Federal license or permit deadlines; associated National Environmental Policy Act deadlines; and/or anticipated timeframe for neighboring jurisdictions process);; and/or the potential for the licensed or permitted activity to affect water quality.

4.1.2 Do Not Support Federal Agency and Certifying Authority Jointly Setting "Reasonable Period of Time"

4.1.2.1 Certifying Authority Should Set the "Reasonable Period of Time" or be Elevated Over the Federal Agency

Many commenters said that the reasonable period of time determination should be driven by or solely made by the certifying authority. Some commenters said EPA should remain silent on the reasonable period of time and allow certifying authorities to apply their own administrative procedures, as long as the one-year statutory limit is not exceeded. One commenter said that certifying authorities could put the timelines on their own webpages to have that information publicly accessible. Another commenter expressed concern about the 60-day default and said that if an agreement is not reached between the Federal agency and certifying authority, then the certifying authority should determine the reasonable period of time. Another commenter argued that only certifying authorities know what timeframe is reasonable for them to complete a certification request. The commenter cited the vast disparity in staffing resources, need to accommodate public comment, and varying project complexities, noting that some projects require up to a year for adequate consideration.

A few commenters recommended that the Federal agency should not be placed on the same or elevated footing over the certifying authority when it comes to setting the reasonable period of time. One commenter argued that Federal agencies are unqualified to have the final say on the "reasonable period of time (not to exceed one year)" because they lack expertise regarding water quality as well as knowledge regarding each individual certifying authority's procedures for implementing section 401 or general workload at any given point in time. The commenter also asserted that Federal agencies also lack knowledge regarding the information a certifying authority needs to make its decision, or the schedule on which information gathering and studies (which may be restricted to certain seasons) can or should be conducted. Rather, the commenter argued that the state or Tribe is more familiar with their water quality requirements, their aquatic resources, potentially affected state or Tribal waters, and what review time is needed based on project complexity and wetland impacts.

Several commenters discussed concerns over coordinating the reasonable period of time. Several commenters, who did not support the default 60-day period to set the reasonable period of time, asserted that the proposal assumes states will have all the necessary information to evaluate the proposed project's impacts when the request is filed. One commenter stated that most certification requests in their jurisdiction are for Army Corps permits spanning four districts, and that it can often be difficult to coordinate on one timeframe. The commenter stated that the fixed timeframe leads to inconsistent practices that leave the public without predicable public notice procedures on projects and asserted a need for the flexibility to extend the default period of time. Another commenter critiqued both the 2020 Rule

and the proposed rule, arguing that by adding two Federal agencies to all section 401 certifications, even uncomplicated ones, the rules created complications, thereby lacking effectiveness, efficiency, or predictability.

One commenter supported EPA's proposed approach to allow certifying authorities to create a reasonable period of time on a project type basis because it would enable certifying authorities to create more efficient and predictable conditions for clean energy projects and meet the Administration's climate goals. The commenter also recommended that EPA should mention in the final rule preamble that it will create a template MOA for certifying authorities that would shift presumptive reasonable period of time and call for no further conditions for clean energy projects.

Agency's Response: EPA disagrees that the certifying authority should solely determine the reasonable period of time or be elevated over the Federal agency in setting the reasonable period of time. CWA section 401(a)(1) is silent regarding who may or must determine the reasonable period of time. Nor does the statute imply that the Federal agency is the only entity that may establish the reasonable period of time. As such, EPA finds that the best reading of the statute is to allow both entities – the certifying authority and the Federal agency – to play a role in establishing the reasonable period of time, and only include the EPA-derived default of six months if they cannot come to an agreement. As stated above, Federal agencies and certifying authorities may collaboratively set the reasonable period of time in lieu of relying on the default of six months. Federal agencies and certifying authorities can offer each other their expertise relevant to determining what timeframe is reasonable. Federal agencies are in the best position to opine on timing in relation to their Federal licensing or permitting process. Likewise, certifying authorities are in the best position to determine how much time they need to evaluate potential water quality impacts from federally licensed or permitted activities. Certifying authorities are also best positioned to opine on the impacts of state or Tribal procedures governing the timing of decisions with respect to environmental review and public participation requirements.

EPA disagrees with commenters who recommended that the Agency should be silent on the setting of the reasonable period of time and allow certifying authorities to apply their own administrative procedures. As discussed in Section IV.D.2 of the final rule preamble, EPA finds that the best reading of the statute is to allow both entities – the certifying authority and the Federal agency – to play a role in establishing the reasonable period of time, and only include the EPA-derived default of six months if they cannot come to an agreement.

EPA recognizes that coordinating the reasonable period of time for reviewing requests for certification requires time and resources for Federal agencies and certifying authorities. Therefore, EPA encourages the creation of MOAs between Federal agencies and certifying authorities as appropriate to help reduce the need for determining the reasonable period of time on a case-by-case basis for every request. In response to commenters' concerns about setting the reasonable period of time each time a request for certification is submitted, the final rule clarifies that Federal agencies and certifying authorities may set categorical reasonable periods of time through written agreements – for example, based on certain

types of Federal licenses or permits. However, EPA declines to develop an MOA template for certifying authorities as suggested by one commenter. While the Agency may provide technical assistance pursuant to section 401(b) upon request by a Federal agency, project proponent, or certifying authority, the Agency does not find it appropriate to develop an MOA template. Federal agencies are in the best position to opine on timing in relation to their Federal licensing or permitting process. Likewise, certifying authorities are in the best position to determine how much time they need to evaluate potential water quality impacts from federally licensed or permitted activities. Certifying authorities are also best positioned to opine on the impacts of state or Tribal procedures governing the timing of decisions with respect to environmental review and public participation requirements. Accordingly, Federal agencies and certifying authorities are best suited to draw upon their collective expertise to develop an MOA, as appropriate.

4.1.2.2 Federal Agency Should Set the "Reasonable Period of Time"

Some commenters stated that Federal agencies should determine the reasonable period of time. One commenter said that because the D.C. Circuit recognized a division of authority between the Federal agency and certifying authority and held that the lead Federal agency decides matters of waiver, this inherently means the Federal agency should set the reasonable period of time.

Several commenters expressed concern that the proposed approach would cause instability or inefficiencies for various reasons, including the fact that there could be different reasonable periods of time because it is set on a case-by-case basis or may differ by certifying authority. One commenter argued that allowing each certifying authority to set their own reasonable period of time would make implementation less clear and consistent. As an example, the commenter asserted that a pipeline that crossed multiple jurisdictions could be subject to vastly different review deadlines for the same project, forcing projects to wait for the certifying authority with the most expansive reasonable period of time. The commenter also asserted that this hypothetical would be particularly true if EPA finalized the proposed approach to allow Tribes to obtain TAS for section 401.

A few commenters recommended that the Agency ensure that certification decisions are not unnecessarily delayed, or timelines evaded through loopholes. One commenter noted that both EPA and the Corps have determined that the period should generally be less than one year. The commenter stated that having a Federal agency set it serves to minimize the arbitrary delays and bureaucratic gamesmanship that were at the heart of some states' concerns and suggested that EPA should continue to have Federal agencies establish it, as they have done for decades consistent with judicial and administrative precedent. *See, e.g.*, *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."); *Constitution Pipeline Company, LLC*, 164 FERC P 61029 (F.E.R.C.), 2018 WL 3498274 (2018) ("[T]o the extent that Congress left it to Federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.").

One commenter asserted that the proposed approach would leave project proponents unaware of what the reasonable period of time is and whether there will be an extension. One commenter asserted that the 2020 Rule provided a safety valve so that Federal agencies could extend the reasonable period of time at the request of the certifying authority or the project proponent. One commenter argued that certifying authorities had sufficient time under the 2020 Rule.

Agency's Response: The Agency disagrees with commenters asserting that the Federal agency should determine the reasonable period of time. Such an approach is not compelled by the statutory text because CWA section 401(a)(1) is silent regarding who may or must determine the reasonable period of time. Nor does the statute imply that the Federal agency is the only entity that may establish the reasonable period of time. As such, and as described in Section IV.D of the final rule preamble, EPA finds that the best reading of the statute is to allow both entities – the certifying authority and the Federal agency – to play a role in establishing the reasonable period of time, and only include the EPA-derived default of six months if they cannot come to an agreement.

The Agency also disagrees with commenter assertions that a collaborative approach to setting the reasonable period of time will lead to inefficiencies or delays or that having the Federal agency alone set the default serves to minimize arbitrary delays and bureaucratic gamesmanship because that approach leaves the certifying authority out of the reasonable period of time decision-making process. In response to commenters' concerns about setting the reasonable period of time each time a request for certification is submitted, EPA anticipates that certifying authorities and Federal agencies will enter into categorical agreements, which will minimize, if not eliminate, any potential arbitrariness and bureaucratic gamesmanship. Additionally, written agreements between Federal agencies and certifying authorities with categorical reasonable periods of time – for example, based on certain types of Federal licenses or permits – would create efficiency while still taking advantage of the knowledge of both parties for determining the time necessary for reviewing the request for certification. In response to commenters concerned about different reasonable periods of time for multi-jurisdictional projects, the Agency recommends that project proponents, certifying authorities, and Federal agencies work together to determine the most efficient and effective means of communication before the certification process begins. The final rule's pre-filing meeting process provides an opportunity for such early engagement to gather input from project proponents that may help in setting the reasonable period of time. The Agency does not agree that, nor understand how, a project proponent would be more likely to be subject to different reasonable periods of time due to the final rule's new TAS provisions. As discussed in Section IV.H of the final rule preamble, EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification," which includes the scenario where a Tribe does not have TAS for section 401. In that instance, EPA would act as the certifying authority and would be responsible for collaborating with the Federal agency to set the reasonable period of time.

The Agency disagrees with the commenter asserting that relying on a collaborative approach to setting the reasonable period of time will leave the project proponent unaware of the reasonable period of time or any possible extensions. This final rule does not prevent certifying authorities and Federal agencies from communicating with the project proponent. Rather, this final rule encourages certifying authorities, project proponents, and Federal agencies to coordinate and communicate throughout the certification process. See previous paragraph and the preamble to the final rule.

The Agency disagrees with the commenter asserting that certifying authorities categorically had enough time to act on requests for certification under the 2020 Rule. While the Agency agrees with the commenter asserting that the 2020 Rule allowed Federal agencies to extend the reasonable period of time, the Federal agency was not required to grant extension requests under the 2020 Rule. *See* 40 CFR 121.6(d)(2) (2020). As a result, Federal agencies sometimes denied those requests even in situations where the certifying authority said it was not able to act within the established timeframe (e.g., where state public notice procedures required more time than the regulatory reasonable period of time). For instance, one commenter noted that its requests for extensions due to public notice procedures were refused by the Corps for the 2020 Nationwide General Permits.

4.1.3 Length of Time to Negotiate the "Reasonable Period of Time"

Some commenters did not support the proposed 30-day negotiation period for Federal agencies and certifying authorities to establish the reasonable period of time. One commenter said that the Federal agency and certifying authority should have more than 30 days to negotiate a reasonable period of time. In their case, the commenter stated that they have 30 days to determine whether their requests are complete, which leaves no time to negotiate an agreement with the Federal agency. A different commenter said that EPA should provide at least 60 days for the Federal agency and certifying authority to agree on the reasonable period of time.

A few commenters said that any default period for review should not begin to run until after the expiration of the 30-day negotiation period. Otherwise, the commenters asserted that certifying authorities will be forced to either: 1) begin processing certifications assuming a 60-day default, or 2) expend limited agency resources attempting to negotiate with Federal agencies while simultaneously processing certification requests. The commenters argued that both options are likely to result in less efficient decision-making. Another commenter observed that EPA acknowledges that "short reasonable periods of time (e.g., 60 days) do not allow the state or tribe sufficient time" but in circumstances where the Federal agency and certifying authority cannot agree, that is precisely the outcome that the proposal could produce. The commenter asserted that EPA further compounds this problem by having half the default period run concurrently with the time the certifying authority and Federal agency are working to establish the review period. The commenter further asserted that engaging in negotiations with the Federal agency requires a new and extra commitment of resources that is not contemplated in the statute and many certifying authorities, particularly Tribal certifying authorities, have limited staff and will not be able to simultaneously make meaningful progress on an application while negotiating with the Federal agency. The commenter stated that adopting a longer default period does not mean that certifying authorities

would always take the full time allotted to make their decision, but it would eliminate the potential for the lack of agreement to give the certifying authorities a mere month to act on a project where substantially more time is necessary.

Another commenter requested that the reasonable period of time be predictable and supported the default of 60 days but requested that EPA eliminate the 30-day period for the Federal agency and the certifying authority to agree on a reasonable period of time. Alternatively, the commenter asked that the joint agreement between the Federal agency and the certifying authority be made in consultation with the project proponent. The commenter asserted that these changes would allow for greater regulatory predictability for project proponents and reduce any confusion between the parties. One commenter asserted that an appeals process must always be available to states and Tribes separate from the reasonable period of time and regardless of whether there is time left on the clock.

Agency's Response: In response to commenters' concerns, EPA is not finalizing a timeframe for the negotiation between Federal agencies and certifying authorities – especially because the final rule makes it clear that the certifying authority and Federal agency may coordinate categorical agreements prior to the date that a request for certification was received.

EPA disagrees that any joint agreement between the Federal agency and the certifying authority must be made in consultation with the project proponent. Requiring project proponent consultation in every case would add unnecessary across-the-board procedure and coordination into the certification process. Additionally, considering the high annual average number of requests for certification,[2] and therefore project proponents, it is unlikely it would reduce confusion or allow for regulatory predictability. Rather, instead of relying on categorical reasonable periods of time (*e.g.*, by project type, by Federal license or permit type), certifying authorities and Federal agencies would have to consult on *every* request for certification. However, EPA notes that certifying authorities and Federal agencies are welcome to consult with project proponents if they wish. For example, early engagement with the project proponent during any pre-filing meeting discussions could also serve to receive input from project proponents that may help in setting the reasonable period of time.

Regarding the comment on an appeals process, EPA disagrees that an appeals process is needed for states and Tribes, since states and Tribes are the entities providing a certification decision as well as having a role in the reasonable period of time determination. States and Tribes may avail themselves to their own state or Tribal appeals processes as appropriate, but this final rule does not create (nor does the Agency find it necessary to create) an appeals process.

[2] EPA estimates that the average annual number of certification requests is 1,947 requests per certifying authority. *See* Supporting Statement for the ICR.

4.2 Default Reasonable Period of Time

4.2.1 Support for 60-Day Default Reasonable Period of Time

Several commenters agreed that a 60-day review is a reasonable default time limit. One commenter explained that while highly complex reviews can require up to one year, certifying authorities often review many simpler projects in 30 days or less. Another commenter opined that EPA should establish a default of 45 days, but in no event should it be longer than 60 days. Another commenter observed that applicable state law already requires it to approve or deny the certification request within 60 days of receipt of a complete application. Another commenter stated that this would encourage FERC to revise its hydroelectric regulations accordingly. One commenter supported the collaborative process to set the reasonable period of time and viewed the 60-day default as sensible and practical since it will help ensure consistency and predictability for stakeholders. Another commenter supported the 60-day default so there is a known deadline if the Federal agency and certifying authority fail to reach an agreement. Another commenter said it was a marked improvement over the 2020 Rule. Another commenter urged EPA to refrain from allowing for modifications to the 60-day default by Federal agencies or certifying authorities because a uniform period provides the most clarity to project proponents and other stakeholders, and it would allow project proponents to anticipate the timeline for how the certification process will align with their project timeline.

> **Agency's Response: EPA agrees that some certifying authorities often review many simpler projects in a short period of time, such as 30 or 60 days. EPA recognizes that a 60-day reasonable period of time is being implemented for section 401 decisions for some licenses and permits, including by EPA for draft NPDES permits and by the Corps. However, EPA disagrees that 60 days as a default reasonable period of time for all projects is sensible and practical for the reasons provided in the Agency's rationale in the final rule preamble section IV.D.2, in addition to the many comments summarized below explaining why a 60-day default for all projects is not sufficient. EPA agrees that a uniform period can provide clarity to project proponents and other stakeholders, but EPA is convinced that any uniform period should only be a default to allow the certifying authority and Federal agency to determine, as appropriate, the review timeframe on an individual or categorical basis. While this may reduce the ability of project proponents to anticipate the timeline for the certification process, they will still have six months as a default guidepost, plus EPA anticipates that certifying authorities and Federal agencies will enter into categorical agreements that will allow project proponents to anticipate timelines for certification processes. As explained in the final rule and preamble, the default reasonable period of time would not apply if the Federal agency and certifying authority agree to a different time.**

4.2.2 Qualified Support for 60-Day Default Reasonable Period of Time

A few commenters supported the 60-day default in certain instances. One commenter agreed that 60 days is an appropriate default for most projects if no joint decision is reached, but that 60 days may be insufficient to thoroughly review information for larger, more complex projects. Another commenter agreed that there should be no more than a 30-day timeframe to determine the reasonable period of time,

and if the agencies do not come to an agreement, the reasonable period of time should default to 60 days or some other set timeframe(s) that considers the level of Federal agency permit, the certifying authority's codified procedures, and the scope and potential impacts of the proposed project. Ideally, the commenter noted that it would be included in regulation for certifying authorities and Federal agencies to jointly develop reasonable periods of time for standard permits. Similarly, another commenter generally supported a project-by-project approach to setting the reasonable period of time, with a 60-day default, but recommended that EPA provide the specific criteria for Federal agencies to use in evaluating and establishing longer periods of time, including the complexity of the proposed project, the potential for any discharge, and the potential need for additional study or evaluation of water quality effects from the discharge. One commenter asserted that 60 days is sufficient to certify and suggested adding another 30 days for final ruling if parties agree and an additional 60 days if a public hearing is requested. Another commenter asserted that the one-year timeframe allotted for FERC certifications was too long when submitting an amendment that would have minimal water quality impacts and positive safety improvements.

Agency's Response: EPA agrees in part and disagrees in part with these comments. EPA agrees that 60 days may be appropriate for some projects (*e.g.*, certain CWA section 402 and 404 general and NWPs involving less complicated projects) and anticipates that certifying authorities and Federal agencies will enter into categorical agreements to address those scenarios. EPA agrees that Federal agencies and certifying authorities could establish criteria to use in evaluating and establishing periods of time other than the default, including the complexity of the proposed project, the potential for any discharge, and the potential need for additional study or evaluation of water quality effects from the discharge. However, EPA is deferring to the combined expertise of the Federal agencies and certifying authorities for establishing the reasonable period of time and declining to define the criteria that must be used in establishing the reasonable period of time.

EPA appreciates commenter concerns over the need to ensure meaningful opportunities to engage in the certification process. EPA recognizes that public notice and comment procedures are critical aspects of the CWA and section 401. *See* section IV.F in the final rule preamble for further discussion of public notice procedures and section 401. With respect to public notice and comment procedures that extend beyond the default reasonable period of time, the Agency proposed and is finalizing a process to automatically extend the reasonable period of time to accommodate those public notice and comment requirements. *See* section IV.D.2.b in the final rule preamble. However, for the reasons commenters mention and as discussed throughout this section of the Response to Comments, EPA has decided to finalize a default reasonable period of time of six months.

In response to the commenter asserting that a one-year reasonable period of time was too long for a certification on an amendment to a FERC license, EPA notes that Section 401(a)(1) provides that a certifying authority waives its ability to certify a Federal license or permit if it does not act on a certification request within the reasonable period of time. 33 U.S.C. 1341(a)(1) ("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."). Other than specifying its outer bound (one year), the CWA does not define what length of time is "reasonable." As discussed in Section IV.D of the final rule preamble and throughout this section of the Response to Comments, Federal agencies and certifying authorities may collaboratively set the reasonable period of time in lieu of relying on the default of six months. However, if a Federal agency establishes a one-year reasonable period of time in regulation, it would not be at odds with the final rule's language or intent. Rather, in such a scenario (e.g., FERC regulations), it is unnecessary for the certifying authority and Federal agency to negotiate an alternate reasonable period of time because the Federal agency has already agreed to the maximum amount of time statutorily allowed, and if the certifying authority determines that one year is too long, it may act on the request for certification as early as it chooses.

4.2.3 Opposition to 60-day Default

Many commenters expressed concern about the default reasonable period of time and said 60 days was not long enough for various reasons.

Agency's Response: For the final rule, EPA decided on six months as the default reasonable period of time for several reasons that are covered in responses below. *See also* Section IV.D of the final rule preamble.

4.2.3.1 Cooperative Federalism Concerns

Many commenters that opposed EPA's proposed 60 day default argued that it effectively gives the Federal agencies veto power over a longer period if the Federal agency refuses to agree with the certifying authority on a different time period. For example, one commenter argued that establishing the default as 60 days in the absence of an agreement between the certifying authority and Federal agency would improperly interfere with the certifying authority's exercise of its authority under section 401, because it would give the Federal agency the power to unilaterally impose a 60-day time limitation on the certifying authority's time to act or risk waiver. The commenter relied on *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) to support their assertion. Commenters also argued that the proposal promotes one-way collaboration, instead of promoting cooperative federalism, and asserted that states and Tribes should have the final say in determining how long it will take for them to fulfill their obligations and act on a project's application. Commenters noted that where a Federal agency is required to obtain certification for its own actions, the agency would be disincentivized from reaching agreement with the state on a period greater than 60 days.

Agency's Response: The Agency appreciates commenter concerns regarding cooperative federalism and the proposed 60-day default reasonable period of time. As discussed in Section IV.D of the final rule preamble, the Agency has decided to finalize a default reasonable period of time of six months to best balance equities between the Federal agency and certifying authority, which should address commenter concerns and promote

cooperative federalism. Federal agencies and certifying authorities can offer different types of relevant expertise for setting the reasonable period of time. The final rule default provides both parties with ample time to negotiate the reasonable period of time and inform its length based on their respective expertise but provides a default middle ground in the event an agreement cannot be reached. Six months is exactly half of one year, which is the statutory maximum for the reasonable period of time. If the Federal agency and certifying authority cannot reach an agreement, it seems reasonable to designate half of the statutory maximum as the default reasonable period of time as a middle ground to best balance equities between the Federal agency and certifying authority. Six months should give the Federal agency and certifying authority ample time to negotiate an alternate reasonable period of time if they do not want to be subject to the six-month default. At the same time, the six-month default establishes a reasonable time period for Federal agencies and certifying authorities to follow if they cannot agree on a different time period.

4.2.3.2 Increase in Denials or Waivers due to 60-Day Default

Several commenters asserted that the 60-day default would cause certifying authorities to deny requests for certification they might otherwise grant if given adequate review time (not to exceed 1 year), resulting in less efficient, not more efficient, administrative proceedings. For example, one commenter noted that Washington State receives about 400 requests for certification annually – each request is different and carries unique implications that must be examined based on the specific characteristics of the water bodies and proposed project and Federal permit in question. However, the commenter noted that some requests for certification require more time than others because they are unusually complicated or the project proponent fails to furnish significant information, in which case the reasonable period of time needs to be set in ways that allow consideration of individual circumstances. One commenter asserted that the Federal agency may take up to 30 days to negotiate with a potentially overwhelmed state or Tribal authority and, in turn, the state or Tribal authority may be left with only 30 days to act on the request, which could strap state and Tribal authorities and lead to a rushed process or unnecessary denials by certifying authorities that are not left with enough time to consider the full range of project impacts.

A few commenters stated that the 60-day default may result in more waivers. One of these commenters asserted that a waiver is a significant consequence, and that the rule should not encourage waivers due to more restrictive deadlines not found in the statutory text. The commenter asserted that a waiver based on the inability to take reasonable review time to review a complex project or consult with Tribes or fulfill state/Tribal public notice requirements is a draconian result and not the result intended by the CWA. The commenter recommended that if the current language stands, then EPA should establish an appeals process because there is little to no reassurance that should a state or Tribe need more than 60 days to review a project, involve the public, and write a decision that the state or Tribe will receive this time.

Agency's Response: The Agency appreciates these comments and recognizes that a 60-day default reasonable period of time is not sufficient for reviewing requests for certification for all project types, potentially leading some certifying authorities to deny or waive certification. For this reason, and several other reasons discussed in section IV.D of the final rule preamble, EPA is finalizing a default reasonable period of time of six months.

Additionally, EPA does not find an appeals process for certifying authorities to appeal the default reasonable period of time necessary, because 1) certifying authorities are involved in the determination of the reasonable period of time, and 2) the final rule includes provisions for automatic extensions of the reasonable period of time in certain scenarios. *See* 40 CFR 121.6 and Section IV.D of the final rule preamble.

4.2.3.3 Administrative Burden and Time to Sufficiently Review

Numerous commenters alleged that the 60-day default is too short for certifying authorities to accomplish required tasks. Commenters said the default is restrictive, prohibits thoughtful review of certification requests, and places undue burden on the states given public notice requirements (e.g., state requires a 30-day public notice period, which would need to run after an initial 2-3 week period to assign and conduct an initial review of the request, so by the end of the notice period, they would be up against the 60-day period without having sufficient time to respond to comments and conduct a final review). The commenters argued that the 60-day default simply does not allow adequate time to receive and review the request, receive any additional information requested, publicly notice the draft certification, respond to public comments, and issue the certification decision. One commenter observed that a 60-day default review period is not feasible, based on the time necessary for reviewing the project for completeness, the time allotted for public notice, and the time for reviewing the project activities for certification. Another commenter stated that certifying authorities need more time to evaluate an application as they ask questions and receive more materials to address information gaps. Another commenter said that the proposed default reasonable period of time and approach unfairly prejudices states' and Tribes' ability to review projects, and asserted that certifying authorities are best equipped, in light of their understanding of their own procedures, resources, and applicable state or Tribal law, to determine the time necessary for review.

One commenter explained that in most cases, defaulting to 60 days will not allow sufficient time for a state or Tribe to (1) technically review the certification request; (2) prepare and publish public notice of the request for public comment; (3) make necessary supporting application documents and data available to the public; (4) provide the public with sufficient time to review the proposal and draft and submit comments, noting that EPA should assume that the public needs at least 60 days to comment after a public notice is issued by a state or Tribe. *See, e.g*., E.O. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735, 51740 (Oct. 4, 1993) ("[A]fford[ing] the public a meaningful opportunity to comment on any proposed regulation … in most cases should include a comment period of not less than 60 days."); (5) review comments and input submitted by the public; and (6) fully consider and respond to public comments, before (7) making a determination on the request and giving notice of the same to the project proponent and the public.

Several commenters expressed concern that the 60-day default did not account for the administrative or resource burden on certifying authorities or Federal agencies. One commenter expressed concern about the 60-day default reasonable period of time, because certifying authorities had to increase their staff and resources to meet the Corps 60-day deadline. This commenter also stated that the 2020 Rule caused an increase in workload to process additional individual certifications. Another commenter observed that EPA did not address the increased administrative burden of requiring the certifying authority and Federal

agency to negotiate the reasonable time period, and any extension of that time period, for every request for certification. The commenter asserted that FERC has previously expressed an unwillingness to engage in case-by-case review of state procedures in the context of section 401 due in large part to the administrative effort. A different commenter said the proposal was not based on an analysis of project timelines or input from Tribes and states and would put an excessive burden on Tribal staff who already have limited capacity and multiple responsibilities—particularly in comparison to well-resourced corporate permit applicants. The commenter noted that while these timelines may be less convenient for industry, they are vital to the protection of treaty resources and community, and are rooted in decades of legal precedent, public process, and the best available science. A different commenter added that certifying authorities should not be expected to request extensions on each certification.

A few of these commenters discussed specific workload challenges in specific jurisdictions. One commenter, who runs its 401 water quality certification program with a 0.5 full-time employee (FTE) position, noted that states with relatively small programs aim to be expeditious in delivering timely certification decisions but occasionally struggle to accommodate fluctuating workloads, especially when staff is on leave or multiple applications are received at once. Accordingly, the commenter recommended that EPA should lengthen the default to account for issues that may arise in complex certifications. Another commenter said that looking at an activity as a whole requires a significant amount of staff time and coordination to evaluate, for example, pre and post conditions for stormwater runoff; potential impacts to threatened and endangered species including temporary staging and timing of proposed activities; assessment of the functions and values of the wetland; loss or impact from the activities; and evaluation of impacts to fisheries and benthic habitat. The commenter noted that in their state, the certifying authority must publish a notice of a decision on all 401 water quality certifications, leaving it with 30 days to confirm request for certification components are present and sufficient, review request for certification materials, create EA summary documents, coordinate with the project proponent and the Federal agency, conduct administrative processing such as coordinate the notice of tentative determination with vendors/appropriate newspapers and route the certification through the appropriate chain of command for signature, respond to comments received during the comment period, and attend to other items as needed. As a result, the commenter stated that 60 days is not a sufficient or reasonable period of time for nearly all request for certification reviews.

One commenter said that there is no reason to arbitrarily shorten the timeline for certification reviews, and recommended that EPA extend the default to give overstretched state and Tribal agencies sufficient time to collect comments and consider all relevant factors when reviewing the impacts of federally-licensed projects.

Some commenters specifically discussed their concerns with the 60-day default reasonable period of time and meeting public notice and hearing requirements pursuant to section 401. One commenter noted that many states have statutory public notice and comment obligations that could not be completed within 60 days. The commenter asserted that the proposal's provision for granting an automatic extension where the state or Tribal public notice and comment process takes longer than the negotiated or default reasonable period is good procedural practice but is not a justification for a too-short default time limit – an extension should be exceptional, not routine. Another commenter stated that if a public hearing is requested during the public notice period, the 60-day review period would not be met and ultimately limiting the period to

60 days may hinder the public input process if a hearing is deemed necessary. A different commenter opined that the proposal sets timeframes that unreasonably limit its ability to meet its required administrative and public processes for water quality decisions, noting that the CWA clearly grants states the responsibility and authority to develop reasonable public notice procedures. The commenter suggested that EPA's rule should consider that states require time to meet established procedures for public notice, asserting that the proposal's default would make it difficult, if not impossible, for the commenter to comply with existing public notice and comment requirements, particularly with respect to complex certification decisions. The commenter asserted that consistently meeting time limits imposed by the proposal would result in noncompliance or would require amendment of state law and that this limited review period would interfere with the ability of the commenter to meet its administrative processes and may not provide opportunity for meaningful notice and comment. One commenter asserted that the 60-day default and additional procedures to obtain extensions to comply with public notice and participation requirements disregards certifying authorities' expertise in processing and reviewing applications for certification, and it makes the review process more burdensome, increasing the difficulty for states and Tribes to comply with their own procedures and state law requirements. The commenter noted that the CWA requires states to provide public notice and encourages public hearings and that many states are required to hold a public comment period ranging from 15 to 60 days. The commenter also asserted that some states must also wait for completion of Federal or state environmental reviews required under NEPA or similar state statutes before making determinations on applications. As an example, the commenter discussed the section 401 review process in Virginia. The commenter noted that state law establishes the following: interagency consultation, public notice and comment, and the certifying authority's review period, which can vary based on whether the project requires additional public hearings or public process (e.g., natural gas transmission pipelines larger than 36 inches in diameter). Another commenter found the 60-day default inadequate for project review because it must issue a public notice for 30 days, then may need to address comments and/or hold a public hearing. The commenter noted that they may also request additional information from the project proponent within this period, which may delay the public notice. As a result, the commenter asserted that 60 days is not an adequate period in which to request and receive additional information, hold a 30-day public notice, address comments, hold a public hearing, and respond to additional comments.

Some commenters observed that, while EPA acknowledged that some certifying authorities may have public notice requirements and could provide written justification for the extension, this will almost always be necessary and would be an undue burden on them as they would need to provide a written notice for every certification request. The commenters also asserted that it was unclear why these factors would not already have been considered during the 30-day negotiation between the Federal agency and certifying authority.

Commenters implored EPA to keep "front of mind" as it completes this rulemaking process that it can be easy when considering the "moving parts" of the section 401 certification process to focus only on the regulatory dynamic between the involved state or Tribe and Federal agency. The commenters asserted that they and other members of the public lean heavily upon section 401 to protect water resources and communities from pollution, and it is imperative for EPA to prioritize the public's interests and rights as it considers section 401 timeframes and processes, citing 33 U.S.C. 1251(e).

Relatedly, other commenters also asserted that EPA should not assume that there is a sophisticated environmental attorney or non-governmental organization (NGO) "at the ready" to assist communities with navigating every section 401 certification process, as most of the time there is not. Commenters argued that many communities, including rural, frontline environmental justice, and other underserved communities, require sufficient time after a certification application is publicly noticed by a state or Tribe to figure out how to participate, attempt to find technical and/or legal assistance (if it is available at all), and ultimately participate in the certification process with whatever understanding, expertise, and resources they can muster. Commenters implored the Agency to prioritize the public's rights and ability to fully and fairly participate in protecting their waters and communities and suggested the Agency could accomplish this by allowing states and Tribes to determine reasonable periods of time themselves, or by increasing the default reasonable period of time for states and Tribes to act, will be vital in this regard. Another commenter asserted that the proposal provides inadequate opportunity for public engagement, particularly by historically marginalized communities or Tribes, noting that sixty days may be an appropriate amount of time in some situations but is far too short to be the default. Similarly, one commenter noted that a longer period may be necessary to ensure historically marginalized communities or Tribes impacted by a project have the time necessary to research and comment on the possible impacts on waters that they rely and depend upon. As a result, the commenter asserted that the default appears to be inconsistent with the Administration's goal of advancing environmental justice.

Agency's Response: EPA agrees that a 60-day reasonable period of time is not sufficient for reviewing all requests for certification of different types of projects, and for the reasons discussed in the final rule preamble, the Agency is finalizing a longer default reasonable period of time of six months. *See* Section IV.D of the final rule preamble.

***See also* the Agency's response to comments in Section 4.1 on who sets the reasonable period of time and Section 4.4 on automatic extensions to the reasonable period of time.**

4.2.3.4 Default Should Be One Year

Many commenters said the proposed 60-day default is contrary to the plain language and intent and purpose of CWA section 401, under which states have one year to decide on a request for certification. Commenters asserted that Congress did not authorize EPA to decide for a state what constitutes a "reasonable time" to act below one year, and that EPA's regulations should not contravene the statute by mandating action, or allowing the Federal agency to mandate action, in less than one year.

Commenters asserted that there were several foreseeable consequences of a 60-day default, including more frequent extensions and requests for extensions, more conflict over required review information, strain on limited state capacity, and greater post-decision conflict or litigation. As a result, commenters suggested that the default should be one year because it is sufficient time for a certifying authority to act and provides confidence in an endpoint to project proponents. Another commenter asserted that EPA's proposed default sets the certifying authorities up to fail, at the expense of the environment and the communities section 401 is meant to protect. The commenter recommended that EPA should revise the rule to provide that a Federal agency may request the certifying authority act in less time than one year, but the certifying authority must consent and in no event shall its refusal or failure to act in less than one

year be the basis for a waiver determination. Commenters suggested that EPA revise the proposal to read: "If the Federal agency and the certifying authority do not agree on the length of a reasonable period of time within 30 days of receipt of a request for certification, the reasonable period of time shall be one year." One commenter asserted that a project proponent should assume a certification decision will not occur until the statutory maximum one year runs.

Commenters asserted that while certifying authorities can and often do routinely act on requests in less than one year, particularly in contexts outside of complex Federal licensing proceedings for major infrastructure projects, like hydropower projects and natural gas pipelines, that does not mean EPA should assume 60 days is sufficient time for a certifying authority to act in all cases. Instead, the commenters suggested that states and Federal agencies can establish MOAs with shorter categorical or standardized time periods for routine permitting matters and more contextually sensitive criteria for common project types. For novel, complicated, or controversial projects, commenters suggested that states and Federal agencies can negotiate an appropriate review period based on the factors EPA suggests – project type, complexity, location, and scale; the certifying authority's administrative procedures; and the potential for the licensed or permitted activity to affect water quality – but absent an agreement, the state should be able to avail itself of the maximum time provided under the statute.

> **<u>Agency's Response</u>: EPA disagrees with commenters asserting that the plain language of section 401 provides for a one-year reasonable period of time in all instances. As discussed in Section IV.D of the final rule preamble, section 401(a)(1) provides that the reasonable period of time "shall not exceed one year," which means that the reasonable period of time can be less than one year. If Congress meant for the reasonable period of time to be one year in all cases, it would have simply written "shall be one year." But Congress did not do that. For the reasonable period of time to "not exceed one year," it must either be less than or equal to one year. Under the clear language of the statute, Congress envisioned a scenario in which the reasonable period of time could be less than one year. For the reasons explained in Section IV.D of the final rule preamble, EPA reasonably decided on six months as the default, which is half of the maximum allowable time, substantially longer than the proposed and often applied 60 days, and consistent with almost 50 years of implementation under the 1971 Rule. Again, the default only applies where the Federal agency and certifying authority cannot agree on another period of time, which EPA expects to be rare. In sum, this approach is consistent with the plain text of CWA section 401 and the Agency's longstanding implementation of that text under the 1971 Rule, which acknowledged that the reasonable period of time may be less than one year and is generally considered to be six months. *See* 40 CFR 121.16(b) (2019). Nevertheless, the Agency re-emphasizes that six months is only the default, and that certifying authorities and Federal agencies may agree to a reasonable period of time less than or equal to one year on a case-by-case or categorical basis.**
>
> ***See also* the Agency's Response to Comments in Section 4.1 for further discussion on setting categorical reasonable periods of time.**

4.2.3.5 Default Should Be 90 Days/120 Days/180 Days

Many commenters claimed that a 60-day default is too short and should be longer, providing specific suggestions including 90 days, 120 days, and 180 days, noting that 180 days is consistent with EPA's guidance under the 1971 Rule. Commenters stated that EPA lacks data to justify moving all projects to 60 days, which does not account for required time expended in discussion with the Federal agency, the required coordination and review of pertinent information and consultation with other affected state agencies, and implementation of state administrative requirements governing public notice and comment. One commenter referenced the proposed rule's economic analysis and said that most certification decisions are issued in 60-90 days, while another commenter observed that the reasonable period of time for general permits almost always needs to be longer than 60 days, because determining the potentially affected parties and impacts of a general permit takes a significant amount of time.

Several commenters argued that Section 401 already limits the maximum amount of time a certifying authority may take—one year. One commenter noted that the suggested default of 60 days does not recognize that for complex projects—like liquefied natural gas (LNG) terminals or deepwater ports and those that trigger the need for an EIS or multiple Federal permits—it may be insufficient. The commenter expressed concern that the proposal would not incentivize the Federal agency to critically weigh the needs of the certifying authority for more time, since the period defaults to a mere 30 additional days if no agreement is reached after the first 30 days elapse. The commenter supported a longer default period—e.g., four to six months – and suggested that the certifying authority receive an automatic extension of time when it has been asked to certify complex projects (like those described above), and when the project proponent fails to provide needed information to the certifying authority within the existing time frame.

A few commenters discussed a six-month or 180-day default. One commenter asserted that the default should be increased to a minimum of six months to allow the public adequate time for robust and meaningful public participation, and for states and Tribes to have adequate time to carefully consider and incorporate public input in their decision making. Another commenter also said that EPA should return to the 1971 Rule language that provided that the reasonable period of time was generally considered to be six months. A different commenter said that a 60-day default is unreasonably short, especially considering that the reasonable period of time was generally considered six months for the past 50 years. Another commenter suggested that if EPA defines "request for certification" to include something short of the draft Federal permit or license, it should lengthen the default period to at least 180 days, preferably one year.

Commenters said that any default longer than 60 days but shorter than one year should be subject to modification by agreement or by a Federal agency's regulations. Commenters asserted that this would be more consistent with prior EPA regulations and practice and more likely to give states sufficient time to obtain and review necessary information from the applicant and complete their public notice and comment process.

> **Agency's Response: EPA agrees that a default 60-day reasonable period of time does not capture the length of time needed for all requests for certification, considering some**

projects are more complex and may require more coordination and information. For the final rule, EPA decided on six months as the default reasonable period of time for several reasons, as discussed in detail in Section IV.D of the final rule preamble. While the data on the amount of time it takes certifying authorities to act on a request for certification is limited, the data that is available from 14 certifying authorities shows that a six-month default would cover the self-reported length of time those certifying authorities take to issue a certification decision. *See* Final Rule Economic Analysis. Additionally, based on comments received on the proposed rule, it seems that many, if not most, commenters would support a six-month default reasonable period of time. However, the Agency re-emphasizes that six months is only the default, and that certifying authorities and Federal agencies may agree to a reasonable period of time less than or equal to one year on a case-by-case or categorical basis.

The Agency disagrees that the reasonable period of time should be automatically extended for complex projects or when the project proponent fails to provide needed information. The final rule provides automatic extensions to accommodate public notice procedures or due to force majeure events (including, but not limited to, government closure or natural disasters). The Agency maintains that providing a limited list of scenarios that warrant automatic extensions promotes efficiency and clarity, while providing some flexibility for stakeholders when unforeseen circumstances arise. However, Federal agencies and certifying authorities may agree to extend the reasonable period of time for any reason, such as those mentioned by commenters, provided it does not exceed the statutory one-year limit.

4.2.3.6 Any Federal Agency Default Greater Than 60 Days Should Apply

Several commenters argued that the final rule should clarify that if a Federal agency has a regulation or guidance document establishing a longer period for a particular type of request, that regulation or guidance document applies. For example, commenters noted that FERC has established by regulation that the reasonable period of time for state review of section 401 requests for hydropower and natural gas projects is one year. However, commenters stated that it is not clear whether such separate regulatory requirements would apply under the proposal.

A commenter asserted that the one year default the FERC established provides clarity and consistency and avoids dispute and possible litigation that could arise from disparate case-by-case determinations. Therefore, the commenter proposed that the default be 60 days unless the Federal agency regulations define a different reasonable period of time, provided it is not less than 60 days, which would allow FERC to continue applying one year, per its regulations.

Agency's Response: EPA does not find that Federal agency defaults in regulation that are less than one year can supersede the need for a certifying authority and Federal agency to collaborate in setting the reasonable period of time. That said, if a Federal agency establishes a one-year reasonable period of time in regulation, EPA finds that it would not be at odds with the final rule's language or intent. Rather, in such a scenario (*e.g.*, FERC

regulations), it is unnecessary for the certifying authority and Federal agency to negotiate an alternate reasonable period of time because the certifying authority is provided the maximum amount of time statutorily allowed, and if it determines that one year is too long, it may act on the request for certification as early as it chooses. In these circumstances, individual written agreements for each request for certification communicating the reasonable period of time would not be necessary, since a negotiation between the certifying authority and Federal agency would not need to occur.

4.2.3.7 EPA's Experience with NPDES Permits is not Representative

Some commenters observed that EPA's primary support for the default is its "nearly 40 years of experience with NPDES permits." But the commenters noted that, according to the economic analysis, less than 0.05% of "the annual average number of Federal licenses or permits issued that may require section 401 certification" are NPDES permits. Commenters also noted that the same document acknowledges that "[m]ost states issue certification decisions [for all projects] in 60-90 days." Accordingly, the commenter asserted that EPA cannot rely on its experience with NPDES permits—which make up an infinitesimal amount of the number of potential 401 certifications required annually—to prevent certifying authorities from taking the time necessary to fulfill their obligations under section 401.

Agency's Response: The Agency acknowledges that EPA-issued NPDES permits only comprise approximately 0.25 percent of the annual average number of Federal licenses and permits subject to certification. *See* Final Rule Economic Analysis. The Agency also appreciates the variable factors that inform the amount of time it may take a certifying authority to act on a request for certification. As discussed further in section IV.D of the final rule preamble, the Agency is finalizing a six-month default reasonable period of time.

4.2.3.8 60 Days is Unreasonable if Draft License or Permit is not in the Request For Certification

Several commenters noted that, should the final rule not include the requirement for the applicant to include in a request for certification a draft of the relevant Federal license or permit, a longer time for review will be required, and the final rule should reflect this. Commenters asserted that EPA's adoption of a shorter default period appears to be, in large part, predicated on the assumption that the "request" the certifying authority will receive will include a draft Federal license or permit and thus it will have the benefit of the process that the Federal agency has undergone and the preliminary conditions the agency will seek to impose. Commenters noted that if EPA opts for a different approach that does not require that applicants wait to apply until they have a draft Federal permit or license, the proposed default will be unreasonable in an even greater number of cases.

Agency's Response: As discussed in Section IV.C of the final rule preamble, EPA is not finalizing that a copy of the draft license or permit be included for all requests for certification. The Agency agrees that 60 days is not sufficient for certifying authorities to review all requests for certification due to different project types having varying levels of

complexity. Therefore, EPA is not finalizing a 60-day default reasonable period of time. *See* Section IV.C, D of the final rule preamble.

4.2.3.9 CZMA Federal Consistency Review

Several commenters asserted that the 60-day default reasonable period of time would not align with concurrent Federal consistency reviews conducted pursuant to the CZMA and would either undermine efficient review processes or make it unnecessarily challenging. One commenter noted that Federal consistency review under the CZMA provides states with an important tool to manage coastal uses and resources, to facilitate cooperation and coordination with Federal agencies, to work with non-Federal entities seeking Federal approval and authorizations, and to balance competing interests such as energy development, tourism, recreation, and ecological protection. Another commenter noted that multiple coastal states have reported that, under the 2020 Rule, Corps districts have set 60- or 90-day time limits for CWA section 404 permits and have had to routinely grant extensions. Most of these commenters recommended that the timeframe should never be shorter than the CZMA Federal consistency period of six months, particularly for activities in the coastal zone. One commenter suggested that EPA should also ensure as a general principle that, should the design or impacts of a proposed project change significantly during the review process, regardless of whether the changes are driven by preliminary Federal permit conditions or any other reason, adequate time is provided to states to review the changes through extension or staying of the review period. The commenter argued that it is beneficial for the Federal agency and the applicant that these processes align as to reduce decision delays.

Agency's Response: While most of these comments are addressed through the establishment of a longer default reasonable period of time of six months, EPA also notes that these are the types of permits, licenses, and/or projects that could warrant a categorical agreement between the Federal agency and certifying authority to establish the appropriate reasonable period of time. Furthermore, as discussed in section IV.D of the final rule preamble, if a Federal agency establishes a one-year reasonable period of time in regulation (*e.g.*, FERC regulations), it is unnecessary for the certifying authority and Federal agency to negotiate because the certifying authority is already provided the maximum amount of time statutorily allowed.

4.2.3.10 Complex Projects

A few commenters stated that 60-day default could be appropriate for smaller projects (e.g., projects covered by general permits), but for complex projects the 60-day default may not provide certifying authorities with enough time to determine a proposed project's compliance with applicable water quality regulations. Commenters suggested that the final rule should consider the circumstances that impact the amount of time a certifying authority may need to evaluate a proposed project to uphold the certifying authority's role of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters and defer to the expertise or management needs of the certifying authority when establishing reasonable periods of time. Accordingly, commenters recommended that the final rule could establish default durations as a function of permit type, noting that this approach considers that the evaluation of a project requesting the use of a general permit, for example, may differ from the evaluation

of a project requesting an individual permit with the understanding that in no instance will the period exceed one year from the date of receipt of a certification request.

Another commenter asserted that water supply projects in their jurisdiction are often controversial and generate a large volume and wide range of public comments, which can be very technical in nature as local groups that oppose water projects hire consultants to conduct their own evaluations of project impacts. The commenter stated that it takes public process seriously and is diligent in its efforts to consider and incorporate, where appropriate, these comments into conditions. The commenter also noted that it coordinates with certification applicants and other state agencies in crafting mitigating conditions -- a process that entails a great deal of email communication and numerous meetings to discuss myriad technical and legal aspects of certification conditions.

Several commenters observed that the 60-day default is inadequate for FERC pipeline authorizations or relicensing of hydroelectric dams, for which FERC has established by regulation the reasonable period of time as one year. Commenters asserted that hydropower projects are complex, time-intensive, and can affect many miles of rivers with their operations and contain multiple dams and other project works that impact water quality in the entire watershed. In many cases, commenters noted that certifying authorities need a full year to entirely assess the impacts of a given hydropower project on water quality. Indeed, one commenter's last four water supply projects that have undergone the certification process have taken the entire year to process, even with several staff members, consultants, and an assigned attorney dedicating significant resources consistently throughout that entire period of time.

> **<u>Agency's Response</u>: The Agency agrees that 60 days may be a sufficient reasonable period of time for some projects, but other projects may require more time for certifying authorities to act on the request for certification. For multiple reasons discussed in Section IV.D.2 of the final rule preamble, EPA is finalizing a default reasonable period of time of six months. The Agency is not finalizing different default reasonable periods of time based on project types, because EPA does not believe it can draw clear lines on the needs of projects even if they are for the same type of permit or project. Some projects of the same type may require more or less time for review, and circumstances or questions that arise are not always predictable. Rather than establish multiple default reasonable periods of time based on project or permit type and risk confusion, EPA is finalizing a default reasonable period of time that is in the middle of the statutory limit of one year. However, EPA reminds stakeholders that the default of six months only applies if the certifying authority and Federal agency do not reach an agreement. Federal agencies and certifying authorities may collaboratively set the reasonable period of time in lieu of relying on the default of six months. Under this approach, Federal agencies and certifying authorities can offer each other their expertise relevant to determining what timeframe is reasonable. The Agency also encourages certifying authorities and Federal agencies to consider project complexity when determining the reasonable period of time.**

4.2.3.12 No Default

A few commenters suggested that the Agency should not establish a default reasonable period of time, including one commenter who suggested that certifying authorities and Federal agencies have the opportunity to decide on the default reasonable period of time instead of the 60-day default.

> **Agency's Response: EPA holds that establishing a default reasonable period of time in the final rule provides transparency for all stakeholders in the certification process. A default six-month reasonable period of time is consistent with the Agency's longstanding 1971 regulations, which provided that the reasonable period of time is generally considered to be six months. *See* 40 CFR 121.16(b) (2019). Thus, EPA's decision to choose six months as the default reasonable period of time is consistent with almost 50 years of program implementation under EPA's 1971 regulations. *See* Section IV.D of the final rule preamble for further discussion on the Agency's rationale for establishing a six-month default reasonable period of time.**

4.3 Causes for Delays and Data

A few commenters stated that a main cause of certification delay was insufficient application materials provided by the project proponent. One commenter cited several examples of project proponents delaying the process by: (1) choosing to withdraw and resubmit certification requests because they had not previously complied with environmental regulations, (2) "persistently refus[ing] to provide information" requested by the certifying authority, or (3) "walking away" from an extended timeframe agreement with the certifying authority after the certification was later denied. This commenter asserted that applicants have an incentive to delay the certification process to avoid more stringent certification conditions. Another commenter stated that applications submitted before being finalized was the most common cause of certification delays. Another commenter stated that for a proposed natural gas pipeline project, the certifying authority requested additional information from the project proponent multiple times and never received sufficient responses to allow the state to certify the project. This commenter also asserted that the reasonable period of time should be extended in the event of an applicant-caused delay so that the certifying authority is not forced to deny the certification request. Another commenter argued that allowing certifying authority's discretion in allowing extensions and withdrawal and resubmission would delay projects and make project proponents unsure of timing.

Some commenters provided quantitative data about the average time required to process a request for certification. A few commenters reported that it takes an average of 79 to 80 days to issue a certification. One commenter stated that it has received approximately 16 requests for certification per year, and another commenter stated it has processed 458 certification requests in the last three years. One commenter stated that their typical certification timeline (upon receiving a complete application) includes a 1-2 week review period, a 30-day public notice, and a 2-4 week management review and response to comment period. One commenter stated that Virginia's Department of Environmental Quality (DEQ) has noted that while most 401 actions requiring public comment can be completed within 110 to 130 days, certifications for more complex projects can take longer, especially where incomplete applications are submitted. Another commenter stated that approximately 90% of their certification are issued within 60

days, and for the majority of those issued beyond 60 days, the certifying authority was required to request additional information from the project proponent. The commenter also provided that some of its concerns regarding the reasonable period of time were partially ameliorated by proposed section 121.5(b) and the definition of "receipt."

Agency's Response: EPA finds that several provisions of the final rule will help to minimize delays in the certification process, including but not limited to pre-filing meeting coordination and a greater availability of information afforded to the certifying authority at the beginning of the certification review process under the final rule (as compared to the 2020 Rule). *See* Section 4.4 of the Final Rule Economic Analysis for further discussion.

The Agency appreciates the quantitative data that some commenters shared. The data was incorporated as appropriate into the economic analysis of the final rule to provide insight into the timing of certification decisions. *See* Final Rule Economic Analysis.

4.4 Extensions to the "Reasonable Period of Time"

4.4.1 Automatic Extensions

All commenters expressed support for extending the default reasonable period of time due to unforeseen circumstances such as government closures or force majeure events. A commenter wrote that states appreciated that the proposed rule accommodated certifying authorities' requirements for public notice or "force majeure events." A few commenters explicitly supported maintaining the automatic extension provision if the rule retains a default reasonable period of time.

Several commenters suggested that automatic extensions should be limited only to unforeseen events and extensions should not include public comment and other known procedures that were in place at the time the reasonable period of time was established. One of these commenters also noted that automatic extensions should not be allowed for staff shortages or other reasons unrelated to the proposed project.

On the other hand, other commenters expressed support for an expanded list of situations that warrant automatic extensions and for maximum flexibility in terms of extensions to address such things as public hearings, responding to comments, revisions to the certification based on community engagement, appeals under state laws, project complexity, and inadequate information or unresponsive project proponents. A few commenters noted that while examples may be helpful, the rule should not include a defined list or limit the circumstances under which extensions could be granted. Conversely, a few commenters suggested that situations and reasonable standards for automatic extensions should be established to provide for more efficiency and predictability.

Some commenters noted that the rule needs to provide more clarity such as specifically defining public notice requirements and providing more details on how extensions would work. One commenter asserted that automatic extensions should only be the period of time necessary for the certifying agency to satisfy its public notice requirements, and that extensions be granted only if EPA finds that unusual circumstances require a longer time.

Agency's Response: The Agency appreciates commenter suggestions on reasons for automatic extensions to the reasonable period of time. This final rule allows certifying authorities, in limited circumstances, to unilaterally extend the reasonable period of time. The final rule recognizes that there are circumstances the reasonable period of time should be extended without the certifying authority needing to negotiate an agreement, including where a certification decision cannot be rendered within the reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters) and where the state or Tribal public notice and comment process that exists at the time the written notification for an extension is received takes longer than the negotiated or default reasonable period of time. The Agency is finalizing that extensions of the reasonable period of time must occur to accommodate certifying authority public notice "procedures," rather than public notice "requirements" as was proposed. This change is consistent with the statutory language that certifying authorities "shall establish procedures for public notice in the case of all applications for certification." 33 U.S.C. 1341(a)(1). The change to "procedures" also clarifies that extensions to the reasonable period of time could be due to subsequent public hearing procedures.

The Agency disagrees with the commenter suggesting that automatic extensions should only be granted if the Agency finds unusual circumstances for reasons discussed above and in Section IV.D of the final rule preamble.

The Agency declines to add other scenarios or remove the limited list of scenarios that require automatic extensions. The Agency maintains that providing a limited list of scenarios that warrant automatic extensions promotes efficiency and clarity, while providing some flexibility for stakeholders when unforeseen circumstances arise. EPA retained the accommodation for public notice procedures in the list of circumstances warranting extensions of the reasonable period of time to capture unanticipated occurrences such as extended public notice periods. This approach also supports section 401's emphasis on public notice opportunities and is consistent with the spirit of cooperative federalism in balancing the interests of certifying authorities with those of Federal agencies. *See also* Section IV.D of the final rule preamble for further discussion. To be clear, the Agency finds that such extensions only apply to public notice procedures in effect at the time the written notification for an extension is received. Due to the final rule's collaborative approach to setting the reasonable period of time, which allows for consideration of certifying authority public notice procedures, the Agency expects that the need for automatic extensions to accommodate public notice procedures will be rare. In all other instances, certifying authorities and Federal agencies may determine collaboratively whether and how the reasonable period of time should be extended, as long as it does not exceed one year.

In response to comments requesting more clarity on how automatic extensions would work, the Agency has revised section 121.6 to clearly delineate automatic extensions from agreed-upon extensions. Additionally, the Agency has revised what is now section 121.6(d) to clarify

that in the certifying authority's notification to the Federal agency, it must identify how much additional time is required by either the public notice procedures requirements or the force majeure event in addition to the justification for such extension. To be clear, automatic extensions shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

4.4.2 Agreed-upon Extensions

Most of the commenters expressed support for the certifying authority and Federal agency agreeing to extensions, after consulting with the project proponent, and the flexibility it would allow. One commenter supported retaining a process for agreed-upon extensions if the final rule included a default reasonable period of time. Conversely, a couple commenters expressed that the decision to extend the reasonable period of time should only be at the discretion of the Federal agency, while another commenter suggested that the certifying authority should have the sole discretion to extend the reasonable period of time. One of these commenters stated that not having the Federal agency as the final decisionmaker would render the 60-day default meaningless and there would be no way to address disagreements over extensions.

Several commenters noted that extensions should only be allowed under specific justifiable and reasonable limits and that the concerns of the project proponent in terms of cost and project schedule be taken into consideration. One commenter suggested that the rule should identify specific situations where extensions should be granted and provide clearly defined provisions for extending the reasonable period of time. Another commenter indicated that the proposed rule was unclear whether the EPA or the Federal agency could deny the request for an extension if they did not agree with justification for the extension.

Some commenters stated that certifying authorities and Federal agencies should engage project proponents as much as possible when determining whether to extend the reasonable period of time. A few commenters noted that the concerns of the project proponent should be taken into consideration in terms of extensions to the reasonable period of time. One commenter suggested that the certifying authority should provide written justification for the extension request to both the Federal agency and the project proponent. Conversely, other commenters suggested that consultation with project proponents be removed from the regulatory text, or the language be change to notification rather than consultation when determining to extend the reasonable period of time. Other commenters suggested the regulatory text be clear that the project proponent does not have the ability to veto a final decision made by the certifying authority and the Federal agency.

A couple of commenters stated that it is unclear how the project proponent has a role in the determination of any extensions. One of the commenters said that the term "consulted" should be changed to given "notice." On the other hand, a different commenter said that the project proponent should be able to provide input on the reasonable period of time because the decision would impact the timing and planning of the projects.

A few commenters specifically noted that extensions should not be permitted in situations where the certifying authority fails to act with the reasonable period of time. One commenter suggested that extensions to the reasonable period of time should not be allowed for any reason. A commenter said that

EPA should clarify that the one-year language in the statute is indeed a deadline and if a certifying authority does not act within that deadline, the certification is waived. Another commenter said that the one-year statutory deadline cannot be bypassed by requests for additional information and resetting the clock, which the commenter said the proposed rule may allow.

One commenter asserted that the proposed rule did not include any mechanism to extend the reasonable period of time and would result in denials in instances where the certifying authority is waiting for the project proponent to provide additional information. The commenter argued that this would lead to an unnecessary burden on certifying authorities without any environmental benefit, and impact financial aspects of the proposed project.

Agency's Response: Consistent with the collaborative approach for setting the reasonable period of time, EPA maintains that the Federal agency and certifying authority should be able to jointly agree to extend the reasonable period of time in most cases, provided the extension does not exceed one year from the receipt of the request for certification. Aside from these requirements, the Agency declines to define or limit circumstances under which a certifying authority and Federal agency may agree to extend the reasonable period of time. Rather, the Agency finds that both the Federal agency and certifying authority can provide insight on the length of time a review needs to be extended, based on their knowledge of the Federal licensing or permitting process and their knowledge of water quality and applicable state or Tribal laws, respectively.

EPA holds that both the Federal agency and certifying authority must both agree to the extension, unless the reason for the extension falls under one of the two automatic extension categories as discussed in Section IV.D of the final rule preamble. Therefore, if one party does not agree, then the extension cannot occur. *See also* Section IV.F and G for further discussion on waivers resulting from failure to act within the reasonable period of time.

The Agency is not finalizing proposed text that would have required project proponent consultation. Under this final rule, the project proponent does not play a role in setting the reasonable period of time, see section 121.6(b), so it is unnecessary to provide the project proponent with a role in extending the reasonable period of time. Additionally, considering the annual average number of certification requests[3] and therefore possible extension requests, EPA finds it unreasonable to require project proponent consultation on all requests for extension. However, the final rule does not prevent the certifying authority and Federal agency from seeking input from the project proponent on any potential extensions.

The Agency strongly disagrees with the commenter asserting that extensions should not be allowed for any reason. First, the statute does not address extending the reasonable period of time once it has started; it does not prohibit extending the reasonable period of time as long as the certifying authority "acts" within one year from the date the request for

[3] EPA estimates that the average annual number of certification requests is 1,947 requests per certifying authority. *See* Supporting Statement for the ICR.

certification is received. Second, federal agency regulations allow for extensions to occur. For example, several Federal agencies, including EPA and the Corps, have established regulations allowing extensions to their default reasonable periods of time. *See* 40 CFR 124.53(c)(3) (2022) (allowing for a reasonable period of time greater than 60 days for certification requests on NPDES permits where the EPA Regional Administrator finds "unusual circumstances"); 33 CFR 325.2(b)(1)(ii) (allowing for a reasonable period of time greater than 60 days for certification requests on Corps permits when the "district engineer determines a shorter or longer period is reasonable for the state to act."). Additionally, the 2020 Rule allowed certifying authorities to request an extension of the reasonable period of time. 40 CFR 121.6(d) (2020). Third, most of the commenters who addressed extensions of the reasonable period of time supported allowing certifying authorities and Federal agencies to agree to extensions. *See* the Final Rule Economic Analysis for further discussion on the benefits associated with extensions to the reasonable period of time.

The Agency also disagrees with the commenter asserting that the proposed rule did not provide a mechanism for extending the reasonable period of time. The Agency is finalizing its proposed approach to extending the reasonable period of time, including allowing certifying authorities and Federal agencies to determine collaboratively whether and how the reasonable period of time should be extended, as well as allowing for automatic extensions in limited scenarios, as long as it does not exceed one year. 40 CFR 121.6(d)-(e).

4.5 Withdrawal and Resubmittal

4.5.1 Support 2020 Rule Reading of Hoopa Valley Tribe

Some commenters strongly opposed the proposed removal of 40 CFR 121.6(e) (2020), citing various cases in support of their opposition, including *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019); *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1182 (D.C. Cir. 2022); *N.Y.S. Dep't of Env'l Conserv'n v. FERC*, 991 F.3d 439 (2d Cir. 2021); *N.C. Dep't of Envtl. Quality (NCDEQ) v. FERC*, 3 F.4th 65 (4th Cir. 2021); *SWRCB v. FERC*, 2022 WL 3094576, at *9-10. (9th Cir. August 4, 2022). A few commenters described the facts of *NCDEQ v. FERC* as highly unusual and distinct from *Hoopa Valley*; accordingly, the commenters concluded that the Fourth Circuit decision does not justify EPA's proposed revisions to 40 CFR 121.6(e). One commenter stated that the fact pattern that arose in *NCDEQ v. FERC* would not happen under the 2020 Rule.

A couple commenters asserted that the final rule should state that the withdrawal and resubmittal process is unlawful. One commenter asserted that EPA has a duty to ensure that the rulemaking revisions do not allow for manipulation of the statutorily prescribed timeline, arguing that some states have abused the certification process. The commenter further asserted that the 2020 Rule's position on withdrawals and resubmittals have helped ensure that the certification process cannot be misused to delay or prevent issuance of the license or permits. Commenters also disagreed with EPA's position that case-by-case determinations of whether and when withdrawal and resubmittal of a certification request is appropriate and asserted that the existing case law from *Hoopa Valley* clearly demonstrates the need for EPA to enforce regulations to compel compliance with the express section 401 deadlines.

Commenters who opposed EPA's proposed approach to refrain from taking a position on the legality of withdrawing and resubmitting a request for certification asserted that this process may be used as a loophole to circumvent the one-year time limit described in section 401, which would increase uncertainty, increase costs, and indefinitely delay Federal licensing or permitting processes, especially if there is an increase in litigation. Many of the commenters who opposed EPA's proposed approach expressed concern that an open-ended process without guardrails would allow states and Tribes to hold the Federal licensing or permitting process hostage and/or coerce project proponents into withdrawing certification requests for feasible projects. These commenters described complex and sometimes conflicting case law as evidence for why EPA should take a position in regulation against situations in which a certifying authority requests the project proponent withdraw the certification request in order to extend the certifying authority's review period. These commenters asserted that clarity is important in distinguishing between a circumstance where the project proponent might withdraw their request for certification and cases where the certifying authority attempts to delay the commencement or conclusion of the certifying authority's review period.

Most of the commenters opposed to EPA's proposed approach pointed out that Congress was clear in their intent for including the statutory maximum one-year period of time in section 401 to "guard against a situation where the water pollution control authority in the State in which the activity is to be located . . . simply sits on its hands and does nothing." *See* 115 Cong. Rec. at 9,259 (starting debate on H.R. 4148, Water Quality Improvement Act of 1969), 9,264–65 (amendment offered and discussed), and 9,269 (amendment accepted) (Apr. 16, 1969). Therefore, these commenters asserted that it is outside of EPA's authority to allow certifying authorities to pressure project proponents to withdraw and resubmit requests for certification to extend the review period past the one year specified in the CWA. These commenters urged EPA to retain the language of the existing regulation at 40 CFR 121.6(e) since Congress already created a "bright line" in section 401 of one year.

A few commenters suggested that EPA should take a stance against the withdrawal and resubmittal of a certification request to extend the reasonable period of time beyond the one-year statutory maximum because under the proposed rule, the certifying authority would have a role in setting the reasonable period of time in which they can act on the request for certification. One commenter stated that if a project proponent submits all the information required by the certifying authority at the start, then there should be few reasons to ask a project proponent to withdraw and resubmit the certification request.

> **<u>Agency's Response</u>: EPA disagrees with the above comments and is aware that, historically under the 1971 Rule, certifying authorities sometimes asked project proponents to withdraw and resubmit their requests for certification to restart the clock and provide more time to complete their certification review. Neither the text of section 401 nor *Hoopa Valley Tribe* categorically precludes withdrawal and resubmission of a request for certification. EPA understands the concern expressed by the D.C. Circuit in *Hoopa Valley Tribe* that prolonged withdrawal and resubmission "schemes" might—under certain facts—unreasonably delay and frustrate the Federal licensing and permitting process. Yet, the potential factual situations that might give rise to, and potentially justify, withdrawal and resubmission of a request for certification are so varied that the Agency is not confident**

that it can create regulatory "bright lines" that adequately and fairly address each situation. By EPA not taking a regulatory position on this issue, it is up to project proponents, certifying authorities, and/or possibly Federal agencies to determine on a case-by-case basis whether and when withdrawal and resubmittal of a request for certification is appropriate. Such determinations are ultimately subject to judicial review based on their individual facts.

4.5.2 Avoiding a Denial Without Prejudice

A few commenters asserted that withdrawal and resubmission of certification requests may occur to avoid denials of certification. One commenter stated that timelines for projects that involve withdrawals and resubmissions could be addressed on a case-by-case basis by the certifying authority consistent with state and Tribal regulations. A few commenters suggested that allowing a certifying authority to discuss withdrawal and resubmittal with a project proponent is in the project proponent's interest because they may be able to avoid unnecessary denials of certification. Conversely, one commenter requested that EPA expressly prohibit the use of certification denials as a way to avoid a constructive waiver of certification, but the commenter suggested that project proponents should retain the ability to withdraw and resubmit their requests for certification if they deem it in their interest. Another commenter stated that the 2020 Rule limitations on informational requirements and limitations on withdrawal and resubmission exacerbated the same problem that certifying authorities were not able to properly consider all information on water quality, water quantity, and habitat impacts for projects where the license period may span decades.

Agency's Response: The Agency recognizes that there may be legitimate reasons for withdrawing and resubmitting certification requests, including but not limited to the following potential reasons: a new project proponent, project analyses are delayed, and/or the project becomes temporarily infeasible due to financing or market conditions. Because EPA is not taking a regulatory position on this issue, the final rule does not preclude a project proponent from withdrawing and resubmitting a request for certification and lets the certifying authorities, Federal agencies (*e.g.*, as the project proponent where it is the Federal agency issuing the license or permit), and/or possibly project proponents take the lead in deciding whether it is reasonable.

The Agency disagrees with the commenter asserting that the Agency should categorically prohibit the use of certification denials to avoid constructive waiver. *See* Section IV.F of the final rule preamble for further discussion on certification decisions, including denials of certification.

4.5.3 Limiting the Use of Withdrawal and Resubmittal

Some commenters expressed the need for safeguards in regulatory text outlining criteria where withdrawal and resubmittal of a certification request are appropriate, such as major change to the project route; the project becomes temporarily infeasible due to financing or market conditions; delays in project analyses; a change to project/parent company ownership; when an applicant is unable or unwilling to

provide the certifying authority with requested information; a change in law or regulation; a new scientific development; or a need to conduct additional consultation or public outreach on water quality impacts. One commenter recommended a requirement for the certifying authority and project proponent to consult with the Federal agency prior to the withdrawal of a request for certification where there is a pending license or permit application. One commenter asserted that any withdrawal and resubmittal scheme is a violation of Section 401(a)(1), absent a genuine change of circumstance under section 401(a)(3).

Some commenters expressed that EPA should make clear that withdrawal and resubmission of requests for certification may occur except where there is evidence that the certifying authority and applicant are attempting to collude to thwart Congress's intention to avoid undue delay in processing applications. A few of these commenters stated that EPA has an opportunity to avoid increased litigation and costly project delays by providing guidance to Federal agencies and applicants in the final rule. One commenter recommended that EPA expressly clarify the difference between a denial and resubmission and a withdrawal and resubmission of a request for certification.

A few commenters pointed to *NCDEQ v FERC*, where the state agency continued to correspond with the petitioner and therefore clearly intended to not abuse the withdrawal process. 3 F.4th 655, 669 (4th Cir., 2021). One commenter stated that EPA's reluctance to describe limits pertaining to withdrawal and resubmittal of requests for certification contrasts with EPA's willingness to wade into other areas where the statute is ambiguous, so the commenter suggested that EPA finalize a provision that makes clear that withdrawal and resubmissions are acceptable in the absence of evidence that the certifying authority and applicant are attempting to collude to thwart Congress's intention to avoid undue delay in processing applications. The commenter recommended that EPA include discussion around reasons that would justify a withdrawal and resubmittal, and noted that even under the 2020 Rule provision, questions remained (e.g., if the prohibition is on having the certifying authority require that the applicant withdraw and resubmit, would something that falls short of a requirement be deemed permissible? What would happen if an applicant radically changed its project and realizes that the certifying authority no longer has the time it needs to evaluate the implications of those changes? Could the applicant voluntarily withdraw its application rather than face a denial? What would stop an applicant in that circumstance from withdrawing its application and then claiming—once the reasonable period expired—that the state or Tribe waived its authority under section 401, because it implicitly required resubmission by making it clear that the alternative was a denial?).

Although one commenter asserted that EPA should not allow for withdrawal and resubmittal of requests for certification, the commenter suggested that EPA could require the certifying authority to provide justification for any extension beyond the one-year timeline and require that the certifying authority include a list of all requests for additional information or clarification necessary to complete the certifying authority's analysis. Another commenter asserted that litigation risks and costs could be reduced if EPA finalized a process where all parties should have to agree in writing to withdrawal and resubmission of the request for certification, with the rationale for why it is appropriate to circumvent the statutorily mandated one-year period.

One commenter recommended that EPA expressly provide for a process to restart the reasonable period of time through resubmission of remedied requests for certification following a denial without prejudice or EPA presumptively limit the quantity of withdrawal and resubmittals to three or fewer one-year periods.

Agency's Response: As discussed in the final rule preamble, EPA understands and shares the concern expressed by the D.C. Circuit in *Hoopa Valley Tribe* that prolonged withdrawal and resubmission "schemes" might—under certain facts—unreasonably delay and frustrate the Federal licensing and permitting process. However, the Agency does not find that mere coordination between the certifying authority and project proponent rises to the level of a scheme. The potential factual situations that might give rise to, and potentially justify, withdrawal and resubmission of a request for certification are so varied that the Agency is not confident that it can create regulatory "bright lines" that adequately and fairly address each situation. For example, the Agency recognizes that there may be legitimate reasons for withdrawing and resubmitting certification requests, including but not limited to the following potential reasons: a new project proponent, project analyses are delayed, and/or the project becomes temporarily infeasible due to financing or market conditions. By EPA not taking a regulatory position on this issue, it is up to project proponents, certifying authorities, and/or possibly Federal agencies to determine on a case-by-case basis whether and when withdrawal and resubmittal of a request for certification is appropriate. Such determinations are ultimately subject to judicial review based on their individual facts.

As discussed in Section IV.D of the final rule preamble, EPA recognizes that the practice of withdrawal and resubmittal has been subject to litigation. For example, in the *Hoopa Valley Tribe* case, which featured highly unusual facts, the court rejected the particular "withdraw and resubmit" strategy the project proponents and states had used to avoid waiver of certification for a FERC license. 913 F.3d at 1105. The court held that a decade-long "scheme" to subvert the one-year review period characterized by a formal agreement between the certifying authority and the project proponent, whereby the project proponent never submitted a new request, was inconsistent with the statute's one-year deadline. *Id*. Significantly, the court said it was not addressing the legitimacy of a project proponent withdrawing its request and then submitting a new one, or how different a new request had to be to restart the one-year clock. *Id*. at 1104. On the other hand, at least three circuit courts have acknowledged the possibility that withdrawal and resubmittal of a request for certification may be a viable mechanism for addressing complex certification situations. *See NCDEQ*, 3 F.4th at 676 (withdrawal and resubmittal was appropriate where the certifying authority and project proponent did not engage in a coordinated scheme to evade the reasonable period of time); *NYSDEC*, 884 F. 3d at 456 (noting in dicta that the state could "request that the applicant withdraw and resubmit the application"); *Cal. State Water Res. Control Bd. v. FERC*, 43 F. 4th 920 (9th Cir. 2022) (vacating FERC orders where FERC had found that the certifying authority had waived certification by participating in a coordinated scheme to allow the project proponent to withdraw and submit its application for certification before the reasonable period of time expired). With the dynamic case law related to the topic of withdrawal and resubmittal and the complexities of certain

certification situations, EPA's approach in this final rule lets certifying authorities, Federal agencies (*e.g.*, as the project proponent where it is the Federal agency issuing the license or permit), and/or possibly project proponents take the lead in deciding whether and when it is reasonable to allow withdrawal and resubmittal of requests for certification.

Because the Agency is declining to take a position on this practice, the Agency is also declining to provide any regulatory text on any process associated with this practice (e.g., which stakeholders must consult with each other, criteria for evaluating withdrawal and resubmittal, justifications for withdrawing and resubmitting).

In response to the commenter requesting that the Agency develop a process for resubmitting a request for certification after a denial, the Agency observes that the certification process as described in this final rule at part 121 applies to any request for certification. Section 401(a)(1) provides that a Federal license or permit may not be granted if certification is denied, but it does not speak to new requests for certification following a denial of certification. Nothing in section 401, nor this final rule, prohibits a project proponent from re-applying for certification if a certifying authority denies its initial request.

As discussed in Section IV.C.3 of the final rule preamble, a CWA section 401 certification cannot be issued in the absence of a project proponent requesting certification for a Federal license or permit that may result in any discharge into waters of the United States. If the request for certification or Federal license or permit application was withdrawn, then the certifying authority is no longer responsible for acting on the request for certification because the pre-requisite "request" is absent.

4.5.4 Recommend Including Regulatory Text Supporting Practice of Withdrawal and Resubmittal Approach

A few commenters disagreed with EPA's proposed approach and requested that EPA finalize a regulation outlining that the practice of withdrawal and resubmission of a request for certification is appropriate, especially where unexpected and significant changes with the project arise; where the environmental review is incomplete; the existing application information is insufficient to ensure compliance with water quality standards; a project proponent expects to add information to a request; the project proposal will undergo significant modifications; or a project is found to contain no jurisdictional waters. A few commenters argued that there is a need for regulations authorizing a process for withdrawal and resubmission of requests for certification with improved or more complete information – especially when there is a significant or unexpected project change. Another commenter argued that EPA should alleviate the "national fallout" resulting from the *Hoopa Valley Tribe* opinion, whose narrow holding has been misapplied by Federal agencies.

One commenter also requested that EPA clarify that "take any other action for the purpose of modifying or restarting the established reasonable period of time" does not prohibit certifying authorities from

denying section 401 certification without prejudice and the project proponent may resubmit a request for certification which would restart the reasonable period of time.

Other commenters requested that EPA affirm in the final rule that when applicants withdraw requests for certification, the certifying authority need not complete the certification process because there is no longer a request for certification to act upon; these commenters stated that in the event that a new request for certification is submitted, the reasonable period of time should be deemed to start anew. A few of these commenters highlighted the fact that withdrawal of a certification request is in the applicant's control rather than the certifying authority's, so an applicant's decision to resubmit a request for certification should not be the basis for waiver of a certifying authority's authority. A few commenters recommended that EPA provide clarity to certifying authorities that upon the withdrawal of a certification request by the project proponent, the certifying authority is no longer obligated to issue a certification decision, so that the certifying authority does not have to issue a denial of certification or run the risk of involuntary waiver if the project proponent chooses to re-request certification.

> **Agency's Response: EPA disagrees that it is inappropriate for the Agency to decide not to outline when withdrawal and resubmittal is appropriate. *See* the Agency's Response to Comments in section 4.5.3.**

4.5.5 Support No Regulatory Text on Withdrawal and Resubmittal for Flexibility

A few commenters supported EPA's proposed approach because flexibility is important for project proponents and certifying authorities. These commenters agree with EPA's observation that some circumstances may exist where restarting the reasonable period of time is appropriate and acknowledgement that this area of the law is dynamic.

A few commenters suggested that EPA develop national or regional guidance on the practice of withdrawal and resubmission of a request for certification where circuits have not split against the practice. One commenter argued that short of including a regulatory provision specifically authorizing withdrawals and resubmission, EPA should provide illustrative factual situations where such an action is appropriate because there are more than ninety U.S. District Courts which could make this area of section 401 less clear. Another commenter described the need for more guidance to reduce litigation on the withdrawal and resubmittal practice. To support this request, the commenter asserted that uncertainty around this issue led a certifying authority to abandon their withdrawal and resubmittal attempt and ultimately led to a decision that was less protective of water quality.

One commenter provided three arguments in support of the approach EPA proposed. First, the commenter noted that the D.C. Circuit made clear that its decision in *Hoopa Valley Tribe* was limited to the "coordinated withdrawal-and-resubmittal scheme" before it, and that it was not "resolv[ing] the legitimacy" of other arrangements. 913 F.3d at 1103-04. Second, the commenter noted that the D.C. Circuit acknowledged *Hoopa Valley Tribe*'s limited scope and declined to extend it to a situation in which the water quality agencies denied certification without prejudice. *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022). The commenter also noted that the Ninth Circuit rejected FERC's conclusion that the California State Water Resources Control Board had waived its section 401 authority

over several hydroelectric dams where the applicants had withdrawn and resubmitted their section 401 requests. *California State Water Resources Control Bd. v. FERC*, 2022 WL 3094576 (9th Cir. Aug. 4, 2022). Third, the commenter asserted that as a matter of policy, the practice of withdrawing and resubmitting a certification request allows states and project proponents to avoid denials of certification based on lack of information or when state administrative processes (such as public notice) have not been completed.

A few other commenters disagreed with EPA's interpretation of the *Hoopa Valley Tribe* case in the 2020 Rule and therefore support EPA's proposed restrained approach.

One commenter supported EPA's proposed approach, but the commenter asserted that EPA's analysis perpetuates the misconception that withdrawal and resubmission has occurred at the certifying authority's direction. The commenter disagreed that EPA's proposal would leave it up to the certifying authorities to decide on a case-by-case basis whether withdrawal and resubmittal is appropriate because it is the Federal agency's authority to make the waiver determination, so EPA needs to clarify for all parties that the certifying authority is not obligated to act on a withdrawn request within the one-year period. The commenter asserted that there is no practical reason for the certifying authority to force an applicant to maintain a pending request over the applicant's objection. Citing multiple cases, the commenter stated that the question was not whether it was "appropriate" for the applicant to use the procedure, but whether the applicant's use of the procedure should result in potential waiver of the certifying authority's right to issue a certification decision.

Agency's Response: *See* Section IV.D.2 of the final rule preamble and the Agency's Response to Comments in Section 4.5.1-4.5.3.

4.6 Input Received on Prior Rulemakings

4.6.1 Input on the 2019 Proposed rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

A commenter expressed concern that the timeframe proposed in the 2019 proposed rule would prevent states from complying with section 401's requirement for public notice. The commenter said states' administrative procedures and substantive requirements for evaluation of requests for section 401 certification have already been calibrated to comply with the statute's one-year review period, provided applicants deliver adequate information. The commenter stated that EPA should not artificially constrain decision-making timeframes, because such action would interfere with public input, and make it impossible for states to comply with state law.

Some commenters stated that the one-year limit was reasonable, and they commend EPA for confirming the limit. One of these commenters said smaller projects may be reviewed within six months or less. A different commenter said that in order to guarantee that the required timeline for review is met, EPA should also consider setting enforcement requirements for the one-year turnaround in the final rule.

A commenter said they do not support adopting a one-size-fits all approach for setting the reasonable period of time. This commenter recommends that the Federal agency set the reasonable period of time and that EPA encourage Federal agencies to establish default timelines for different types of projects for which they are commonly the lead Federal agency. The commenter further recommended that EPA remind certifying authorities that the statute allows the Federal agency to set a reasonable period of time that is less than one year, and that certifying authorities should ensure that their public notice requirements can be satisfied within the reasonable period of time as determined by the Federal agency.

One commenter suggested that EPA clarify that the factors a Federal agency considers in determining a reasonable period of time should be within the scope of section 401 certification. The commenter also recommended that EPA eliminate the factor that Federal agencies consider the "potential need for additional study or evaluation of water quality effects from the discharge."

A commenter said that there is a conflict of interest when a Federal agency is both the project proponent and the Federal agency issuing the permit or license, and suggested that the Federal agency should consult with the certifying authority when setting the reasonable period of time or determining whether conditions apply.

A couple commenters expressed support for the 2019 proposed rule's prohibition of the withdrawal and resubmittal approach. One of these commenters supported the prohibition of certifying authorities requesting project proponents to withdraw and resubmit, but they recommended that EPA clarify that the project proponent can withdraw its request for consideration by the certifying authority at any time, e.g., if it no longer intends to develop the proposed project as described in its original request for certification.

One commenter recommended that EPA clarify that certifying authorities may deny a certification request without prejudice, as long as they provide a statement explaining why the project will not comply with water quality requirements and the specific water quality data or information that would be needed to grant certification.

A commenter stated that Federal agencies should consider identifying interim milestone dates within the reasonable period of time to share expectations of the certifying authority's progress. The commenter said these milestones could include defining the time, such as 30 days, by which the certifying authority should request from the applicant additional information that is within the scope of section 401. The commenter added that EPA has included such a milestone in the proposed rule for when EPA is the certifying authority.

Another commenter said EPA should provide clear direction that Congress was clear that the states' role was temporally limited to a reasonable period of time, not to exceed one year, from the date of receipt of the certification request.

One commenter stated that Federal agency can modify the reasonable period of time, provided it remains reasonable and does not exceed one year from receipt of the request for certification.

A commenter asked for clarification on what it means to be the "same request," such that the withdrawal and submission of the same section 401 request does not restart the reasonable period of time for review.

One commenter claimed that EPA is dictating the timing of review certification applications, despite section 401 only requiring that states act within a reasonable period of time up to one year. Another commenter said that EPA should not impose more than section 401 requires nor should it prohibit the withdrawal and resubmittal process.

A commenter said that EPA needs to ensure states can comply with their own administrative procedures and not unnecessarily limit their timeframe for reviewing 401 applications. The commenter added that EPA should provide applicants with the flexibility to extend administrative review through the withdrawal and resubmission of applications. Lastly, the commenter said nothing in the section 401 text or legislative history gives EPA or other Federal agencies authority to establish Federal oversight of timing for state action, other than the one-year maximum.

Another commenter said any review/waiver timelines proposed by EPA must provide a reasonable interpretation of what constitutes a flexible timeframe to review and act on applications. The commenter stated that affording states the full one-year period under the CWA, or at a minimum providing flexibility to easily extend the timeframe for review up to the one-year period, will ensure that states have a meaningful opportunity to fully evaluate the potential impacts of Federal projects and ensure state water quality is protected, as is consistent with the goal and intent of section 401.

One commenter expressed concern about the timeframe for review being constrained to one year and not allowing the withdrawal and resubmittal approach for additional study, especially with the timeframe starting at the date of request no matter if the application is complete. The commenter also expressed concern about agencies having the ability to dramatically reduce the one-year statutory clock that state agencies have to complete the certification process and about limits for how long the certifying authority may request additional information; supportive of "reasonable period of time" extensions.

A commenter expressed support for the reasonable period of time generally being considered six months with a one-year maximum. The commenter also said that the timeframe should be triggered when the request is complete, and that 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 clock.

In expressing their assertion that states and Tribes are the only ones who can evaluate their needs for reviewing applications, a commenter said that any delays are generally due to actions/inactions of project proponent (e.g., incomplete or poor-quality applications, slow response), and they added that only in rare instances do states withhold certification. The commenter further stated that substituting Federal judgment over that of states goes against the state authority established in the CWA.

> **<u>Agency's Response</u>: *See* Section IV.D of the final rule preamble and the Agency's Response to Comments in Section 4.1-4.5.**

***See also* Section IV.H of the final rule preamble for further discussion on the Agency's removal of time constraints on requests for additional information when EPA acts as the certifying authority.**

4.6.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

A stakeholder said that states and Tribes should define what is a reasonable time for them to make their CWA section 401 decisions for 3 reasons: (1) states and Tribes have the expertise to know how much time it takes to conduct a proper review; (2) they have varying staff sizes and 401 program workloads, a factor not considered by EPA's 2020 Rule; and (3) EPA's 2020 Rule will force certifying authorities to violate their own regulations. Another stakeholder opposed the Federal agency setting the reasonable period of time. The stakeholder argued that states are in the best position to determine the timeframe needed. One stakeholder said that EPA should not restrict the time and information allotted to states and Tribes to make certification decisions. The stakeholder expressed concern about undercutting states and Tribes with the clock being controlled by project proponents and Federal agencies.

On the other hand, another stakeholder said the lead Federal agency has the authority to set the reasonable period of time. One stakeholder said that allowing all 50 states and other certifying authorities to establish different timeliness for review increases instability and inefficiency. This stakeholder supports the Federal agency setting the reasonable period of time, asserting that they have set it for decades and it is consistent with judicial and administrative precedent. Another stakeholder said there needs to be predictability in the timeframes that certifying authorities have to review certification requests. The stakeholder asserted that 401 certification is a Federal program, and as such, it is inappropriate for stakeholders other than Federal agencies to have a decision-making role in setting or extending the reasonable period of time.

A different stakeholder said to give Tribes and states a role in determining what the reasonable period of time is, along with the Federal permitting agency. The stakeholder stated that their suggested approach would better align with the text and cooperative principles of the CWA.

One stakeholder also called for EPA to eliminate the prohibition of the withdrawal and resubmittal approach, because the prohibition is not supported by section 401 text, purpose, or legislative history and has the effect of forcing state agencies to issue unnecessary section 401 denials. The stakeholder asserted that the withdrawal and resubmittal approach has long been used without controversy by applicants and state agencies where it is clear that additional time is required.

A stakeholder said EPA should clarify that states have up to one year to act on section 401 requests that are complete pursuant to state administrative laws. The stakeholder added that EPA should encourage other Federal agencies to conform their section 401 procedures to EPA's forthcoming rule and should ensure that other Federal agencies recognize and accept state agencies' primary authority to determine the reasonable period of time (of up to one year) necessary to act on section 401 requests.

A stakeholder expressed concerns with 2020 Rule's waiver provisions. The stakeholder called for the repeal of the 2020 Rule immediately and for EPA to start from scratch with a new rule designed to achieve, and not flout, the objective and goals of the CWA.

One stakeholder said that the far stricter deadlines in the rule have been inflexibly applied by Federal agencies regardless of the complexity of projects.

A stakeholder said to provide a full year for the review of water quality certification requests, unless otherwise specified in Federal agency regulations or based on a Federal agency's categorical determination. The stakeholder added that where case-by-case determinations are not provided by the Federal agencies within 15 days, the default time period should also be one year.

One stakeholder said that EPA should immediately rescind the 2020 Rule while it undertakes the process of updating the section 401 regulations. The commenter also said that the Corps' regulations concerning water quality certifications should be revised to eliminate the standard review period of time from 60 days and increase it to at least six months.

> **Agency's Response: *See* Section IV.D of the final rule preamble and the Agency's Response to Comments in Section 4.1-4.5.**
>
> ***See also* Section IV.M of the final rule preamble for further discussion on existing Federal agency regulations implementing section 401.**

5. SCOPE OF CERTIFICATION (SECTION 121.3)

5.1 Activity Scope of Certification

5.1.1 CWA arguments

5.1.1.1 Support for Proposed Approach

Many commenters who supported the "activity as a whole" scope argued that it is consistent with the CWA and Supreme Court precedent, while the 2020 Rule's "discharge-only" interpretation of section 401 was inconsistent with the text, structure, and legislative history of section 401.

Some commenters asserted that the language, intent, and history behind the CWA support an activity as a whole approach. One commenter argued that the CWA was intentionally written with broad and flexible language to allow certifying authorities to use section 401 to manage the challenges and conditions unique to their water resources. Another commenter argued that the activity as a whole interpretation aligns with the original intention of section 401 to provide certifying authorities with the authority to effectively protect their water resources from potential pollution. Another commenter asserted that the activity as a whole scope of review is consistent with the CWA's mission and will ensure certifying authorities can ensure the activity will comply with water quality standards. One commenter asserted that section 401 embodies the central purpose of the CWA to ensure Federal projects will not jeopardize the

joint federal-state efforts to achieve the goals of the CWA and asserted that "minor changes" to what became section 401 were to advance the objectives in the 1972 Act to protect the chemical, physical, and biological integrity of the nation's waters. The commenter also argued that section 401 is the "primary mechanism[] through which states may exercise" their statutory role "as the prime bulwark in the effort to abate water pollution" from federally approved projects, citing *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 393–94 (D.C. Cir. 2017). Another commenter asserted that Congress has consistently focused on ensuring the compliance of an "activity" from the enactment of Section 21(b) to the incorporation of section 401 in the 1972 CWA, noting that from its inception, section 401 was described as requiring any "activities that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation." Senate Debate on S. 3770 (Nov. 2, 1971), reproduced in Legislative History Vol. 2 at 1388.

Several commenters asserted that limiting the scope of certification to the discharge is inconsistent with the CWA. One commenter argued that a "discharge-only" scope of certification is inconsistent with the plain language of the CWA. First, the commenter asserted that it makes no sense to limit conditions to discharges when there is no requirement for discharges to occur, but rather section 401 just requires projects that have a potential to discharge to trigger section 401. Second, the commenter argued that Congress used two different terms to describe when a section 401 certification is required and the scope of conditions that can be imposed on the project once the need for certification is established. The commenter noted that the term "discharge" as used in section 401(a)(1) means something different than "applicant" in section 401(d), *citing Transbrasil S.A. Linhas Aereas v. U.S. Dep't of Transp*., 791 F.2d 202, 205 (D.C. Cir. 1986) ("[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." (*quoting Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984)). The commenter further asserted that Congress chose to allow certifying authorities to add conditions to assure that any applicant, and not just any discharge, will comply with water quality related laws, and argued that EPA has no authority to override that language choice in a rulemaking. Another commenter asserted that a discharge-only interpretation of section 401(d) is unreasonable because it is Congress' intent to "assure that Federal licensing or permitting agencies cannot override State water quality requirements" (*quoting Sierra Club v. U.S. Army Corps of Eng'rs,* 909 F.3d 635, 647–48 (4th Cir. 2018)). Another commenter argued that an interpretation of section 401 that confines states and Tribes to regulating discharges is inconsistent with these fundamental principles of the CWA. The commenter further asserted that section 401 serves "to assure that Federal licensing or permitting agencies cannot override state water quality requirements," S. Rep. No. 92-414, at 69 (1971), and specifically to ensure "that a federally licensed or permitted activity . . . [is] certified to comply with State water quality standards" before its construction or operation. H.R. Rep. No. 95-830, at 96 (1977). However, as asserted by the commenter, that objective can only be fulfilled if states and Tribes can regulate the water quality effects of projects as a whole and any other approach (such as a discharge-only approach) renders the text, structure, purpose, and legislative history of the CWA incoherent as written. Another commenter noted that the "activity as a whole" interpretation is the only interpretation that is consistent with the "purpose of the certification mechanism … [which] is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3735. The commenter further asserted that limiting the scope of certification to the "discharge" would severely curtail the states and Tribes' ability to assure compliance with designated uses and narrative water quality criteria, which would subvert the states and Tribes' authority to restore

the chemical, biological, and physical integrity of a river affected by a federally licensed project. Another commenter asserted that the legislative history of the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) contradict the 2020 Rule's "discharge-only" interpretation. The commenter cited to legislative history for section 21(b) as evidence that Congress originally intended a broad scope, and then cited to legislative history to the 1972 amendments as evidence that Congress understood it was making only "minor" changes. The commenter added that in 1972 Congress added 401(d) which expanded, not weakened, the authority of certifying authorities.

One commenter asserted that EPA is required to revise the 2020 Rule's scope of certification for two reasons. First, the commenter argued that Congress did not delegate authority to EPA to interpret section 401(d) because it clearly indicates that certifying authorities consider the activity as a whole. Second, the commenter asserted that even if Congress delegated authority to EPA to interpret section 401(d), any interpretation narrowing the scope of review would be unreasonable because it would be contrary to Congressional intent and decades of judicial and agency practice. The commenter argued that the Agency's argument that section 401(d) is ambiguous is unpersuasive because section 401(d) plainly provides the certifying authority with the authority to assure that the applicant will comply with applicable water quality requirements by imposing limitations on the Federal license or permit. Instead, the commenter argued that Congress' decision to include words in one subsection of a statute and exclude them from another is additional evidence of Congress' clear intent (*citing Medina Tovar v. Zuchowski*, 982 F.3d 631, 635 (9th Cir. 2020)). The commenter also asserted that the Court in *PUD No. 1* arrived at its interpretation by relying on "the traditional tools of statutory construction", which acted as further indication that Congress's intent in passing Section 401(d) was clear, and the fact that the Court stated the 1971 Rule offered a reasonable interpretation was not dispositive because it applied to the 1970 version of the Act. Lastly, the commenter asserted that Congress confirmed its intent for section 401(d) to apply broadly because it acquiesced to the *PUD No. 1* holding and attempts to revise Section 401 had been rejected (*citing Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593–94 (2004)).

Agency's Response: See Section IV.E.2.a of the final rule preamble.

5.1.1.2 Do Not Support Proposed Approach

Some commenters argued that the proposed scope of certification did not comport with the CWA's text, structure, or legislative history. A few commenters asserted that the text of section 401 unambiguously limits the scope of certification to discharges. Many of these commenters provided little to no supporting analysis.

Agency's Response: The Agency disagrees with commenter assertions that the proposed or final rule scope of certification does not comport with the CWA's text, structure, or legislative history. *See* Section IV.E.2 of the final rule preamble and the Agency's Response to Comments below for further discussion on how the final rule's scope of certification comports with the CWA's text, structure, and legislative history.

The Agency also disagrees with commenters asserting that section 401 unambiguously limits the scope of certification to discharge and finds that although the Supreme Court's

assessment of the statute in *PUD No. 1* is the best reading of the text with regard to the proper scope of certification, the text is subject to more than one possible interpretation. EPA's conclusion is supported not only by the two separate sets of commenters arguing in support of contrary "plain meaning" interpretations of the proper scope but also by the Supreme Court's interpretation of the statute in *PUD No. 1*. The Supreme Court held that the text regarding the scope of certification "is most reasonably read" the way EPA interprets the statute in this final rule. 511 U.S. at 712. In the 2020 Rule, EPA likewise acknowledged that the statutory language addressing scope of review is subject to more than one possible interpretation. *See* 85 FR 42232, 42251 ("The Agency also disagrees with commenters who asserted that the scope of certification is expressed unambiguously in section 401. As demonstrated by the variation in public comments received, section 401 is susceptible to a multitude of interpretations. The EPA also disagrees with the suggestion that the *PUD No. 1* Court found section 401 to be unambiguous."). Congress' use of "discharge" and "activity" in section 401(a)(1) and "applicant" instead of "discharge" in section 401(d) introduced some uncertainty as to the proper scope of section 401 review and conditions. In this final rule, EPA is following the Supreme Court's authoritative interpretation of the statute while also exercising its authority granted by Congress to construe, interpret, and implement the CWA.

5.1.1.2.1 Statutory-based Arguments

A few commenters asserted that the Agency's statutory analysis of the scope of certification started with a specific policy endpoint in mind. One commenter asserted that EPA's statutory analysis began with the result in mind, rather than finding ambiguity and requested that the Agency show a clear statement from Congress that authorizes the proposed scope.

Several commenters argued that the Agency ignored changes to the statutory text between 1970 and 1972. One commenter argued that EPA did not explain why it accepted the change from "water quality standards" to "water quality requirements" but rejected the revisions to section 401(a)(1) and asserted that it was arbitrary and capricious to only accept revisions to broaden the scope but not those to limit the scope. A few commenters asserted that Congress's 1972 revisions to the certification requirement support a "discharge-only" approach. These commenters argued that in its 1972 revisions, Congress expressly limits the certification requirement to the "discharge," rather than the "activity." In support, one commenter argued that this interpretation is consistent with the presumption that statutory amendments are intended to have real and substantial effect, and quoted *S.D. Warren* for the proposition that "when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind." A couple commenters asserted that Congress' revised certification language reflected the new emphasis in the CWA on directly regulating point source discharges of pollutants, away from indirectly regulating activities through ambient water quality standards. One commenter asserted that while the proposal states that it does not find Congress's change from "activity" to "discharge" to be persuasive, it provides no alternative explanation as to why Congress made this change. Another commenter asserted that the 1972 CWA amendments revised the certification provisions from a focus on whether the activity would violate water quality standards to a focus on the impact of the proposed discharge and new language to allow certifying authorities to condition certifications to assure compliance from the applicant. One commenter

asserted that EPA's statutory analysis supporting the proposed scope of certification is flawed for several reasons. First, the commenter argued that it was not necessary or appropriate to go beyond the text and evaluate the legislative history because the text of the statute was changed from "activity" to "discharge" citing *NLRB v. SW Gen., Inc*., 137 S. Ct. 929. 942 (2017); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176-77 (2014). Second, the commenter argued that Congress changed the statute, and the Agency must adhere to it, citing *Ctr. for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 989 (Alaska 2018); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000). Third, the commenter argued that EPA did not explain its change in position from the 2020 Rule in sufficient detail, namely whether the Agency no longer agrees that Congressional amendments have real effects. The commenter asserted that the Agency's analysis misrelied on *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and did not explain why Congress did not use the word "activity" instead of "applicant." Furthermore, the commenter argued that EPA's analysis to "daisy chain" from discharge to applicant to activity as a whole would be unnecessary if the Agency applied the plain language analysis of the text and concluded that the Agency's statutory interpretation was arbitrary and capricious and inconsistent with basic canons of statutory construction.

Several commenters argued that expanding the scope of certification to the activity as a whole without a connection to discharge would contravene the statutory language. One commenter asserted that section 401(a) provides the trigger for certification review and the scope of review and argued that there was no basis for EPA to read the term "discharge" out of statute. The commenter further argued that section 401(d) does not address the scope of review, but rather addresses how the discharge complies, and the reference to the "applicant" is necessary since the focus of section 401(d) is on conditions incorporated into the applicant's permit. The commenter also asserted that it is unreasonable to read "applicant" in section 401(d) as revising the specificity in section 401(a)(1) regarding discharges. Rather, the commenter noted that section 401(d) does not authorize a certifying authority to set conditions on the activity as a whole or the activity. One commenter argued that the proposed scope of certification expanded section 401 beyond the CWA and EPA's authority. The commenter argued that EPA's interpretation of scope would render section 401(a) meaningless and questioned why Congress limited the triggering action to a point source discharge into a water of the United States if Congress wanted certifying authorities to review all conditions regardless of the source. The commenter further asserted that section 401 should be read in context with sections 402 and 404 because they are all core regulatory provisions of the CWA and have been consistently limited to review of point source discharges into navigable waters. The commenter argued that if Congress wanted section 401 to have a different scope from sections 402 and 404 then it would have unambiguously articulated that.

Some commenters disagreed with how section 401(d) factored into EPA's proposed interpretation of scope. A few commenters argued that section 401(a)(1) unambiguously limits the scope of certification to discharges, and that the reference in subsection 401(d) to the "applicant's" compliance does not create any ambiguity regarding the scope of certification. One commenter asserted that section 401(d) was a limited and narrow provision, and that EPA's proposed interpretation of scope places too much weight on section 401(d) and not enough on section 401(a)(1), which the commenter asserted created the framework and foundation for the entire certification process. Another commenter argued that the Agency failed to explain why it believes Congress intended the term "applicant" in section 401(d) to mean "activity as a whole," stating that they did not believe references to activity in the legislative history were enough and

asserting that it is inappropriate to rely on legislative history to negate changes made to the plain language of the statute (citing *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942-43 (2017)). One commenter argued that the reference in section 401(d) indicates only who must comply with certification conditions, and says nothing about which activities of the applicant are subject to certification. According to the commenter, in context, the reference to the applicant's compliance can only be a reference to the applicant's compliance with the requirements applicable to the applicant's discharges that are the subject of the certification. Another commenter argued that section 401(d)'s requirement that the certification set forth requirements for the applicant, and not the discharge, makes sense because a certification is not some abstraction; it is a document that a certifying authority gives to a person or entity, and it describes what that person or entity must do to ensure that its discharges comply with water quality requirements. That commenter referenced the principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used, and argued that this principle supported the commenter's interpretation of 401(d). Another commenter asserted that the use of "applicant" in section 401(d) makes sense because the certification describes what the person must do to ensure its discharges comply with water quality requirements and argued that the 1972 amendments transformed the Act to focus on direct regulation of discharge. The commenter further argued that any certification and conditions have an overarching purpose to assure point source discharges from federally licensed or permitted projects will not violate water quality requirements, yet EPA ignored this interpretation and instead pointed to varied terms and concluded they created ambiguity. The commenter asserted that EPA's interpretation was invalid because the Agency used statutory ambiguity to misconstrue section 401(a)(1) for predetermined policy objectives, although the commenter claims section 401(a)(1) unambiguously limits the scope to discharges.

A few commenters that argued in support for "discharge-only" and stated that the CWA sections for which section 401(d) requires compliance—CWA sections 301, 302, 306, and 307—regulate only discharges. One such commenter noted that section 401(a)(1) also requires certification that the discharge will comply with CWA section 303, which is not listed in section 401(d). The commenter stated that section 303 requires the establishment of water quality standards, but it does not itself require compliance with the standards. The commenter continued that section 301, however, requires point source discharges to comply with water quality standards established under Section 303, citing to 33 U.S.C. 1311(b)(1)(C). Thus, according to the commenter, certification conditions to ensure that discharges comply with section 301 must necessarily ensure that the discharges comply with water quality standards established under section 303.

A few commenters disagreed with the Agency's interpretation of other subsections in support of its proposed "activity as a whole" interpretation. One commenter argued that sections 401(a)(3)-(5) support a "discharge-only" approach because they concern compliance with CWA sections 301, 302, 303, 306 and 307, all of which, the commenter argued, regulate only discharges. The commenter disagreed with the proposal preamble that these paragraphs support a broader scope of certification. Another commenter asserted that, in addition to 401(a)(1), the other elements of section 401 are consistently limited to discharges and do not extend more broadly to the "activity as a whole." The commenter noted that section 401(a)(2) allows a neighboring state or Tribe to object to the issuance of the Federal license or permit if the "discharge will affect the quality of its waters." The commenter asserted that the "neighboring jurisdiction" provisions of the proposal are consistent with paragraph 401(a)(2) in limiting consideration

of the effects on neighboring jurisdictions to the "discharge" from the project or activity. The commenter found it notable that the preamble to the proposal does not discuss the implications of 401(a)(2) for the scope of certification, even though the preamble does include a relatively detailed discussion of the other subsection 401(a) paragraphs in this context. Another commenter asserted that EPA's statutory analysis attempted to create textual support using sections 401(a)(3)-(5) where there is no support, arguing that the terms "construction" and "operation" were not inconsistent with section 401(a)(1). The commenter further argued that EPA failed to recognize that sections 401(a)(3)-(5) referenced certifications issued pursuant to section 401(a)(1). Additionally, the commenter argued that EPA did not explain why it adopted "discharge" in some sections, such as section 401(a)(2), but would replace the term with "activity as a whole" elsewhere, which the commenter asserted made the legal interpretation arbitrary and capricious.

One commenter argued that a broader scope beyond "discharge-only" is not necessary to protect water quality because nothing in section 401 or the CWA limits the authority of states or Tribes to protect water quality under their own laws, nor do states or Tribes require any authorization under the CWA to protect water quality. The commenter cited to the preservation of state authority in section 510. The commenter offered an example. According to the commenter, if EPA issues an NPDES permit to authorize a discharge pursuant to CWA section 402, a state or Tribe may, independently of section 401 and the CWA, regulate or prohibit the discharge, regardless of EPA's issuance of a NPDES permit authorizing it, citing to 40 CFR 122.5(c). The commenter similarly asserted that a state or Tribe may independently regulate or prohibit a discharge under its own laws that is authorized under a Corps CWA section 404 permit, citing 33 CFR 320.4(j). According to the commenter, the only circumstances in which the scope of certification may influence a state's ability to regulate an activity that affects water quality are those few instances in which some other Federal law preempts or restricts the state's regulatory authority over the activity, including hydropower projects licensed by FERC. The commenter asserted that even in those instances, the Federal licensing or permitting agency is almost always charged with ensuring protection of water quality after considering the views of the state and other public and private interests. The commenter offers FERC hydropower licenses as an example in support of this assertion.

One commenter asserted that the Agency's interpretation of ambiguity in section 401 was unreasonable and arbitrary in light of the statutory text and structure of the CWA because the Agency defined a term that does not exist in section 401 (referring to "activity as a whole"), the proposal ignores that Congress replaced "activity" with "discharge" in section 401(a), and it would allow a section 404 permit to remain in effect over a project for as long as whatever is built on, around, or near the permitted fill exists or operates.

Agency's Response: *See* the Agency's Response to Comments in Section 5.1.1.2.

The Agency disagrees with commenters asserting that the Agency's statutory analysis of the scope of certification began with a specific policy endpoint in mind or that the Agency ignored changes to the statutory text between 1970 and 1972. Rather, having now carefully reconsidered the 2020 Rule's "discharge-only" interpretation of scope of review, EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source

discharges. This reading is further supported by the legislative history of section 401, Supreme Court precedent, and the goals of section 401, which include recognition of the central role that states and authorized Tribes play in protecting their own waters. It also realigns scope with accepted practice for the preceding 50 years. Consistent with this interpretation, EPA is finalizing revisions to section 121.3 that reaffirm the activity scope of review that Congress intended when it first enacted the water quality certification provision in 1970 and reaffirmed when it amended the CWA in 1972 and 1977. Additionally, in response to comments, EPA is finalizing revisions to section 121.3 that clarify important limiting principles and provide greater regulatory certainty. *See* Section IV.E of the final rule preamble for further discussion on the Agency's analysis of the statutory text.

EPA strongly disagrees with commenter assertions that revisions to section 401 in the 1972 amendments to the CWA reflected a changed emphasis to directly regulating point source discharges of pollutants. As discussed in section IV.A of the final rule preamble, the statutory definition of "discharge" is broad and is not limited to a discharge of pollutants. Additionally, this interpretation is consistent with the text of the statute as interpreted by the U.S. Supreme Court. *See* Section IV.A of the final rule preamble for further discussion on the term "discharge" in section 401. Congress did significantly revise the statutory water quality protection framework in 1972, focusing more on effluent limitations and numeric limits than water quality standards to try to drive down pollution levels. While EPA agrees that the 1972 amendments reflected a new overall emphasis in the CWA on regulating point source discharges (through section 402 NPDES permits and section 404 dredge and fill permits), this does not change EPA's conclusion regarding how best to interpret the scope of section 401. Section 401 predates these discharge-related permitting provisions and, even after the 1972 amendments, remains significantly different in character. It remains a direct Congressional grant of authority for states and authorized Tribes to protect their water resources from impacts caused by federally licensed or permitted projects. While Congress largely retained the water quality certification scheme it enacted in 1970, it did make several revisions, including some in the subsections relevant to interpreting the scope of certification. As discussed in section IV.E.2.a.iii of the final rule preamble, the legislative history shows that when Congress was enacting new discharge-related permitting provisions in 1972, it had no intention of fundamentally constraining the certification power that Congress granted just two years before.

EPA disagrees with and finds unpersuasive commenter attempts to conflate section 401 with sections 402 and 404. First, while section 401 is in the same subchapter as section 402 and section 404, the placement of a section into the same subchapter as other sections offers little interpretative value in this instance. The subchapter is titled "permits and licenses." While section 402 and 404 programs are markedly different from section 401 certification, they all concern "permits and licenses," so it makes sense that they share this subchapter (along with other sections regarding permitting). However, they are otherwise markedly different; sections 402 and 404 create Federal permitting programs specific to point source discharges of pollutants, whereas section 401 is a direct Congressional grant of authority to states to protect their waters from all federally licensed or permitted activities, including

those that do not need section 402 or 404 permits. Indeed, section 401 predates both the section 402 and section 404 programs, existing before Congress later adopted these discharge-focused provisions. Further, section 401 explicitly authorizes states to add conditions to ensure compliance with requirements of state or Tribal laws beyond those typically considered for section 402 or section 404 permits (e.g., beyond EPA-approved state water quality standards effective under the CWA). Even the trigger for sections 402 and 404 differs from section 401. Sections 402 and 404 require an actual point source discharge, *see e.g., Waterkeeper Alliance. v. EPA*, 399 F.3d 486, 504-06 (2d Cir. 2005), whereas section 401 requires the potential for a discharge. See Section IV.A.2.b of the final rule preamble. Moreover, section 402 and 404 permits are required for discharges that include pollutants, whereas section 401 certification is required for "any discharge" even for discharges without pollutants. *See* Section IV.A.2.c of the final rule preamble. In the 1972 amendments, Congress was unambiguously clear that section 402 and 404 permits are limited to regulating point source discharges of pollutants. Congress could have been equally clear about section 401, but made revisions that, when read holistically, strongly indicate that Congress intended to maintain a "scope" that encompassed the entire activity subject to the relevant Federal license or permit.

The Agency disagrees with commenters arguing that the CWA sections for which section 401(d) requires compliance regulate only point source discharges. In addition to CWA sections 301, 302, 306, and 307, section 401 also requires compliance with CWA section 303. 33 U.S.C. 1341(a)(1), (d). Section 303 is *not* limited to regulating point-source discharges. Section 303 concerns establishment of water quality standards, identification of waters that do not meet those standards, and establishment of daily maximum pollutant loads for such waters, all of which go well beyond regulation of point source discharges. *See* Section IV.E.2.a, c in the final rule preamble for further discussion on why the listed provisions in section 401(a)(1) and section 401(d) comport with an activity-based scope of certification.

In response to commenters appearing to argue that sections 401(a)(3)-(5) apply only to "discharges" related to the "construction or operation" of a "facility or activity," EPA disagrees that this represents the best interpretation of sections 401(a)(3)-(5) when considering the text of section 401 as a whole. Congress could have easily limited sections 401(a)(3)-(5) to point source discharges by using language such as "discharges related to the construction or operation of a facility." One commenter argued that sections 401(a)(3)-(5) support a "discharge-only" approach because they concern compliance with CWA sections 301, 302, 303, 306 and 307, all of which, the commenter argues, regulate only discharges. EPA disagrees; as described above, section 303 goes beyond regulating point source discharges. EPA does not find the list of CWA sections identified in sections 401(a)(3)-(5) persuasive to adopt a "discharge-only" scope of certification considering the weighty support for an activity-based scope in the text and legislative history. *See also* Section IV.E.2 for further discussion on additional textual support for the activity scope of certification.

For further discussion on the scope of section 401(a)(2), see Section IV.K of the final rule preamble and Section 11.1.4 of the Agency's Response to Comments.

The Agency disagrees with the commenter asserting that a broader scope beyond "discharge-only" is not necessary to protect water quality because of other federal or state laws or Federal agency roles in ensuring protection of water quality. First, the Agency is not adopting its interpretation of scope because it finds it is necessary to protect water quality but because the Agency has concluded that it represents the best reading of the statutory text. Second, as the commenter concedes, there are instances where state regulatory authority is preempted or restricted over the activity by Federal law (e.g., in the case of FERC licensed projects). Further, the commenter fails to acknowledge the impetus behind the creation of a state water quality certification program -- *Federal agencies* were failing to comply with state laws and regulations regarding water quality standards. As discussed in Section III.A of the final rule preamble, Federal agencies were issuing licenses and permits "without any assurance that [water quality] standards [would] be met or even considered." S. Rep. No. 91-351, at 3 (August 7, 1969). While Federal agencies may consider water quality impacts independently, Congress made clear that the purpose of section 401 was to empower states to protect their waters from the effects of federally licensed or permitted projects and "assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, at 69 (1971). Accordingly, the Agency disagrees that other state or Federal laws provide water quality protection benefits tantamount to those provided by section 401. *See also* Section IV.E of the final rule preamble and Section 5 of the Agency's Response to Comments for additional public comments and discussion on the water quality impacts of a "discharge-only" scope of certification.

In response to the commenter who asserted that the Agency defined a term ("activity as a whole") that does not exist in section 401, in this final rule, the Agency is removing the phrase "as a whole" from the regulatory text throughout Part 121. *See* Section IV.E for further discussion on the removal of the phrase "as a whole" and why this modification does not represent a change in substance from proposal.

The Agency disagrees with the commenter who asserted that the activity scope of certification allows a section 404 permit to remain in effect over a project for as long as whatever is built on, around, or near the permitted fill exists or operates. EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. *See* Section IV.E.2.b of the final rule preamble for further discussion.

5.1.1.2.2 Congressional Intent Arguments

A few commenters argued that the proposed scope of certification was inconsistent with Congressional intent. One commenter argued that Congress intended section 401 to apply to water quality impacts from the permitted activity and not unrelated impacts far removed from the project itself. Another commenter argued that the activity as a whole scope must be bound to the discharge, or it would contravene Congress's intent that Federal permits covering discharges into navigable waters comply with applicable water quality requirements. One commenter who discussed hydropower projects also provided a detailed discussion of the history of section 401 in support of the commenter's arguments about limiting the scope of certification. The commenter asserted that based on the commenter's interpretation of this history, Congress intended for section 401 certifications to focus on point source discharges only.

> **Agency's Response: EPA disagrees with commenter assertions that the proposed scope of certification was inconsistent with Congressional intent. *See* Section IV.E.2.a of the final rule preamble for further discussion on the activity scope of certification and Congressional intent. For further discussion on the water quality limitations inherent in section 401, see Section IV.E.2.b, c of the final rule preamble.**
>
> **EPA disagrees with commenter assertions that the overall goal and purpose of section 401 is only to ensure that any point source discharge will comply with CWA water quality provisions. *See* Section IV.E.2.c of the final rule preamble for further discussion on why EPA finds that the text, purpose, and legislative history of the statute support the final definition of "water quality requirements," which appropriately allows certifying authorities to certify compliance with the enumerated provisions of the CWA *and* state and Tribal water quality-related provisions (for both point and nonpoint sources).**

5.1.2 Case Law/PUD No. 1 Arguments

5.1.2.1 Support for Proposed Approach

Many commenters who supported the "activity as a whole" scope of the proposed rule asserted that it was affirmed by the Supreme Court in *PUD No.1*. Commenters agreed with EPA's proposal that the existence of "discharges" is the trigger for section 401 review, but that the scope of review is broader. Many of these commenters noted that EPA's proposed interpretation is consistent with the Supreme Court's interpretation in *PUD No. 1*. A few commenters noted specifically that the Court endorsed the "activity as a whole" scope as the "most reasonable" interpretation of the statute. Some commenters expressed agreement with the interpretation taken in the proposal of section 401(d) regarding scope of certification, noting that it was consistent with the interpretation taken by the Court in *PUD No. 1*. Several commenters argued that the Court analyzed the statutory text in section 401 and determined that a certifying authority was not limited to imposing conditions specifically tied to a discharge according to the plain language of sections 401(a) and 401(d). One commenter noted that the Court identified the clear and key differences in language between sections 401(a) and (d) to make clear that Congress intended states to have certification authority over the activity as a whole, and not just the discharge. Another commenter

asserted that the Court in *PUD No. 1* expressly rejected the notion that under section 401(d) a certifying authority is only empowered to regulate the discharge that triggered the certification process.

Similarly, some commenters asserted that the 2020 Rule is inconsistent with *PUD No. 1*. A few such commenters argued that the Court's holding was based on the unambiguous language of the statute, and that the Court's opinion did not turn on deference. One commenter disagreed with EPA's position from the 2020 Rule that the term "discharge" in section 401(a) was ambiguous, and instead asserted that the majority in *PUD No. 1* did not identify any ambiguity in section 401 because the plain language of section 401 clearly addressed impacts of an activity as a whole.

One commenter asserted that the 2020 Rule is inconsistent with the Supreme Court decision in *S.D. Warren*, which the commenter characterized as recognizing the integral role section 401 certifications play in upholding state and Tribal authority to address a broad range of pollution.

> **Agency's Response: The 2020 Rule rejected the scope of certification affirmed by the Supreme Court in *PUD No. 1*, precedent in effect for a quarter of a century. In *PUD No. 1*, the Court held, based on a textual analysis, that section 401 "is most reasonably read" as authorizing the certifying authority to place conditions on what the Court described as the "project in general" or the "activity as a whole" once the predicate existence of a discharge is satisfied. 511 U.S. at 711-12. EPA agrees with the Court's interpretation regarding the proper scope of certification. Specifically, EPA agrees with the Court's analysis of section 401(a)(1) and section 401(d), and, as discussed in Section IV.E.2.a of the final rule preamble, has identified further support for its conclusion in additional statutory text of section 401 beyond what the Court analyzed in *PUD No. 1*, the legislative history of section 401, the water quality protection goals of section 401, and the principles of cooperative federalism that underlie the CWA. *See* Section IV.E.2.a of the final rule preamble for further discussion regarding *PUD No. 1*.**
>
> ***See also* the Agency's Response to Comments in Section 5.1.1.2.**

5.1.2.2 Do Not Support Proposed Approach

A few commenters asserted that EPA's interpretation of *PUD No. 1* did not support the proposed approach to scope of certification. One commenter argued that *PUD No. 1* focused on the permissibility of one type of certification condition in a fact-specific circumstance and that outside of that context, the use of Section 401(d) to regulate the activity as a whole is statutorily prohibited, asserting that the Court's fact-specific interpretation of section 401(d) to allow certifying authorities to regulate the activity as a whole must yield to statutorily mandated fields of preemption.

Another commenter argued that the Court did not substantively support EPA's approach that the "activity as a whole" governs a certifying authority's decision to grant or deny a certification. Citing *PUD No. 1*, the commenter asserted that the Court distinguished Section 401(a)(1) from section 401(d) and explained that Section 401(a)(1) addresses the scope of the certification while Section 401(d) addresses the scope of conditions. The commenter further argued that EPA conflated the provisions without any basis in text and

in a manner inconsistent with principles of statutory construction. The same commenter also asserted that the Court in *PUD No. 1* did not support applying Section 401(d) conditions beyond what is required to comply with water quality standards. Another commenter argued that the 2020 Rule's discharge-only approach is the only plausible interpretation of section 401(a) and asserted that the proposal erroneously applied the activity as a whole concept from section 401(d) to section 401(a) and that the Court never considered nor endorsed such an interpretation in *PUD No. 1*. The commenter further asserted that the scope of certification was not at issue in the case, and the Court discussed section 401(a) only to illustrate its differences with section 401(d) and was very clear that the scope of review under section 401(a) and the conditions that may be imposed on the "activity as a whole" under Section 401(d) are very different things. The commenter concluded that the *PUD No. 1* Court favored the 2020 Rule's interpretation and argued that it provided no support for section 401(d) to apply to 401(a).

One commenter stated that while the proposal relies on the Supreme Court decision in *PUD No. 1* to support a return to "activity as a whole," that case did not hold that the "activity as a whole" approach was required by the text of the statute, nor was the Supreme Court in that case considering an EPA interpretation of that text. The commenter stated that despite the holding in *PUD No. 1*, under the *Brand X* doctrine EPA retained the ability to depart from the Supreme Court's reading of the text.

A few commenters asserted that the *PUD No. 1* Court was misinformed because of the 1971 Rule. One commenter argued that the *PUD No. 1* decision and a significant portion of jurisprudence on section 401 is based on judicial deference to EPA regulations that predate the 1972 CWA amendments and should be distinguished on this basis. Another commenter asserted that this significantly undermines the validity and applicability of the *PUD No. 1* decision and should not be relied upon for the rulemaking. One commenter asserted that the 2020 Rule identified concerns with the *PUD No. 1* analysis and decision, including that the Court did not consider the practical effects of its decision and relied on EPA's regulations because it believed it reflected the Agency's interpretation of section 401. The commenter argued that the Court was not informed that the 1971 Rule was substantively inconsistent with section 401, and that the Court and EPA's proposal did not grapple with whether the entire range of activities potentially included are appropriate for review within the certification program. The commenter concluded that the Agency adopted the *PUD No. 1* analysis wholesale without addressing shortcomings in the decision because it aligns with the Agency's policy preference. Another commenter asserted that the Court in *PUD No. 1* relied on, and deferred to, EPA's 1971 certification rule and guidance derived from that rule. The commenter stated that both the Court majority and the dissent were apparently unaware that Congress had revised the statute in 1972 and that the EPA rule was based on the pre-1972 version of the statute. The commenter expressed disagreement with the proposal characterizing this apparent unawareness as of "minor significance" and asserted instead that it meant that the Court's decision cannot be relied on to support the proposal's broad scope of certification.

One commenter asserted that that the *PUD No. 1* Court misconstrued subsection (d) and argued that it does not authorize certifying authorities to conduct a free-ranging survey of state law to impose conditions on certification. Rather, the commenter said it should be construed analogous to the operating permit program Title V of the Clean Air Act to authorize certifying authorities at most to establish monitoring requirements to ensure that other, applicable provisions are fulfilled.

<u>Agency's Response</u>: *See* Section IV.E.2.a of the final rule preamble for further discussion regarding *PUD No. 1*, including responses to comments regarding the 1971 Rule.

EPA disagrees that *PUD No. 1* can be read so narrowly as to apply only to the facts of the case. Nowhere did the Court suggest its holding was so limited. The Court first interpreted the text of section 401 before applying its interpretation to the specific facts before it.

EPA disagrees that the Court in *PUD No. 1* explicitly limited its holding to the scope of section 401(d) conditions and not the scope of section 401 certification overall. At issue before the Court was a certification condition, therefore it is hardly surprising the Court focused its analysis around the proper scope of certification conditions. However, in identifying the issue before it, the Court did state that it was considering the scope of State authority under section 401 more broadly. *Id.* at 710 ("The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed … is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401."). Even if the Court did not directly consider the proper scope for certification decisions (as opposed to certification conditions), the Court certainly never suggested that the scope for a certification decision must be more limited than scope for certification conditions. The Court held that section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges," and section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 711-12. In other words, the Court explained that there must be a potential discharge before certification is required (which is clear from the statute), but the Court never suggested that certification decisions are somehow limited to considering the water quality effects of only that potential discharge. As explained at section IV.E.2.e of the final rule preamble, sections 401(a)(1) and 401(d) are inextricably linked and by far the most reasonable reading of the two is that the same scope applies to a both the decision whether to grant certification and whether that certification requires conditions. If the scope for certification decisions was actually "discharge-only" while the scope for certification conditions was the full activity subject to the Federal license or permit, then the scope for a decision whether to grant certification would be considerably narrower than the scope of any conditions that could accompany a grant of certification. That would lead to odd or even absurd results. For example, if a certifying authority grants certification regarding a point source discharge (because the point source discharge will comply with water quality requirements), the certifying authority must then shift gears to a different inquiry and consider the water quality impacts of the full activity subject to the Federal license or permit and add conditions necessary to assure that the activity will comply with water quality requirements. But if the certifying authority determines that no conditions can assure that the activity will comply with water quality requirements, it still cannot deny certification.

The Agency disagrees with the commenter suggesting that the Court's holding in *PUD No. 1* and/or the Agency's proposed approach to scope of certification would somehow authorize

certifying authorities to conduct a free-ranging survey of state law to impose conditions on certification. *See* Section IV.E for further discussion on the types of conditions that are within the scope of certification under this final rule.

5.1.3 Support Activity Based Scope for Other Reasons

5.1.3.1 Longstanding Practice

Many commenters supported the Agency's "activity as a whole" scope of certification. Several of these commenters indicated that the "activity as a whole" scope was consistent with EPA's longstanding interpretation and certifying authority practice prior to the 2020 Rule, citing to EPA's 1989 and 2010 Guidance. One commenter argued that the broad language in Section 401 has consistently been interpreted and applied as allowing a certifying authority to review a project's impacts on water quality. One commenter agreed that the activity as a whole scope better aligns with cooperative federalism principles. Another commenter noted that the activity as a whole scope aligned with its state certification procedures. A commenter said that many states support the readoption of the activity as a whole approach for scope of certification review.

Agency's Response: *See* Section IV.E of the final rule preamble.

5.1.3.2 Water Quality Reasons

Some commenters argued that an "activity as a whole" scope was necessary for certifying authorities to holistically protect their waters, and several commenters asserted that analyzing the activity as a whole makes section 401 more effective in protecting water quality and achieving water quality goals. One commenter argued that the discharge only approach to section 401 would allow activities to occur that can result in violations of water quality requirements, such as impacts from reduced stream flows, thermal loading from removal of streamside vegetation, increases or decreases in sediment load, and destabilized stream banks, and ultimately undermine Congress's intention to provide states and Tribes with a tool to protect their water resources. Another commenter asserted that without the activity as a whole interpretation, certifications would underestimate the implications of projects on watershed scales and hamper the ability of certifying authorities to manage designated uses. Another commenter argued that activities, such as land use or disturbance directly adjacent to streams and wetlands, have a direct relationship to the biological, physical, and chemical components and overall health of the water resource. One commenter asserted that the activity as a whole approach would better enable states and territories to obtain needed information to understand an activity's water quality impact, which would make review more efficient and predictable.

One commenter asserted the activity as a whole approach is important to consider impacts comprehensively for piecemealed projects. Another commenter stated that projects in its state do not always seek certification for each individual Federal permit that a project requires, so the activity as a whole approach would allow the state to evaluate whether the project in general is protective of state waters.

Several commenters discussed the importance of the "activity as a whole" scope for hydroelectric dam projects. One commenter asserted that the activity as a whole scope is necessary to fulfill the CWA's purpose of allowing states to address the "broad range of pollution" affecting their waters and provided examples of the water quality impacts from hydroelectric dams that are not tied to a specific discharge (e.g., increased water temperature from decreased water flows, vegetation loss and reduced shading from dam reservoirs, fish kills from turbines, increased toxin mobility from elevated turbidity). Another commenter also supported the activity as a whole scope of certification, arguing that the discharge from the powerhouse or tailrace of FERC-licensed hydropower projects are not the only impacts from those projects, but rather they are federally-licensed activities that fundamentally alter the chemical, physical, and biological integrity of a river. One commenter argued that the proposed scope is necessary to achieve Congress' intent in the CWA to protect and restore the quality of the nation's waters with respect to FERC-licensed hydropower projects. The commenter noted that section 401 provides one of the few exceptions to Federal preemption of state law on FERC-licensed projects and asserted that limiting the scope to just the discharge would leave unregulated the impacts from stormwater and wastewater discharge and eutrophication and oxygen depletion from the activity. Another commenter asserted that the activity as a whole scope would allow certifying authorities to protect their waters and the communities that rely on and use those waters and discussed the water quality impacts from the Conowingo Dam that were non-discharge related.

Regarding dams more generally, one commenter asserted that reviewing only the discharge would leave water quality impacts unmitigated and described impacts from a dam that would be unaddressed under a discharge-only scope, including change in the timing and flow of water, blockage of nutrients, and altered chemical makeup of water due to reservoirs. Another commenter discussed the impacts of dam alterations of natural flow regimes, including the chemical, physical, and biological properties of riverine ecosystems, as identified in an EPA report (Final EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration. EPA Report 822-R-16-007/USGS Scientific Investigations Report 2016-5164 (2016)).

> **<u>Agency's Response</u>: The Agency agrees that greater water quality protection could result from an "activity" scope of certification, in addition to the fact that an "activity" scope best reflects Congressional intent and appropriately restores consistency with the "activity as a whole" scope that the Supreme Court affirmed in *PUD No. 1* over a quarter of a century before the 2020 Rule. As commenters observed, the distinction between certifying the activity or only its associated discharges is more than semantic and can in some cases have significant consequences for water quality protection. By allowing states and authorized Tribes to protect their water quality from the full activity made possible by a Federal license or permit, the "activity" scope of certification effectuates Congress's goal of maximizing protection of the nation's waters by providing an independent grant of authority to states and authorized Tribes to ensure that federally licensed or permitted activities do not frustrate attainment of their water quality protection goals. *See* Section IV.E.2 for further discussion.**
>
> **In response to the commenter who stated that projects in the commenter's state do not always seek certification for each individual Federal permit that a project requires, the**

Agency notes that a project proponent may only rely on the same certification obtained for the construction of a facility for any Federal operating license or permit for the facility if 1) the Federal agency issuing the operating license or permit notifies the certifying authority, and 2) the certifying authority does not within 60 days thereafter notify the Federal agency that "there is no longer reasonable assurance that there will be compliance with applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. 1341(a)(3). The Agency finds that section 401(a)(3) provides compelling textual support for the reading that section 401 is not constrained to those activities directly authorized by the Federal license or permit in question or the point source discharge. *See* Section IV.E.2.a, b for further discussion on why section 401(a)(3)-(5) adds more support to an "activity" based scope of certification.

5.1.4 Additional 2020 Rule Specific Input

Some commenters described challenges and issues with the "discharge-only" scope of certification from the 2020 Rule, arguing that it is too narrow, limits certifying authorities' ability to protect water quality, and does not allow states to fully assess a proposed project's potential impacts on water quality. Several commenters asserted that the 2020 Rule's interpretation of scope diminished their authority to include certification conditions that protected water quality or consider critical issues, such as riparian loss or long-term project operation impacts to water quality. One commenter asserted that the 2020 Rule approach to scope would prevent the state from including conditions on monitoring, modeling, and mitigation addressing potential water quality impacts.

Several commenters argued that the 2020 Rule's approach to scope of certification was illegal. A few of these commenters asserted that the 2020 Rule unlawfully rejected Supreme Court precedent and EPA's longstanding practice. One commenter said the proposed revisions to the scope of certification are necessary to correct legal deficiencies from the 2020 Rule. One commenter argued that it would be patently unreasonable to return to the 2020 Rule's discharge only approach for several reasons, including because EPA admitted in the preamble that the activity as a whole scope was the longstanding approach (citing *Chamber of Com. of United States of Am. v. United States Dep't of Lab*., 885 F.3d 360, 380 (5th Cir. 2018)), that it was not reasonable to assume Congress intended a fundamental change in scope based on limited changes to statutory text, and that some water quality impacts would fall outside the scope of the 2020 Rule.

Conversely, other commenters did not support the Agency's proposed scope of certification and recommended retaining the "discharge-only" scope from the 2020 Rule. A few commenters argued that the 2020 Rule provided a reasonable basis for the discharge-only approach to the scope of certification. One commenter argued that EPA provided a detailed discussion of the statutory, regulatory, and legal history of section 401 and established a clear framework to justify EPA's revisions. Another commenter asserted that the 2020 Rule provided a reasoned legal basis for its scope of certification by analyzing the different interpretations and rejecting those that did not closely align with the statutory text. The commenter argued that the proposed rule disregarded the specific actions taken by Congress in favor of the Agency's policy preference and asserted that the "activity as a whole" is inconsistent with the statutory text and does not reflect an authentic legal interpretation. Another commenter argued that the

2020 Rule's approach to the scope of certification focused states and Tribes on water quality and promoted consistency across certifying authorities, and further asserted that the proposed scope would create uncertainty, delay or disrupt clean energy projects, and allow significant expansion of certification authority beyond what was intended by the CWA. Another commenter asserted that the 2020 Rule explained how to read sections 401(a) and (d) together, but the proposal arbitrarily rejected this analysis and uses the term "applicant" to unlawfully and unreasonably expand the scope of certification beyond the CWA. One commenter stated that the 2020 Rule's scope of certification was appropriately limited to the review of point source discharges into waters of the United States and the proposed rule's expansion of the scope of certification is not consistent with the unambiguous text of section 401. Another commenter asserted that the 2020 Rule scope is legally appropriate and makes the permitting program more predictable for Federal agencies, Tribes, states, and project sponsors to navigate receiving the timely permitting decision, which is important for private investors, predictability, and cost effectiveness. The commenter further asserted that expanding the scope would conflict with the Administration's policy goals on climate change and equity by slowing down much needed deployment of infrastructure projects.

Agency's Response: EPA is concerned that some, if not many, of the water quality-related impacts identified by commenters might fall outside the scope of review under the 2020 Rule's "discharge-only" approach to scope of review. While the potential additional water quality protections associated with the "activity"-based scope (as opposed to a "discharge-only" scope) will vary depending on the nature, size, location, and type of project that requires a Federal license or permit, this final rule provides the opportunity for additional water quality protections compared to the 2020 Rule's approach. *See* Section IV.E of the final rule preamble for further discussion on water quality harms of the 2020 Rule.

In response to commenters asserting that the 2020 Rule provided a more reasonable basis for the scope of certification, EPA find that the 2020 Rule does not represent the best statutory interpretation of the scope of certification. Instead, the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges. This reading is further supported by the legislative history of section 401, authoritative Supreme Court precedent, and the goals of section 401, which include recognition of the central role that states and authorized Tribes play in protecting their own waters. It also realigns scope with accepted practice for the preceding 50 years. *See* section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification and why such an outcome is inconsistent with both the Act and Congressional intent. Accordingly, the Agency strongly disagrees with commenters asserting that the "activity" scope of certification is inconsistent with the statutory text or does not reflect an authentic legal interpretation. The finalized approach returns to the scope that is consistent with not only the statutory language and Congressional intent but also longstanding Agency guidance and decades of Supreme Court case law. *See* Section IV.E.2 of the final rule preamble for further discussion on the "activity" scope of certification and the Agency's Response to Commenters in Section 5.1.

As discussed throughout the preamble to the final rule, the Agency is finalizing revisions to the 2020 Rule that best reflect the statutory text. These revisions also support a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990. The 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification, nor does it align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. Therefore, the comparisons made by some commenters regarding possible delays between the proposed approach and the 2020 Rule's scope of certification (or any other aspect of the 2020 Rule) are somewhat misleading. Accordingly, the Agency disagrees with commenter assertions that the "activity" scope of certification would create uncertainty, delays, or disruptions to project deployment. First, most certifying authorities are familiar with the "activity" approach and the final rule clarifies that the scope of certification is limited to water quality-related impacts. Second, although water quality impact analyses could take longer when considering the "activity" as opposed to the "discharge only," in part because certifying authorities may request additional information from project proponents to consider the "activity" in their section 401 reviews, such data requests are unlikely to place any incremental burden on project proponents since these activity-related data requests may address data that project proponents must compile in any event for the Federal license or permit application.

5.1.5 Activity as a Whole Definition

5.1.5.1 Did Not Support Proposed Activity as a Whole Definition

Many commenters who did not support the proposed scope of certification, also did not support the proposed definition for the "activity as a whole." Several of these commenters disagreed with the proposed definition because the commenters asserted that it was ambiguous and would lead to various implementation challenges, such as regulatory uncertainty, increase litigation risk, increased project costs, project delays, and inconsistent interpretations of scope across jurisdictions. One commenter argued that even if the "activity as a whole" approach was lawful, the Agency had not adequately explained how the term would function in practice, stating that the Agency did not describe the extent of project activity and as a result, the definition would introduce regulatory uncertainty, litigation risk, and threaten infrastructure projects. The commenter argued that the term is too vague to be consistently implemented and violates the APA as an arbitrary and capacious provision. The commenter recommended that the Agency either not use the term "project activity" or set limits on the extent of project activity to be considered in the activity as a whole, suggesting that it should not include aspects of a project that have received authorization for construction or operation. Similarly, another commenter argued that the proposed scope of certification was so broad that it was effectively unknowable, which would create financing uncertainties because it would prevent project proponents from planning in advance to develop information needed for the certification process. Another commenter asserted that the definition of "activity as a whole" undermines the specificity of the point source discharge requirement of certification. One commenter stated that neither the Supreme Court in *PUD No. 1* nor EPA have ever defined the scope of this "activity as a whole" concept, and EPA did not purport to do so in the proposal.

A few commenters requested that the Agency revise the proposed definition for "activity as a whole" to provide more clarity on the boundaries of such a term, such as what impacts can be considered by the certifying authority and how indirect the impacts may be to water quality. One commenter provided recommended regulatory text revisions and suggested that proposed section 121.1(a) should read "Activity as a whole means an aspect of the project activity that has reasonable potential to adversely affect water quality" while proposed section 121.3 should read "When a certifying authority reviews a request for certification, it shall evaluate whether there is reasonable assurance that the activity as a whole will comply with all applicable water quality standards." Similarly, another commenter recommended limiting the scope to the proposed project's impacts to water quality standards. One commenter recommended revising proposed section 121.1(a) to read "means any aspect of the project activity with the potential to affect water quality from the discharge." Another commenter requested that the Agency provide opportunities for further public comment on the definition.

A few commenters that supported the proposed scope of certification asserted that the proposed definition of "activity as a whole" was confusing. One commenter asserted that the definition was circular and recommended that the Agency delete the word "activity" from the definition. The commenter also suggested that the Agency should define the term "project" to clearly reference the entirety of whatever is being licensed or permitted by the Federal agency. Another commenter stated that it should be the entire project associated with the potential discharge into a water of the United States.

A few commenters asserted that the definition could be used by certifying authorities to impose conditions on activities that may only be speculatively or obscurely linked to the actual discharge or used as a vehicle to insert Federal jurisdiction over activities on waters that are not waters of the United States. One of these commenters further argued that the definition does not clearly demarcate where authorities under section 401 end and authorities under other CWA program begins (e.g., stormwater permitting under CWA section 402), and would allow certifying authorities to condition any aspect of a dredged or fill project permitted by the USACE or hydropower project licensed by FERC regardless of if it is directly related to the discharge. Another commenter argued that the proposed definition would allow certifying authorities to consider any aspect of the project for the duration of the activity that are not related to the requirement of the Federal permit nor related to adverse effects. The commenter asserted that this would lead to certifying authorities claiming they have limited ability to exclude a statistically insignificant aspect of a project if it can have any affect at all on water quality. Another commenter argued that the definition could allow a decision to be based on any activity of the "applicant," even those involving wholly separate projects owned or operated by the applicant.

One commenter asserted that the proposed scope would allow circumvention of the one year statutory maximum, *e.g.*, where certification is for a section 404 permit on a hydropower dam, the certification could impose additional requirements on the project after the one-year period for issuing the certification occurs and after the FERC license was issued.

> **<u>Agency's Response</u>: The Agency appreciates commenter concerns regarding implementation of the proposed definition of "activity as a whole". In response to these comments and to aid in implementation of the final rule, the Agency has revised the**

regulatory text regarding the scope of certification. Although an activity-based scope of certification had been the Agency's longstanding interpretation prior to the 2020 Rule and should be familiar to stakeholders, the Agency is providing further clarification around the "activity" subject to certification. *See* Section IV.E.2.b of the final rule preamble for further discussion around removal of the definition for "activity as a whole" and subsequent modifications at section 121.3 to articulate the activity subject to a certifying authority's review.

EPA agrees with the commenter asserting that the Court in *PUD No. 1* did not define the "activity as a whole" term. When *PUD No. 1* endorsed a scope of "activity as a whole" almost thirty years ago, the Court did not offer a specific definition or explanation of that term. Nevertheless, certifying authorities and Federal agencies have gained significant experience over nearly 50 years implementing an "activity" approach, and EPA expects that certifying authorities and Federal agencies remain capable of appropriately delineating the "activity" based on the facts of each situation. EPA is not aware of and did not receive any comments identifying any cases in which delineation of "activity" has been litigated, provided that the scope of review was limited to water quality. Moreover, this final rule addresses commenter concerns regarding regulatory certainty by clarifying important limiting principles that inform delineation of the "activity" under review by the certifying authority including that certifying authorities are limited to considering adverse impacts to water quality from the activity subject to the Federal license or permit. *See* Section IV.E.2.b of the final rule preamble.

In response to commenters suggesting that certification should be limited to assuring compliance with water quality standards, the Agency disagrees. Rather, consistent with the statutory text, this final rule requires certifying authorities to consider whether the activity will comply with "water quality requirements," which includes but is not limited to water quality standards. *See* Section III for further discussion on the textual changes from Section 21(b) to Section 401, and Section IV.E for further discussion on the term "water quality requirements."

In response to commenters asserting that the scope of certification adopted in this final rule will lead to certifying authorities placing conditions on Federal licenses or permits that are speculatively linked to the actual discharge, the Agency first disagrees that scope is limited to the point source discharge for reasons discussed in Section IV.E of the final rule preamble. Nevertheless, even under an "activity" scope of certification, the Agency finds it unnecessary to establish in this rulemaking how indirect or certain the impacts of the activity may be to water quality. *See* Section IV.E.2.b of the final rule preamble for further discussion on why the Agency reached this conclusion and responses to commenters. In response to commenters asserting that an activity-based scope of certification will lead to certifying authorities placing conditions on Federal licenses or permits for non-waters of the United States, see Section IV.E.2.d for further discussion on the scope of waters.

EPA disagrees that the final rule fails to demarcate where authorities under section 401 end and authorities under other CWA programs begin. The final rule addresses section 401, not other CWA programs. While CWA section 402 and 404 permits are subject to section 401 certification when issued by EPA or the Corps, this rule only addresses how section 401 applies to these permits.

The Agency strongly disagrees with commenters asserting that a scope encompassing the full activity subject to the Federal license or permit instead of only its associated point source discharges would allow certifying authorities to consider aspects of the project not related to adverse effects on water quality. Under this rule, when a certifying authority reviews a federally licensed or permitted activity, it must determine whether the activity "will comply" with "water quality requirements." The phrase "will comply" used in sections 401(a)(1) and 401(d) means that the certifying authority is limited to examining whether the activity will meet existing water quality requirements; only if the activity will not comply with such requirements, then section 401 provides certifying authorities with the ability to either deny the activity where compliance cannot be ensured with conditions or condition the activity in such way to assure compliance. Section 401(d) requires a certifying authority to determine whether "the applicant" will—without additional conditions — comply with the specified CWA provisions and "any other appropriate" requirement of state law. Only if the certifying authority determines pursuant to section 401(d) that adding "any effluent limitations and other limitations, and monitoring requirements" to the Federal license or permit will assure that water quality requirements will be met, may the certifying authority grant the certification contemplated by section 401(a)(1). Congress intended for section 401 to act as a powerful tool to address adverse water quality impacts from federally licensed or permitted activities and understood the implications of such a tool. *See* 116 Cong. Rec. 8805, 8984 (1970) ("No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard."); *see also* S. Rep. 92-414, at 69 (1971) ("The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."). As noted in Section IV.E of the final rule preamble, certifying authorities may use section 401 certifications to address adverse water quality impacts either caused or contributed to by a Federally licensed or permitted activity.

The Agency finds that the statutory text and the legislative history clearly indicate Congress's intention for a certifying authority to holistically consider impacts of the activity subject to the Federal license or permit, including the activity's construction and operation. Therefore, it would be appropriate for a certifying authority to consider the water quality-related impacts associated with the operation of an activity even if the Federal license or permit that triggered the need for certification is limited to the construction phase of the activity. *See* 33 U.S.C. 1341(a)(3) and related discussion in the final rule preamble at Section IV.E.2.b. The Agency disagrees that its interpretation extends to any activity of the applicant. Rather, the final text at section 121.3 makes it clear that the analysis is limited to the applicant's activity subject to the Federal license or permit at issue (and to considering that activity's adverse impacts on water quality). The Agency revised its proposed

regulatory text regarding the scope of certification to no longer refer to the "project activity" in response to commenter confusion about the term. The final rule refers simply to the "activity" subject to the Federal license or permit, instead of the "activity as a whole," the "project in general" or, as proposed, the "project activity." The Agency understands these terms to be interchangeable.

In response to the commenter asserting that the "activity" scope of certification would allow circumvention of the one year statutory maximum, the Agency disagrees. First, this final rule does not allow certifying authorities to unilaterally add new certification conditions after issuance of the certification decision and/or the Federal license or permit. *See* Section IV.I for further discussion on modifications to grants of certification. However, to be clear, the Agency does not consider so-called "adaptive management" conditions to be unilateral modifications. *See* Section IV.F for further discussion on adaptive management conditions. Second, for purposes of section 401, certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

5.1.5.2 Support Proposed Activity as a Whole Definition

Several commenters supported the proposed definition for activity as a whole. One of these commenters stated that they interpreted the term to include, but not be limited to, the construction or operation of the project as well as impacts in addition to those which triggered the request for Section 401 certification. Another commenter supported the definition as one that includes all activities that might affect water quality both directly and indirectly, noting that such a definition would be consistent with the concept of "proposed action" used in ESA consultations. One commenter stated that the proposed definition strikes a good balance, while another commenter asserted that the clarification was necessary to allow state and Tribes to meet their obligations under the CWA (citing *Catskill Mountains Chapter of Trout Unltd., Inc. v. EPA*, 846 F.3d 492, 530 (2d Cir. 2017)). A commenter also argued that Congress intended for section 401 to give states and Tribes authority to guarantee that entire "facilities under a Federal license or permit … will comply with [state and Tribal] water quality standards," not just that portions of facilities will comply, citing *S.D. Warren Co.*, 547 U.S. at 386 (quoting Sen. Muskie, 116 Cong. Rec. 8984 (1970)).

Agency's Response: The Agency is not finalizing the proposed definition for "activity as a whole," and is clarifying the concept in section 121.3 instead. The final rule language emphasizes that the activity subject to review can include, but is not limited to, the activity's construction and operation. As discussed in section IV.E of the final rule preamble, the

Agency also agrees with commenters asserting that Congress intended for section 401 to allow certifying authorities to consider whether the entirety of an activity subject to the Federal license or permit will comply with water quality requirements, not just the point source discharges associated with the activity, and not just the portions of that activity subject to the Federal license or permit at issue. *See* 33 U.S.C. 1341(a)(3) and discussion in section IV.E of the final rule preamble.

***See also* the Agency's Response to Comments in Section 5.1.5.1.**

5.1.6 Alternatives to Activity as a Whole

5.1.6.1 Support Alternative Definition of Activity as a Whole or Related

Some of the commenters who did not support the definition of "activity as a whole" supported defining the term to mean "only those activities at the project site that are specifically authorized by the Federal license or permit in question," a possible alternative definition that EPA invited comment on at proposal. Another commenter argued that the "activity as a whole" should be limited to the activities authorized by the Federal license or permit for which certification is required because it is consistent with the structure of Section 401. The commenter argued that section 401 cannot authorize any activity by itself, but rather it is a certification of compliance with specified legal requirements that is necessary to issue a Federal license or permit, and if the license or permit is not issued, the certification has no legal effect. Given this, the commenter argued that the scope of certification can be no broader than the activities authorized by the Federal license or permit. The same commenter also argued that conditions based on activities other than those authorized by the Federal license or permit could not be effectively implemented. One commenter suggested that aspects of a particular infrastructure project that are outside of the Federal permitting regime do not fall within the jurisdiction of Section 401 and should not be within the scope of certification for states to evaluate. The commenter further asserted that the most logical and reasonable reading of "activity" from *PUD No. 1* is the activity subject to the permitting authority of the Federal agency and recommended that EPA should clarify that only the activity subject to Federal permitting can be included in the scope of certification, and that once the permitted activity concludes, the conditions imposed by the water quality certification and the certification itself are no longer applicable.

A few commenters asserted that the scope of certification should be limited to the discharge associated with the Federal license or permit, including one commenter who asserted that section 401 only applies to discharges into navigable waters that may violate specific water quality provisions proximate to the project at issue. One commenter stated that the scope should be limited to and defined in reference to the Federal agency's authority granted from Congress, because it cannot act on conditions that are outside of its authority. Another commenter asserted that the broad proposed scope of review could lead to certification conditions that a Federal agency does not have the authority to implement.

A few commenters argued that the certification process should not provide certifying authorities an opportunity to re-evaluate aspects of the project that have already been authorized. One of these commenters asserted that the proposed definition would result in duplicative regulatory obligations and recommended explicitly excluding review of any other permitted water management activities at a project

site. A few commenters who have projects involving maintenance of flood control or water supply infrastructure expressed concern over certifying authorities considering impacts of reservoirs or dams in the activity as a whole because of possible impacts on flood control and water supply systems. One of these commenters asserted that review should be limited to water quality impacts of the discharge associated with the activity covered by the Federal permit, and not impacts associated with the original construction or ongoing operation of the overall facility. One commenter suggested defining "activity" to mean only those activities at the project site that are specifically authorized by the Federal license or permit in question with the potential to affect water quality and exclude areas of the project that are already permitted.

> **Agency's Response: EPA appreciates commenter input of an alternative approach to defining "activity." After considering public comments, the statutory text, legislative history, and prior Agency guidance, EPA finds that section 401 is not constrained to those activities directly authorized by the Federal license or permit in question. *See* Section IV.E.2.b of the final rule preamble for further discussion on the Agency's textual analysis, the Agency's longstanding practice, and legislative history in support of this conclusion.**
>
> **In response to comments regarding how a Federal licensing or permitting agency could implement certification conditions addressing aspects of the activity that the Federal agency does not otherwise have licensing or permitting authority over, see the Agency's Response to Comments in Section 5.1.6.3.**
>
> **EPA would like to clarify that a certification cannot alter an existing Federal license or permit after its issuance; rather, the certification is incorporated into the relevant Federal license or permit that triggered the need to request certification. *See* section IV.I of the final rule preamble for discussion on modifications to granted certifications. However, EPA finds that existing authorizations may be relevant to a certifying authority's analysis and determination of whether a particular activity will comply with water quality requirements. For example, existing authorizations may inform the baseline water quality conditions in a waterbody and whether a certifying authority needs to add conditions to ensure the activity will comply with water quality requirements.**

5.1.6.2 Do Not Support Alternative Definition of Activity as a Whole

A few commenters did not support the Agency's possible alternative definition of "activity as a whole" that EPA invited comment on. One commenter argued that it was unlawful and there was no basis in the CWA to limit the scope to "only those activities at the project site that are specifically authorized by the Federal license or permit in question." The commenter further asserted that such a definition would run contrary to Congress' clear intent to give states and Tribes broad authority to review, condition, and deny certifications and would have the same effect as the 2020 Rule's discharge-only approach for some projects. Another commenter asserted that it was unnecessary for EPA to parse the "activity as a whole" definition on narrow, jurisdictional grounds and that the entire project associated with the potential discharge should be subject to the certification requirement to achieve the CWA's purpose.

Agency's Response: *See* Section IV.E.2.b of the final rule preamble and the Agency's Response to Comments in Section 5.1.6.1.

5.1.6.3 Authority Over a Small Part Question

A few commenters provided comments in response to EPA's request for comment on whether and how the Federal licensing or permitting agency could effectively implement a certification with conditions that address impacts from the "activity as a whole" if it has authority over only a small part of a larger project. One commenter asserted that Federal agencies do not have the capability or processes to oversee enactment of certification conditions for off-site actions or longer duration activities, which can lead to liability issues, and encouraged EPA to work with Federal agencies on implementation issues. Another commenter asserted that the bounds of Federal authority are irrelevant to the scope of state or Tribal authority, observing that Section 401(d) requires the Federal agency to adopt whatever conditions the state or Tribe includes to ensure compliance with the CWA and does not mention that the scope of those conditions should depend on the scope of the Federal agency's authority over the project. One commenter stated that in cases where the Federal agency would have authority over only a small part of a larger project, the certifying authority and project proponent may sign an agreement to ensure offsite measures would be implemented.

Agency's Response: EPA generally agrees with the commenter asserting that bounds of the permitting authority of the Federal permitting agency does not dictate the scope of state or Tribal authority under section 401. Section 401 requires the certification conditions to become conditions of the Federal license or permit subject to certification, regardless of whether the Federal agency has independent authority to condition its license or permit to ensure compliance with water quality requirements. However, EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

5.1.6.4 Hydroelectric Facilities Example

EPA received a few comments on the example in the proposal regarding two hydroelectric facilities, Facility A and Facility B, which require different sets of permits. One commenter used the example to express support for a broader interpretation of "activity as a whole" not limited to the activity regulated by the Federal permit. The commenter noted that under a narrower approach to "activity as a whole" tied to the permit at issue, for the certification of Facility B's NPDES permit, no consideration would be given

to the water quality impacts of the construction and operation of the facility. The commenter continued that review of the facility's operation impacts on protected uses such as aquatic propagation and survival may be left out. Another commenter stated that while the certification for Facility B will apply only to the prospective operation of the dam, it is possible that in order to comply with applicable water quality requirements, the dam will be required to implement structural or operational modifications. Another commenter stated that EPA's hydroelectric dam hypothetical does not account for circumstances in which a Federal permit is temporary in nature. The commenter asserted that the FERC and NPDES permits in the example are ongoing in nature, while a section 404 permit is finite and once the permitted activity is complete, any certification conditions included in the section 404 permit are likely no longer in effect.

One commenter asserted that the hydroelectric dam example was irrelevant to many scenarios because, unlike a hydroelectric dam, not all infrastructure projects require operating permits. The commenter argued that once the "activity" that was the subject of the Federal permit is complete, it would be inappropriate for the certifying authority to include any "adaptive management" conditions in the certification because the certifying authority has no authority to impose late-arising conditions that spring into effect at some point in the future.

Agency's Response: *See* Section IV.E.2.b of the final rule preamble and the Agency's Response to Comments in section 5.1.6.

The Agency agrees that, for purposes of section 401, certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401 or the type of certification condition (e.g., adaptive management). However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

The Agency disagrees with commenter assertions that certifying authorities do not have the authority to impose "adaptive management" conditions. This final rule does not allow certifying authorities to unilaterally add new certification conditions after issuance of the certification decision and/or the Federal license or permit. *See* Section IV.I for further discussion on modifications to grants of certification. However, to be clear, the Agency does not consider so-called "adaptive management" conditions to be unilateral modifications. *See* Section IV.F for further discussion on adaptive management conditions. Like other conditions, these conditions would also expire when the Federal license or permit expires.

5.1.7 Who Should Define Activity

A few commenters asserted that states and Tribes should be able to define the "activity" they plan to review. One of those commenters recommended amending proposed section 121.7 to allow states to partially waive certification to exclude specific aspects of a project it deems as outside the scope of review. Another commenter stated that certifying authorities should only consider project components for which the certifying authority has authority. One commenter recommended that states should have the discretion to decide whether or not to place conditions on impacts from nonpoint sources once the overall activity has triggered the need for certification so states may implement the CWA in their state as they see fit.

One commenter asserted that the Agency should address the question of how to define the activity as a whole. To illustrate such need, the commenter discussed issues with section 404 projects (e.g., linear projects) where the Corps treats each individual water body or wetland crossing as a separate project and forces the certifying authority to limit their scope to that particular project. The commenter argued that such a result does not allow a holistic review of water quality impacts, but rather end up where activity as a whole and the point source discharges that trigger section 401 review are defined essentially the same way.

> **Agency's Response: The Agency is not finalizing the proposed definition for "activity as a whole," and instead will rely on clarifying edits in final rule section 121.3 to articulate the activity subject to a certifying authority's review. Specifically, this final rule addresses commenter concerns regarding regulatory certainty by clarifying important limiting principles that inform delineation of the "activity" under review by the certifying authority including that certifying authorities are limited to considering adverse impacts to water quality from the activity subject to the Federal license or permit. In addition to these clarifying edits, the Agency notes that certifying authorities and Federal agencies have gained significant experience over nearly 50 years implementing an "activity" approach, and EPA expects that certifying authorities and Federal agencies remain capable of appropriately delineating the "activity" based on the facts of each situation. EPA is not aware of and did not receive any comments identifying any cases in which delineation of "activity" has been litigated, provided that the scope of review was limited to water quality. *See* Section IV.E.2.b of the final rule preamble.**
>
> **In response to the commenter asserting that states should have discretion to address (or not address) impacts from nonpoint sources, the Agency notes that section 121.3(a) requires a certifying authority to evaluate "whether the activity will comply with applicable water quality requirements." Whether or not a certifying authority needs to add conditions to address water quality impacts from nonpoint source aspects of the activity subject to the Federal license or permit will depend on its water quality requirements and the water quality-related impacts from the proposed federally licensed or permitted activity.**
>
> **In response to the commenter recommending that states should be able to "partially waive certification," EPA wishes to clarify that any attempt at a "hybrid" version of the four**

certification decisions identified at section 121.7(a) does not meet the standard of "acting" on a request for certification (e.g., a waiver with conditions, a conditional denial). *See* Section IV.F of the final rule preamble.

5.1.8 Other Arguments (Major Questions, Duplicative of NEPA, Fed Agency Impacts)

A few commenters asserted that the Agency's proposed scope was impermissible under the major questions doctrine. One commenter asserted that EPA's request for comment on whether Federal agencies could effectively implement certification conditions for the activity as a whole if they have authority over only a small part of a larger project highlighted the weak legal foundation for the proposed scope and that it was impermissible under the major questions doctrine. Another commenter asserted that EPA should not assume that Congress hid vast state power in section 401(d), noting that the Supreme Court recently held that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The commenter argued that EPA's proposed scope of review would rewrite Congress's balanced legislative language and place certifying authorities in control of interstate projects.

A few commenters argued that the "activity as a whole" scope would duplicate the NEPA review process. One commenter asserted that section 401 was intended to focus on specific discharges because of changes made from section 21(b) to section 401 and section 401's relationship to NEPA. First, the commenter argued that the changes made to Section 21(b) in the 1972 CWA amendments were intended to maintain consistency with the amendments' broader focus on point source discharges to waters of the United States. Second, the commenter further asserted that section 21(b) provided states with the authority to examine the water quality impacts of Federal actions in the absence of any Federal obligation to consider potential environmental impacts. However, according to the commenter, Section 401 followed passage of NEPA, and when analyzed in that context, Congress did not intend section 401 to duplicate NEPA's processes in scope, scale, or duration.

A few commenters discussed the impact of the proposed scope on other Federal agencies or in the context of the Federal licensing or permitting process. One commenter argued that EPA's proposed scope of certification would create a situation where the scope of the certifying authority's review is broader than the scope of the Federal authorization that triggered the review, which the commenter asserted would be an impracticable and unlawful result. Another commenter asserted that the proposed scope would expand section 401 certification condition enforcement by Federal agencies to land and water resources more appropriately subject to state authority. One commenter asserted that EPA's interpretation of the scope of certification lacked any reasonable consideration of the broader licensing and permitting context within which certification is a part. The same commenter asserted that EPA incorrectly stated that section 401 is the only means for states and Tribes to address concerns regarding potential environmental impacts of Federal projects and argued that section 401 allows states and Tribes to protect their water quality in the context of the permitting process that otherwise would preempt state or Tribal authority.

A few commenters discussed perceived consequences of the activity as a whole scope. One commenter argued that the "activity as a whole" scope would cause facilities that obtain EPA-issued NPDES permits to be treated unequally in comparison to facilities that obtain state or Tribal issue NPDES permits,

because they will be subject to burdensome certification conditions on nonpoint source discharges that are more appropriately considered through a TMDL. Another commenter argued that the proposed scope may cause significant and unmitigable water supply losses and invite litigation.

A few commenters asserted that the proposed scope of certification would implicate the commerce clause when certifying authorities review projects that are interstate in nature. One commenter asserted that the scope would create unnecessary conflict between states and create dormant commerce clause concerns in which the laws of one state impermissibly dictate the economic activity of another state. The commenter argued that the activity as a whole scope of review would allow states with little relation to the main project to harm the land and water priorities of another state.

One commenter said that they are concerned about the use of the guidance document, Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) ("1989 Guidance"). The commenter further said that the guidance document was outsourced and in part written by an activist.

Another commenter stated that some states are prohibited from evaluating a project's "activity as a whole."

> **<u>Agency's Response</u>: EPA disagrees that this rulemaking represents one of the "extraordinary cases" that implicates the major questions doctrine. *West Virginia v. EPA* 142 S. Ct. 2587, 2609 (2022). First, while the doctrine concerns instances where an agency "claim[ed] to discover in a long-extant statute an unheralded power," *id.* at 2610 (internal cite omitted), the scope of certification adopted in this final rule is far from "unheralded"—it realigns with 50 years of accepted practice squarely upheld by the Supreme Court in *PUD No.* 1. This final rule restores the scope of certification affirmed by the Supreme Court in *PUD No. 1* over a quarter of a century ago and realigns the Agency's interpretation of scope with all of its previous interpretations, some dating from the 1980s. Second, section 401 is hardly an "ancillary provision" or "little-used backwater" of the CWA, nor was it "designed to function as a gap filler" that "had rarely been used in the preceding decades." *See id.* at 2610, 2613. Section 401 certification is a well-established tool for states to protect their water quality from Federally licensed and permitted projects. EPA estimates that certifying authorities receive 77,000 certification requests annually. *See* ICR Supporting Statement. Additionally, while the doctrine stems from "separation of powers principles" and addresses the relationship between Congress and a Federal administrative agency "asserting highly consequential power" for itself, *id.* at 2609, this final rule generally concerns the authority of states and Tribes, not EPA.[4] Nor is EPA asserting authority, for itself or for certifying authorities, to make policy judgements similar to what the Court found problematic in *West Virginia v. EPA*. *Id.* at 2596 (criticizing EPA's interpretation as allowing the agency to take on a role typically left for Congress in "balancing the many vital considerations of national policy implicated in deciding how Americans will get their**

[4] Although EPA does act as a certifying authority when no state or Tribe has authority to certify, such instances are the exception, not the norm.

energy"). Instead, under the final rule, certifying authorities are limited to considering water quality-related impacts from the activity subject to the Federal license or permit, and not broader policy implications. Finally, the final rule's interpretation of scope hardly represents a major question "of such economic and political significance" or "unprecedented power over American industry" that necessitates clear congressional authorization. *Id*. at 2612-13. Instead, the economic impacts of the final rule are expected to be minimal, as it codifies many existing practices that have been widely implemented over the last 50 years or more and adds further clarity on several key issues. *See* the Final Rule Economic Analysis.

The Agency disagrees with commenters asserting that an activity-based scope would duplicate the NEPA review process. The environmental review required by NEPA has a much broader scope than that required by section 401 or this final rule. For example, the NEPA review evaluates potential impacts to all environmental media. By comparison, the activity-based scope adopted in this final rule is appropriately bounded so that certifying authorities may only consider adverse impacts to waters that prevent compliance with water quality requirements. Section 401 also authorizes certifying states and Tribes to add conditions to a Federal license or permit, or even prohibit its issuance, if that is what is required to assure compliance with water quality requirements. NEPA affords states and Tribes no such similar authority. Therefore, for those Federal licenses or permits that are subject to both NEPA and CWA section 401, both NEPA review and section 401 certification serve important—but distinct—roles in Federal licensing and permitting processes.

In response to the commenter assertions regarding the impact of the scope of certification on Federal agencies, *see generally* Section 5.1 of the Agency's Response to Comments. The Agency also disagrees that section 401 is limited to only allowing states and tribes to protect their water quality where the Federal licensing or permitting process would otherwise preempt state or tribal authority. Both the plain text of section 401 and the legislative history make clear that *any* federally licensed or permitted activity that may result in any point source discharge into waters of the United States is subject to section 401. *See* Section III of the final rule preamble. Nowhere in the statutory text nor legislative history did Congress state or imply that section 401 was limited in the manner suggested by the commenter.

In response to commenters' perceived consequences of the "activity" scope of certification, EPA observes that commenters did not provide evidence to substantiate alleged impacts or harms (e.g., "significant and unmitigable water supply losses"). Indeed, the final rule codifies many existing practices that have been widely implemented over the last 50 years and adds further clarity on several key issues in response to commenter input, which should mitigate the potential for any negative impacts from implementing this final rule.

In response to commenters asserting that EPA's interpretation regarding the scope of certification would implicate the dormant Commerce Clause, EPA notes that Supreme

Court case law regarding the dormant Commerce Clause concerns actions taken by states (or localities) under state (or local) law, and considers whether these actions impermissibly discriminate against interstate commerce or impose an "undue burden" on such commerce. *See S. Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2089-91 (2018). The Supreme Court's dormant Commerce Clause jurisprudence is not applicable to actions taken by the Federal government—including this rulemaking—regardless of whether the Federal actions regulate actions of states that may themselves be subject to dormant Commerce Clause jurisprudence. *Lake Carriers Association v. EPA*, 652 F.3d 1, 9 (D.C. Cir. 2011) (explaining that "[d]ormant Commerce Clause doctrine applies only to burdens created by *state* law," not "a federal statute [such as] the CWA, and a federal regulation") (emphasis in original).

Actions taken by states pursuant to section 401 are not insulated from dormant Commerce Clause challenges. *Lake Carriers*, 652 F.3d at 10 (internal citations omitted) ("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."). Whatever interpretation of scope that EPA adopts in this rulemaking does not change the fact that state actions taken under section 401 could theoretically implicate the Court's dormant Commerce Clause jurisprudence. For example, regardless of the scope of certification, a state cannot discriminate against interstate commerce in violation of the dormant Commerce Clause when acting on a request for certification. If a project proponent believes that a certifying authority acted on a request for certification in a way that violates dormant Commerce Clause jurisprudence, it may assert such a challenge in court. EPA notes that most certification decisions are issued without controversy. EPA is aware of only a single challenge to a state action taken pursuant to section 401 alleging dormant Commerce Clause violations, and that challenge never reached the merits. *Millennium Bulk Terminal and Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-5005, Complaint at ¶¶206-210; ¶¶224-248 (W.D. Wash. filed Jan. 8, 2018).

In response to commenter assertions regarding the 1989 Guidance, the Agency notes that the commenter provided no further discussion or evidence to substantiate concerns regarding the guidance's content or authors. Nevertheless, the Agency emphasizes that the "activity" scope of certification in this final rule is not only consistent with longstanding Agency guidance, but also, more importantly, the statutory language, Congressional intent, and authoritative Supreme Court case law. *See* Section IV.E for further discussion on the final rule's scope of certification and analysis.

In response to the commenter asserting that some states are prohibited from evaluating the "activity" scope of certification, the Agency notes that section 121.3(a) requires a certifying authority to evaluate "whether the activity will comply with applicable water quality requirements." Whether or not a certifying authority needs to place conditions on impacts from the activity will depend on its water quality requirements and the water quality-related impacts from the proposed Federally licensed or permitted activity. However, as

discussed in Section IV.E of the final rule preamble, EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges. This reading is further supported by the legislative history of section 401, authoritative Supreme Court precedent, and the goals of section 401, which include recognition of the central role that states and authorized Tribes play in protecting their own waters.

5.2 Water Quality-Related Effects and Requirements

5.2.1 Whether the Scope of Certification Should Extend Beyond Water Quality

The overwhelming majority of commenters agreed that the scope of section 401 certification is limited to water quality. Many commenters asserted that the scope of certification should not extend beyond impacts to water quality and/or water quality provisions. Several commenters argued that certifying authorities have limited power under CWA section 401 to consider anything beyond water quality. These commenters asserted that section 401 does not authorize EPA or other regulators to impose conditions on permits and licenses that pertain to matters other than water quality. One of these commenters argued that Congress intended for Section 401 to focus exclusively on the potential water quality impacts from point source discharges of proposed federally licensed or permitted projects, citing S. Rep. No. 92-414, at 69 (1971). Another commenter stated that case law demonstrates that it is impermissible under the CWA and other statutes assigning decision-making authority to Federal agencies for a certifying authority to use section 401 authority to hold the Federal licensing process hostage or to base its certification decision on policy considerations that cannot be credibly construed as addressing concerns over water quality impacts. One commenter noted that EPA has consistently taken the position that the scope of certification is limited to potential water quality-related effects and urged the Agency to retain its position. Commenters provided general examples of what they deemed as non-water quality impacts, including as air quality impacts, local traffic patterns, economic impacts, political issues, and noise.

Conversely, one commenter argued that EPA inappropriately limited the scope of certification to aspects of the activity that have the potential to affect water quality without any meaningful analysis and asserted that the CWA and *PUD No. 1* require certifying authorities, and not EPA, to determine the appropriate scope of authority.

Several commenters expressed concern that the proposed scope of certification would enable certifying authorities to deny or condition projects for non-water quality related reasons or for water quality considerations that are not appropriate under section 401. One commenter asserted that the proposed scope of certification will encourage a return to improper, non-water quality-related conditions, such as including payments for improvements unrelated to the proposed project or associated with air emissions and transportation effects. Another commenter asserted that the Agency's primary factor for proposing the activity as a whole scope was to allow states to include the effects of climate change to water quality resulting from the lifetime operation of a project and claimed this would allow states to improperly use the CWA to deny projects on shaky hypothetical assumptions. One commenter asserted that the proposed rule's Economic Analysis illustrated "mission creep" from the activity as a whole approach and argued that consideration of water quality-related impacts of a large pipeline project, such as erosion and

sedimentation, were not the purpose of section 401. One commenter argued that the CWA does not allow states and Tribes to use section 401 as a catch all to evaluate any potential environmental impacts that theoretically could impact some waters at some point or to pursue state environmental goals unrelated to water quality. Another commenter asserted that the scope should be limited to water quality concerns and not the activity as a whole.

A few commenters argued that other Federal and state statutes and regulations allow certifying authorities to address non-water quality related issues. One commenter asserted the existence of these other avenues to address non-water quality impacts demonstrates that certifications are not the proper mechanism to address potential environmental impacts beyond water quality. Another commenter argued that states should not deny certification based on non-water quality issues evaluated in a separate state environmental quality review, while another commenter asserted that there is nothing in section 401 that prevents states from addressing these issues under state law instead. A different commenter argued that incorporating non-water quality issues into the certification process is duplicative of Federal reviews under NEPA for the same activity, while another commenter argued that expanding the scope of certification beyond water quality concerns risks inviting duplication and conflict with other regulatory compliance efforts, such as section 7 of the Endangered Species Act. A few commenters argued that interpreting section 401 to include non-water quality conditions would interfere with FERC's exclusive licensing authority. One of these commenters argued that courts have found certifying authorities may only consider matters related to their water quality standards when certifying FERC licensed-projects (citing *Mohawk Power Corp. v. DEC*, 624 N.E.2d 146, 149-50 (N.Y. 1993); *Power Auth. v. Williams*, 60 N.Y.2d 315, 325 (N.Y. 1983)).

> **Agency's Response: As discussed in Section IV.E.2.c of the final rule preamble, a certifying authority's review must be limited to the water quality-related impacts from the activity. It would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based on potential impacts that have no connection to water quality (e.g., based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality). Accordingly, EPA strongly disagrees that this final rule would permit certifying authorities to consider non-water quality-related factors as the basis for a certification denial or condition. The scope of certification is limited to adverse water quality-related impacts from the activity. That said, water quality-related impacts can encompass impacts that adversely affect the chemical, physical, and biological integrity of waters, which could include, for example, changes in water flow that might affect aquatic habitat. As discussed in Section IV.E.2.c of the final rule preamble, the Agency finds that a multi-faceted interpretation of water quality-related impacts represents the best interpretation of section 401 and best allows certifying authorities to realize the water quality protection goals of the CWA and section 401.**
>
> **The Agency disagrees with the commenter asserting that the Agency inappropriately limited the scope of certification without any meaningful analysis or that either the CWA or *PUD No. 1* require certifying authorities to determine the scope of authority. When Congress gave certifying authorities the ability to review any activity subject to a Federal license or permit that may result in a discharge into waters of the United States, it added a**

key limiting principle to that otherwise broad authority—the review is limited to determining compliance with water quality requirements. *See* Section IV.E.2.c for further discussion on Congressional intent, judicial interpretation, and EPA interpretation on the water quality limitations in section 401.

EPA disagrees with commenter assertions that the Agency's primary factor for proposing the "activity" scope of certification was to allow states to consider the effects of climate change to water quality. Rather, the Agency proposed and is finalizing the "activity" scope of certification because EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges. This reading is further supported by the legislative history of section 401, authoritative Supreme Court precedent, and the goals of section 401. *See* Section IV.E of the final rule preamble and the Agency's Response to Comments in Section 5.1. Similarly, EPA disagrees that the "activity" scope of certification would allow states to improperly use the CWA to deny projects on "shaky hypothetical assumptions" or "potential environmental impacts that theoretically could impact some waters at some point" related to climate change or otherwise. However, Agency also finds it unnecessary to establish in this rulemaking how indirect or certain the impacts of the activity may be to water quality. It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements. If a project proponent believes the certification decision is premised on "shaky hypothetical assumptions," it may challenge the sufficiency of the decision in a court of competent jurisdiction. This outcome is consistent with Congressional intent. The legislative history reveals that Congress intended project proponents to seek relief in state courts in instances where it disagreed with a certification decision. See, e.g., 116 Cong. Rec. 8805, 8988 (1970) (Conf. Rep.) ("If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so."); H.R. Rep. No. 92-911, at 122 (1972) (same).

The Agency disagrees with the commenter asserting that certifying authorities are limited to only considering matters related to their water quality standards when certifying FERC licensed-projects. Rather, for all Federal licenses or permits subject to certification, certifying authorities must evaluate whether the activity will comply with applicable all water quality requirements, which include, but are not limited to, water quality standards. 33 U.S.C. 1341(a), (d); 40 CFR 121.3. *See* Section IV.E.2.c for further discussion on the term "water quality requirements."

5.2.2 Clearly Limiting Scope of Review to Water Quality

A few commenters recommended that the rule should clearly state that the scope of review is limited to activities that may affect water quality, while another commenter suggested that the Agency should add express language that a certifying authority may not include non-water quality conditions or conditions that would extend the reasonable period of time beyond one year. One of these commenters suggested that the regulations should clearly state what is within and outside the scope of review and asserted that

case law establishes that the scope is limited, quoting *American Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."). Another commenter asserted that many courts have recognized the need to constrain the types of conditions states can impose under section 401 to those necessary to protect water quality, citing federal and state case law. The commenter also noted that FERC has often noted that conditions unrelated to a project's activity are not proper section 401 conditions.

Another commenter recommended that the Agency clarify that certification conditions must include specific conditions based on review of actual and site-specific information of the water quality impacts of the proposed project and asserted that EPA must clarify that a condition that requires a project proponent to obtain required state water quality permits is inconsistent with Section 401. The commenter asserted that conditions that direct the project proponent to receive other necessary permits is insufficient to protect water quality and undermine the purpose of the CWA because the certifying authority is not completing any further analysis and granting certification if the project meets previously instituted requirements.

Another commenter asked the Agency to list all permissible categories of requirements that states may rely upon to issue certifications in regulation. One commenter asserted that the proposed rule would allow pre-2020 Rule scope creep issues to reemerge because the proposal does not explicitly define issues that are outside the scope.

Another commenter asserted that even under the "activity as a whole" scope, any conditions must exclusively and directly relate to water quality standards to be consistent with the plain language of section 401 and restrain certifying authorities from blocking projects for reasons unrelated to water quality.

> **<u>Agency's Response</u>: The scope of certification is limited to adverse water quality-related impacts from the activity. *See* the Agency's Response to Comments in Section 5.2.1. The Agency does not feel it necessary or appropriate to specifically list each possible activity or impact that is within or out of the scope of review, or each category of water quality requirements a certifying authority may rely upon. The Agency revised its explanation of the "activity" approach from proposal to provide more clarity. Although each determination will be fact specific, the Agency is clarifying important limiting principles that inform delineation of the "activity" under review by the certifying authority. The Agency finds that its approach to "activity" in this final rule is appropriately bounded to allow certifying authorities to only consider adverse impacts to waters that prevent compliance with water quality requirements. The final text at section 121.3 also makes it clear that the analysis is limited to the applicant's activity subject to the Federal license or permit at issue (and to considering that activity's adverse impacts on water quality). *See* Section IV.E.2.b for further discussion on the limiting principles in the final rule's scope of certification.**

Relatedly, the Agency is adding text at section 121.3(b) to clarify that the scope of review for a certification decision is the same as the scope of permissible conditions that may be added to that certification. See Section IV.E.2.e of the final rule preamble. The Agency declines to explicitly identify which conditions would be within or outside the scope of section 401 certification because, subject to a case-by-case review of the particular facts presented by each certification, a wide variety of conditions could be appropriate as necessary to prevent adverse impacts to a state's or Tribe's water quality. While the final rule preamble provides some examples of non-water quality-related conditions that would generally be beyond the scope of section 401, the appropriateness of any given condition will depend on an analysis of all relevant facts, including the certifying authority's applicable water quality requirements. For potentially qualifying conditions, it is appropriate for the certifying authority to consider all potential adverse water quality impacts. *See* Section IV.E.2.c and Section IV.E.3 for further discussion in response to these commenters.

The Agency disagrees with the commenter asserting that any conditions must exclusively and directly relate to water quality standards. Consistent with the statutory text, this final rule requires certifying authorities to consider whether the activity will comply with water quality requirements, which includes but is not limited to water quality standards. *See* Section III for further discussion on the textual changes from Section 21(b) to Section 401, and Section IV.E for further discussion on the term "water quality requirements."

5.2.3 Experience With Non-Water Quality Factors

Several commenters asserted that certifying authorities considered non-water quality factors prior to the 2020 Rule and provided examples of such factors and the asserted consequences, including project delays, ambiguity, and undue burden on project proponents. One commenter provided examples of certification conditions from before the 2020 Rule that the commenter asserted had little or nothing to do with water quality effects of the certified project, including conditions addressing terrestrial or aquatic wildlife issues unrelated to project effects on water quality (e.g., support a feral hog task force and allow state access to the project area to trap and kill feral hogs), conditions requiring enhancements to public recreational opportunities and facilities unrelated to project effects on water quality (e.g., make annual payments for maintaining and enhancing public recreational facilities on non-project lands), and conditions wholly unrelated to project effects on water quality. Another commenter asserted that states looked at all direct and indirect impacts of the proposed activity on any and all state interests and non-water quality impacts. The same commenter asserted that pre-2020 Rule practice allowed states to engage in de facto regulation of rail transportation, interstate and foreign commerce, and asserted that the proposed rule would allow negative impacts on infrastructure projects, particularly in the rail industry.

A few commenters asserted that a handful of states have attempted to block or constrain projects based on non-water quality reasons, including one commenter who asserted that states have misused section 401 to block pipeline projects. Another one of these commenters asserted that certain certifying authorities used ambiguities between the 1971 Rule and the 1972 CWA to abuse their certification authority for the purpose of delaying or denying certifications on non-water quality grounds. A few commenters discussed specific certification actions that they asserted demonstrated "state abuse" of section 401, including

Washington's denial of certification for the Millennium Bulk Terminal, arguing that Washington denied certification of the project for non-water quality related political reasons; New York's denial of certification for the Valley Lateral Pipeline, arguing it was unrelated to water quality; and a project in Maryland where, according to the commenter, the state sought a multi-billion dollar payment-in-lieu of imposing unachievable conditions unrelated to the discharge.

Conversely, one commenter argued that prior to the 2020 Rule, the vast majority of certifications were issued promptly, and asserted that some project applicants and lobbyist incorrectly claimed that states were abusing section 401 following the certification denials on high profile projects. The commenter argued that the denials in question were based on water quality, citing several high-profile projects, including Mountain Valley Pipeline, Millennium Valley Lateral, Constitutional Pipeline, and Millennium Bulk Terminal.

Several commenters discussed the possible consequence of allowing certifying authorities to consider non-water quality related concerns, including project delays, ambiguity, and undue burden on project proponents. A few commenters asserted that states had required project proponents to provide documentation wholly unrelated to water quality, such as EAs of impacts to other environmental media, demonstrations of the need for the project, alternative route analyses, and analyses of air impacts, traffic impacts, and other reviews undertaken by FERC or other Federal agencies pursuant to the NEPA, the ESA, and the NGA. One commenter asserted that certifying authorities require non-water quality administrative requirements in requests for certification or place such conditions on certifications that ultimately delay and disrupt infrastructure planning. The same commenter provided various examples, including requiring proof of acquisition of all necessary real property rights for the entire project, and objecting to FERC-approved construction methods for water and wetlands crossings.

A few commenters focused specifically on certification actions related to climate change. One commenter stated that some states have used section 401 certifications to try and address direct and indirect effects associated with projects (e.g., global warming and social impacts) that are unrelated to CWA permitting and water quality requirements. Another commenter asserted that climate change and greenhouse gas emissions are not water quality issues and that allowing denials, or certification conditions based on climate change would be inconsistent with statutory authority, citing *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The commenter also argued that the proposed rule would permit certifying authorities to reject fossil fuel-related projects with no serious water quality concerns.

> **Agency's Response: The Agency appreciates commenter input regarding experiences pre-2020 Rule. For the reasons described in Section IV.E.2.c of the final rule preamble, a certifying authority's review must be limited to the water quality-related impacts from the activity. It would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based on potential impacts that have no connection to water quality (e.g., based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality). Accordingly, EPA strongly disagrees that this final rule would permit certifying authorities to consider non-water quality-related factors as the basis for a certification denial or condition. *See* Section IV.E for further discussion on water**

quality-related impacts from federally licensed or permitted projects; *see also* the Agency's Response to Comments in Section 5.2.1, 5.2.2.

5.3 Definition of Water Quality Requirements (WQR)

5.3.1 Support for Proposed Water Quality Requirements Definition

Many commenters supported the proposed approach to "water quality requirements," including its inclusion of requirements related to point and nonpoint sources, noting it is more holistic, consistent with the Act and its purpose, consistent with case law, and restores and reinforces the authority Congress reserved for states and Tribes. One commenter supported the proposed definition's explicit recognition of state water quality requirements because it provides clarity and promotes efficiency for projects reviewed under section 401 and other related state regulations (i.e., the state can take an integrated approach to review), reducing application processing time. Similarly, another commenter reflected on the flexibility the proposed definition, asserting that it would allow the commenter's state to work with project proponents to develop conditions that balance water quantity and quality issues. Another commenter noted that it would increase implementation clarity because it would avoid arguments about the nexus between the discharge and the impact. One commenter stated that the Agency's proposed approach to water quality requirements was consistent with the way the Supreme Court explained the law in the 1994 decision.

Several commenters discussed the importance of certifying authorities being able to protect their waters from a wide range of impacts. One commenter asserted that the term "other appropriate requirements of state law" is intended to be broad so states and Tribes can allow for things like access to waters for fishing or recreation, monitoring of certain water conditions, and compensatory mitigation to help protect certain designated uses. Another commenter argued that states and Tribes must be given broad discretion to determine what factors they consider in evaluating whether certification under Section 401 is appropriate and noted that the preamble rightly recognized that this definition must include review of a wide range of impacts, including a project's potential to affect designated uses, such as recreation, or alter the chemical, physical, and biological integrity of waterways. Another commenter argued that climate change highlights the need for states and Tribes to have strong authority to protect their waters. A commenter said that water quality impacts from the larger project in general or the activity as a whole might occur in waters at some distance from the triggering discharge, and the commenter further stated that the proposal correctly interprets "other appropriate requirements of state law" to include point and nonpoint discharges.

A few commenters reflected on the 2020 Rule's definition for water quality requirements, arguing that it was unlawful, and in direct contravention of *PUD No. 1*, *S.D. Warren*, and section 401(d). One of these commenters noted that the proposed rule would allow the certifying authority to use a certification to address water quality impacts that would not occur without issuance of the Federal permit or license, such as impacts to groundwater, impacts to isolated surface waters, impacts from structural changes to waterways, or impacts from non-point sources. A few commenters asserted that the 2020 Rule's approach to water quality requirements impeded certifying authority ability to impose conditions that protect water quality, such as standards for erosion and sedimentation control, stormwater management, endangered species protection, minimum in-stream flows, prevention of aquatic habitat loss, and prevention of

groundwater contamination. A few commenters stressed the importance of this authority for FERC licensed projects in particular because of their length and preemption. Another commenter noted that the 2020 Rule approach conflicted with the commenter's state laws, regulations, and water quality management program. Another commenter argued that the CWA, its legislative history, the 1971 Rule, and prior EPA guidance documents did not suggest that Congress intended to limit the scope of point source discharges into waters of the United States, and further argued that *PUD No. 1* expressly rejected this position.

One commenter recommended that EPA should expressly reaffirm that water quality requirements capture all three components of water quality standards (i.e., designated beneficial uses, water quality criteria, and antidegradation policy), noting that some Federal agencies and project proponents have viewed conditions to achieve these components with skepticism despite the plain text of the Act (citing letter from EPA to FERC, Jan. 18, 1991). Another commenter noted that inclusion of water quality standards, as opposed to just numeric criteria, is necessary to meet the primary objective of the Act. One commenter recommended that EPA should add clarifying language to the end of the proposed definition for "water quality requirements" to say "with such state or tribe determining which of its laws are water quality-related" to accommodate complementary state and Tribal policy goals and affirm Tribal and state sovereignty.

One commenter stated that the proposed rule would allow states to include certification conditions similar to those at issue in *PUD No. 1*, i.e., instream flow requirements, which the 2020 Rule made a departure from.

> **Agency's Response: In finalizing the definition of "water quality requirements" as proposed, the Agency has reconsidered the 2020 Rule's definition of the term and finds that section 401 is best interpreted in a way that respects the full breadth of the Federal and state and Tribal water quality-related provisions that Congress intended a certifying authority to consider when determining whether to grant certification. Accordingly, EPA is defining "water quality requirements" to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state or Tribal laws or regulations implementing the enumerated provisions, and any other water quality-related requirement of state or Tribal law regardless of whether they apply to point or nonpoint source discharges. *See* 40 CFR 121.1(j). *See* Section IV.E.2.c of the final rule preamble for further discussion and response to comments.**
>
> ***See also* the Agency's Response to Comments in Section 5.3.2, 5.3.3.**

5.3.2 Do Not Support Proposed Water Quality Requirements Definition

5.3.2.1 Proposed Definition of Water Quality Requirements is Too Broad or Too Narrow

Some commenters did not support the proposed definition for "water quality requirements" and asserted that it was too broad and ill-defined. One commenter asserted that the Agency did not explain why it changed its position on the definition of "water quality requirements," asserting that the proposal did not

explain what it means to be "water quality-related" or "state or Tribal law" and claimed that the proposal purposefully precluded any possibility of establishing regulatory certainty. Another commenter asserted that inclusion of the term "any" was ambiguous and may be interpreted to denote "oneness" as opposed to "plurality." Accordingly, the commenter suggested removing the term any and retaining the 2020 Rule definition of water quality requirements. Another commenter argued that that the proposed definition would allow certifying authorities to include non-water quality standards, which would amount to a rewriting of the CWA cooperative federalism language, citing *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). One commenter argued that the proposal's expansion to include "any other water quality-related requirement of state or Tribal law" is not supported by the statute, separates the connection with applicable provisions of the CWA, and does not set enough bounds on state authority.

Conversely, several commenters asserted that the proposed definition of "water quality requirements" was overly restrictive. Another commenter asserted that EPA was adding a limit to section 401(d) that does not exist and, assuming Congress said what it means, EPA cannot define what is "appropriate," citing *US v. Lopez*, 998 F.3d 431, 441 (9th Cir. 2021).

Agency's Response: EPA disagrees that the final rule's definition for "water quality requirements" is too broad or too narrow. As discussed in Section IV.E.2.c of the final rule preamble, EPA finds that the text, purpose, and legislative history of the statute support the final definition of "water quality requirements," which appropriately allows certifying authorities to certify compliance with the enumerated provisions of the CWA and state and Tribal water quality-related provisions (for both point and nonpoint sources). *See* Section IV.E.2.c and IV.E.3 of the final rule preamble for further discussion, including the Agency's interpretation of the term "any other appropriate requirements of state law"; *see also* the Agency's Response to Comments Section 5.3.2.2-5.3.2.4.

In response to the commenter asserting that because the proposal did not explain what it means to be "state or Tribal law," this precluded any possibility of establishing regulatory certainty, EPA disagrees. EPA is not offering an opinion in this rulemaking about what constitutes a "State law" as that term is used in section 401(d). In the spirit of cooperative federalism, EPA defers to the relevant state and Tribe to define which of their state or Tribal provisions qualify as appropriate "State law" or Tribal law for purposes of implementing section 401. However, this does not preclude any possibility of regulatory certainty. EPA is not aware of any controversy over this question that would require rulemaking action. EPA is not aware of any litigation or other dispute regarding whether a state or Tribal provision was sufficiently "legal" in nature to constitute a "law" that may inform a certification decision. Moreover, the 2020 Rule defined this term to mean state or Tribal "regulatory requirements," which hardly offers additional certainty.

In response to the commenter suggesting that water quality requirements should be limited to compliance with water quality standards, the Agency disagrees. Rather, consistent with the statutory text, this final rule requires certifying authorities to consider whether the activity will comply with water quality requirements, which includes but is not limited to water quality standards. *See* Section III for further discussion on the textual changes from

Section 21(b) to Section 401, and Section IV.E for further discussion on the term "water quality requirements."

5.3.2.2 Issues with the Term "Water Quality-Related"

A few commenters asserted that the term "water quality-related" was too broad and would allow certifying authorities to include conditions unrelated or weakly related to water quality. Similarly, another commenter argued that the term "water quality-related" goes beyond "water quality." Another commenter argued that the use of "any water quality-related requirement" was circular and overly broad because it would include conditions not related to the chemical, physical, or biological integrity of water, while another commenter argued that it would allow states to include conditions on purely speculative or obscure impacts. A few commenters asserted that the proposed rule would allow certifying authorities to condition or deny projects as long as there is a nexus to water quality, which commenters argued would allow states to block projects for non-water quality reasons. Another commenter asserted that the proposal would allow for speculative concerns and argued that states could claim anything without ever showing any concrete threat to water quality. One commenter suggested replacing "water quality-related requirements" with "water quality requirements" to make it less broad.

A few commenters asserted that certifying authorities should demonstrate that water quality concerns are likely to occur. One commenter also requested that EPA require certifying authorities to demonstrate a strong likelihood of significant threats to water quality and that a non-water quality reason is not influencing the decision.

A few commenters discussed possible implementation challenges associated with the term "water quality-related," including asserting that it would delay projects, lead to uncertainty in implementation, and be more expensive. One commenter asserted that it would add considerable expense to urban water providers and result in significant water losses. Another commenter argued that it would be challenging for a Federal agency to implement or enforce water quality-related conditions.

Conversely, a few commenters asserted that the term "water quality-related" was too restrictive and recommended removing the term "water quality-related" in the definition for water quality requirements. One commenter who agreed that the scope of certification is properly limited to water quality asserted that certifying authorities should be able to consider impacts that are tangential to the discharge that can have significant effects on water quality. Another commenter argued that EPA must allow certifying authorities to impose any and all conditions that may be necessary to prevent adverse impacts to the certifying authority's water quality, even if the water quality benefit of the condition is secondary or incidental. One commenter expressed concern that the term could limit certifying authorities from including conditions on procedural matters, like public access and fish passage. Another commenter expressed concern over the list of conditions the preamble said would be out of scope, arguing that certifying authorities are in the best position to determine what conditions will protect their water quality and asserted that EPA should not prejudge the outcome. One commenter requested that the Agency explicitly provide in regulation that certifying authorities can impose any conditions for which there is any discernable water quality benefit, even if the condition principally addresses non-water quality related impacts. Another commenter asserted that there are certain types of impacts that some may interpret as

non-water quality related that are water quality related, such as land use conversion and tree removal. One commenter asserted that in its state, certification requests may require public interest evaluations which include water quality requirements and non-water quality related considerations. The commenter recommended replacing the term "water quality-related" with "certification." One commenter asserted that the phrase is improperly restrictive and recommended that the Agency use the term "any other appropriate requirement" consistent with section 401(d).

Agency's Response: The Agency disagrees with commenter assertions that the term "water quality-related" is overly broad or restrictive. The wording that Congress used in the text of section 401 demonstrates that the certifying authority's review is limited to water quality-related provisions. Looking at the text of the various subsections of section 401, each subsection that refers to the act of certifying either uses the phrases "effluent limitation," "quality of waters," or "water quality requirements," or explicitly enumerates subsections of the CWA having to do with water quality—section 301 (effluent limitations), section 302 (water quality-related effluent limitations), section 303 (water quality standards and implementation plans), 306 (national standards of performance), and 307 (toxic and pretreatment effluent standards). *See* 33 U.S.C. 1341(a), (d).

As discussed in the Agency's Response to Comments in Section 5.2, EPA strongly disagrees that this final rule would permit certifying authorities to consider non-water quality-related factors as the basis for a certification denial or condition. The scope of certification is limited to adverse water quality-related impacts from the activity. That said, water quality-related impacts can encompass impacts that adversely affect the chemical, physical, and biological integrity of waters, which could include, for example, changes in water flow that might affect aquatic habitat. *See* Section IV.E.2 and IV.E.3 for further discussion on the water quality-related scope of section 401 review.

In response to commenters recommending that the Agency require certifying authorities to demonstrate the likelihood of water quality-related impacts, the Agency finds it unnecessary to establish the required degree of causality between the activity and the impact to water quality. Consistent with the statutory text and purpose of section 401, final rule section 121.3 clearly limits a certifying authority's analysis of any given activity to the water quality-related impacts that may prevent compliance with water quality requirements. It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements. If a project proponent believes a certification decision is based on unreasonable conclusions regarding the water quality-related impacts of the activity, it may likewise challenge that decision in court. This outcome is consistent with Congressional intent. The legislative history reveals that Congress intended project proponents to seek relief in state courts in instances where it disagreed with a certification decision. See, e.g., 116 Cong. Rec. 8805, 8988 (1970) (Conf. Rep.) ("If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so."); H.R. Rep. No. 92-911, at 122 (1972) (same).

The Agency also disagrees with commenters asserting that the term "water quality-related" will cause implementation uncertainty or delays or be more expensive. Consistent with the Agency's longstanding position, while EPA continues to interpret section 401 as providing broad authority to certifying authorities to review activities subject to a Federal license or permit, the review must be limited to the water quality-related impacts from the activity. *See* Section IV.E.2.c for further discussion on Congressional intent, judicial interpretation, and EPA interpretation on the water quality limitations in section 401. Accordingly, this concept should be familiar to stakeholders. Nevertheless, the Agency has made several clarifications in this final rule to clearly limit a certifying authority's analysis of any given activity to adverse water quality-related impacts that may prevent compliance with water quality requirements. *See* Section IV.E.2.b of the final rule preamble. These clarifications should aid in implementation of the final rule. In response to the commenter assertions regarding Federal agency enforcement, see Section IV.J of the final rule preamble.

5.3.2.3 Defining "Any Other Appropriate Requirement of State Law"

A few commenters disagreed with the Agency's interpretation of water quality requirements and "any other appropriate requirement of state law," focusing on the Agency's proposed interpretation of section 401(a)(1) and (d). One commenter argued that although "water quality requirements" is not defined in the CWA, the enumerated provisions in section 401(a)(1) delineate the scope of certification and section 401(d) does not change the scope. The commenter further asserted that the Agency must interpret the term "any other appropriate requirement" by looking to the statutory provisions expressly identified in section 401 and exhaust statutory construction tools before finding the statutory text ambiguous. Another commenter asserted that the Agency should respect the principle of *ejusdem generis* when interpreting what "any other appropriate requirements of state law" means. One commenter argued that the scope of certification extends only to discharges because the CWA sections listed in subsection 401(d) regulate only discharges. Another commenter argued that section 401(d) compels a limited focus on point source discharges and asserted that it was unreasonable for the Agency to support its argument to expand beyond point source discharges by stating that section 401(d) does not use the term; the commenter argued that the Agency failed to analyze section 401(d) in connection with all of section 401 and the overall structure and language of the CWA. The commenter also contested the Agency's argument that Congress failed to expressly create a limited scope of review, arguing that the CWA is clearly focused on discharges, navigable waters, and point sources, and that there is no express language on nonpoint sources in section 401. One commenter argued that the term "any other appropriate requirement of state law" should be interpreted consistent with the *nosctiur a sociis* interpretive canon, and because it 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, must be interpreted to include only those EPA-approved provisions of state or Tribal law that implement the section 402 and 404 permit programs or otherwise control point source discharges to WOTUS (*citing Keffeler*, 537 U.S. 371, 383–85 (2003); *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting)). Similarly, another commenter asserted that CWA sections 401, 402, and 404 make it clear that only point sources are regulated and that courts have upheld that position. The same commenter asserted that Federal agencies would be unable to implement or enforce certification conditions pertaining to nonpoint sources. Another commenter argued that the text, structure, and history of Section 401 requires the Agency to interpret Section 401(d) and the phrase "any other

appropriate requirement" to include only those EPA-approved provisions of state or Tribal law that implement the Section 402 and 404 permit programs or otherwise control point source discharges to WOTUS. The commenter further asserted that this was consistent with the 1977 CWA amendments that added CWA section 303 to the list of enumerated provisions because it is the provision through which EPA approves state standards and does not regulate nonpoint sources of pollution, *citing Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1093–94 (9th Cir. 1998).

Several commenters expressed concern over the proposed rule's application of the term "appropriate." One commenter argued that EPA failed to grapple with abuses surrounding application of the term "appropriate." Another commenter argued that the statutory context makes clear that "appropriate" refers only those state and Tribal requirements applicable to the discharges, and not every requirement that a state or Tribe might deem appropriately related to water quality. The same commenter argued that it is inconceivable that Congress intended to substantially repeal FERC's exclusive regulatory authority under the Federal Power Act through the phrase "any other appropriate requirement of State law."

Several commenters provided suggestions on how the Agency should interpret "any other appropriate requirement of state law." One commenter suggested limiting state or Tribal laws to "any other surface water quality-related requirements of state or Tribal law." Another commenter asserted that *PUD No. 1* said a state could only consider effluent limitations and water quality standards. A few commenters suggested removing the word "any." One commenter suggested removing the term "any other water quality-related requirement of state and Tribal law" and instead limit water quality requirements to the enumerated provisions and any Federal or state and Tribal laws or regulations implementing those sections. One commenter suggested that EPA limit appropriate state and Tribal laws to those implementing protection of water quality requirements as provided for in sections 301, 302, 303, 306 or 307 of the CWA.

> **Agency's Response: In response to comments regarding the Agency's definition of water quality requirements, including interpretation of "any other appropriate requirement of state law," EPA finds that its definition of "water quality requirements" is the best interpretation considering the text of section 401 and appropriately allows certifying authorities to certify compliance with the enumerated provisions of the CWA and state and Tribal water quality-related provisions (for both point and nonpoint sources). EPA's final definition is also supported by the purpose, and legislative history of the statute. *See* Section IV.E.2.c of the final rule preamble for further discussion on the Agency's analysis of the statutory text, legislative history, Congressional intent, and prior judicial interpretation.**

5.3.3 Suggestions of what Water Quality Requirements Should Include

One commenter asserted that many activities or conditions to protect designated uses do not impact water quality, such as constructing recreational facilities. Similarly, another commenter argued that the Act does not extend itself to designated uses of state water and asserted that designated uses are secondary to the water quality associated with those uses. However, another commenter argued that some members of the regulated industry who contest conditions related to recreational facilities and addressing pollutants from upstream sources misunderstand the nature of state water quality requirements and asserted that many

states regulate water quality by ensuring that water remain suitable for certain designated uses, which may include uses such as recreation or fishing.

Several commenters asserted that the scope of certification should be limited to whether the discharge complies with water quality standards. A few commenters asserted that the proposed scope was unreasonable and would allow regulatory overreach because it allows certifying authorities to include conditions beyond the discharge and its compliance with water quality standards. Another commenter argued that section 401 conditions should be limited to those that directly impact attainment of water quality standards. One commenter asserted that certifying authority review should be focused on reviewing the water quality impacts of the federally-authorized discharge and that certifying authorities may place conditions necessary for the discharge to achieve compliance with water quality standards. Another commenter asserted that the purpose of Section 401 is to give states or Tribes the power to ensure proposed Federal actions will not result in violations of water quality standards promulgated pursuant to the CWA and argued that the proposal attempts to rely on the language of Section 401(d) to trump the overall purpose and goal of section 401, which is to ensure discharges to waters of the United States will comply with CWA water quality provisions.

> **Agency's Response: The Agency declines to explicitly identify which conditions would be within or outside the scope of section 401 certification because, subject to a case-by-case review of the particular facts presented by each certification, a wide variety of conditions could be appropriate as necessary to prevent adverse impacts to a state's or Tribe's water quality. However, to be clear, a certifying authority could condition an activity to ensure its compliance with any and all components of applicable water quality standards (water quality criteria, designated uses, and antidegradation requirements). *See* Section IV.E.3 of the final rule preamble.**
>
> **In response to the commenter suggesting that water quality requirements should be limited to compliance with water quality standards, the Agency disagrees. Rather, consistent with the statutory text, this final rule requires certifying authorities to consider whether the activity will comply with water quality requirements, which includes but is not limited to water quality standards. *See* Section III for further discussion on the textual changes from Section 21(b) to Section 401, and Section IV.E for further discussion on the term "water quality requirements."**

5.4 Scope of Section 401(a) and (d)

One commenter argued that EPA erroneously asserted that a certifying authority may deny an application under section 401(a) using the language from section 401(d) and that the scope of the certifying authority's review with respect to granting or denying an application is limited to the applicant's discharge. Conversely, another commenter agreed with EPA that interpreting sections 401(a)(1) and (d) to impose two different scopes of review would be irrational.

> **Agency's Response: *See* Section IV.E.2.e of the final rule preamble.**

5.5 Disagree with Scope of Waters

Some commenters expressed concern that the proposed approach for scope would allow certifying authorities to use the certification process and conditions for waters that are not "waters of the United States." Several commenters disagreed with the Agency's proposed position that section 401 certification decisions could consider impacts to non-"navigable waters" once the threshold discharge into a water of the United States is met, arguing that it represented Federal overreach because it was out of the scope of the Agency's authority and inconsistent with the scope of the Act. One commenter argued that no provision of the CWA applies to waters other than waters of the United States and that it would be unreasonable to assume that only section 401 would apply to other waters. Another commenter argued that suggesting that section 401 has a broader scope than sections 402 and 404, even though they are in the same permitting section of the Act, is in conflict with a reasonable interpretation of Congress' purpose and statutory interpretation. One commenter argued that section 401(d), when analyzed with the rest of section 401 and the general structure of the Act, makes it clear that certification is focused on sections limited to discharges into navigable waters and it is irrelevant that section 401(d) does not use the term "navigable waters." Similarly, another commenter asserted that *ejusdem generis* requires that any requirements of state law be like the preceding requirements in the list, which precludes certifications from taking non-navigable waters into account. A few commenters also asserted that this interpretation would interfere with a state's authority to regulate surface water quality in non-navigable waters and noted that states could regulate state waters under their own laws. One of these commenters noted that this interpretation would present legal challenges for the Federal agency when it comes to enforcement of certification conditions in non-navigable waters.

One commenter said EPA is arguing that because section 401 does not expressly prohibit Federal regulation of state waters, Congress authorizes it. The commenter further said that this justification from EPA for expanding the scope of review was rejected in the Supreme Court's decision in *Solid Waste Agency of Northern Cook v. United States*, 531 U.S. 159 (2001) ("SWANCC").

One commenter said that "impacts to water quality," "activity as a whole," and "water quality requirements" need to be applied in a manner consistent with the plain language and context of section 401, specifically focusing on the activity's "discharge into the navigable waters."

One commenter asserted that the proposal was the first time in Agency history that states could consider impacts to non-navigable waters and from nonpoint sources of pollution.

> **<u>Agency's Response</u>: The Agency concludes that while a certifying authority is limited to considering impacts to "waters of the United States" when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying compliance with requirements of state or Tribal law that otherwise apply to waters of the state or Tribe beyond waters of the United States. As discussed in Section IV.E.2.d of the final rule preamble, this interpretation best reflects the text of section 401. EPA recognizes that some states regulate waters beyond CWA "navigable waters," while other states do not. EPA's interpretation best supports principles of cooperative federalism by allowing those states that do have laws applicable beyond "navigable waters" to apply those laws to those**

state waters in the certification context, and by not requiring other states to do so. *See* Section IV.E.2.d of the final rule preamble for further discussion on the Agency's rationale. EPA disagrees with the commenter that asserted that EPA adopted this interpretation simply because EPA assumed that Congress authorized it "because section 401 does not expressly prohibit Federal regulation of state waters." As explained in Section IV.E.2.d of the final rule preamble, EPA affirmatively determined that its interpretation best reflects what Congress intended by "any other appropriate requirement of State law."

For further discussion on why application of the maxim *ejusdem generis* ("of the same kind") to limit "appropriate requirement of State law" to only those state law provisions that impose discharge-related or point source-related restrictions is misplaced, see Section IV.E.2.c of the final rule preamble.

The Agency disagrees with the commenter asserting that the proposal was the first time the Agency stated that states could consider impacts to non-navigable waters or impacts from nonpoint sources of pollution. This final rule realigns with the Agency's position prior to the 2020 Rule. *See e.g.*, 2010 Handbook at 5 ("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[] law."), 17 ("Thus, it is important for the [section] 401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project") (rescinded in 2019).

5.6 Explicit Input on Preamble Example Conditions

Some commenters provided input on the example conditions listed in the preamble that may be within the scope of certification. A few commenters explicitly supported the listed examples, including one commenter who noted each example has obvious water quality benefits and asked the Agency to codify those examples as non-exhaustive conditions. One commenter suggested that the Agency should expand the examples to include impacts from nonpoint sources and aquatic resource impacts resulting from climate change or required adaptation to climate change, noting that nonpoint sources are one of the principal sources of water quality impairments in assessed waters. A few commenters discussed the types of conditions included on certifications for hydropower licenses, including minimum and/or maximum instream flows, fish passage, erosion control measures, or development of a recreational facility to protect designated uses related to recreation and/or the public's right to access rivers.

Several commenters disagreed that the example conditions listed in the preamble were appropriately within the scope of certification. A few commenters argued that the scope of certification should be limited to protection of water quality sufficient to support designated uses, as opposed to direct protection of those uses. One of these commenters asserted that the CWA's goals and regulatory requirements do not protect aquatic life and recreation directly, but rather the CWA is focused on restoring and maintaining water quality to provide for those uses. Another commenter argued that the examples were unrelated to effluent limitations or water quality standards and conflated water quality criteria for a designated use with the activity promoted through designation and were outside the scope of the CWA. A few

commenters focused specifically on the examples regarding public fishing access and recreation facilities, arguing that they are not linked to preserving the water quality necessary for the designated use and should not be in the scope of the rule. A few other commenters asserted that EPA was equating ensuring people can enjoy the benefits of water quality with actually ensuring water quality and argued that certifications should not include impacts that are not directly related to improving or maintaining water quality. Another commenter argued that if EPA's interpretation of "designated uses" in the proposed rule was correct, then EPA would require states to list waters with a recreational fishing designated use where the landowner has not provided public access for fishing as "impaired." The same commenter further asserted that if the regulation encompasses land use planning and non-water quality matters, then it would trigger the major questions doctrine. Another commenter argued that the scope should be limited to requirements related to the biological, chemical, and physical integrity of waters, and that the examples such as construction of parking spaces, would not achieve that nor relate to water quality. Another commenter expressed concern regarding the example conditions and asserted that such conditions could negatively affect operation of critical flood control and water supply infrastructure.

One commenter expressed concern regarding the examples of out of scope conditions, noting that it might leave ambiguous whether certifying authorities might consider that fossil fuels transported via proposed pipeline will exacerbate climate related harms to state or Tribal waters.

> **Agency's Response: The Agency declines to explicitly identify which conditions would be within or outside the scope of section 401 certification because, subject to a case-by-case review of the particular facts presented by each certification, a wide variety of conditions could be appropriate as necessary to prevent adverse impacts to a state's or Tribe's water quality. The appropriateness of any given condition will depend on an analysis of all relevant facts, including the certifying authority's applicable water quality requirements. For potentially qualifying conditions, it is appropriate for the certifying authority to consider all potential adverse water quality impacts. *See* Section IV.E.3 of the final rule preamble.**

5.7 Input Received on Prior Rulemakings

5.7.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

5.7.1.1 Do not support 2019 Proposed Rule

Some commenters did not support the 2019 proposed rule's approach to the scope of certification for several reasons. One commenter asserted that the 2019 proposed rule ignored the text, purpose, and legislative history of section 401, as well as binding Supreme Court precedent, and failed to provide "good reasons" to reverse prior position. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Similarly, another commenter asserted that the 2019 proposed rule conflicted with the CWA's language, intent, or case law in four ways, including by limiting certification to ensuring that point-source

discharges to navigable waters comply with EPA-approved water quality standards, by authorizing Federal agencies to disregard certification conditions or denials, by narrowing the scope and timing of a state's certification review, and by interfering with states' ability to follow their own administrative procedures.

Another commenter questioned the legality of the 2019 proposed rule's approach to scope and asserted that it would make it impossible to effectively protect water quality, while another commenter asserted that narrowing the scope would have profound effects because it would ultimately prevent states from ensuring that activities will not impair water quality in accordance with section 401.

One commenter said the 2019 proposed rule's scope of certification would unlawfully limit the extent of activities covered by section 401 and the type of conditions imposed, while another commenter stated that limiting the state's role in protecting water resources within their boundaries would damage the CWA's cooperative federalism relationship.

Several commenters asserted that the 2019 proposed rule's limitation to only point source discharges was inconsistent with the CWA. One of these commenters asserted that the Agency cherry-picked language from the CWA to argue that the 1972 amendments were focused solely on regulating discharges, noting that section 303, which is referenced in 401, empowered states to create and enforce water quality standards unrelated to point source discharges. Another commenter argued that the scope cannot be limited to just the discharge because Section 401(a) does not even require an actual discharge; rather the statute triggers certification when a discharge "may result."

Several commenters stated that it has been established that section 401 allows states to consider the water quality impacts of the activity as a whole, citing *PUD No.1* and *S.D. Warren*, and one of these commenters further asserted that if certification is limited to discharges, then the *PUD No. 1* decision would be illogical. Several commenters also asserted that the Court in *PUD No. 1* based its interpretation on the plain language of section 401. One of these commenters disagreed that the *PUD No.1* was based on EPA's previous interpretation rather than the plain language. Another one of these commenters asserted that EPA's reliance on *Brand X* to contradict *PUD No. 1* was misplaced for several reasons, including arguing that the Court relied on the plain language of section 401 in *PUD No. 1*, that it was unsettled whether *Brand X* applied to prior Supreme Court decisions citing *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488-89 (2012).

One commenter noted that there were clear differences in the language of section 401(a) and (d) that were deliberate and must be given full import, while another commenter asserted that the 2019 proposed rule's interpretation of section 401(d) rendered the term "applicant" meaningless and would preclude certifying authorities from imposing conditions related to impacts not direct related to point source discharges. Similarly, another commenter argued that EPA ignored the plain language in section 401(d), which describes the scope of conditions that states impose on an "applicant." The same commenter asserted that the 2019 proposed rule's argument that the terms "discharge" and "applicant" meant the same thing violates a fundamental principle of statutory interpretation that "the words Congress use[s] . . . are not surplusage; they have some meaning and were intended to accomplish some purpose of their own." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 130 (1960).

Commenters provided specific input on the 2019 proposed rule's interpretation of the term "any other appropriate requirement of state law." Some commenters asserted that the 2019 proposed rule's interpretation of "any other appropriate requirement of state law" was contrary to the clear language of section 401. One of these commenters asserted that such an interpretation would radically curtail current practice and limit states' ability to protect their waters. Another of these commenters asserted that the 2019 proposed rule approach to "any other appropriate requirement of State law" would be inconsistent with the CWA goals and leads to potential expense for applicants because states would be more likely to deny certification. The commenter also asserted that it would limit conditions necessary protect wetlands and other special aquatic sites, such as conditions addressing sediment and erosion.

One commenter asserted that the 2019 proposed rule's interpretation of "any other appropriate requirement of State law" was irrational, contradicted the statutory text, and was inconsistent with the legislative history. The commenter also asserted that because EPA-approved standards were included in the provisions listed in section 401(a) and (d), it would render the term an extraneous duplication or a nullity. Another commenter argued that limiting "any other appropriate requirement of state law" to EPA-approved CWA programs would significantly limit the broad statutory language without adequate justification.

One commenter argued that the CWA makes it clear that the scope of state authority to ensure compliance with "any other appropriate requirement of State law" is expansive, citing CWA section 510 and *PUD No. 1*, while another commenter noted that section 401 and 510 demonstrate Congress' clear intent to supplement and amplify state authority and the proposed approach clashed with Congress' explicit and long-standing desire for the CWA not to preempt state law.

Several commenters discussed EPA's characterization of the legislative history. One commenter asserted that EPA ignored Congress's characterization of changes in the 1972 amendments as "minor." Another commenter asserted that section 21(b) was nearly identical to section 401 and embodied Congress' consistent intent that states exercise broad authority over all water quality impacts that could result from federally licensed or permitted activities.

Several commenters discussed their concerns with the 2019 proposed rule's impacts on state and Tribal ability to protect their water quality. One commenter asserted that states would be powerless to protect the beneficial uses of their waters. Commenters also expressed concerns about litigation, regulatory uncertainty, and increased denials.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 5.1-5.6; *see also* Section IV.E of the final rule preamble.**

5.7.1.2 Support 2019 Proposed Rule

Some commenters supported the 2019 proposed rule's scope of certification, arguing that it was consistent with the statutory text and Congressional intent and balanced the cooperative federalism principles of the CWA.

One commenter asserted that the 2019 proposed rule's interpretation of scope appropriately addressed the statutory ambiguity between the term "discharge" in section 401(a)(1) and "applicant" in section 401(d), which have been interpreted as allowing conditions that address water quality impacts from any aspect of the proposed activity as a whole. A few commenters asserted that the ambiguity has led to inconsistent interpretations of the scope of the certifying authority's review by certifying authorities and courts. Similarly, another commenter asserted that perverse interpretations of "applicant" and "activity" enabled the expansion of the scope of Section 401 certification far beyond water quality concerns and stated that the 2019 proposed rule has appropriately fixed the interpretation of these terms to their plain language roots.

One commenter asserted that 2019 proposed rule's interpretation of scope reflected a reasoned analysis that recognized that the 1971 Rule was promulgated prior to the 1972 CWA amendments and that the section 401 process had been undermined by costly and conflicting interpretations. Another commenter also agreed with EPA's proposed scope of certification would provide appropriate bounds consistent with a logical reading of section 401 and that section 401's purpose and placement within the CWA clearly limited the scope to discharges affecting water quality. Similarly, another commenter asserted that limiting the scope to point source discharges was well-supported by the recognition that section 401 was first in the section directly related to Federal permits and licenses and that Federal authorities under the CWA focus on controlling point source discharges.

Several commenters acknowledged that the 2019 proposed rule's interpretation of scope differed from the majority opinion in *PUD No. 1*, but noted that the Agency correctly noted that the opinion did not deprive the Agency of its authority to interpret ambiguous statues reasonably, citing *Brand X*.

Several commenters agreed that the scope of section 401 should be limited to water quality considerations, including one commenter who argued that section 401 and the CWA generally focused on water quality and there was no suggestion that non-water quality considerations or conditions were appropriate under section 401. A few of these commenters argued that that statutory language, specifically in section 401(d), had been read to expand the scope beyond water quality outside the reasonable bounds of the CWA.

One commenter agreed that the scope of a grant or denial is the same as the scope of a certification with conditions and asserted that the 2019 proposed rule's scope reflected both sections 401(a)(1) and (d).

Several commenters specifically discussed the term "water quality requirements" or components of it. One commenter agreed with the 2019 proposed rule's definition of "water quality requirements" because it was based on a holistic reading of the Act and included a logical reading of the term "appropriate requirement of state law" that would decrease opportunities for abuse. The commenter also argued that the 2019 proposed rule's approach to "appropriate requirement" was consistent with the structure and purpose of the Act and Justice Thomas' opinion in *PUD No. 1*, which the commenter asserted was the more logical and internally consistent reading of section 401 and the CWA. Another commenter asserted that the term "requirements of state law" should be interpreted as a state water quality law that provides a standard or requirement and not a prohibition on an action.

Several commenters discussed their experience with section 401 prior to the 2019 proposed rule and asserted that states had abused the section 401 process, specifically for infrastructure projects. One commenter asserted that there was an increase in states misusing 401 over the past several years to block important pipeline projects that would replace less-efficient and higher emission fuel sources. Another commenter asserted that some states had used section 401 to block infrastructure projects in the public interest, citing two 2017 certification denials in New York (Northern Access) and Washington (Millennium Bulk Terminal). The commenter argued that states should not be allowed to unilaterally and negatively impacts the economies of other states and the nation under the guise of implementing Federal law. The commenter also argued that some states had denied certification based on downstream effects on climate by increased fossil fuel usage or opposition to expansion of fossil fuels general, citing the State of New York's denial of the Valley Lateral Project. The commenter asserted that this practice increased regulatory burdens and frustrated economic and national security, in addition to thwarting the express will of Congress. Another commenter argued that it had seen states utilize section 401 to address direct and indirect effects associated with projects (e.g., global warming) that are completely unrelated to CWA permitting authorities.

One commenter recommended that EPA should clarify that certifying authorities should not seek absolute certainty when determining whether a discharge will comply with applicable water quality standards, but rather whether there is a reasonable basis for compliance. The same commenter also recommended that the Agency should clarify that where a discharge does not directly discharge to a navigable water, any secondary impacts cannot trigger Section 401.

Agency's Response: *See* the Agency's Response to Comments in Sections 5.1-5.6.

5.7.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

5.7.2.1 Do not support 2020 Rule

One stakeholder asserted that the 2020 Rule's interpretation of the scope as limited to point source discharges was unsupported by the CWA, legislative history, EPA's prior regulations, and EPA's prior guidance, and was rejected by the Supreme Court in *PUD No. 1*. Additionally, the stakeholder asserted that EPA does not have the authority to limit the scope in such a manner. Another stakeholder asserted that the 2020 Rule's scope was the most environmentally harmful and legally indefensible provisions of the rule, and ran counter to the CWA, congressional intent, case law, and EPA's longstanding prior interpretations. The stakeholder also asserted that EPA based its interpretation on minor statutory language modifications between section 21(b) and section 401 and rejected EPA's suggestion in the 2020 Rule that a "holistic" review of section 401 or a minor amendment to the text of the statute justify limiting the scope of state review to point source discharges into waters of the United States. Similarly another stakeholder asserted that EPA's interpretation of the word "discharge" and the scope contradicted the plain language of the Act and ignored case law and EPA's longstanding position recognized the scope as

the activity. According to the stakeholder, section 401 does not require a discharge to occur, so restricting certification to focus on the discharges of pollutants is nonsensical. Another stakeholder asserted that EPA could not justify limiting the types of discharges that fall within section 401 based on Federal enforcement authority because such limitation has no basis in the CWA.

One stakeholder asserted that the term "other appropriate requirement[s] of State law" is intended to be broader than just specific sections of the Act and point source discharge regulatory requirements as enumerated in the 2020 Rule and argued that limiting states and Tribes to EPA-approved water quality standards would be contrary to statute. Another stakeholder argued that EPA should not define "any other appropriate requirement of state law" or "water quality requirements" because state and Tribal courts and administrative hearing boards have issued and reviewed certifications for decades without the delays industry complained of prior to the 2020 Rule.

Several stakeholders asserted that the legislative history did not support the 2020 Rule's scope of certification, arguing that the changes from the 1970 Act to the 1972 Act supported the "activity as a whole" scope and that the legislative history did not suggest Congress intended the scope to be so narrow. Several stakeholders also asserted that the 2020 Rule's scope was at odds with the Supreme Court's decision in *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–14 (1994).

One stakeholder argued that EPA must consider water quality impacts and ensure that the new rule is consistent with the CWA's purpose, asserting that the 2020 Rule failed to consider the water quality harms that would result from the rule and instead focused on speculative, unrepresentative examples from industry. The stakeholder additionally stated that the restoration and maintenance of the nation's water quality is the only objective of the CWA and the most important aspect of the problem to be considered. The stakeholder argued that the Agency cannot ignore express statutory objectives and factors and that if EPA "fail[s] to grapple with" how the rule affects EPA's "statutory scientific mandate[]" to safeguard the chemical, physical, and biological integrity of the Nation's waters, EPA will "fail[] to consider an important aspect of the problem," rendering the rule arbitrary and capricious under the Administrative Procedure Act. *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020). Another stakeholder argued that EPA did not do any analysis of the harm to rivers, streams, wetlands, and other waters that have historically received these protections under the 401 program.

Some stakeholders also discussed challenges associated with implementation of the 2020 Rule and/or its impact on water quality. One stakeholder asserted that it had experienced challenges in implementing the 2020 Rule due to questions about the scope of certification and ability to impose conditions. Similarly, another stakeholder asserted that it had to limit conditions relating to administrative conditions, invasive species conditions, and threatened and endangered species conditions in light of the 2020 Rule, which the stakeholder argued has ultimately diminished its authority to meet the goals of the CWA. Another stakeholder argued that under the 2020 Rule, certifying authorities and the public have significantly less opportunity to protect their waters from the harms of projects requiring Federal permits and discussed five examples of ongoing consequences from the 2020 Rule. A few stakeholders discussed the sort of impacts an activity may have on water quality and asserted that an activity as a whole scope allows certifying authorities to add conditions on a project that are crucial to preserving water quality, e.g., addressing erosion, sedimentation, temperature, flow requirements. One stakeholder argued that the 2020 Rule

hamstringed state authority and undermined or even eliminated decades old state environmental protections to address water quality impacts from Federal projects, specifically discussing harms related to hydropower licensing and relicensing (e.g., dams cause increased water temperature resulting from decreased water flows within streams and decreased flow rates as a result of ponding behind dam structures) as well as destruction of aquatic habitat and increase pollution transport due to nutrient loading and excess sedimentation.

One stakeholder argued that EPA based the 2020 Rule on the false narrative that certifying authorities were misusing Section 401.

Agency's Response: *See* the Agency's Response to Comments in Sections 5.1-5.6.

5.7.2.2 Support 2020 Rule

Some stakeholders expressed support for the 2020 Rule's interpretation of the scope of certification. One stakeholder argued that the 2020 Rule provided a detailed discussion of the statutory, regulatory, and legal history of section 401 and established a clear framework to justify EPA's clarifications to the regulations governing the scope of section 401 certifications. Another stakeholder asserted that the 2020 Rule recognized the interrelation of sections 401(a)(1) and (d) that, when read in isolation, exhibit a facial incongruity that had created significant challenges in implementing Section 401 uniformly and fairly across the nation. The stakeholder asserted that the 2020 Rule's interpretation was clear and supported by statute, and argued that the Court's interpretation of section 401(d) did not bind EPA, citing *Brand X*. The stakeholder also asserted that there is no evidence that Congress intended to convey broader conditioning authority under Section 401(d) than necessary to support the focus of the state's review stated in Section 401(a). Similarly, another stakeholder argued that the 2020 Rule's definition of "water quality requirements" clarified the scope by harmonizing sections 401(a) and (d) and asserted that Congress' listing of those provisions of the CWA in section 401 makes clear that the authority granted to certifying authorities was limited to point source discharges into navigable waters. Another stakeholder argued that EPA's 1971 Rule was incongruent with the CWA and the 2020 Rule's interpretation of the CWA was correct, consistent with *ejusdem generis* and *noscitur a sociis* canons, consistent with the presumption that statutory amendments are intended to have real and substantial effect, and permissible under *PUD No. 1*. The stakeholder also asserted that any interpretation that allows certifying authorities to make certification decisions based on matters unrelated to water quality would be an unreasonable interpretation of the statute and create boundless discretion and inject ambiguity. One stakeholder argued that the 2020 Rule's limitation to point source discharges was well-supported by the recognition that section 401 is the first part of Title IV of the CWA and that Federal authorities under the CWA focus on controlling point source discharges.

One stakeholder recommended that EPA should limit section 401 certification to water quality impacts that directly result from actions taken by the applicant within the scope of the Federal permit or license, specifically discussing hydroelectric power generating facilities which effectively act as a passthrough for pollutants added by upstream sources that are beyond the control of the project proponent and the Federal licensing or permitting authority.

Several stakeholders discussed their experience prior to the 2020 Rule to assert that the 2020 Rule should remain in place. One stakeholder argued that it saw a wide range of interpretations of the scope of certification prior to the 2020 Rule, which undermined predictable understanding regarding section 401 certification requirements and contributed to very long and costly process for federally permitting mining projects. The stakeholder asserted that some states had used section 401 certifications to try and address direct and indirect effects associated with projects unrelated to CWA permitting. The stakeholder also argued that it had not seen any impact on state or Tribal authority to protect water quality due to the 2020 Rule. Another stakeholder stated that prior to the 2020 Rule, there were situations where states sought to expand section 401 authority to address nonpoint source discharges or projects without discharges, which added unnecessary cost and time to critical infrastructure projects. One stakeholder argued that the State of Washington's denial of certification for a proposed coal facility, the Millennium Bulk Terminal, was a paradigmatic example of abuse and that Wyoming had been adversely impacted by the misapplication of other states' CWA Section 401 certifications. Another stakeholder asserted that certifying authorities have attempted to expand the scope of Section 401 beyond water quality based on an erroneous interpretation of the phrase "any other appropriate requirement of state law" to include conditions related to odorization of gas, mitigation measures to address past contamination, construction at the site, and requirements to adjust herbaceous stratum at the site.

Agency's Response: *See* the Agency's Response to Comments in Sections 5.1-5.6; *see also* Section IV.E of the final rule preamble.

6. CERTIFICATION DECISIONS (SECTION 121.7)

6.1 What It Means "To Act"

Some commenters supported the proposed definition of actions that a certifying authority may take as grant, grant with conditions, deny, or waive. A few of these commenters suggested that the proposed definition is correct in not including taking "significant and meaningful action" as an action that a certifying authority may take on a request for certification. A few of these commenters stated that the proposed definition provides much needed clarity. A few of these commenters noted they supported proposed section 121.7(a) which provides that a certifying authority may act on a certification request in only the four ways specified, and that, in doing so, the certifying authority must act within the scope of certification and within the reasonable period.

A few other commenters suggested that the proposed definition needs additional clarity to state that the four actions proposed are the only ways in which a certifying authority may "act" on a request for certification. One commenter further stated that the proposed definition does not provide a clear end point. A few other commenters suggested that the final rule should remove the term "expressly" from the waiver provisions because the CWA does not provide any circumstances in which certification can be waived before the reasonable period of time expires, and EPA does not have the authority to add provisions in which a certifying authority can expressly waive certification.

A few commenters stated that the term "to act" should be interpreted more broadly than the proposed definition. A few commenters argued that the final rule should not prescribe the types of actions a

certifying authority may take to avoid waiving certification, including one commenter that suggested the Agency should delete proposed section 121.7(a). A few commenters stated that defining "act" as "decide" violates the presumption that Congress could have included language that it did not. One commenter stated that Congress deliberately used the language "fails or refuses to act" instead of "grant or deny" when crafting the statutory text of section 401. A few commenters stated that a certifying authority acting in "good faith" to make a final decision on a certification request should not be deemed a failure to act even if that decision takes longer than one year. One commenter specifically stated that the final rule should adopt the Fourth Circuit's interpretation of "to act" to mean something more than making a final decision on a certification request. *N.C. Dep't of Envtl. Quality (NCDEQ) v. FERC*, 3 F.4th 655 (4th Cir. 2021). This commenter further stated that absent sheer inactivity, a certifying authority's inability to make a final decision within the reasonable period of time should not be deemed a "failure to act" resulting in a waiver.

<u>Agency's Response</u>: Consistent with the CWA, EPA is finalizing the proposed approach that a certifying authority must make one of four decisions on a request for certification pursuant to its section 401 authority: it may grant certification, grant certification with conditions, deny certification, or it may expressly waive certification. 40 CFR 121.7(a).

The Agency disagrees with commenter assertions that the text located at section 121.7(a) needs further clarification. EPA finds that the regulatory text at final rule section 121.7(a) clearly provides that the four decisions (grant, grant with conditions, denial, express waiver) are the only ways in which a certifying authority may act. However, EPA wishes to clarify that any attempt at a "hybrid" version of those four decisions does not meet the standard of "acting" on a request for certification (e.g., a waiver with conditions, a conditional denial). *See Waterkeepers Chesapeake, et al. v. FERC*, 56 F.4th 45, 49 (D.C. Cir. 2022) (holding that FERC could not issue a license "[i]f a state has neither granted a certification nor failed or refused to act on a certification request" and finding that "Maryland's subsequent backtracking in the settlement agreement, in which it 'conditionally waiv[ed]' its authority to issue a water quality certification after the fact, is neither a 'fail[ure]' nor a 'refus[al]' to act" and therefore could not "qualify as a section 401(a)(1) waiver."). To further clarify how a certifying authority may act on a request for certification, the Agency is finalizing regulatory text that encourages certifying authorities to clearly identify whether a decision is a grant, grant with conditions, denial, or express waiver. *See* Section IV.F for further discussion on the recommended contents of a certification decision.

EPA disagrees that the term "expressly" should be removed from the waiver provision and reaffirms that an "express waiver" is one of the four ways to act on a request for certification. While the Agency recognizes that the statute does not explicitly state that a certifying authority may expressly waive certification, EPA has determined that providing this opportunity in this final rule is consistent with a certifying authority's ability to waive through failure or refusal to act. *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."). Express waivers are consistent with the Agency's longstanding interpretation of the waiver provision and may create efficiencies where the certifying authority knows early in the process that it will waive. *See* 40 CFR 121.9(a)(1) (2020) (allowing a certifying authority to expressly waive certification via written notification); 40 CFR 121.16(a) (2019) (same).

The Agency disagrees with commenters requesting the Agency to expand, or alternatively not define, what it means to act on a request for certification. The Agency finds that defining "to act on a request for certification" as making one of the four certification decisions described in the final rule is reasonable, consistent with Congressional intent, is consistent with longstanding Agency position and case law, and allows for greater certainty and transparency in the certification process. First, while Congress did not use the words "grant or deny" or "decide" in place of "act on a request for certification," in context it seems evident that these are the actions Congress had in mind. After all, section 401(a)(1) is about the effects of granting or denying certification. Moreover, while Congress did not use the words "grant or deny," it likewise did not use a term that clearly indicated that Congress had in mind something short of a final "action" on a request for certification. Congress clearly intended to balance state water quality concerns with the need to guard against unreasonable delays in the Federal licensing or permitting process. *See, e.g.*, 115 Cong. Rec. 9257, 9264 (April 16, 1969) ("The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification required as to that State."); H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Rep.) ("In order to insure that sheer inactivity by the State . . . will not frustrate the Federal application, a requirement, similar to that contained in the House bill is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, after it has received a request to certify, the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived.").

For similar reasons, the Agency declines commenter requests to interpret "to act on a request for certification" as acting in a "significant and meaningful" way. If a certifying authority could merely act in a "significant and meaningful" way to avoid waiver at the expiration of the reasonable period of time, it could delay the Federal licensing or permitting process well beyond the statutory one year timeframe and have the same practical effect as denying certification without going on the record to do so. While Congress provided states and Tribes with a powerful tool to prevent federally licensed or permitted activities that will not comply with water quality requirements, Congress clearly intended states and Tribes to take an affirmative action to prevent such activities. 33 U.S.C. 1341(a)(1) ("No license or permit shall be granted if certification *has been denied* …") (emphasis added). The Agency finds that defining "to act" as taking one of the four decisions contemplated in section 401 best effectuates Congressional intent and respects the cooperative federalism balance central to section 401. Further, at proposal, EPA shared similar concerns as stakeholders with the *NCDEQ* approach, noting that it may make the section 401 certification process less predictable and transparent. 87 FR 35350. The Agency remains concerned that interpreting "to act on a request for certification" as any

"significant and meaningful action" might inject significant uncertainty and subjectivity into the certification process (e.g., what is a "significant and meaningful action?") causing significant confusion for stakeholders. *Id.* EPA finds that the final rule approach will provide stakeholders with a clear and predictable endpoint for knowing when the certifying authority has failed or refused to act, resulting in a waiver. *See* 33 U.S.C. 1341(a)(1).

6.2 Contents of a Certification Decision

6.2.1 Do Not Support Inclusion of Citation and Explanation Requirement

Some commenters supported the proposed rule's removal of specific statutory or regulatory citations for each certification condition. A few commenters expressed support for the proposed rule's removal of specific statutory or regulatory citations for denials. Some other commenters asserted that the Agency should remove all content requirements for a certification with conditions and for denials. Almost all of those commenters noted that the explanation requirements place an undue burden on the certifying authority.

A few commenters argued that including justifications for certification conditions interferes with the readability of the certification as a whole. Another commenter suggested that instead of explanation requirements for each condition, certifying authorities should be allowed to provide an explanation for a group or category of conditions. A few other commenters said the Agency should consider guidance to help certifying authorities develop certification decisions that are transparent.

Agency's Response: After considering public comments and in support of the cooperative federalism balance central to section 401, the Agency is not mandating the contents that certifying authorities must include in their certification decisions. Instead, the final rule includes recommended contents for a grant of certification (section 121.7(c)), a grant of certification with conditions (section 121.7(d)), a denial of certification (section 121.7(e)), and an express waiver of certification (section 121.7(f)).

EPA expects certifying authorities understand the importance of clear, transparent communication with project proponents and Federal agencies. Indeed, it is in the certifying authority's own interests to clearly convey the reasoning and rationale behind its action. To encourage development of clear certification decisions, the Agency is identifying recommended—but not required—contents for each certification decision type at final rule section 121.7(c)-(f). These contents are similar to the contents proposed (to be required) at section 121.7(c)-(f), with modifications based on stakeholder input. *See* section IV.F of the final rule preamble. The recommended contents should provide transparency and consistency in the certification process, particularly where a certifying authority does not have a standard approach for the contents of a certification decision. *See* Section IV.F of the final rule preamble for further discussion on the benefits of including the recommended information and possible ways a certifying authority may address readability concerns identified by commenters.

6.2.2 Support Inclusion of Citation and Explanation Requirement

Some commenters supported the proposed requirement for a statement explaining why each of the included conditions is necessary to assure that the activity as a whole will comply with water quality requirements. These commenters argued that the explanation requirement provides transparency and regulatory certainty to the project proponent and the public in understanding the certifying authority's rationale.

Some commenters expressed support for the 2020 Rule's requirement for citations on denials and certification conditions. One commenter requested EPA to require certifying authorities to identify the precise state requirements that exceed the Federal requirements for certification, noting that project proponents are often unaware of whether a certification includes "other state requirements." A few of these commenters also explicitly recommended that the final rule should retain the 2020 Rule's requirement for explaining certification conditions and denials. A few of these commenters argued that citations are necessary for legally defensible certification decisions.

Some commenters argued that denials due to insufficient information should, as in the 2020 Rule, include an explanation of what information was missing. Another commenter suggested that without a basis for denial, project proponents may have to challenge the denial.

A commenter recommended that certification decisions should require a sufficient level of supporting materials to ensure the certification decision is within the scope of section 401 and asserted that the proposal would give states unfettered authority to include any condition in a certification it deems necessary. Another commenter asserted that case law supports that states exercising authority under section 401 must act in a way that is reasonable and adequately explained.

> **<u>Agency's Response</u>: EPA appreciates commenter input on the contents of certification decisions. As discussed in Section IV.F of the final rule preamble, the Agency is declining to mandate the contents that certifying authorities must include in their certification decisions. Instead, the final rule includes recommended contents for a certification decision. The recommended contents should provide transparency and consistency in the certification process, particularly where a certifying authority does not have a standard approach for the contents of a certification decision. *See* the Agency's Response to Comments in Section 6.2.1; *see also* Section IV.F of the final rule preamble for further discussion on the recommended contents of a certification decision.**
>
> **Before the 2020 Rule, EPA did not impose requirements on certifying authorities regarding what information they must include in a denial or what information they must include to support a certification condition. EPA is not aware of any major issues regarding clarity or information in certification denials or conditions. Instead of mandating detailed requirements for certifying authorities, the final rule identifies recommended contents for a grant of certification, a grant of certification with conditions, a denial of certification, and an express waiver of certification. This approach addresses workload concerns expressed by certifying authorities and, in support of the cooperative federalism balance central to**

section 401, provides certifying authorities with the flexibility to determine how best to communicate certification decisions to project proponents and Federal agencies. It also will eliminate unnecessary potential disputes about whether a certifying authority complied with EPA-issued requirements for certification decision documents (in addition to whatever requirements the certifying authority imposes on itself).

In response to commenter assertions regarding concerns that the proposal would give states unfettered authority to include any condition in a certification, the Agency strongly disagrees. As discussed in Section IV.E.2.e of the final rule, the scope of review for a certification decision is the same as the scope of permissible conditions that may be added to that certification and requires that a certifying authority include conditions necessary to assure that the activity will comply with applicable water quality requirements. For further discussion on the scope of certification, including limiting principles, *see* Section IV.E of the final rule preamble and the Agency's Response to Comments in Section 5.

6.2.3 Other Comments Addressing the Proposed Contents of a Certification Decision

One commenter suggested replacing the term "shall" throughout proposed section 121.7 with either the word "may" or "should."

One commenter supported the proposed contents of a waiver; specifically, the requirement for an express waiver being in writing.

One commenter asserted that it may be better for a certifying authority to rely on other permits and authorizations rather than include conditions in a certification decision. Accordingly, the commenter requested that EPA affirmatively recognize in the final rule that certifying authorities may rely on other permits and authorizations to support their certification decisions.

One commenter asserted that the final rule should differentiate the contents of a certification decision between individual and programmatic permits (i.e., NWPs). Another commenter recommended that EPA should revise the requirements for the contents of a grant of certification with or without conditions to clearly state what a certifying authority must submit for a draft license or permit that has programmatic application. The commenter asserted that there are no specific names or addresses known at the time a draft general permit with programmatic application is issued (e.g., Corps NWPs).

A few commenters suggested that the final rule should remove any requirements to include the identification of the Federal license or permit. One of these commenters suggested that certifying authorities should not be required to identify the Federal license or permit, because the certification request is associated with the proposed activity, irrespective of the specific Federal license or permit the project proponent must acquire. The commenter asserted that if this requirement is retained, then it will result in a significant number of post-certification modifications if there are substantial changes in an application for authorization which result in a different authorization being issued. Another one of these commenters recommended removing the requirement to identify the applicable Federal license or permit to avoid complications where the certifying authority fails to identify all applicable Federal license or

permit requirements and asserted that identification of the activity was sufficient. One commenter recommended that the final rule should remove any requirements to include the identification of the Federal license or permit number.

One commenter suggested that EPA should encourage certifying authorities not to create additional requirements for certification on renewable energy projects and asserted that the proposed modification process would be robust enough to address any concerns after certification is granted and avoid project delays. The commenter suggested that EPA could also create a template MOA for these projects to allow for predictable timing and conditions.

Agency's Response: As discussed in Section IV.F of the final rule preamble, the Agency is not requiring certifying authorities to include the components listed at section 121.7(c)-(f) in their certification decisions, but instead defining recommended contents of certification decisions. Accordingly, the Agency has replaced the word "shall" with "should" in section 121.7(c)-(f), except the Agency is finalizing that certification decisions must be in writing.

The Agency appreciates commenter support for the proposed contents of an express waiver. Although the Agency is not finalizing required components for an express waiver, the Agency is finalizing a requirement that all certification decisions be in writing.

The Agency declines to provide a categorical list of materials or facts that a certifying authority may rely on to support a certification decision. Information needs or justifications for a particular certification decision will depend on the relevant facts for a specific project, including but not limited to project specifics (e.g., project type, location, etc.) and the certifying authority's water quality requirements. Certifying authorities are best suited to determine their information needs to support a certification decision on a project-by-project, or project type, basis.

In response to the commenter requesting that the Agency distinguish between the contents in a certification decision for an individual permit versus general permit, the Agency is not distinguishing between certification decisions based on an individual or a general Federal license or permit. Although EPA made such a distinction in the 2020 Rule, EPA finds it unnecessary in this final rule because it is no longer defining required certification decision contents and the recommended contents would apply to a certification with conditions regardless of the nature of the Federal license or permit.

The Agency is removing the inclusion of the name and address of the project proponent from the list of recommended contents of each certification decision. The Agency finds this component unnecessary since the certification will be included with the Federal license or permit that will identify the appropriate project proponent. However, the Agency is retaining the identification of the applicable Federal license or permit as one of the recommended components for all certification decisions. While this final rule is only recommending the identification of the Federal license or permit, the Agency observes that there must be a Federal license or permit to trigger the section 401 process. As such, the

Agency intends for this component to help clarify which Federal license or permit the certification decision applies to.

The Agency declines to create any project specific certification decision requirements or MOA templates, consistent with its decision to not finalize any required contents in certification decisions. This approach provides certifying authorities with the flexibility to determine how best to communicate certification decisions to project proponents and Federal agencies. EPA anticipates that certifying authorities will work with project proponents and Federal agencies to determine what information would be most useful. *See* Section IV.F of the final rule preamble and the Agency's Response to Comments in Section 6.1.1, 6.1.2 for further discussion on why the Agency is not finalizing any required contents for certification decisions. To the extent the commenter is suggesting that the Agency should categorically bar certification conditions on a class of projects, or even suggest such, the Agency declines to take such an approach. Certifying authorities are best positioned to determine whether any conditions are necessary to assure that the activity subject to the Federal license or permit will comply with applicable water quality requirements. Additionally, whether or not conditions are necessary, and if so, the type(s) of conditions necessary to assure the activity will comply with applicable water quality requirements is subject to a case-by-case review of the particular facts presented by each certification. Ultimately, a wide variety of conditions could be appropriate as necessary to prevent adverse impacts to a state's or Tribe's water quality. The appropriateness of any given condition will depend on an analysis of all relevant facts, including the certifying authority's applicable water quality requirements. *See* Section IV.E of the final rule preamble for further discussion on the scope of certification, including the scope of conditions.

6.3 General

6.3.1 Reasonable Assurance

A few commenters provided input on the use of the term "will comply" versus "reasonable assurance" in certification decisions. One commenter requested that EPA should consider changing the explanatory statement language back to that required in the 1971 Rule, stating, "there is reasonable assurance that the activity will not violate applicable water quality standards." Another commenter expressed concern over replacing the term "reasonable assurance" with "will comply" at proposed 40 CFR 121.7(c)(2) but accepted the proposed preamble's position that there is no practicable difference between the phrases. One commenter suggested the final rule should include the concept of "reasonable assurance" in making certification decisions.

<u>Agency's Response</u>: The Agency declines to replace the term "will comply" with "reasonable assurance" in section 121.7. While the 1971 Rule required a statement that there was "reasonable assurance," 40 CFR 121.2(a) (2019), the 2020 Rule and this final rule use the term "will comply" which is more consistent with the 1972 statutory language used in sections 401(a)(1) and 401(d). Similar to the Agency's position in the 2020 Rule, the Agency does not think that retaining the 1972 statutory language "will comply" in the

regulations requires certifying authorities to provide absolute certainty that applicants for a Federal license or permit will never violate water quality requirements. *See* 85 FR 42278 (July 13, 2020). This is not EPA's intention, and EPA does not think such a stringent interpretation is required by the statutory or final regulatory language. The use of language comparable to "will comply" is not uncommon in CWA regulatory programs. For example, CWA section 402 contemplates that NPDES permits will only be issued upon a showing that a discharge "will meet" various enumerated provisions of the CWA. 33 U.S.C. 1342(a). This standard has not precluded states, Tribes, or EPA from routinely issuing CWA compliant NPDES permits to allow pollutant discharges, nor has it resulted in permits that are impossible for permittees to comply with. *See* Section IV.F of the final rule for further discussion on this topic, including reasons the Agency does not intend or expect the use of the term "will comply" to limit or impact a certifying authority's ability to rely on such modeling to support its certification decisions.

6.3.2 Adaptive Management Conditions

A few commenters asserted that adaptive management conditions are the same as "reopener" clauses and that they are important to ensure water quality resources will be protected throughout the life of the project if the project changes or conditions of the waters impacted by the project changes. One of these commenters asserted that reopeners are adaptive management conditions that provide a bounded "if-then" description of a future triggering event and associated responsive action and recommended that the final rule should allow them. The commenter asserted that reopener clauses can reduce the number of situations where a certifying authority may seek to modify an existing certification. The commenter also distinguished the reopener clauses the 2020 Rule aimed to prevent from "if-then" reopener clauses that provide a predictable process. The commenter also specifically discussed the use of such conditions in the hydropower licensing context (e.g., certification conditions that require facility operators to get review and approval of a dredging management plan prior to dredging operations associated with the dam).

Conversely, one commenter asserted that certifying authorities should not be able to add adaptive management conditions to certifications, because such conditions would allow certifying authorities to include reopener conditions that could lead to new conditions being incorporated into the Federal permit long after the certification is issued, which the commenter argued would hinder investment in projects or cause delays. Rather, the commenter argued that once the permitted activity is complete, the state has no authority to impose late-arising conditions that spring into effect at some point in the future. However, the commenter acknowledged that there may be scenarios in which it would be practical for certifying authorities to include conditions that depend on unknown future events.

<u>Agency's Response</u>: The Agency disagrees that adaptive management conditions are the same as "reopener" clauses. Reopener clauses purport to authorize a certifying authority to "reopen" and modify a certification at a later date, sometimes due to the occurrence of a specific event. As discussed at Section IV.I of the final rule preamble, certifying authorities cannot "bootstrap" themselves greater authority to modify a certification beyond what is authorized in this final rule at 121.10. On the other hand, adaptive management conditions are set at the time the certification is granted and provide a concrete action that must occur

in the event certain criteria are met. The text of an adaptive management condition does not change after certification is granted. This promotes regulatory certainty, in contrast with a unilateral modification pursuant to a "reopener" clause. For example, a condition may require a project proponent to increase monitoring efforts or conduct remediation if the baseline, routine monitoring established in the certification reveals an increase in a specific pollutant due to the activity. To ensure project proponents and Federal agencies understand and are able to implement any such adaptive management conditions, EPA recommends that certifying authorities clearly define and explain in the certification document the basis for these conditions and the circumstances in which adaptive management conditions would require action by the project proponent (e.g., expectations for undertaking additional planning and monitoring; thresholds triggering adaptive responses; requirements for ongoing compliance). EPA has previously acknowledged the use of "adaptive management" conditions in prior guidance, see, e.g., 2010 Handbook at 32 (rescinded in 2019).

EPA disagrees with commenter assertions that adaptive management conditions will hinder investment in projects or cause delays. Rather, adaptive management conditions enable projects to adapt to future water quality-related changes, as opposed to forcing stakeholders to seek a modification or new certification. However, to be clear, EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach, including adaptive management conditions. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

6.3.3 Denials Without Prejudice

A few commenters discussed whether the proposal would prevent a project proponent from resubmitting a request for certification following a denial. One commenter noted that while the 2020 Rule provided that a certification denial would not preclude a project proponent from submitting a new certification request (at 40 CFR § 121.8), the proposal did not include a similar provision. The commenter suggested that EPA is taking the position that a certification denial is always a permanent final action that is taken with prejudice. The commenter asserted that if this is EPA's position, it would be a significant change from its previous longstanding position affirmed by the 2020 Rule. The commenter requested that EPA clarify its position. The commenter identified reasons why the commenter believes this position would be problematic, including that it would be detrimental to certifying authorities and project proponents, particularly in cases where certification is denied based on insufficient information. The commenter stated that at least one state routinely issues denials without prejudice which are authorized under state law.

Another commenter recommended that project proponents be able to resubmit a request for certification following a denial of certification.

> **Agency's Response: EPA's removal of regulatory text regarding the effects of a denial of certification has no impact on denials without prejudice. EPA continues to interpret section 401 as allowing denials without prejudice. Section 401(a)(1) provides that a Federal license or permit may not be granted if certification is denied, but it does not speak to new requests for certification following a denial of certification. Nothing in section 401, nor this final rule, prohibits a project proponent from re-applying for certification if a certifying authority denies its initial request.**

6.3.4 Waivers

One commenter asserted that EPA's interpretation that section 401(a)(1) clearly indicated Congress's intent to limit constructive waivers to situations where a certifying authority did not act was inconsistent with Congress's broader focus on a one-year timeframe.

One commenter recommended revising the proposed rule provisions on waivers because it is inconsistent with the commenter's state program. Specifically, the commenter noted that it may certify a general permit and then later decide to issue an individual certification for a project that cannot meet the requirements of the Federal general permit and/or water quality certification associated with it.

> **Agency's Response: The Agency disagrees that its interpretation of section 401(a)(1) and constructive waiver is inconsistent with the reasonable period of time. Section 401(a)(1) clearly indicates Congress's intent to limit constructive waivers to situations where a certifying authority did not act within the reasonable period of time. As discussed in section IV.D of the final rule preamble, a certifying authority and Federal agency may jointly agree to set the reasonable period of time up to one year. 40 CFR 121.6(b). However, if they are unable to reach agreement, it will default to six months. 40 CFR 121.6(c). Accordingly, if the certifying authority fails or refuses to act in the agreed-upon or default reasonable period of time, the certifying authority will constructively waive. Accordingly, section 121.9(a) of the final rule provides that "the certification requirement shall be waived only if a certifying authority fails or refuses to act on a request for certification within the reasonable period of time." *See* Section IV.F, G for further discussion on the Agency's interpretation.**
>
> **In response to the commenter asserting that the proposed rule's approach to waivers was inconsistent with the commenter's state program, the Agency notes that nothing in this final rule precludes a certifying authority from acting on a request for certification on a project that no longer qualifies for coverage under a general permit and its associated certification and now requires coverage under a different (individual) permit. If a project proponent is required to obtain a new Federal license or permit because its project does not comply with the requirements of the general permit, then the project proponent must seek a section 401**

water quality certification or waiver before that new Federal license or permit may be issued.

6.3.5 Notification of Certification Decision

One commenter asserted that EPA did not specify in the proposal whether a certifying authority must communicate its certification decision with a project proponent or Federal agency, and recommended that EPA include a provision in the final rule that requires the certifying authority to provide the project proponent and Federal agency a copy of the certification decision within five days of the decision.

Agency's Response: The Agency has added further discussion in the final rule preamble to clarify that once a certifying authority acts on a request for certification, the certifying authority should send the certification decision to the project proponent requesting certification. *See* Section IV.F of the final rule preamble. However, the Agency declines to add regulatory text requiring the certifying authority to provide the project proponent and Federal agency with a copy of the certification decision within a certain timeframe. Section 401(a)(1) requires the project proponent, not the certifying authority, to provide the Federal agency with the certification from a certifying authority. However, EPA encourages certifying authorities to include Federal agencies on any certification decision transmittal to the project proponent to ensure all parties have a clear, consistent understanding of the status of the decision (e.g., copy the Federal agency point of contact on e-mail correspondence).

6.3.6 Incorporating Conditions in a Federal License or Permit

One commenter commended the Agency for removing the 2020 Rule's approach to certification conditions and instead requiring all conditions to be included. However, another commenter recommended that EPA clarify that certification conditions must be incorporated into a Federal license or permit and that the rule should include a requirement that Federal agencies should revise their applicable regulations to accommodate EPA's new rule.

Agency's Response: Pursuant section 401(d), if a grant of certification includes conditions, those conditions must be incorporated into the Federal license or permit. 33 U.S.C. 1341(d) ("Any certification provided under this section shall 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 [sections 301, 302, 306, and 307], and with any other appropriate requirement of State law set forth in such certification, and *shall become a condition* on any Federal license or permit . . .") (emphasis added). Granting certification with conditions means the Federal license or permit may be issued, provided the conditions are incorporated into that Federal license or permit. *See* Section IV. F, G of the final rule preamble for further discussion on incorporating certification conditions into Federal licenses or permits.

The Agency declines to include regulatory text requiring Federal agencies to review their regulations. However, EPA expects that Federal agencies with existing section 401 implementing regulations will evaluate their regulations and guidance documents to ensure consistency with this final rule. *See* Section IV.M of the final rule preamble.

6.4 Input Received on Prior Rulemakings

6.4.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

6.4.1.1 Contents of a certification decision

A few commenters expressed support for the proposed contents of a certification decision as described in the 2019 proposed rule. One commenter expressed support for the 2019 proposed rule's definition of certification and claimed this guidance appropriately ties certification approvals back to water quality requirements. The commenter also stated support for the 2019 proposed rule's requirement that a certifying authority may deny a certification if it is unable to certify that the proposed activity would be consistent with applicable water quality requirements, as long as the project proponent has the proper channels to supply necessary information.

Another commenter asserted that the 2019 proposed rule clarifies appropriate certification conditions and removes ambiguity to ensure that section 401 decisions remain within the scope of the CWA. The commenter asserted that states and Tribes have historically abused the certification process to include unrelated and unenforceable conditions into section 401 decisions.

A few commenters indicated that they would like to see additional changes to the proposed contents of a certification decision as described in the 2019 proposed rule. One commenter requested that the 2019 proposed rule be amended to clarify that a notice of denial should be in writing, identify the reasons for denial related to water quality, and list any outstanding data or information gaps that prevent compliance with applicable water quality requirements. The commenter further requested that states and Tribes identify conditions that are clear, specific, and directly related to a state or Tribal water quality requirement, and include citations to the relevant state or Tribal law requirement. Another commenter asserted that the 2019 proposed rule's options for certifications decisions of grant, grant with conditions, denial, and waiver, all threatened the integrity of the nation's waters. The commenter expressed support instead for the 1971 Rule, which they argued respected state administrative procedures. The commenter asserted that the 1971 Rule preserved cooperative federalism because it did not impose specific requirements on the contents of a certification denial and provided only a few broad categories of information that should be included when a certifying authority grants a certification.

A few commenters emphasized concerns regarding the impact of the 2019 proposed rule on certifying authorities. One commenter expressed concern that the 2019 proposed rule imposed limitations on state authority, in particular the requirement that each condition in an issued certification decision contain an

explanation as to why it is necessary, along with the specific provision of law that authorizes it. Another commenter asserted that the 2019 proposed rule's requirements for conditional approvals or denials were unfair, stating that it should be the applicant's responsibility to show that a proposed project will comply with water quality requirements rather than the state's responsibility to show how compliance might be achieved. One commenter asserted that the 2019 proposed rule's information requirements for conditions put undue burden on the certifying authority, claiming that with a more limited review timeframe, the information requirements will further strain states' already limited time and resources. The commenter further stated that requiring an explanation of what less stringent conditions could be applied implies that states require certification conditions that are more stringent than necessary to comply with state water quality requirements.

> **Agency's Response: *See* the Agency's Response to Comments in Section 6.2; *see also* Section IV.F of the final rule preamble.**

6.4.1.2 Denials with prejudice

A few commenters provided input regarding the 2019 proposed rule's approach to denials with prejudice. One commenter expressed concern that the 2019 proposed rule removes the ability to "deny with prejudice," asserting that this approach allowed a state to preserve resources that would otherwise be demanded for review of similar certification requests, even if they determine that the project cannot comply with applicable water quality standards. The commenter expressed further concern that the 2019 proposed rule removes the ability to withdraw and resubmit or extend time, stating that these tools give states and applicants the ability to process and resolve complex situations. Another commenter requested that the 2019 proposed rule be amended to acknowledge that a certifying authority's denial of certification may be made with or without prejudice. The commenter stated that allowing certifying authorities to indicate their willingness to consider additional information through subsequent requests would likely avoid unnecessary litigation. The commenter claimed this approach would be an improvement over the withdrawal-and-resubmission scheme, increasing opportunities for regulatory cooperation. The commenter further requested that the 2019 proposed rule be amended to consider terms that preclude the use of denials "with prejudice" to prevent states from using this as a tool to hamper projects from being implemented.

> **Agency's Response: *See* the Agency's Response to Comments in Section 4.5 and Section 6.3.3; *see also* Section IV.F of the final rule preamble.**

6.4.1.3 Waivers

One commenter expressed concerns that the 2019 proposed rule violates the Congressional intent behind the waiver provision, claiming this was intended only to prevent "sheer inactivity" by the state. The commenter provided a detailed history of the waiver provision to support their argument.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 6.3.4 and 7.4; *see also* Section IV.F of the final rule preamble.**

6.4.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

6.4.2.1 What it means "to act"

One stakeholder requested that the 2020 Rule be revised to specify that a project proponent's withdrawal of a request for certification concludes the review and requires the submission of a new and complete request for certification. The stakeholder asserted that this process would provide applicants with a way to avoid denial of a request for certification if they lacked time to provide the necessary information.

> **Agency's Response: *See* the Agency's Response to Comments in Section 4.5 and Section 6.1; *see also* Section IV.F of the final rule preamble.**

6.4.2.2 Contents of a certification decision

A few stakeholders expressed support for the 2020 Rule requirement that certain information be included for certifications that are issued with conditions and denials. One stakeholder asserted that these provisions provide clarity, transparency, and regulatory certainty for applicants and certifying authorities, stating that these provisions ensure that the certifications are implemented consistently. Another stakeholder asserted that this information is essential for judicial review and that particularly in the case of denials, a complete statement of the basis for denial is essential before a proponent pursues a new certification request. One stakeholder expressed support for the proposed contents of the 2020 Rule and requested that EPA maintain these provisions and commit to transparency and regulatory certainty.

One stakeholder requested that the 2020 Rule be revised to eliminate the requirement to cite specific water quality requirements and provide a rationale for each condition. The stakeholder stated that the information provided by a certifying authority when it issues a decision should be determined solely by that certifying authority. The stakeholder argued that the 2020 Rule should also be amended to provide the certifying agency with an opportunity to remedy deficiencies within a reasonable period of time after certification. The stakeholder also expressed concern that it will take additional time to incorporate the requirements of the 2020 Rule into each condition, resulting in delays in certification decisions.

> **Agency's Response: *See* the Agency's Response to Comments in Section 6.2; *see also* Section IV.F of the final rule preamble.**

6.4.2.3 Certification conditions

One stakeholder expressed concern regarding the 2020 Rule's removal of adaptive management conditions. The stakeholder stated that states and Tribes must be able to place conditions that allow for the re-opening of certifications if circumstances change and different measures are needed to protect waters, particularly with respect to climate change. Referencing Executive Order 13990, the stakeholder further claimed that given the challenge of climate change, states' and Tribes' authority to impose

conditions that protect water quality through certifications is even more important, citing examples of potential impacts to environmental justice communities and fisheries. The stakeholder further stated that the impacts of the 2020 Rule are evident in recent certifications, citing three examples of 401 certifications for new dam projects in Colorado, each of which they claimed included conditions that would likely not be permitted under the 2020 Rule.

Agency's Response: *See* the Agency's Response to Comments in Section 6.3.2; *see also* Section IV.F of the final rule preamble.

6.4.2.4 Waivers

A few stakeholders provided input regarding the use of waivers in the 2020 Rule. One stakeholder requested that the 2020 Rule specify that a waiver only occurs on the date of a Federal agency's written notification to the project sponsor and certifying authority. The stakeholder argued that the 2020 Rule shortened the reasonable period of time for review and created unnecessary procedural requirements, asserting that this would increase the likelihood of certifying authorities inadvertently waiving their Section 401 authority.

Another stakeholder asserted that the waiver provisions of the 2020 Rule were unlawful, claiming that they remove the authority of states and Tribes to protect their waters and implement an unlawful scope of certification and definitions of discharge and water quality requirements. The stakeholder claimed that Congress did not intend for a denial of a certification to be turned into a waiver, citing several Federal court cases in support of their argument. The stakeholder also asserted that the 2020 Rule would permit Federal permitting authorities review and reject certification conditions or denials, counter to Congress' intentions.

Agency's Response: *See* the Agency's Response to Comments in Sections 5, 6.3.4, and 7.4; *see also* Section IV.F and G of the final rule preamble.

7. FEDERAL AGENCY REVIEW (SECTIONS 121.8-121.9)

7.1 Support Proposed Approach to Federal Agency Review (In All Or Part)

7.1.1 General Support for Proposed Approach

Several commenters agreed with limiting the 2020 Rule's scope of Federal agency review, with some of these commenters supporting all four of the proposed section 121.9 review provisions. One commenter suggested that the scope of Federal agency review should be limited to ensuring the certification decision was made within the reasonable period of time only. One commenter said that the proposed approach removes the Federal agency's ability to second guess a certifying authority's decision, and another commenter stated that the Federal government cannot supplant its judgement for the judgement of the state or Tribe as the Federal review. Some of these commenters noted that the proposed scope of Federal agency review restores the cooperative federalism intended by the statute. In expressing support for the proposed approach, one commenter asserted that it is clear in section 401 that states and Tribes should be

able to condition permits that the Federal agency and permit applicant need to meet. A few commenters wrote in favor of the proposed rule's limited "ministerial" role for Federal agencies.

> **Agency's Response: EPA agrees that Federal agency review is limited in nature, and the Agency is finalizing regulatory text at section 121.8 to affirmatively limit Federal agency review to verifying compliance with the facial requirements of CWA section 401. The Agency is revising the proposed list of factors that a Federal agency may review, including removing the first factor (the nature of the decision) from the final regulatory text. *See* Section IV.F of the final rule preamble for further discussion on the final rule's approach to Federal agency review.**

7.1.2 Comparison to the 2020 Rule

Commenters who critiqued the 2020 Rule's provision on Federal agency review wrote in support of the proposed rule, generally arguing that the proposed rule is more consistent with case law and the CWA than the 2020 Rule. One commenter provided a detailed discussion of the history of the CWA and precursor language to Section 401 in the Water Quality Improvement Act of 1970 in support of their argument.

Most of these commenters specifically argued against Federal agencies' authority to deem non-compliant certification decisions waived, arguing that it was inconsistent with case law and the CWA (*citing Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645 (4th Cir. 2018); *United States v. Marathon Dev. Corp*., 867 F.2d 96, 101 (1st Cir. 1989)). A few commenters generally argued that allowing Federal agencies to determine constructive waiver for issues besides late certification contradicts the CWA's plain language that conditions of a section 401 certification "shall become" conditions of the federal permit (33 U.S.C. 1341(d)) and undermines the CWA framework of cooperative federalism. Another commenter argued that Federal agencies are without the requisite legal authority and expertise to review certification decisions. One commenter critiqued the 2020 Rule for what the commenter characterized as "ambiguity" in defining the role of Federal agencies.

Several commenters noted that Section 401 does not give Federal agencies the authority to nullify, reject, "veto" or "override" a certifying authority's water quality certificate or conditions. Some of these commenters asserted that courts have affirmed that certifying authorities can include conditions within a certification and that Federal agencies do not have the authority to ignore these conditions. One of these commenters stated that any substantive review of certification decisions that could result in the Federal agency overriding or ignoring the decision should be expressly prohibited. This commenter further stated that should a Federal agency refuse to include certification conditions, then the result should be an automatic approval of the Federal license or permit that incorporates the certification conditions. A couple of commenters stated that the proposed rule is a necessary correction to ensure that Federal agencies do not have the authority to veto conditions or limit the ability of certifying authorities to deny certification to projects that fail to comply with water quality standards.

One commenter cited specific examples of the U.S. Army Corps of Engineers' certification process for the 2020package of section 404 Nationwide General Permits (NWPs) asserting that the Corps

misinterpreted certifying authorities' conditions as reopener clauses. A few other commenters discussed experience with the 2020 Rule and Federal agency review. One commenter asserted that many states and Tribes found the 2020 Rule's documentation requirements to be burdensome and with limited water quality benefit. The commenter stated that the 2020 NWP review process demonstrated the problem with the 2020 Rule's approach, asserting that many Corps districts reviewed the substance of some certification conditions and led to a process that was not predictable, transparent, or consistent and resulted in substantive changes to certifications not envisioned by the CWA. The commenter also asserted that some certifying authorities whose conditions on the NWPs were rejected were subjected to a Corps'-established new category of action ("decline to rely on") that was not provided in section 401. The commenter stated that a certifying authority denied certification on seven Corps NWPs, but the Corps, relying on the 2020 Rule, found that the certifying authority waived its right to certify because it failed to identify the specific water quality requirements at issue and explain how the relevant discharges would not comply with these requirements. According to the commenters, the certifying authority was unable to remedy the issue for three of the seven permits.

Agency's Response: EPA agrees with commenters that section 401 does not give Federal agencies the authority to nullify or reject a certifying authority's water quality certification or conditions and that courts have affirmed that Federal agencies do not have the authority to ignore conditions of certification. Accordingly, the Agency is finalizing regulatory text at section 121.8 to clarify that Federal agency review is limited to verifying compliance with the requirements of CWA section 401. Aside from the three elements listed at section 121.8, EPA concludes that Federal agencies lack the authority to review other aspects of a certification decision for purposes of determining whether a "certification required by [section 401] has been obtained or has been waived." 33 U.S.C. 1341(a)(1). Additionally, section 121.8 clarifies that a Federal agency may only determine that a certifying authority inadvertently waived where a certifying authority fails or refused to act within the reasonable period of time. As discussed in the final rule preamble, the final rule approach to Federal agency review represents the best reading of the text of section 401, Congressional intent, and relevant case law, and incorporates recommendations from public comments received on the proposed rule. For further discussion of the Agency's analysis of the statutory text, Congressional intent, and relevant case law, *see* Section IV.G of the final rule preamble.

The Agency appreciates commenter input regarding experiences with the 2020 Rule's Federal agency review provision. The Agency finds that stakeholder experiences with constructive waivers under the 2020 Rule and the Corps' Nationwide General Permits are one example of how the 2020 Rule failed to appropriately address adverse impacts to state and Tribal water quality. As discussed in section IV.F in the final rule preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (i.e., cause noncompliance with water quality requirements) may proceed without any input from the certifying authority.

7.1.3 Comments on Certification Decision Type (proposed Section 121.9(a)(1))

One commenter suggested that proposed section 121.9(a)(1) is not necessary because the decision should be apparent on its face.

> **Agency's Response: In response to public comment, the Agency is not finalizing the regulatory text proposed at section 121.9(a)(1), which provided that a Federal agency may also review a certification decision to confirm the nature of the decision (*i.e.*, whether the certification decision is a grant, grant with conditions, denial, or express waiver). The Agency does not disagree with this aspect of the proposal, but the Agency finds the regulatory text unnecessary and somewhat confusing when listed among the other components of Federal agency review. Certainly, a Federal agency needs to look at the certification decision to determine how it should act in response. For instance, the Federal agency cannot issue the relevant license or permit if the certification decision is a denial. If the decision is a grant with conditions, the Federal agency must include those conditions in its license or permit. However, looking at the certification document to see how the certifying authority decided to act represents a different sort of "review" than the other components of Federal agency review identified in section 121.8. The other components all concern verifying compliance with the statutory requirements of section 401. EPA concluded that it is best to remove this provision to avoid confusion.**

7.1.4 Comments on The Public Notice Provision (121.9(a)(3))

Some commenters noted that public notice procedures vary amongst certifying authorities. One commenter noted that establishing generally applicable procedures for public notice is not necessarily the same as providing public notice on every application. This commenter suggested that EPA allow states to affirm compliance with their own public notice requirements, rather than mandate demonstration of public notice on all section 401 requests.

A couple of commenters suggested that Federal agency review of public notice requirements should not be included in the final rule because it goes beyond the facial requirements of the statutory text. One of these commenters further stated that Federal agencies have little knowledge of the public notice procedures of certifying authorities, and that any issues with the procedural process would be addressed in state court.

One commenter noted that Federal agency review of public notice requirements is not necessary in instances where a certification decision is a "grant" without conditions because there are no water quality requirements included.

> **Agency's Response: EPA agrees with commenters that public notice procedures vary amongst certifying authorities and that establishing generally applicable procedures for public notice is not necessarily the same as providing public notice on every application. Section 401(a)(1) requires a certifying authority to establish procedures for public notice, and a public hearing where necessary, on a request for certification. 33 U.S.C. 1341(a)(1).**

Accordingly, EPA has revised the regulatory text, now located at section 121.8, to better reflect the statutory text and to clarify that a Federal agency may review whether the certifying authority confirmed it complied with its public notice procedures.

EPA disagrees with commenters asserting that Federal agency review of public notice requirements goes beyond the facial requirements of the statutory text. EPA acknowledges that the text of section 401 does not explicitly define a role for Federal licensing or permitting agencies to review certification decisions. However, the Agency has long recognized, both in regulation and guidance, some degree of appropriate Federal agency review of certification decisions. Additionally, courts have generally found that Federal agencies may review certification decisions only to see whether the decision satisfies the facial statutory requirements of section 401, including whether public notice procedures were followed.

While EPA agrees that questions regarding compliance with specific state public notice laws and regulations would be addressed in state proceedings, EPA disagrees that it is therefore inappropriate for a Federal agency to seek verification from the certifying authority that it complied with its public notice procedures, a Federal statutory requirement. The Agency appreciates commenter concerns regarding a Federal agency's lack of substantive knowledge about a certifying authority's public notice procedures. Therefore, the Agency is limiting Federal agency review regarding public notice to simply verifying that the certifying authority confirmed it complied with its public notice procedures. This should not require the Federal agency to delve into any specifics regarding a state or Tribe's public notice procedures, but rather should entail merely asking the certifying authority to provide confirmation of its compliance. To aid in this review, EPA recommends that certifying authorities indicate compliance with their public notice procedures in the certification decision.

In response to the commenter who asserted that Federal agency review of compliance with public notice requirements is unnecessary for a grant of certification, EPA disagrees. Neither the statutory text nor case law suggest that certain types of certification decisions are categorically exempt from Federal agency review. However, the Agency notes that the final rule allows Federal agencies to review specified aspects of a certification decision but does not require such review. *See* Section IV.G of the final rule preamble.

7.2 Support 2020 Rule Approach to Federal Agency Review

Several commenters wrote in support of the 2020 Rule's approach to Federal agency review. These commenters argued that the proposed rule should retain the Federal agency authority to evaluate required explanatory statements in certification denials and statements and in their absence, to determine that certification or the certification condition had been waived. These commenters argued that Federal agencies are obligated to determine if procedural requirements have been met and warned that without Federal oversight, certifying authorities would have little incentive - and might be disincentivized - to provide the supporting information (citing *Hoopa Valley Tribe*, 913 F.3d at 1103-05; *City of Tacoma v.*

FERC, 460 F.3d 53, 67-69 (D.C. Cir. 2006), *Jackson Cnty. v. FERC*, 589 F.3d 1284, 1289 (D.C. Cir. 2009); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991)).

A few commenters argued that removing Federal agency oversight would create a structure that could be misused by certifying authorities to deny otherwise federally approved projects. One commenter argued that section 401 has been misused by certifying authorities to pursue policy objectives unrelated to water quality, and that this misuse can wield a disproportionate level of decision-making authority over a wide variety of interstate projects and projects of national importance. This commenter suggested that Congress intended to limit the scope and duration of section 401, and that the principles of cooperative federalism do not dictate that certifying authorities receive as much authority and autonomy as possible. This commenter opposed eliminating Federal agency oversight over the substance of certification decisions or certifying authorities' compliance with statutory and regulatory requirements applicable to certification decisions.

One commenter asserted that the 2020 Rule's approach to Federal agency review served to police certifying authority compliance with EPA's procedural rules through a mechanism that is quicker and less costly than judicial review. Similarly, another commenter argued that the lack of certification condition or denial review to ensure their validity will add unnecessary time and costs to projects because judicial review will be the only avenue for any recourse. A commenter asserted that removing Federal agency review of certifications or certification conditions will provide project proponents little to no timely recourse for challenging a certification decision, as the project proponent is only able to challenge the certification decision in an appropriate court. The commenter recommended that EPA adopt an approach where the certifying authority and project proponent proceed to arbitration for a period of 60 days when certification is denied or there is disagreement about certification conditions, and after that period the project proponent can move for judicial review if there is no settlement agreement. The commenter argues that this approach would enhance cooperation and coordination between stakeholders and could reduce litigation and extended delays for projects.

> **Agency's Response: *See* Section IV.G.2 of the final rule preamble for responses to these comments.**
>
> **In response to the commenter who recommended that the Agency develop an arbitration process for certification denials or disagreements about certification conditions, the Agency declines to adopt the commenter's suggestion. The Agency has encouraged coordination and communication throughout the final rule, and similarly encourages communication between project proponents and certifying authorities about proposed certification decisions and certification conditions when such communication has the potential to avoid litigation. EPA even encourages communication regarding finalized certification conditions if there is an opportunity for modification consistent with this final rule that would avoid litigation. However, EPA declines to mandate in this final rule an automatic 60-day arbitration period. This offers flexibility that reflects cooperative federalism and the reality that not every dispute is amenable to arbitration. Further, as discussed in the final rule preamble, Congress recognized that state courts were the proper venue for any issues or concerns surrounding the substance of a certification decision. *See, e.g.*, H.R. Rep. No. 91-**

940, at 55-56 (March 24, 1970) ("If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so."); S. Rep. 92-414, at 1487 (October 28, 1971) ("Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction."); H.R. Rep. 92-911, at 122 (March 11, 1972) ("If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal if the applicant wishes to do so.").

7.3 Do Not Support Federal Agency Review at All

A few commenters recommended removing Federal agency review of any certification decisions from the final rule, with one commenter arguing that Federal agency review erodes cooperative federalism principles, and the other noting that Federal agency review is unwarranted by the statutory text. A few commenters noted that Section 401 does not define a role for Federal agency review of certification decisions. One commenter supported EPA's decision to remove Federal agency review and waiver of a certification decision due to procedural defects.

A couple of commenters argued that the additional oversight provided by Federal agency review of certification decisions is inefficient and ineffective for routine projects with minimal impacts. One of these commenters further suggested that the project proponent should decide which projects receive additional oversight because the project proponent is most capable of understanding cases where oversight is needed. A few commenters stated that procedural technicalities are not a basis for an involuntary or implicit waiver of certification.

<u>Agency's Response</u>: EPA acknowledges that the text of section 401 does not explicitly define a role for Federal licensing or permitting agencies to review certification decisions. However, the Agency has long recognized, both in regulation and guidance, some degree of appropriate Federal agency review of certification decisions. Additionally, as discussed in section IV.G.2 of the final rule preamble, a few courts have acknowledged a limited role for Federal agencies to ensure that a certifying authority meets certain requirements of section 401. The Agency disagrees that this final rule's approach to Federal agency review would erode cooperative federalism principles or prove inefficient for projects. Rather, the final rule recognizes a Federal agency's legitimate interest in receiving a certification in accordance with section 401 to lawfully proceed with its licensing and permitting process.

EPA disagrees with the commenter suggesting that project proponents should determine which projects receive Federal agency review. Neither the statutory text nor case law support a decisive role for project proponents in determining what projects are subject to Federal agency review. *See* Section IV.G for further discussion on the Agency's analysis of the statutory text and case law addressing Federal agency review.

EPA agrees with commenters that a constructive waiver occurs only where a certifying authority fails to act on a request for certification (i.e., grant, deny, expressly waive) within the reasonable period of time. *See* Section IV.F and G for further discussion on when constructive waiver occurs.

7.4 Waiver for "Reasonable Period of Time" Passage Only

Some commenters expressed support for the position in the proposal that constructive waiver may occur only when the certifying authority fails or refuses to act (i.e., to grant, grant with conditions, deny, or expressly waive) within the reasonable period of time. One commenter stated that section 401 only allows for a waiver when a certifying authority fails or refuses to act on a request for certification within a reasonable period of time.

Agency's Response: EPA agrees with commenters that a constructive waiver occurs only where a certifying authority fails to act on a request for certification (*i.e.*, grant, deny, expressly waive) within the reasonable period of time. The Agency recognizes that a constructive waiver is a severe consequence; as discussed in section IV.F in the final rule preamble, a waiver means that a Federal license or permit which could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed without any input from the certifying authority. EPA encourages Federal agencies, project proponents, and certifying authorities to communicate early and often to prevent inadvertent waivers due to passage of time. For example, a Federal agency could set up an MOA or other agreement with certifying authorities to establish notification protocols prior to finding a waiver of certification (*e.g.*, where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that 30 day period).

7.5 Demonstrating Compliance with Elements in Proposed Section 121.9

One commenter explained that the Federal agency should be able to confirm three elements from the certification decision without any additional input from the certifying authority. Similarly, another commenter stated that it should only take minimal effort by a certifying authority to demonstrate compliance. Another commenter suggested that operating agreements between the certifying authority and Federal agency may be used to identify how the certifying authority can demonstrate that it met the section 401 facial requirements. The commenter explained that this would reduce the need for coordination on each individual certification decision. The commenter, a certifying authority, explained that it had an existing operating agreement with the Corps that could be adapted to this effect.

A few of these commenters also provided suggestions for demonstrating compliance with proposed section 121.9 or clarifying the review. One commenter suggested that EPA make it clear that Federal agency review of a certification decision for whether it indicates the nature of the decision does not require a determination that the decision contains all the required contents. Another commenter

recommended that the certifying authority should provide a copy of the public notice with the certification to satisfy proposed section 121.9(a)(3). Similarly, another commenter, a certifying authority, noted that it sends a copy of its public notice to the Federal agency, which the commenter asserted will provide the Federal agency with confirmation that public notice requirements were appropriately met. A different commenter that acts as a certifying authority explained that it typically includes a description of its public notice process in its certification decisions. The commenter asserted that this description should be sufficient such that no further inquiry regarding public notice is necessary. The commenter stated that, at most, the final rule could allow a Federal agency to obtain an assertion of compliance with public notice procedures.

> **Agency's Response: Consistent with the proposed rule, EPA is declining to define the specific information a certifying authority must include in a certification decision to demonstrate compliance with the facial requirements of section 401. Section 401 does not expressly address what specific information certifying authorities must include in a certification decision, nor does it address the process of Federal agency review. While the statute does contain important information about the identity of the appropriate certifying authority, the length of the reasonable period of time, and a requirement for public notice procedures, it does not prescribe how a certifying authority must demonstrate compliance with those requirements. Certifying authorities are the entities most familiar with their certification process, and certifying authorities, and not EPA or other Federal agencies, are in the best position to determine how to demonstrate compliance. EPA finds that the approaches described by commenters (providing a copy of the public notice in the certification decision or including a description of the public notice process it undertook in its certification decision) are sufficient to satisfy Federal agency review. In fact, it would be sufficient for the certifying authority to simply state in its certification decision that the certifying authority complied with its public notice procedures. EPA expects that it should only take minimal effort by a certifying authority to demonstrate compliance for Federal agency verification.**
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> ***See* Section IV.G of the final rule preamble for the Agency's recommendations, based on commenter input, on ways certifying authorities could demonstrate compliance with the facial requirements of section 401.**

7.6 Ability to Remedy Deficiencies

7.6.1 Opportunity to Remedy

Almost all commenters that commented on certifying authority ability to remedy deficient certification decisions expressed support for proposed 40 CFR 121.9(b) that if the Federal agency determines that certain facial requirements (e.g., public notice) have not been met, it must provide the certifying authority with an opportunity to remedy the situation. Many commenters agreed with the proposal's characterization of constructive waiver as a "severe consequence."

<u>Agency's Response</u>: Upon further reconsideration, the Agency is declining to include regulatory text addressing the potential consequences and remedies to deficient certification decisions, aside from failure or refusal to act within the reasonable period of time. As discussed in Section IV.G of the final rule preamble, this restores the Agency's pre-2020 Rule approach to Federal agency review and avoids unnecessarily encumbering the certification process with more procedure. *See* Section IV.G of the final rule preamble for further discussion on why the Agency is declining to define the process that a Federal agency and certifying authority must follow if the Federal agency's review reveals that the wrong certifying authority issued the certification decision, or the Federal agency was unable to obtain confirmation that the certifying authority complied with its public notice procedures and why other aspects of this final rule should prevent the need for specific EPA-mandated process to remedy deficiencies identified through Federal agency review.

EPA agrees with commenters that a constructive waiver occurs only where a certifying authority fails to act on a request for certification (i.e., grant, deny, expressly waive) within the reasonable period of time. The Agency recognizes that a constructive waiver is a severe consequence; as discussed in Section IV.F in the final rule preamble, a waiver means that a Federal license or permit which could adversely impact the certifying authority's water quality (i.e., cause noncompliance with water quality requirements) may proceed without any input from the certifying authority. EPA encourages Federal agencies, project proponents, and certifying authorities to communicate early and often to prevent inadvertent waivers due to passage of time. For example, a Federal agency could set up an MOA or other agreement with certifying authorities to establish notification protocols prior to finding a waiver of certification (e.g., where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that 30 day period).

7.6.2 Extension of the "Reasonable Period of Time" for Remedy

Most commenters expressed support for Federal agencies extending the reasonable period of time to allow for correction of deficiencies up to the statutory one-year limit. One commenter urged EPA to require the Federal agency to extend the reasonable period of time if the Federal agency finds that the certifying authority has not acted within the agreed upon or default reasonable period of time, as long as the maximum one-year period has not yet been exceeded. The commenter noted that the proposal encouraged Federal agencies to extend the reasonable period of time instead of finding waiver. However, the commenter interpreted the statutory text of section 401(a) as prohibiting a finding of constructive waiver until the one-year period has been exceeded. The commenter also asserted that finding constructive waiver before the maximum one-year period is not fitting with the cooperative federalism and the co-regulatory design of the CWA. Another commenter stated that it supported a general time frame of at least sixty (60) days to remedy a deficient certification when the one-year timeframe has not expired, but noted that Federal and certifying authorities should have the flexibility to set mutually agreeable deadlines to address deficiencies. Another commenter suggested that EPA amend proposed section 121.9(c) to clearly provide Federal agencies with discretion to determine whether a constructive

waiver has occurred where the certifying authority inadvertently failed to issue a certification decision within the reasonable period of time, and require Federal agencies to extend the reasonable period of time so long as it does not exceed one year. The commenter asserted that its suggested revisions would effectuate EPA's intent as expressed in the preamble and further cooperative federalism goals. Otherwise, the commenter argued that the proposed language directly conflicts with EPA's statements in the preamble and cooperative federalism.

A couple of commenters recommended that the final rule should allow certifying authorities to correct errors even after the reasonable period of time has ended. One of these commenters suggested that EPA allow states and Tribes to remedy issues with 401 certification decisions after the reasonable period of time, even if more than one year after the certification request, so long as the state or Tribe acted "in good faith" and took some "significant and meaningful action" within the reasonable period of time, not to exceed one year. The commenter made this suggestion in the context of waivers for non-compliance. This commenter referred to the *N.C. Dept of Envtl Quality v. FERC* case and the text of section 401 as in support, and argued that state and Tribal ecosystem, community, and water resource protection should be prioritized over inflexible procedures and rules that could lead to what the commenter characterized as unfairness by removing state and Tribal authority because of errors.

A commenter stated that the proposal did not provide a timeline for the Federal agency to issue notice of the deficiency or a timeline for the certifying authority to remedy the deficiency. The commenter also questioned what happens if a deficient certification or denial is issued on day 364 of the reasonable period of time. The same commenter also asserted that it is unreasonable to allow an opportunity for remedy where the certifying authority fails to clearly indicate if they are issuing or denying a certification.

One commenter urged EPA to reconsider requiring automatic extensions of the reasonable period of time as necessary to allow the certifying authority with an opportunity to remedy any deficiency. The commenter explained that it does not oppose small extensions of time for certifying authorities to provide additional detail or make minor changes necessary to satisfy the elements. However, the commenter expressed concern that certifying authorities may abuse this extension process by submitting purposely incomplete decisions. According to the commenter, if a certifying authority submits a clearly deficient certification decision, the certifying authority should not be entitled to more time; instead, the certification should be waived. The commenter argued that this approach would promote timely certification decisions, minimize exploitation of time extensions, and encourage certifying authorities to submit complete certification decisions. Another commenter suggested that corrections should be made within the reasonable period of time and be limited to "errors made in good faith." This commenter cautioned that this provision should not allow or incentivize certifying authorities to ignore procedures or take more time.

One commenter expressed concern over preamble language encouraging Federal agencies to extend the reasonable period of time where a certifying authority inadvertently waives certification, asserting that the proposal did not explain what would qualify as an inadvertent waiver or how a Federal agency would document such, and questioned how EPA could authorize the Federal agency to ignore the statute. The commenter asserted that section 401 clearly provides that if a reasonable period of time is established and

the certifying authority does not act within that reasonable period of time then waiver has occurred, and EPA cannot create a regulatory override over clear statutory language.

Agency's Response: *See* the Agency's Response to Comments at Section 7.6.1.

The Agency disagrees with the commenter asserting that section 401 prohibits a finding of constructive waiver until the one-year period has been exceeded. This final rule requires a certifying authority to act within the reasonable period of time as determined pursuant to final rule section 121.6, which may be less that the statutory maximum of one year. This is consistent with the statutory text and the Agency's 1971 Rule and 2020 Rule. For further discussion about constructive waivers due to passage of time, *see* Section IV.F, G of the final rule preamble and the Agency's Response to Comments in Section 6.3.4.

7.6.3 Federal Agency Notification

A few commenters offered recommendations regarding the process surrounding Federal agency notification of a deficiency and an opportunity to remedy. A couple of commenters recommended that the final rule require the Federal agency to immediately notify the certifying authority after a deficiency is identified, as opportunities to modify an existing certification or correct certification deficiencies can help avoid delays and ensure consistency between Federal licenses and water quality goals. One of these commenters also recommended that the reasonable period of time be stopped when the certifying authority submits its certification, and that remaining time within the reasonable period of time or one year be available for remedying the deficiency. Another commenter recommended that Federal agencies develop procedures providing how a certifying authority should respond to a Federal agency's notice regarding deficiencies. The commenter also recommended that the Federal agencies provide a letter to the certifying authority stating the deficiencies, the specific rule regarding the deficiency, and a timeframe to correct or respond to the deficiency.

One commenter recommended that the final rule should require the Federal agency to promptly notify the certifying authority of a finding of constructive waiver due to the passage of time. Another commenter requested that the final rule specify that waiver occurs only on the date of a Federal agencies written notification to the project proponent and certifying authority. Another commenter recommended that the final rule provide instructions to Federal agencies about reaching out to certifying authorities about the lack of action on a certification prior to finding constructive waiver. One commenter, a project proponent, noted that it has experienced a few cases where the Federal agency found that the certifying authority waived certification under the 2020 Rule because the certifying authority did not act before the end of the reasonable period of time.

One commenter described the notification requirements under 40 CFR 121.9 and suggested including a requirement that the Federal agency notify the certifying authority that the certification has been received within the reasonable period of time, and the certification conditions have been incorporated into the relevant license or permit.

<u>Agency's Response</u>: Under the final rule, if a Federal agency determines that the certification decision was not issued within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that a waiver has occurred. Similar to the 2020 Rule, *see* section 121.9(b) of the 2020 Rule, the Agency is also finalizing regulatory text that clarifies that such notification from the Federal agency satisfies the project proponent's requirement to obtain certification. 40 CFR 121.9(b). The Agency made minor revisions to the text proposed at section 121.9(c) to clarify that a waiver only satisfies the project proponent's obligation to obtain a certification and does not satisfy any other obligations under section 401 (*e.g.*, need to provide the Federal agency supplemental information pursuant to section 121.12). However, the Agency is declining to finalize regulatory text on the process that Federal agencies and certifying authorities must follow for non-compliance with other facial requirements of CWA section 401 including potential consequences and remedy procedures. This is consistent with the Agency's approach to Federal agency review prior to the 2020 Rule and avoids unnecessarily encumbering the certification process with additional procedures. *See* the Agency's Response to Comments at Section 7.6.1.

EPA encourages Federal agencies, project proponents, and certifying authorities to communicate early and often to prevent inadvertent waivers due to passage of time. For example, a Federal agency could set up an MOA or other agreement with certifying authorities to establish notification protocols prior to finding a waiver of certification (*e.g.*, where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that 30 day period).

7.7 Input Received on Prior Rulemakings

7.7.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

A commenter asked EPA to restore original jurisdictional language in the CWA to define the roles of the state and Federal government.

A commenter stated that Federal agencies should review conditions when called upon to do so, and that EPA should explicitly recognize that the Federal agency's review of certification conditions is focused on conditions that are called into question by the project proponent. This commenter also said that Federal agencies should have the authority to make waiver determinations and evaluate the validity of section 401 certification, and the commenter stated that EPA should encourage lead Federal agencies to consult with other Federal agencies with expertise on the proposed discharge or activity on whether the actions (e.g., conditions and denials) of the certifying authority facially comply with section 401. The commenter

further said that EPA should clarify the process by which Federal agencies may evaluate whether a certifying authority's actions are beyond the scope of section 401.

One commenter said that EPA should clarify that where a project requires multiple Federal authorizations, the "lead" Federal agency is responsible for carrying out the section 401 responsibilities (i.e., setting the reasonable period of time for the certifying agency to make a decision, determining waiver, etc.) and that all other Federal agencies should defer accordingly. The commenter also recommended that EPA clarify that where the lead Federal agency determines that waiver has occurred the certification requirement "falls out of the equation" and all other Federal agencies can and should move forward with processing their reviews and authorizations. The commenter stated that EPA should clarify that the lead Federal agency's written notification of waiver should also be provided to the other Federal agencies.

One commenter said it supports that it is the Federal agency's role to determine whether a waiver has occurred and that waiver can occur when a certifying authority expressly waives or fails to act within a reasonable period of time. The commenter stated that the Federal agency has the authority to determine whether the proper certifying authority issued the certification and if done so timely. The commenter also said that if a condition does not satisfy the requirements, the condition should not be included in the Federal license or permit, and they stated Federal agencies have the authority to reject certifications or conditions that are not consistent with the requirements or limitations of section 401.

A commenter said that the lead Federal agency should respect the sovereignty and expertise of states, with a not required and discretionary review of state certification conditions. The commenter added that the review of the state certification conditions should be limited to their validity under the proposed changes and that Federal agencies do not have the authority to condition a project after a certifying authority's review or overturn a state's certification denial.

Some commenters expressed concern about the 2019 proposed rule's Federal agency review requirement and said that Federal agencies do not have the authority to override a state's certification decision. One said that the 2019 proposed rule would substitute a state's judgement for the judgement of Federal agencies by providing Federal agencies with the ability to veto specific conditions, solely enforce conditions, and find waiver even if a state acts within the reasonable period of time. A few of these commenters stated that section 401 does not allow Federal agencies to issue Federal permits or licenses if a state has denied certification and that EPA's 2019 proposed rule did not provide support for how Federal agencies have authority to substantively review state-imposed conditions to determine if they complied with EPA's interpretation of the scope of review. One commenter said that the 2019 proposed rule also did not give certifying authorities the opportunity to remedy any parts of their certification decision that the Federal agency found inconsistent with the proposed changes.

Referring to the 2019 proposed rule, one commenter stated that Federal agencies would be allowed to disregard a states' timely denials or conditions, despite timely denials and conditions being subject only to judicial review. This commenter added that the 2019 proposed rule was a sharp departure from the 50 years of EPA's interpretation and practice, asserting that the 1971 Rule did not interject Federal oversight

into states' processes. The commenter further said that the 2019 proposed rule would impose Federal agency control and upend cooperative federalism.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 7.1-7.6; *see also* Section IV.G of the final rule preamble.**
>
> **In response to commenter assertions regarding relying on the "lead" Federal agency for carrying out section 401 responsibilities, the Agency wishes to clarify the applicability of section 401. For any given project, section 401 certification is required for any activity subject to at least one Federal license or permit that may result in any discharge into waters of the United States. A certifying authority may opt to provide one certification of the activity that specifically covers multiple Federal licenses or permits, but that does not obviate the need for a project proponent to request certification for each Federal license or permit. Depending on the requirements of the applicable certifying authority, a project proponent may be able to submit multiple requests for certification in a single document covering multiple Federal licenses or permits. The only circumstance in which a project proponent may not need to request a separate certification for different Federal licenses or permits for the same activity is in accordance with section 401(a)(3). Under section 401(a)(3), a project proponent may rely on the same certification obtained for the construction of a facility for any Federal operating license or permit for the facility if 1) the Federal agency issuing the operating license or permit notifies the certifying authority, and 2) the certifying authority does not within 60 days thereafter notify the Federal agency that "there is no longer reasonable assurance that there will be compliance with applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. 1341(a)(3). Accordingly, a project proponent may not be able to rely on the same certification for each and every Federal license or permit for the same activity.**

7.7.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

A stakeholder stated that Federal agencies have the authority to evaluate certification actions and asserted that the statute requires the Federal agency to make a threshold determination on whether the certification has been issued, denied, or waived.

A different stakeholder said that requiring Federal agencies to waive on "refusal to satisfy the requirements" of certain provisions polices certifying authorities' compliance with EPA's procedures in a way that is less costly in terms of time and money than judicial review. Another stakeholder said the 2020 Rule altered the review of 401 decisions from judiciary to the Federal executive branch.

One stakeholder recommended that EPA remove the 2020 Rule provisions providing Federal agencies' review of state's decisions for compliance with procedural requirements and said that there is no section 401 text or legislative history authorizing this review. This stakeholder also stated that EPA should clarify

that the review of certification requests should comply with state procedural requirements and that EPA encourage other Federal agencies to conform their section 401 procedures to the new rule to promote consistency. The stakeholder added that EPA should eliminate any Federal review of the substance or contents of certifications and further called for the repeal of the 2020 Rule's Federal agency review requirement in its entirety.

A few stakeholders expressed concern that the 2020 Rule's Federal agency review requirements give Federal agencies the authority to veto state and Tribal conditions by deeming certification authority waived if the Federal agency determines that the state or Tribe did not follow procedural elements of the rule, contravening the CWA.

A stakeholder stated that the 2020 Rule should be revised to eliminate citation requirements to specific water quality requirements and providing rationale for each water quality condition. The stakeholder added that procedural requirements should not be the basis for a Federal agency's determination of waiver or to eliminate conditions.

Agency's Response: *See* the Agency's Response to Comments in Sections 7.1-7.6; *see also* Section IV.G of the final rule preamble.

8. EPA'S ROLES UNDER SECTION 401 (SECTIONS 121.16-121.18)

8.1 EPA as a Certifying Authority

One commenter recommended finalizing the proposed provisions related to when EPA acts as a certifying authority and asserted that the statutory language related to when EPA should act as a certifying authority is adequately clear. Conversely, another commenter stated that EPA had not identified why establishing procedures is necessary for EPA to carry out its roles.

A few commenters expressed explicit support for the proposed updates to the public notice and hearing provisions when EPA acts as the certifying authority. Another commenter said that a procedure for requesting technical assistance would be helpful.

A few commenters discussed the 2020 Rule provisions that defined how the Agency could request additional information when it acts as the certifying authority (located at section 121.14 of the 2020 Rule). A couple of commenters agreed that EPA should not be limited on the amount of information it can request from a project proponent to meet its 401 obligations. One of these commenters asserted that section 121.14 of the 2020 Rule is unnecessary because proposed section 121.7(b) will ensure that EPA will act on requests for certification within the scope of certification within a timely manner. Conversely, another commenter recommended retaining section 121.14(b) from the 2020 Rule and modifying section 121.14(a) from the 2020 Rule to require EPA to make all requests for additional information no later than 120 days before the end of the reasonable period of time unless a change of circumstance under section 401(a)(3) occurs.

One commenter stated that EPA needs to acknowledge in regulations its Federal trust responsibility and to codify its Tribal consultation process. Likewise, a commenter recommended that EPA should add language to proposed section 121.16(b) to require EPA to comply with the Agency's Tribal consultation and coordination policies and applicable Tribal treaty provisions to assure Tribes that EPA will consistently comply with these requirements. The commenter also recommended adding a new section 121.19 to limit revisions to part 121 unless EPA acts in compliance with applicable Tribal consultation and coordination policies and applicable Tribal treaty provisions, asserting that EPA failed to comply with consultation obligations on the 2020 Rule and that obtaining the free, prior, and informed consent of Indigenous Peoples should be a requirement for agency decisions that would impact their resources.

A few commenters discussed environmental justice as it relates to EPA's role as a certifying authority. One commenter expressed optimism about the incorporation of environmental justice in the EPA's roles under section 401. Another commenter recommended that EPA codify its environmental justice commitments at proposed section 121.16 including requiring EPA to consider whether the activity as a whole has disproportionately high and adverse human health or environmental effects on members of Tribes, minority populations, and low-income populations; consider the cumulative impacts to human health, resources used for subsistence, cultural resources and uses, and treaty-protected resources; consider the historical injustices (such as damming, diversion, or reduction in flow of a waterbody) and how those actions have impacted the resources and human population; consider whether the applicant's activity as a whole will have long term impacts on any watersheds; and publish a written environmental justice analysis in a public docket prior to the issuance of a certification decision.

A commenter said that EPA rarely uses its role as a certifying authority for non-TAS Tribes and on lands exclusively under Federal jurisdiction, and the commenter said EPA needs to investigate this and take action to ensure EPA fulfills this role appropriately.

> **<u>Agency's Response</u>: EPA is finalizing revisions to the part 121 regulations to provide greater clarity about EPA's process when it acts as the certifying authority. Including provisions specific to EPA's role as the certifying authority is consistent with the Agency's longstanding approach. *See* 40 CFR 121.13-15 (2020) (defining procedures when EPA acts as the certifying authority) and 40 CFR 121.21-28 (2019) (same). Additionally, the final rule includes provisions, such as those addressing contents of requests for certification and certification decisions, to provide transparency in the certification process for all reviews, including those conducted by the EPA when it acts as the certifying authority.**
>
> **EPA agrees with some of these commenters and finds that the provisions at sections 121.16 and 121.17 will provide stakeholders with greater certainty and predictability around the section 401 certification process where EPA acts as the certifying authority.**
>
> **The final rule clarifies that EPA must provide technical advice if requested by a Federal agency, certifying authority, or project proponent on (1) applicable effluent limitations, or other limitations, standards (including water quality standards such as water quality criteria), regulations, or requirements, and (2) any methods to comply with such limitations, standards, regulations, or requirements. *See* 40 CFR 121.18. Federal agencies, certifying**

authorities, and project proponents may request EPA's technical assistance at any point in the certification process. The Agency did not expand on the procedures for requesting technical advice to leave flexibility for the ways that Federal agencies, certifying authorities, project proponents may request for technical advice.

Consistent with the proposal, EPA is removing section 121.14 of the 2020 Rule in its entirety because it finds these provisions not conducive to an efficient certification process for several reasons discussed in Section IV.H of the final rule preamble. The Agency agrees with the commenter that regulatory requirements in the final rule (e.g., section 121.7(b)) are sufficient to ensure the Agency will act on requests for certification in a timely and appropriate manner.

The Agency appreciates commenter input on tribal consultation in the section 401 process. Although the Agency is declining to add regulatory text regarding the Agency's Tribal consultation policies, EPA emphasis that when it certifies on behalf of Tribes without TAS, its actions as a certifying authority are informed by its Tribal policies and the Federal trust responsibility to federally recognized Tribes. EPA's 1984 Indian Policy, recently reaffirmed by EPA Administrator Regan, recognizes the importance of coordinating and working with Tribes when EPA makes decisions and manages environmental programs that affect Indian country. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984), available at https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf; *see also* Memorandum from Michael S. Regan to All EPA Employees, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy (September 30, 2021), available at https://www.epa.gov/system/files/documents/2021-09/oita-21-000-6427.pdf. This includes coordinating and working with Tribes on whose behalf EPA reviews and acts upon requests for certification on federally licensed or permitted projects.

Regarding the environmental justice comments above, EPA finds that the final rule allows for outreach designed to reach all potentially interested stakeholders, including communities with environmental justice concerns, which is consistent with the Federal government's commitment to empower communities, protect public health and the environment, and advance environmental justice in Executive Orders 14096, 14008, 13990, and 12898. The Agency discusses in section IV.H of the final rule preamble that when EPA acts as the certifying authority, it will consider impacts on communities with environmental justice concerns who disproportionately bear the burdens of environmental pollution and hazards, including Tribal Nations. EPA emphasizes that in considering impacts from a federally license or permitted project, water quality-related impacts on communities with environmental justice concerns are issues that fall within the relevant scope of analysis and should inform decision-making on requests for certification. Broadening the public notice provision in the final rule also provides communities seeking to advance environmental justice with greater opportunities to inform the certification process. The Agency is not including specific regulatory text on incorporating environmental justice into the

certification process to provide the Agency with the flexibility to determine methods to incorporate environmental justice in the section 401 certification process.

The Agency recognizes the importance of its role as the certifying authority in instances where a state or Tribe does not have authority to issue certifications. The Agency has made revisions throughout this final rule to clarify and help in the implementation of EPA's roles under section 401, including its role as the certifying authority. These revisions should help ensure EPA can fulfill this role appropriately.

8.2 Lands of Exclusive Federal Jurisdiction

Some commenters addressing lands subject to exclusive Federal jurisdiction expressed concern that EPA would act as the certifying authority for all national parks under the proposal. These commenters stated that section 401 does not grant EPA authority to act as a certifying authority for national parks, and further asserted that EPA acting as a certifying authority for national parks would be inconsistent with the history of other authorities issuing certifications for national park lands and the exclusive grant of authority to states and Tribes in section 401. These commenters also reported that this approach regarding national parks would create confusion and inefficiency.

Another commenter more broadly argued that section 401 does not authorize EPA to issue certifications for lands subject to exclusive Federal jurisdiction and that it would be contrary to the statutory language and intent for EPA to act as a certifying authority over such lands. This commenter asserted that this approach would remove authority from states to protect water quality under section 401 in large areas within their borders. More specifically, the commenter acknowledged that Yellowstone National Park is subject to exclusive Federal jurisdiction but requested that EPA recognize Wyoming as the appropriate certifying authority over this area.

With regard to identifying lands subject to exclusive Federal jurisdiction, a commenter supported the approach taken in the proposal to not provide an exclusive list of such areas, but recommended the development of guidance to identify areas where EPA acts as a certifying authority to assist stakeholders and ensure effective participation in proceedings in these circumstances. Conversely, another commenter stated they support the development of a list of lands subject to exclusive Federal jurisdiction, because many Tribes have treaty-protected rights to waters that flow through exclusive jurisdiction lands.

<u>Agency's Response</u>: As an initial matter, EPA wishes to emphasize that not all Federal lands or national parks are lands of exclusive Federal jurisdiction. Rather, exclusive Federal jurisdiction is established only under limited circumstances pursuant to the Enclave Clause of the U.S. Constitution, article 1, section 8, clause 17. These circumstances include (1) where the Federal government purchases land with state consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; (2) where a state chooses to cede jurisdiction to the Federal government; and (3) where the Federal government reserved jurisdiction upon granting statehood. *See Paul v. United States*, 371 U.S. 245, 263-65 (1963); *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).

EPA disagrees with the commenter asserting that section 401 does not authorize EPA to issue certifications for lands subject to exclusive Federal jurisdiction in relevant respects and that it would be contrary to the statutory language and intent for EPA to act as a certifying authority over such lands. Section 401(a)(1) specifically anticipates circumstances in which no state or interstate agency has authority to provide certification, directing that "[i]n any such 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) (emphasis added). Lands of exclusive Federal jurisdiction in relevant respects present a case where states lack authority for certification pursuant to section 401, as states lack legislative jurisdiction in these areas absent specific congressional action. *See Paul*, 371 U.S. at 263 (finding precedent establishes "that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, s 8, cl. 17, by its own weight, bars state regulation without specific congressional action."). In section 401, Congress did not take specific action to grant authority to states to issue certification over lands of exclusive jurisdiction in relevant respects. On the contrary, Congress provided in section 401(a)(1) that the EPA Administrator shall issue certification "in any such case" where no state or interstate agency has authority to give certification, and otherwise recognized the Administrator as a certifying authority. In addition to the statutory text, the legislative history further supports that Congress did not grant authority to states to issue certification where states otherwise lack authority, such as lands of exclusive Federal jurisdiction in relevant respects. *See* 116 Cong. Rep. 9316, 9328 (March 25, 1970) (statement of Rep. Harsha) (emphasis added) ("Another area of great complexity is that covered by section 21—certification by the States to Federal agencies in cases where application has been made for Federal licenses or permits. That certification must come from the States *unless, of course, the waters involved are under the direct supervision of the Federal Government or there is no State certifying authority*."). As a result, EPA finds that section 401 directs the Administrator to issue certification in lands of exclusive Federal jurisdiction in relevant respects. The Agency further disagrees that the Administrator issuing certification for lands of exclusive Federal jurisdiction in relevant respects removes authority from states, as states under section 401 and the U.S. Constitution do not have a jurisdictional basis providing authority to issue certification for lands of exclusive Federal jurisdiction in relevant respects.

Because such jurisdictional status is subject to change, EPA is not providing an exclusive list of lands subject to exclusive Federal jurisdiction. However, EPA is able to offer technical assistance to stakeholders if questions arise regarding the appropriate certifying authority on a given federally licensed or permitted project. *See also* Section IV.H of the final rule preamble for further discussion on exclusive Federal jurisdiction, including a list of national parks that include lands of excusive Federal jurisdiction.

8.3 Input Received on Prior Rulemakings

8.3.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

One commenter stated that when EPA is acting as the certifying authority, the "public notice" requirement should be expanded to include the general public, in addition to those listed parties known to be interested to remain consistent with other Federal public notice practices.

One commenter expressed support for the interpretation of EPA's authority for the Administrator to certify compliance with water quality standards when no state, Tribe, or other agency has the authority to give such a certification and stated that the 2019 proposed rule procedural requirements were an effective regulatory backstop.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 8.1-8.2; *see also* Section IV.H of the final rule preamble.**
>
> **EPA is finalizing section 121.17 as proposed, with minor, non-substantive revisions, to facilitate participation by the broadest number of potentially interested stakeholders, which could include but is not limited to the general public and parties known to be interested.**

9. MODIFICATIONS (SECTION 121.10)

9.1 General Legal Comments on Modification

Some commenters disagreed with the inclusion of a modification provision because the statute does not include a reference to "modifications." A few commenters warned EPA that it is a trap to interpret the absence of a statutory modification provision as the authority to create a modification procedure. One commenter described this interpretation as a reversal of the fundamental axiom of statutory interpretation that agencies only have the powers delegated to them by Congress. Another commenter asserted that Congress included only two narrow and time-limited mechanisms in the statute for amending or rescinding certifications – sections 401(a)(3) and 401(a)(4). The commenter concluded that there is simply no reason "to believe that Congress, by any remaining ambiguity, intended to undertake the regulation" of a subject "never mentioned in the statute," such as an additional authorization for certifying authorities to modify certifications for any reason or any timeframe. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005).

A few commenters noted that the modification provision in the proposed rule represents a return to the flexibility of the longstanding 1971 Rule. One commenter stated that the proposed rule appropriately reintroduced the modification process. Another commenter asserted that the proposed rule's modification procedures were balanced and would ensure that any significant changes found after the certification and permit are issued can be addressed.

A few commenters recommended finalizing a modifications provision similar to the one proposed because case law supports allowing modifications to conditions (*See, e.g., Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008); *Airport Communities Coal. v. Graves*, 280 F. Supp. 2d 1207, 1214-17 (W.D. Wash. 2003)).

> **Agency's Response: The Agency recognizes that CWA section 401 does not expressly authorize or prohibit modifications of certifications. However, EPA concludes that the best interpretation of section 401 is one that allows for modifications with reasonable guardrails like the ones in this final rule. This interpretation is supported by the text of section 401, which envisions the certifying authority participating in the Federal licensing or permitting process after the issuance of a certification, *see* 33 U.S.C. 1341(a)(3)-(4), as well as Congressional intent and relevant case law. *See* Section IV.I of the final rule preamble for further discussion on the Agency's rationale for finalizing a modification provision.**

9.1.1 State Law/Judicial Process

Some commenters argued that EPA must change the proposed modification provision because state regulations and administrative procedures clearly outline and allow for revocation, stays, remands and vacaturs of certification decisions. *See, e.g.*, 15A N.C. Admin. Code 2H.0507(d); Or. Admin. R. 340-048-0050. A few commenters asserted that the state regulatory processes for modification or revocation of state water quality certification should not be supplanted by EPA's regulation. One commenter argued that limits to a state or Tribe's ability to modify or revoke certification decisions in accordance with their state or Tribal laws exceeds EPA's rulemaking authority. Another commenter recommended deleting section 121.10(a) because the provision interferes with state or Tribal laws that allow a certifying authority to reconsider and change the nature of their decisions. One commenter suggested amending proposed section 121.10(b) to allow the certifying authority to modify a certification in accordance with applicable state or Tribal law. One commenter suggested that EPA take no position on the ability of states and Tribes to revoke or modify their decisions because state and Tribal regulations may provide for the ability to revoke or modify their decisions.

A few commenters suggested that a certification modification would be necessary if a certification decision is subsequently stayed, remanded, or vacated by a court or appropriate state administrative review board, thereby necessitating reconsideration by the certifying authority. One commenter recommended that EPA should clarify that it did not intend to suggest that stayed certifications may be modified in the absence of a court order addressing the merits of the challenged requirement. Another commenter argued that EPA should acknowledge that certifications or waivers may be modified or revoked as required by judicial review, otherwise the regulation would be inconsistent with the respect for state law and institutions embodied in section 401. One commenter expressed that a prohibition on changing the nature of the decision could prevent meaningful administrative or judicial review of initial denials of certification. Another commenter asserted that placing constraints on a state or Tribe's ability to revoke or modify a certification decision, particularly if directed to do so by a state or Tribal tribunal on remand following appeal, would interfere with the operation of state or Tribal law that governs the substance of certification. *See American Rivers*, 129 F.3d at 102. One commenter asserted that

administrative or judicial review provide procedural protections for project proponents and community stakeholders, and it is an important element of a cooperative federalism system. The commenter argued that where there are reservations of authority under state regulations for administrative or judicial review, agreement from the Federal agency or the project proponent should be unnecessary. Furthermore, the commenter recommended that EPA remove the limitations for a grant of certification to become a denial of certification and vice versa because administrative or judicial decisions may warrant such a change in the nature of the original certification decision.

Some commenters stated that certifying authorities should be able to modify their certification decisions in light of changes in state or Tribal water quality requirements, such as upgraded water quality standards. One commenter recommended that EPA clarify that reservations of authority are permissible to allow certification modification for water quality protection when revisions to water quality standards occur. The commenter noted that the proposed rule preamble acknowledges, in issuing a certification, a certifying authority is stating that the activity as a whole will comply with water quality requirements for the life of the license or permit, not just at the time of issuance. Conversely, a few commenters disagreed that certification modifications should be allowed for changes in state or Tribal law because state law can change frequently and projects should rely on the law in place at the time the Federal license or permit is issued.

Another commenter asserted that the proposed modification provision would unnecessarily increase the burden on certifying authorities where their regulations already allow for modifications to certification decisions. Another commenter highlighted the fact that in some cases, a certifying authority's procedures may allow a modification with minimal review and no public notice, while in some cases a modification request may be treated as new and subject to the certifying authority's public notice requirements.

> **<u>Agency's Response</u>: In response to comments regarding revoking or reversing certification decisions, the Agency recognizes the ongoing need to adapt to new and changing information after a certification decision has been issued, but the Agency is declining to broaden the final rule's modification provision to be a mechanism to revoke or reverse a certification decision. As discussed in section IV.I of the final rule preamble, while the statutory language and legislative history appear to countenance a role for certifying authorities after a certification is issued, EPA concludes that this role does not include unilateral action to revoke or reverse the decision. In response to commenters, EPA is clarifying that this statement—and more broadly section 121.10 of this final rule—are not meant to address certifying authority action on a request for certification upon remand from a court or administrative tribunal of the certifying authority's initial action on the request. Section 121.10 is also not intended to address or govern court vacatur of certification decisions, or action by a certifying authority after a court vacatur (although the Agency notes that it is unclear how a vacated certification decision could be "modified"). This final rule does not address the situations of vacatur or remand by a court or administrative tribunal. *See also* the Agency's Response to Comments in Section 9.3.3. Furthermore, this final rule's modification provision is not meant to address a certifying authority's action on a state or Tribally- issued license or permit, which sometimes**

concurrently acts as the state or Tribe's section 401 certification decision. Such matters are outside the scope of this rulemaking.

The Agency appreciates commenter input regarding scenarios that may benefit from a modification provision. After reviewing public comment, EPA is not finalizing a list of scenarios that may warrant certification modification because the certifying authority and Federal agency are in the best position to work together to determine whether a new certification or a certification modification is appropriate in a given situation. *See* Section IV.I of the final rule preamble for further discussion on the Agency's rationale for not finalizing a list of scenarios that may require modification.

The Agency disagrees that the modification provision would unnecessarily increase the burden on certifying authorities where their regulations already allow for modifications to certification decisions. Prior to the 2020 Rule, the Agency's longstanding 1971 Rule allowed certification modifications to occur after a certification was issued, provided the certifying authority, Federal agency, and the EPA Regional Administrator agreed to the modification. 40 CFR 121.2(b) (2019). Similar to the 1971 Rule, the final rule's modification provision relies on an agreement between the certifying authority and Federal agency. However, the final rule does not include a role for EPA in the certification modification process where the Agency is neither the certifying authority nor the Federal licensing or permitting agency. This should simplify any negotiations or agreements and make the modification process less burdensome. Additionally, the Agency notes that the final rule provision at 40 CFR 121.10 also does not preclude Federal agencies from developing a process for coordinating with certifying authorities on certification modifications within the framework provided in this final rule.

In response to the comment regarding certifying authority procedures for modifications, the Agency recognizes that some certifying authorities may be required under their regulations to make any proposed modifications to their certification decisions available for public notice and comment. This final rule does not preclude certifying authorities from following their own modification procedures for certifications on Federal licenses or permits, consistent with this final rule.

9.2 Impact of Modifications

9.2.1 Administrative Burden

Some commenters expressed support for the proposed modification process, calling it a significant improvement over the 2020 Rule because the proposed process will reduce administrative burdens on project proponents and certifying authorities. One of these commenters also asserted that modifications would allow the project proponent to avoid completing procedural requirements more than once and ensure a cooperative relationship between the project proponent and certifying authority.

However, one commenter asserted that the limits of the proposed rule may burden the project proponent with the requirement to obtain a new certification if the Federal agency disagrees with a project proponent's request to a certifying authority to modify the scope and conditions of its water quality certification.

> **Agency's Response: EPA agrees that the modification provision in the final rule will reduce administrative burdens. The modification provision of the final rule will restore flexibility and efficiency where certifying authorities and Federal agencies find it appropriate to update a previously issued grant of certification rather than restart the section 401 certification process in response to changed circumstances or new information. However, EPA does not expect the modification provision to address every issue that may arise after a certification has been granted.**
>
> **In response to commenter concerns regarding project proponent burden where the Federal agency disagrees with a proposed modification, EPA expects that Federal agencies will not unreasonably withhold agreement to a modification. However, beyond modifications to existing certifications, there may be circumstances that warrant the submission of a new request for certification, such as if certain elements of the activity (e.g., the location or size of the activity) change materially in a manner that could impact water quality after a project proponent submits a request for certification. If the activity changes so materially after the request for certification as to constitute a different activity, this may warrant a new request for certification. *See* Section IV.I of the final rule preamble for further discussion.**

9.2.2 Environmental Benefits, Long Term Projects, and Unanticipated Impacts

Commenters asserted that the ability to modify conditions is vital to certifying authorities' ability to protect their water quality, and that they should have the ability to re-visit conditions to ensure that they are protecting water quality as conditions change as a result of climate change and other factors. Some commenters suggested that modifications are critical to addressing changing facts on the ground, such as listing of a new species affected by the project as threatened or endangered, and the impacts from climate change, including sea-level rise, increasing intensity of storms, floods, and droughts, and changes to the hydrology of the affected water resource.

A few commenters described the need for a "common sense" modification provision that ensures protection of water quality and continued compliance with water quality certifications. One commenter argued that a process for certification modifications provides an off-ramp to monitoring conditions for project proponents because the project proponent can use adaptive management and reporting to meet water quality requirements only as long as the information is necessary. A few other commenters argued that certifying authorities are unable to anticipate all effects from a discharge on water resources and new information regularly becomes available after certification was granted, denied, or waived. One commenter asserted that modifications are important for taking action to protect water quality from harms that were unknown or unforeseen when the certification was originally issued. One commenter also noted

that modifications would allow for incorporation of emerging, new technology developed after a certification is issued.

A few commenters highlighted the need for certification modifications, especially for projects with longer lifespans (such as large pipelines and hydropower projects with FERC licenses for 30-50 years). These commenters argued that there should not be a limit on the period when certification modifications can be addressed because some projects are ongoing for a long time, during which time water quality concerns may arise. One commenter noted that FERC licenses hydropower dams for 30–50 years and asserted that environmental conditions will inevitably change during the license term. The commenter asserted that modifications may be warranted based on the availability of new information that was not available at the time of certification or changed circumstances, such as climate change, extreme hydrologic events, cumulative impacts from other projects, flow diversions, the listing of species under the Endangered Species Act, changes in existing uses including recreation, and project impacts on aquatic or terrestrial impact over time. Another commenter asserted that reopener conditions are important to address significant, ongoing impacts from non-Federal dams, impacts which climate change is predicted to compound over the term of a FERC license.

One commenter argued that without a mechanism for certification modifications, which can be used as an adaptive management approach towards compliance, certifying authorities may have to wait several years or decades to compel compliance with water quality requirements. Another commenter gave an example of a project that received a waiver of certification in 1982; without the ability to reopen or modify the waiver, the commenter asserted that the certifying authority would continue to not be able to review the project for water quality impacts over the course of 60 years, during which time, science and technology would change.

A few commenters noted that modifications to certifications allows for flexibility to adapt to dynamic situations, such as larger, phased projects with multi-decade timeframes. A few commenters acknowledged that reopener conditions or reservations of authority were used historically to certify projects that are multi-year or phased because the full scope of project information may not be available during the first few years or first phase of a project.

> **<u>Agency's Response</u>: After considering public comment, the Agency is promulgating a final rule at section 121.10 that provides the opportunity for certification modification at any point after certification issuance (until the expiration of the Federal license or permit), provided the Federal agency and the certifying authority agree in writing prior to modifying the grant of certification. As commenters noted, changes to an activity that have significant implications for water quality can occur at any point in time after a certification is granted. Accordingly, the Agency finds this approach best reflects the reality that projects change over time, and provides flexibility for project proponents, certifying authorities, and Federal agencies to adapt to changing circumstances without needing to reinitiate the certification process.**
>
> **Importantly, the final rule provision for modifications to a grant of certification balances the certifying authorities' need for flexibility to protect water quality and the potential**

reliance interests of project proponents and Federal agencies once the certifying authority has issued a grant of certification. Accordingly, EPA intends that a modification to a grant of certification means a change to an element or portion of a certification or its conditions—it does not mean a wholesale change in the type of certification decision or a reconsideration of the decision whether to certify (*e.g.*, changing a grant of certification to a denial of certification). While the final rule text does not address modifications to denials or waivers for the reasons discussed in Section IV.I of the final rule preamble, EPA nonetheless concludes for the reasons mentioned in the final rule preamble that section 401 does not authorize a certifying authority to "modify" a denial or waiver into a fundamentally different decision such as a grant of certification.

Ultimately, certifying authorities and Federal agencies are encouraged to work together to address new information or changed water quality conditions throughout the life of the project such that Congressional intent behind section 401—enabling states to protect their water quality—can be preserved.

9.2.3 Reliance Interest

A few commenters argued that the proposed modification provision may reduce project proponent reliance interests if a certification can be changed after the reasonable period of time. One commenter asserted that reducing the ability to rely on a water quality certification will cool investment in projects that require section 401 certification, and suggested EPA remove the modification provision in the final rule. One commenter suggested that it may be physically or practically impossible to change a major infrastructure project if major changes to a certification occur after the construction of the project is complete, therefore the commenter recommended that EPA finalize a provision limiting major modifications. Another commenter opposed any modification provision, even in the "reasonable period of time," asserting that modifications are unjust and unreasonable and create uncertainty that would undermine project proponent's reliance interest.

One commenter stated that an expansive modification process could generate severe issues for construction and operation planning and could risk legal disputes as to finality and reliance.

One commenter asserted that the definition in the proposal preamble of a "modification" as a "change to an element or portion of a certification or its conditions" is too broad and would afford certifying authorities with the ability to impose a de facto denial through onerous changes well after the project proponent acted in reasonable reliance on the initial certification.

<u>Agency's Response</u>: The Agency disagrees with commenter assertions that a modification provision such as the one in this final rule would significantly impact project proponent reliance interests. EPA is finalizing a provision for modifications to a grant of certification that balances the certifying authorities' need for flexibility to protect water quality and the potential reliance interests of project proponents and Federal agencies once the certifying authority has issued a grant of certification. *See* the Agency's Response to Comments in

Section 9.2.2 and Section IV.I of the final rule preamble for further discussion on limits to modifications of certification decisions.

The Agency also disagrees with commenters asserting that a modification provision would "cool investment" or generate issues in construction and operation planning. In fact, relative to the 2020 Rule, the Agency expects the reintroduction of a certification modification provision to reduce burden on project proponents by adding the flexibility they need to adapt to changing circumstances or new information, without limiting them to submission of a new request for certification when the Federal agency has not established other modification mechanisms.

The Agency emphasizes that this final rule encourages certifying authorities, project proponents, and Federal agencies to communicate early and often in the certification process (e.g., pre-filing meeting provision) to ensure parties develop a common understanding regarding the proposed project. Such communication may reduce the need for certification modifications. In the event a modification occurs, the Agency recommends that certifying authorities engage with the stakeholders who will be impacted by a modification to the certification; some certifying authorities may even be required under their regulations to make any proposed modifications to their certification decisions available for public notice and comment. Although section 121.10 as finalized does not provide the project proponent with a formal role in the modification process, it also does not prevent engagement with the project proponent before or after the certifying authority and Federal agency have agreed that the certifying authority may modify the previously granted certification.

9.3 Types of Modifications

9.3.1 Fundamental Changes in Certification Decisions

Commenters provided differing views on whether EPA should limit the nature of a modification to a certification decision. Some commenters supported the proposed rule's approach to limiting the circumstances in which a certifying authority may modify their certification decision after the reasonable period of time while still providing flexibility to adapt to new information. A few commenters explicitly agreed with EPA that modifications may not fundamentally change the certification action.

Conversely, a couple of commenters disagreed with the proposed rule's approach to changing certification decisions through modifications. One commenter disagreed that a modification should never result in a change in decision (e.g., changing a grant to a denial) and asserted that it is necessary where the discharges are substantially more severe than proposed; new information is obtained which contradicts the rationale for the certification decision; violations of related state regulations; submittal of fraudulent information; or failure to comply with conditions which are essential for compliance with water quality standards.

One commenter specifically discussed denials and recommended that the final rule should omit the proposed prohibition on revoking or modifying a denial of certification or limit its application to circumstances in which the Federal agency has denied the license or permit application based on the denial of certification. The commenter asserted that no such prohibition is required by or can be inferred from section 401. The commenter asserted that the proposal's justifications of "reliance interests and regulatory certainty" do not apply if the Federal agency has not yet denied the license or permit application based on the denial of the request for certification. The commenter further asserted that the proposed prohibition could prevent meaningful administrative or judicial review of a certifying authority's initial denial of certification. The commenter asked, if the applicant were to litigate successfully to invalidate the denial, does the proposed rule mean that the court decision somehow does not "count"? The commenter asserted that this would seem to present a serious due process problem.

A few commenters explained that the only circumstance in which converting a certification into a waiver might create detrimental reliance is that in which the Federal agency has issued the license or permit with the conditions of the certification; however, the Federal agency may be able to modify their license or permit to remove the waived conditions. Accordingly, one of these commenters recommended that the final rule should omit the prohibition on waiving certification after an initial decision to grant (with or without conditions).

> **Agency's Response: As discussed in Section IV.I of the final rule preamble, EPA intends that a modification to a grant of certification means a change to an element or portion of a certification or its conditions—it does not mean a wholesale change in the type of certification decision or a reconsideration of the decision whether to certify (e.g., changing a grant of certification to a denial of certification). Section 121.10(b) of the final rule makes this clear by providing that a certifying authority may not—through the final rule's modification provision—revoke a grant of certification or change it into a denial or waiver. Constraining certifying authorities from fundamentally changing their certification action through a modification process recognizes reliance interests and promotes regulatory certainty. Further, EPA has concerns that changing the fundamental nature of the certification action (e.g., change a grant, denial, or waiver to something entirely different) may be inconsistent with the Congressional admonition to act on a certification request within the statutory reasonable period of time. *See* Section IV.I of the final rule preamble for further discussion on the Agency's rationale; *see also* the Agency's Response to Comments in Section 9.2.2 and 9.2.3.**
>
> **In response to the commenters recommending that the final rule should omit the proposed prohibition on revoking or modifying a denial of certification or converting a grant of certification into a waiver, the Agency notes that the final rule does not address these situations and addresses only modifications to a grant of certification. Commenters indicated much greater interest regarding modification to grants of certification, and very little interest regarding modifications to a denial or waiver. Commenters also expressed confusion regarding EPA's proposed language regarding modifications to a denial or waiver.**

9.3.2 Scope of Modification

Some commenters suggested that modifications should be limited in scope. Some commenters recommended that modifications should be limited to non-substantive issues, such as a change to correct a typographical error, fixing scrivener's errors, extending certain dates, or a change to the point of contact for the project and, according to a few commenters, not a tool for reconsidering or reopening an already approved certification. Similarly, another commenter recommended retaining a certification modification process where the project changes but does not necessitate a change to the underlying Federal license or permit.

Conversely, other commenters recommended that EPA explicitly allow for modifications when significant changes occur. A few commenters noted that certification modifications may be appropriate or warranted to address material changes to the certified project itself (e.g., change in project design for construction/operation/maintenance/mitigation, the nature of the licensed or permitted discharge may change, or the discharge location may change). One commenter suggested that EPA explicitly allow modifications of certifications where new information or project changes of a substantive nature arise, particularly where such information or changes also require a modification or amendment of a corresponding Federal approval. Another commenter expressed support for a collaborative modification process but requested that EPA add language to specify that modifications should only be requested when a significant change occurs. The commenter suggested using section 401(a)(3) as a model for such language.

> **Agency's Response: As an initial matter, EPA wishes to emphasize that the same scope of section 401 that applies to a certification decision also applies to any subsequent modification to a grant of certification. *See* 40 CFR 121.3(b). After reviewing public comment, EPA is not finalizing a list of scenarios that may warrant certification modification because the certifying authority and Federal agency are in the best position to work together to determine whether a new certification or a certification modification is appropriate in a given situation. Although EPA understands the perspective of most commenters that it may be helpful to have examples of circumstances where a modification to a certification may be appropriate, EPA is declining to include a non-exhaustive list in the regulatory text so that certifying authorities and Federal agencies retain the flexibility to determine their certification modification needs after considering the local water quality and project-specific context. Even without a list in the regulation, EPA still expects that the Federal agency will not unreasonably withhold its agreement to modifications, especially for administrative edits, such as correcting typographical errors, changing a point of contact, or adjusting a certification's expiration date to reflect an updated license or permit expiration date. *See* Section IV.I of the final rule preamble for further discussion, including limits to modification of certification decisions.**

9.3.3 Unilateral Modifications, Reopener Conditions, and the Ability to Revoke Certifications

Some commenters argued that certifying authorities should be allowed to unilaterally modify, revoke, or "reopen" certifications for good cause, including unforeseen water quality impacts, changed environmental conditions, especially those related to climate change, and any other new information.

One commenter, citing to CWA section 501(a), asserted that a prohibition on unilateral modifications is not found in the statute and runs counter to the regulatory scheme Congress established in section 401. The commenter asserted that if EPA wishes to obtain concurrence from the Federal permitting agency when EPA is acting as the certifying authority, it is free to do so and write regulations to that effect.

Several commenters discussed unilateral modifications in certain circumstances. A few commenters asserted that certifying authorities should be allowed to unilaterally modify a grant of certification into a denial of certification if that is deemed necessary to protect water quality. One commenter specifically stated support for unilateral modification in the circumstances identified in the previous 40 CFR 124.55(b) for EPA-issued NPDES permits (i.e., if there is a change in state law or regulation upon which certification is based or if a certification is stayed or remanded by a court or state board).

Some commenters stated that EPA should allow for certification revocations. A few of these commenters recommended allowing revocations when done in accordance with the certifying authority's laws and/or regulations. One commenter suggested that EPA change the provision to allow for a denial of certification to be modified or revoked prior to the finalization of a Federal license or permit denial. Another commenter recommended allowing a granted certification to be revoked or modified into a denial of certification when new information is received pertaining to a project, which may substantively change the scope of work that may result in a discharge. Another commenter suggested that EPA should add language to clarify that the certifying authority retains the right to revoke the certification in circumstances where the project proponent provided false or misleading information on which the certification decision was based.

Some commenters specifically addressed the use of reopeners in certifications. One commenter asserted that EPA should not restrict the use of reopener provisions. One commenter recommended that the final rule make clear that certifying authorities can reopen certification based on a showing of changed circumstances and ongoing effects of project operations fail to meet water quality standards. One of these commenters asserted that certifications often include reopener and similar conditions and cited to a few state regulations that the commenter viewed as authorizing reopeners or unilateral modifications. Another commenter asserted that virtually every condition of one specific state certifying authority is subject to further modification and provided an example of one such certification where the certifying authority reserved the right to add or modify the conditions of certification under various specified circumstances. One commenter stated that the proposed rule minimizes the enforcement role of the Federal agency and the certifying authority, therefore, the inclusion of reopener conditions in a certification would allow a certifying authority to address water quality concerns as long as the permit and certification is in effect.

A few commenters agreed with EPA's proposed approach that would not allow unilateral modifications. One commenter asserted that Federal permitting and licensing decisions are final agency actions and project proponents rely upon their durability to make critical long-term decisions about project feasibility, construction and operations. One commenter identified case law the commenter believed supports allowing modifications with the approval of both the certifying authority and the Federal agency. *See, e.g., Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008); *Airport Communities Coal. v. Graves*, 280 F. Supp. 2d 1207, 1214-17 (W.D. Wash. 2003). However, despite expressing opposition to unilateral modifications, one commenter was open to a limited exception for purely clerical errors and the like.

A few other commenters recommended that the final rule should prohibit "reopener" and similar certification conditions that purport to allow certifying authorities to unilaterally add or revise certification requirements after the reasonable period of time ends or after the issuance of the Federal license or permit. A few commenters asserted that reopener conditions are plainly inconsistent with section 401 because they allow certifying authorities to make certification decisions after the maximum one-year period allowed by the statute and after the Federal license or permit had been issued. The commenters continued that reopeners transform section 401's limited grant of authority to states to certify Federal license and permit applications into an ongoing regulatory role. Another commenter asserted that "reopeners" in certifications are contrary to the express and proscriptive provisions for post-certification authority that Congress provided in CWA sections 401(a)(3) and 401(a)(4).

A few commenters argued that "reopener" conditions place an increased burden on the project proponent and suggested that the certifying authority should have to prove that changes or modifications to a certification will not have a significant impact on the project.

One commenter said states have also expressly reserved their authority to reopen the certification in accordance with state law to assure the hydropower project's compliance with water quality requirements over the 30- to 50-year license term. The commenter further added that reopener clauses are not unique to certifications issued under section 401 and that several of FERC's standard license articles reserve its authority to reopen a license for a variety of reasons. As another example, the commenter noted that Biological Opinions issued pursuant to formal consultation requirements under Endangered Species Act section 7 generally describe the circumstances in which the Federal agency may be required to reinitiate consultation. The commenter asserted that such clauses allow projects to proceed despite the inherent uncertainty involved in predicting project impacts on dynamic river systems, which are also more vulnerable to accelerated changes in climatic conditions.

> **<u>Agency's Response</u>: The Agency recognizes the ongoing need to adapt to new and changing information about water quality impacts of a project after a certification decision has been issued, but the Agency is declining to broaden the final rule's modification provision to be a mechanism to revoke or reverse a certification decision. *See* the Agency's Response to Comments in Sections 9.1, 9.2, and 9.3.1.**
>
> **Consistent with the Agency's longstanding approach to certification modifications, EPA is finalizing the ability for a certifying authority to modify a grant of certification (with or**

without conditions) provided that the Federal agency and certifying authority agree in writing that the certifying authority may modify the certification. Accordingly, EPA's final rule does not authorize certifying authorities to unilaterally (*i.e.*, without Federal agency agreement) "reopen" or modify a certification decision. The Agency disagrees with commenters who stated that certifying authorities should be allowed to unilaterally modify or revoke a section 401 certification decision if they have asserted this ability through a "reopener" condition incorporated into the original certification decision. Certifying authorities cannot bootstrap themselves greater authority to modify a certification beyond what is authorized in this final rule at section 121.10. EPA is the Federal agency tasked with administering and interpretating the CWA, *see* 33 U.S.C. 1351(d), 1361(a), including section 401, *see Ala. Rivers Alliance v. FERC,* 325 F.3d 290, 296-97 (D.C. Cir. 2003); *NYSDEC,* 884 F.3d at 453, n.33, and EPA's interpretation supersedes any contrary interpretation taken by a certifying authority. However, EPA wishes to emphasize the distinction between reopener clauses and adaptive management conditions, the latter of which are permissible under the final rule. The text of an adaptive management condition does not change after certification is granted. This promotes regulatory certainty, in contrast with a unilateral modification pursuant to a "reopener" clause. *See* section IV.F for further discussion of adaptive management conditions.

9.4 When Modifications May Occur

A few commenters argued that the certification modification process should not be allowed to upend the licensing or permitting process once a license or permit is issued pursuant to an established process. One commenter opposed open ended modification timeframes and suggested that the temporal limit for modification be the day the Federal decision is issued to establish finality. Similarly, another commenter asserted that modifications should not occur after a project that is in possession of valid permits commences construction or becomes operational, except in extreme circumstances. Another commenter expressed the view that allowing modifications without any regard to project timelines is very problematic for construction and operational planning and stated there should be limits on the timeframe for modifications, such as limiting modifications to ongoing projects only or by limiting modifications to those initiated by the project proponent.

One commenter asserted that EPA should clarify that the certifying authority cannot modify its certification after the issuance of the Federal license or permit that prompted the request for certification. The commenter cited case law it viewed as supporting the position that modification after permit issuance is not permissible. *See Airport Cmtys. Coal. v. Graves*, 280 F.Supp.2d 1207, 1215 (W.D. Wash. 2003) ("the plain language of the statute . . . reflects clear congressional intent that federal agencies only be bound by state certification conditions issued within one year after notice"); *City of Shoreacres v. Tex. Com. of Env't Quality*, 166 S.W.3d 825, 834-35 (Tex. Ct. App. 2005) ("states are not authorized under the Clean Water Act to unilaterally revoke, modify, or amend a state water quality certification after the certification process for a federal permit is complete").

A commenter asserted that linking the Federal agency and certifying authority action should limit the possibility for modifications because under Federal precedent, the CWA bars Federal agencies from waiting more than a year to issue a permit even when a certification modification occurs after 1 year.

Many commenters supported there being no time limit for modifications. These commenters expressed the view that modifications are necessary to reflect changing conditions, scientific understanding of water quality effects, and changes to the project. Multiple commenters explained that placing a time limit on modifications may impede the project proponent's ability to remain in compliance on projects with unanticipated or unpredictable project scope and schedule changes and that restarting the certification process because of a project change during construction could result in significant impacts to project costs and public safety and would not be efficient, effective, or predictable. One commenter stated that environmental or regulatory circumstances may change at any time between issuance and expiration of the certification.

Agency's Response: After considering public comment, the Agency is promulgating a final rule at section 121.10 that provides the opportunity for certification modification at any point after certification issuance (until the expiration of the Federal license or permit), provided the Federal agency and the certifying authority agree in writing prior to modifying the grant of certification. As commenters noted, changes to an activity that have significant implications for water quality can occur at any point in time after a certification is granted. Accordingly, the Agency finds this approach best reflects the reality that projects change over time and provides flexibility for project proponents, certifying authorities, and Federal agencies to adapt to changing circumstances without needing to reinitiate the certification process.

To the extent that commenters are asserting that case law bars any certification modification after permit issuance, the Agency disagrees. While the Agency agrees that certifying authorities may not unilaterally modify or revoke certification decisions once they are issued, *see* the Agency's Response to Comments in Section 9.3, the Agency finds that a grant of certification may be modified after its issuance (including after issuance of the Federal license or permit) if agreed upon by the Federal licensing or permitting agency. Neither case cited by the commenter reaches a different conclusion. *See Airport Cmtys. Coal. v. Graves*, 280 F.Supp.2d 1207, 1217 (W.D. Wash. 2003) (holding that section 401 only required the federal agency to incorporate certification conditions issued within one year from the request for certification and the Federal agency could use its discretion to incorporate conditions issued after that point); *City of Shoreacres v. Tex. Com. of Env't Quality*, 166 S.W.3d 825, 834-35, 837-38 (Tex. Ct. App. 2005) (finding that the certifying authority could not unilaterally place additional conditions on the certification after the certification process was complete).

The Agency disagrees with the one commenter asserting that the CWA bars Federal agencies from waiting more than a year to issue a permit. Under section 401, when a certifying authority receives a request for certification, the certifying authority must act on that request within a "reasonable period of time (which shall not exceed one year)." 33

U.S.C. 1341(a)(1). The plain language of section 401 does not extend this temporal limitation to the issuance of a Federal license or permit. Once a certification or waiver is issued, and the section 401(a)(2) process is complete, the Federal agency may decide whether or not to proceed with the issuance of the Federal license or permit.

9.4.1 Statutory "Reasonable Period of Time" and Modifications

Some commenters argued that the text of the CWA includes temporal limits on the certifying authority's authority over projects subject to section 401 and recommended that the final rule should not include a provision for certification modifications, especially because it conflicts with the one-year limit for certifying authority action. A few commenters argued that Congress defined and precisely time-limited the ability of certifying authorities to review the potential impacts of federally licensed or permitted projects. These commenters argued that the ability to modify or "reopen" a certification decision renders the express time limits Congress imposed in section 401(a)(1) meaningless. One commenter argued that EPA should not finalize a modification provision; however, the commenter recommended that if a modification provision is finalized, no modifications to certifications should occur after the final Federal license or permit is issued. One commenter argued that any modification must occur within 365 days of receipt of the certification request and before the activity has commenced. Another commenter stated that if modifications continue to be allowed only within the reasonable period of time, then the final rule should include a requirement that the Federal agency must notify the certifying authority immediately after any deficiencies are identified.

Conversely, a few commenters asserted that modifications are distinct from the original certification "action," and recommended that EPA clarify that certification modifications should not be limited to the reasonable period of time described in section 401(a)(1). Several commenters similarly expressed the view that the timeframe for modifications should not be limited to the reasonable period of time. One of those commenters asserted that the rule should allow for modification outside the reasonable period of time if new information about a project becomes available because it builds efficiency into the process and preserves time and resources while protecting water quality. Another commenter asserted that modifications should be allowed for the duration of the certification, because some projects either last decades or require multiple years of construction or several phases of work where substantive project changes may be identified. The commenter noted that hydroelectric projects routinely operate under adaptive management principles and anticipate changes to the project occurring during the span of the license, and argued that as a result, it would be reasonable for the rule to allow certification modifications when project operations are proposed that trigger new or expanded water quality impacts. Similarly, another commenter asserted that certifications should be able to be modified at any point during the active period of the permit.

One commenter expressed support for finalization of a modification provision, as long as the certifying authority does not have the ability to unilaterally impose new conditions outside of the statutory one-year reasonable period of time.

<u>Agency's Response</u>: EPA disagrees with commenters asserting that the ability to modify would render the timeframes in section 401(a)(1) meaningless. Rather, EPA concludes that

the best interpretation of section 401 is one that allows for modifications with reasonable guardrails like the ones in this final rule. *See* Section IV.I of the final rule preamble for further discussion on these guardrails. This interpretation is supported by the text of section 401, which envisions the certifying authority participating in the Federal licensing or permitting process after the issuance of a certification. *See* 33 U.S.C. 1341(a)(3)-(4). *See Keating v. FERC*, 927 F.2d 616, 621-22 (D.C. Cir.1991) (summarizing section 401(a)(3)); *see also* 115 Cong. Rec. 9257, 9268-9269 (April 16, 1969) (discussing a hypothetical need for a state to take another look at a previously certified federally licensed or permitted activity where circumstances change between the issuance of the construction permit and the issuance of the operation permit).

The Agency does not view modifications as contrary to the text of, or Congressional intent supporting, the reasonable period of time limitation. First, on its face, the reasonable period of time limitation only applies to the certifying authority's original action on the request for certification. *See* 33 U.S.C. 1341(a)(1) (requiring a certifying authority to act on a request for certification within a reasonable period of time not to exceed one year); *see also* 40 CFR 121.7(a)-(b) (interpreting the term "to act on a request for certification" to mean the certifying authority must make a decision to grant, grant with conditions, deny, or expressly waive certification within the reasonable period of time). The statute is silent regarding subsequent modifications. Second, in imposing the reasonable period of time limitation, Congress was concerned by the potential for the certifying authority's "sheer inactivity" to delay the project. *See* H.R. Rep. 92-911, at 122 (1972). That concern is not present with modifications to a grant of certification because the certifying authority will have already acted on the request.

***See* Section IV.I of the final rule preamble for further discussion on limits to modifications of certification decisions, including unilateral modifications; *see also* the Agency's Response to Comments in Sections 9.3 and 9.4.**

9.5 Participants in the Modification Process

9.5.1 Federal Agency Involvement in The Modification Process

Many commenters expressed concern over the Federal agency involvement in the proposed modification process for various reasons. A few of these commenters asserted that Federal agency involvement could be complicated. One commenter asserted that modifications are frequently needed for minor excursions into time of year restrictions for CWA section 404 permits and asserted that the state should be able to make such modifications with notification to the Federal agency and approval of the appropriate state or Federal fish and wildlife agency. The commenter suggested that the rule could include a presumption that a modification becomes final if the Federal agency does not comment within a certain timeframe (e.g., 5 days), noting that such modification requests are made during active dredge activities and are needed quickly. A few commenters argued that the process for obtaining Federal agency agreement is ambiguous and will be interpreted in a manner more restrictive than EPA intends.

Some commenters asserted that the certifying authority is in the best position to determine if project activities will meet water quality requirements, and that, conversely, Federal permitting agencies are often poorly equipped to know how to protect the environment, especially when that is not their agency mission. Another commenter expressed the view that the Federal agency's role should be removed, stating that a modification reflects the certifying authority's input and interest in protecting state water quality. A few commenters suggested that needing the Federal agency's consent will limit the flexibility of certifications and permits to adapt to changing circumstances which EPA previously indicated it wanted to prevent through this rulemaking. One commenter asserted that failure to allow states and Tribes to modify certifications as they see fit may lead to two unintended consequences. First, the commenter stated, when faced with the prospect of being forced to allow a project to operate for decades with no opportunity to adapt to changing circumstances, some certifying authorities may be more inclined to deny certifications outright. Second, according to the commenter, to mitigate against an inability to amend or modify certification, a prudent certifying authority may be compelled to add additional measures to protect against future harm.

Some of the commenters who supported the proposed process for Federal agency and certifying authority agreement asserted that the Federal agency should not have a role in determining the specific language of a modification for various reasons, including concern that adding a new conferencing and agreement process could lead to delays and the fact that the Federal agency will not review certification content during the original certification issuance. One commenter asserted that requiring the Federal agency to agree to the language would allow Federal agencies to usurp the state or Tribe's authority. Conversely, another commenter recommended that EPA adopt an approach where the actual language of the certification modification would be agreed upon by both the Federal agency and the certifying authority. The commenter asserted that this would foster cooperative federalism as Congress intended.

A few commenters argued that the proposed modification provision is contrary to Congressional intent to preserve the states' primary authority over protection of water quality and the ability to impose conditions, including "reopeners," outlined in section 401(d). *See S.D. Warren v. Bd. of Envtl. Prot*., 868 A.2d 210, 218 (Me. 2005) (explaining that the legally permissible "reopeners" were included as a precaution in case the conditions instituted are not sufficient to ensure compliance with state water quality standards and section 303 limitations). Another commenter argued that giving Federal agencies veto power over modifications jeopardizes the balancing act between state and Federal agencies. *See Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Congress intended that the states would retain the power [under Section 401] to block, for environmental reasons, local water projects that might otherwise win federal approval.").

One commenter asked that EPA clarify in the final rule what happens when the certifying authority and Federal agency do not agree on a certification modification and whether or not the matter must be decided in a court of law.

One commenter suggested that Federal agency concurrence should not be necessary for a modification requested by the project proponent if the certifying authority also agrees with the need for the modification.

A few commenters recommended that the final rule include a provision for modifications to certifications that includes more deference to the certifying authorities, including a few commenters who suggested that EPA finalize a provision that does not restrict the ability of certifying authorities to modify or revoke certifications by requiring Federal agency agreement. One commenter stated that as long as the certifying authority explains the need for the modification, the Federal agency should not have a veto role and should incorporate the modification into the Federal license or permit. Another commenter opposed the inclusion of section 121.10(b) because section 401 certifications are essentially state permits and are not subject to Federal review or veto.

Conversely, multiple commenters supported the proposed process whereby the Federal agency and the certifying agency agree that changes are needed, without involving the project proponent or EPA. One commenter requested that EPA clarify that the state and the Federal licensing or permitting agency may outline standard practices for modifications to issued certifications in a Memorandum of Agreement to avoid the burden of seeking agreement for each modification to an existing certification. The commenter noted that such written agreement should address anticipated complications associated with coordination, including which agency (state or federal) acts first in the coordination of modifications, circumstances in which modifications to a certification also trigger modifications to the Federal permit, and considerations of public notice during a certification modification.

One commenter recommended that EPA remove the requirement that the Federal agency must agree in writing that the certifying authority can modify the grant of certification because it may be difficult to obtain given heavy workloads and competing priorities or lack of interest. The commenter expressed concern that prevention of modifications due to non-responsiveness would neither promote the protection of water quality nor be in the interest of cooperative federalism. The same commenter also expressed concern that a Federal agency, when acting as a project proponent, could use the proposed approach to prevent modifications. Instead, the commenter recommended revising the rule to either require notification and consultation with the Federal agency or provide the Federal agency with the opportunity to object rather than requiring affirmative, written concurrence.

> **<u>Agency's Response</u>: As discussed in Section IV.I of the final rule preamble, EPA is finalizing a provision for modifications to a grant of certification that balances the certifying authorities' need for flexibility to protect water quality and the potential reliance interests of project proponents and Federal agencies once the certifying authority has issued a grant of certification. To achieve this balance, the final rule allows for modifications to grants of certification at any point after certification issuance (until the expiration of the Federal license or permit), subject to Federal agency agreement and without changing the nature of the certification decision. Accordingly, the Agency declines to adopt commenter suggestions to allow certifying authorities to modify certifications without agreement by the Federal agency (with or without project proponent concurrence). This approach is consistent with the Agency's longstanding practice and Congressional intent. *See* the Agency's Response to Comments in Sections 9.3-9.4 and Section IV.I of the final rule preamble for further discussion on the limitations to modifications of certification decisions.**

However, while the final rule requires the certifying authority and Federal agency to agree to a modification, EPA agrees with commenters asserting that the Federal agency should not have a role in determining the specific language of that modification. Congress recognized certifying authorities as the "most qualified" to make decisions about impacts to their water quality, and not Federal agencies. *See* 115 Cong. Rec. 29035, 29053 (Oct. 8, 1969) (Mr. Muskie: "By requiring compliance certification from the water pollution control agency, [the certification provision] would assign policing responsibility to those agencies most qualified to make an environmental decision and not to those committed to carrying out some other function at minimum cost."). The Agency finds that certifying authorities are best equipped to both determine the language of a certification decision and the language of any subsequent modification to that decision. Because of commenter requests for greater clarity regarding what the Federal agency gets to review prior to agreeing to a modification, EPA is finalizing additional text in section 121.10(a) to clarify that the certifying authority is not required to obtain the Federal agency's agreement on the language of the modification. Rather, the certifying authority only needs Federal agency agreement over the portions of the certification to be modified rather than the modified language itself. The Agency notes that certifying authorities are free to discuss the substance of a modification with a Federal agency but are not compelled to do so under this final rule.

EPA agrees with commenters asserting that EPA should not have a role in the modification process where it is not the certifying authority or Federal agency. As noted in the 2020 Rule preamble, the statute does not expressly provide EPA with a role in the certification modification process, unlike the Agency's other roles under section 401. *See* 85 FR 42278. Additionally, although the 1971 Rule provided the Agency with an oversight role in the modification process, the preamble to the 1971 Rule did not explain why. *See* 36 FR 8563-65 (May 8, 1971). The Agency does not see the need to reintroduce such a role now, especially where EPA was not involved in the original certification decision and is not the relevant Federal permitting agency. EPA concludes that it should not have an oversight role in the certification modification process.

EPA also agrees with commenters asserting that the project proponent should not have a formal role in the modification process. *See* the Agency's Response to Comments in Section 9.5.2.

EPA appreciates commenter concerns regarding certifying authority workload associated with obtaining Federal agency agreement to a modification. The Agency emphasizes that this final rule encourages certifying authorities, project proponents, and Federal agencies to communicate early and often in the certification process (e.g., pre-filing meeting provision) to ensure parties develop a common understanding regarding the proposed project. Such communicate may reduce the need for certification modifications. However, nothing in this final rule precludes Federal agencies and certifying authorities from developing a process for coordinating on certification modifications within the framework provided in this final rule. For example, Federal agencies and certifying authorities may establish MOAs

regarding circumstances that may require modification and/or modification coordination procedures. Certifying authorities and Federal agencies are encouraged to work together to address new information or changed water quality conditions throughout the life of the project such that Congressional intent behind section 401—enabling states to protect their water quality—can be preserved. In the spirit of cooperative federalism central to section 401, EPA expects that Federal agencies will not unreasonably withhold agreement to a modification.

9.5.2 Project Proponent Involvement in the Modification Process

A few commenters recommended that EPA outline a way for the project proponent to participate in the certification modification process because section 401 is framed around the role of the applicant, the Federal agency and certifying authority may lack the technical knowledge, and often the project proponent is initiating the project modification. One commenter stated that including the project proponent in the modification decision or at least providing an opportunity for public notice is a more transparent and legally defensible approach that considers the project proponent's reliance interests.

One commenter recommended that the project proponent have an active role in all discussions regarding adding, removing, or revising conditions. The commenter included an exception that solely providing notice to a project proponent regarding non-substantive administrative or ministerial modifications to a certification may be sufficient.

One commenter encouraged the Agency to allow for flexibility to modify certifications in narrow circumstances when it makes sense for the project proponent and Federal agency, but not to allow the process to unnecessarily block or delay projects.

A few commenters asserted that the regulation should clearly indicate that the project proponent can request a certification modification such as when there is a change in project scope or schedule. One commenter requested that EPA clarify that a project proponent can request a certification modification when there is a change in project scope or schedule because of heavy rainfall, unexpected emergencies, or force majeure.

A few commenters expressed support for an approach where the project proponent must consent to the modification. One commenter asserted that while requiring agreement by the Federal agency is an important safeguard, only the project proponent will have unique insight into how belated modifications affect the viability of the project and how to implement additional requirements. Another commenter asserted that project proponents have faced situations where they need to make changes to the project and that EPA should allow for project proponents to have a formal role in the modification process to ensure accurate and efficient modifications consistent with project needs. One commenter suggested adding language to the regulatory text to explicitly provide the project proponent with a consenting role.

One commenter expressed opposition to an approach where the project proponent must agree to a modification. The commenter asserted that the project proponent will likely be involved in the process as the certifying authority would likely need information from the project proponent and they would not be

precluded from presenting their position on any modifications to the certifying authority. As such, the commenter did not see the need for EPA to provide project proponents with a more explicit and expansive role in the modification process.

Agency's Response: Consistent with the 1971 Rule, section 121.10 as finalized does not provide the project proponent with a formal role in the modification process. However, the Agency does not expect the process described in section 121.10 to prevent engagement with the project proponent before or after the certifying authority and Federal agency have agreed that the certifying authority may modify the previously granted certification. EPA recommends that certifying authorities engage with the stakeholders who will be impacted by a modification to the certification; some certifying authorities may even be required under their regulations to make any proposed modifications to their certification decisions available for public notice and comment.

9.6 General

9.6.1 Expiration Dates

A couple of commenters suggested that certifying authorities should set expiration dates on certification decisions or waivers. One of these commenters said this would allow the certifying authority to verify that its water quality requirements are being met. Another commenter expressed the need for certifying authorities to be able to set certification decision expiration dates or to be able to reconsider waiver decisions based on current science and technology, understanding of water quality, water quality standards, and changes to a project scope, discharges, size, etc. because a Federal agency's ability to unilaterally and continuously extend the certification or waiver a section 401 decision is antithetical to the purpose of the CWA. The commenter stated that 33 CFR 325.6 provides that extension requests will be granted unless contrary to the public interest, which is used as a flawed justification for a near-prohibition on section 401 certification and waiver expiration dates.

Agency's Response: The Agency recognizes the ongoing need to adapt to new and changing information about water quality impacts of a project after a certification decision has been issued, but the Agency is declining to broaden the final rule's modification provision to be a mechanism to revoke or reverse a certification decision. The Agency views a certification condition setting an "expiration date" on the grant of certification as similar to a "reopener" condition because it likewise purports to authorize the certifying authority to unilaterally modify its grant of certification. *See* the Agency's Response to Comments in Section 9.3.3. However, the Agency emphasizes that certifying authorities may develop certification conditions in such a way that assure that the project will comply with water quality activities over the life of the project. *See* Section IV.F of the final rule preamble for further discussion on adaptive management conditions.

Likewise, EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or

permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

9.6.2 Defining Circumstances where Modification is Appropriate versus a New Certification

A couple of commenters recommended that EPA develop a list of scenarios where modifications are appropriate, however one of these commenters recommended that the list not be exclusive. A few commenters expressed support for the modification process because the proposal does not define all circumstances in which modification is appropriate. A few commenters recommended that EPA develop guidance regarding scenarios where a new request for certification is necessary, instead of a certification modification request, to provide clarity. Conversely, a. few commenters suggested that EPA should not develop a list of scenarios warranting certification modification because there are several reasons a project proponent may request a modification, including facility modifications.

A few commenters expressed agreement with the examples in the preamble for the proposed rule. One commenter asserted that minor changes, such as needing to shift the certified "work window" to reduce the amount of work occurring during high-flow periods, may not require a new certification but may be significant enough to warrant modification of the certification. A few commenters asserted that the proposal clearly identifies what may not be revoked or modified.

A few commenters requested clarity regarding the circumstances where a new certification or a certification modification are appropriate. One commenter suggested that if the project has changed materially after certification, such as the location or nature of the discharge is different from that certified, it may be appropriate to issue a revised or new license or permit which would be subject to a new 401 certification.

One commenter requested that EPA provide the certifying authorities the ability to define what factors or circumstances determine whether a modified project warrants a modified certification or a new certification, especially when the Federal agency is the proponent for the modified project. Another commenter noted that some certifying authorities are limited to addressing minor certification modifications by state regulatory requirements and any project changes that do not meet the requirements for a minor modification will require the project proponent to request a new certification.

One commenter, who stated that modifications would ensure that section 401 achieves its goal of ensuring that Federal licenses or permits are consistent with state water quality goals and regulations, requested that the final rule include language that clearly requires project proponents to submit a new certification request and receive a new certification for any changes outside of what was proposed when the

certification was issued if modifications are not available. Another commenter asserted that some project proponents are likely to resist submitting a new request for certification, even if the certifying authority finds it necessary to protect its water quality.

Agency's Response: After reviewing public comment, EPA is not finalizing a list of scenarios that may warrant certification modification because the certifying authority and Federal agency are in the best position to work together to determine whether a new certification or a certification modification is appropriate in a given situation. Although EPA understands the perspective of most commenters that it may be helpful to have examples of circumstances where a modification to a certification may be appropriate, EPA is declining to include a non-exhaustive list in the regulatory text so that certifying authorities and Federal agencies retain the flexibility to determine their certification modification needs after considering the local water quality and project-specific context. Even without a list in the regulation, EPA still expects that the Federal agency will not unreasonably withhold its agreement to modifications, especially for administrative edits, such as correcting typographical errors, changing a point of contact, or adjusting a certification's expiration date to reflect an updated license or permit expiration date.

Likewise, EPA is declining to finalize any bright line scenarios (*e.g.*, specific new information or changed circumstances) for when a modification is appropriate versus when a new certification request is required. The Agency cannot anticipate all of the scenarios in which one path may be appropriate over the other, nor can the Agency predict how state, territorial, and Tribal certification modification processes will determine which path to take. Beyond modifications to existing certifications, there may be circumstances that warrant the submission of a *new* request for certification, such as if certain elements of the activity (*e.g.*, the location or size of the activity) change materially in a manner that could impact water quality after a project proponent submits a request for certification. If the activity changes so materially subsequent to the request for certification as to constitute a different activity, this may warrant a new request for certification. The 2020 Rule preamble also recognized this possibility. *See* 85 FR 42247 ("[I]f certain elements of the proposed project (*e.g.*, the location of the project or the nature of any potential discharge that may result) change materially after a project proponent submits a certification request, it may be reasonable for the project proponent to submit a new certification request.").

9.6.3 Federal Agency Modification Processes

A few commenters suggested that EPA does not need to finalize a provision for certification modification because many Federal agencies have established processes for modifying the Federal license or permit which already ensures that the process is transparent, includes applicable processes for project proponent participation, and ensures that the Federal agency agrees to the specific modification that is incorporated into the Federal license or permit. A few of these commenters argued that the section 401 process occurs within the broader context of the Federal licensing or permitting process, therefore, certifying authorities that wish to engage on a federally licensed or permitted project outside of the section 401 review period likely have many other opportunities under the licensing or permitting process. One commenter noted that

certification modifications after the Federal license or permit has been issued will require a corresponding Federal license or permit modification. Another commenter asserted that because any modification to certification conditions after issuance of the permit would necessarily be a modification to the Federal license or permit itself, the proposal should be revised to make clear that the Federal agency's agreement to the modification must be in accordance with the Federal agency's applicable license or permit modification procedures. The commenter asserted that section 401 does not authorize EPA to give Federal agencies the authority to agree to license or permit modifications without following the applicable legal requirements for those modifications.

A few commenters recommended retaining 40 CFR 124.55(b) instead of the proposed section 121.10. One commenter noted that EPA failed to describe any confusion, regulatory uncertainty, or other problems attributed to the certification modification provisions in the NPDES program. See 40 CFR 124.55(b).

Agency's Response: EPA disagrees with commenter assertions that a modification provision is unnecessary in light of Federal agency modification processes for Federal licenses or permits. When the Agency revised the section 401 regulations in 2020, the rule did not provide a process for modification of certification decisions after the certifying authority had acted within the reasonable period of time; instead, the 2020 Rule preamble acknowledged that certification modifications could occur through other mechanisms (e.g., as provided in other Federal regulations) and encouraged Federal agencies to establish procedures in regulation "to clarify how modifications would be handled in these specific scenarios." 85 FR 42279 (July 13, 2020). The Agency acknowledges that the absence of a modification provision in the 2020 Rule caused significant confusion during implementation regarding whether and under what circumstances modifications to certification conditions were allowed. Stakeholders also expressed significant support for the ability to modify certification conditions, noting that minor changes may occur in the project that may not rise to a level that requires a new certification (e.g., needing to extend the certification's "expiration" date to match a permit extension, or shifting the certified "work window" to reduce the amount of work occurring during high-flow periods), but may be significant enough to warrant a modification of the certification. The final rule's modification provision is responsive to commenter input and provides project proponents, certifying authorities, and Federal agencies with the flexibility to address project changes and avoid the burden of having to seek a new certification where the certifying authority and the Federal agency agree.

The Agency notes that although this provision addresses a potential modification to a certification after the certification modification is complete, EPA expects the Federal agency to follow the appropriate Federal license or permit modification process when incorporating any certification modifications into a previously issued Federal license or permit.

EPA notes that the modification provision previously located at 40 CFR 124.55(b) only applied to modifications to certifications for NPDES permits issued by EPA and did not

extend to licenses and permits issued by other Federal agencies. Therefore, retaining 40 CFR 124.55(b) *instead of* the provision proposed at 40 CFR 121.10 would not have provided additional clarity for stakeholders interested in modifying a certification for those licenses and permits issued by other Federal agencies. Furthermore, EPA intends for section 121.10 to apply to all certification modifications, including those on certifications for EPA-issued NPDES permits. Finally, EPA was concerned that leaving section 124.55(b) in place could introduce stakeholder confusion when read with final rule section 121.10 because it may have wrongly indicated that the circumstances in section 124.55(b) are the only circumstances in which EPA might agree to modify a certification on an EPA-issued NPDES permit, and as discussed in the final rule preamble, 124.55(b) conflicted with several key features of this final rule's approach to modifications. However, nothing in this final rule prohibits EPA in its capacity as a Federal permitting agency to continue to agree to modifications to certifications in the types of circumstances previously prescribed in 40 CFR 124.55(b), as long as such modifications are consistent with section 121.10 of the final rule. The final rule is broadening the circumstances under which the Agency might agree with a certifying authority that a modification is appropriate for a certification of an EPA-issued NPDES permit.

9.6.4 Clarification on Modifications to Certain Certification Decisions

One commenter requested that EPA include additional clarity in the final rule on whether or not conditions can be added to a certification with conditions. The commenter also requested clarity on whether a certification modification or a new certification are necessary if the project changes after certification, but all conditions still apply and no new conditions are required by the certifying authority.

A few commenters requested that EPA clarify modifications to certification on general permits. One commenter recommended that EPA avoid potential confusion by expressly allow certifying authorities to deny blanket certifications for categories of projects eligible for general permits, such as the Corps' section 404 NWPs, and then later issue individual certifications for projects seeking the general permit authorization. One commenter asserted that because the certifying authority can only add conditions to a grant of certification for a general license or permit upon agreement with the Federal agency, the proposed rule appears to prohibit a certifying authority from exercising its authority where the certifying authority becomes aware of an activity that would be authorized by a general license or permit that would not comply with water quality requirements. The commenter recommended that EPA include a provision under proposed section 121.10 that would provide certifying authorities with the authority to unilaterally add special conditions to a grant of certification for a project authorized under a general license or permit, when necessary to certify that the discharge will comply with its water quality requirements.

One commenter recommended that a project proponent should be allowed to revise their denied certification request to bring it into compliance with water quality requirements so that it may be certified.

<u>Agency's Response</u>: Regarding whether conditions can be added via modification to a certification with conditions, such a modification would be permissible under the final rule as long as the process set forth in the final rule is followed. See Section IV.I of the final rule

preamble. If the project changes after certification, but all conditions still apply and no new conditions are required by the certifying authority, then no modification might be needed; this will be up to the certifying authority and Federal agency to determine pursuant to the process set forth in the final rule.

In response to the comment on denials of certification on the issuance of the Corps' NWPs (and other Corps' general permits), the Agency does not view this situation as a "modification." A denial of certification on the issuance of a Corps' general permit does not preclude a project proponent from submitting (to a certifying authority) a project-specific request for certification when seeking a general permit authorization; these would constitute separate requests for certification.[5] The same rationale applies to the comment regarding revising a certification denial; there is nothing in the final rule prohibiting the project proponent from revising its request for certification and resubmitting it to the certifying authority. *See* Section IV.F of the final rule preamble for further discussion on the effect of certification denials, including the continued viability of denials without prejudice. Furthermore, the denial of certification for any Federal license or permit, including the issuance of a general license or permit, would not be subject to modification under the final rule because 40 CFR 121.10 only applies to grants of certification.

In response to the commenter asserting that the modification provision would prevent a certifying authority from exercising its authority where the certifying authority becomes aware of an activity that would be authorized by a general license or permit that would not comply with water quality requirements, EPA disagrees. First, a certifying authority and Federal agency may agree to modify a grant of certification on an individual or general license or permit or may determine that a new request for certification is required. Certifying authorities and Federal agencies are encouraged to work together to address new information or changed water quality conditions throughout the life of the project such that Congressional intent behind section 401—enabling states to protect their water quality—can be preserved. In the spirit of cooperative federalism central to section 401, EPA expects that Federal agencies will not unreasonably withhold agreement to a modification. Second, as discussed in Section IV.J of the final rule, the Agency has consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law. Additionally, the Agency views section 401 certification conditions that are incorporated into the Federal license or permit as enforceable by Federal licensing or permitting agencies. *See* Section IV.J of the final rule preamble for further discussion on enforcement.

[5] Note that the Corps is unique in allowing project proponents to seek authorization under a general permit where certification was denied for the issuance of the general permit. *See* 33 CFR 330.4(c)(3) (stating "If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.").

9.6.5 Adaptive Management

Several commenters discussed adaptive management conditions in the context of modifications. One commenter asserted that adaptive management conditions can be particularly important where future water quality-related impacts may occur due to climate change or other events, noting that some Federal permits and licenses can last for decades. Another commenter, who disagreed with allowing reopener provisions or other unilateral modifications, had no concerns, in principle, with appropriately defined and structured adaptive management conditions. According to the commenter, the former are open-ended provisions that would allow fundamental changes in certification requirements; the latter are narrow, structured mechanisms for adjusting specific certification requirements to changing conditions and new information.

One commenter asserted that adaptive management conditions can benefit project proponents and make the permitting process more efficient. To illustrate, the commenter provided an example of a certification decision in Virginia where the project was able to proceed without waiting for all of the state's analyses to be completed since the certification included an adaptive management approach where the project proponent was still subject to further state approvals of its plans.

One commenter asked for additional clarity between adaptive management and modifications. To illustrate the need for additional clarity, the commenter provided an example and asserted that it is unclear whether changes to compensatory mitigation requirements because of mitigation bank limits would be viewed as adaptive management or a certification modification.

> **Agency's Response: EPA wishes to emphasize the distinction between reopener clauses and adaptive management conditions, the latter of which are permissible under the final rule. Adaptive management conditions are set at the time the certification is granted and provide a concrete action that must occur in the event certain criteria are met. The text of an adaptive management condition does not change after certification is granted. This promotes regulatory certainty, in contrast with a unilateral modification pursuant to a "reopener" clause. For example, a condition may require a project proponent to increase monitoring efforts or conduct remediation if the baseline, routine monitoring established in the certification reveals an increase in a specific pollutant due to the activity. *See* section IV.F for further discussion of adaptive management conditions.**

9.7 Input Received on Prior Rulemakings

9.7.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

Some commenters argued that EPA should not finalize the 2019 proposed rule without a provision for modifications. A few of the commenters asserted that while EPA should not have an oversight role in

modifications to certifications, the ability to modify a certification decision is critical for a multitude of reasons, such as to correct an aspect of a certification remanded or found unlawful by a Federal or state court, or to accommodate project change requests by project proponents.

One commenter contended that certification modifications are allowed under the CWA; although Section 401 does not expressly provide such authority, the CWA also does not provide express authority for EPA to modify permits issued under Section 402 or for the Corps to modify Section 404 permits. The commenter continued that nonetheless, both agencies assume substantial authority to modify the permits they issue so long as they follow their own notification and process procedures. Thus, the commenter concluded that inherent within the power to issue CWA authorizations (such as a water quality certification) is the authority to later modify such authorizations under circumstances established by EPA, the agency charged with administering the CWA.

In an additional supporting argument, the commenter claimed that the reasonable period of time restriction was introduced by Congress only to force prompt action, the commenter asserted that it was never intended to prevent certifying agencies from later modifying certifications.

Another commenter provided regulatory text revisions to 40 CFR 121.2(b) from the 1971 Rule to allow the certifying authority, Federal agency, and project proponent to agree to modifications, and all the certifying authority to modify general permit certifications in agreement with the Federal agency.

Agency's Response: *See* Section IV.I of the final rule preamble and the Agency's Response to Comments in Sections 9.1-9.6.

9.7.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

Most stakeholders requested that EPA restore a modification provision in the new rule. These stakeholders provided general reasons that certification modifications are appropriate in situations where a project proponent requests a modification to the project description/timing/location, where an aspect of the approved proposal was determined to be unsafe, or where it is difficult to anticipate all potential impacts of projects that occur over many decades, like hydroelectric dams and natural gas pipelines. Another stakeholder asserted that it makes no sense to limit a certifying authority's ability to change their water quality certification conditions, especially in a world where climate change is causing sea level rise, and increased intensity of storms and at both ends of the hydrologic spectrum, from droughts to floods.

A few stakeholders argued that the 2020 Rule position regarding modifications was flawed because disallowing "modifications plainly frustrates the Clean Water Act's preservation of states' authority to protect their waters and section 401's goal of assuring that Federal licensing and permitting agencies cannot override state water quality protections." The stakeholder argued that modifications to a certification are not in conflict with the one-year statutory timeframe for issuing certification decisions because modifications based on, for instance, a change to the project or changed water quality

requirements does not implicate Congress' concern over states failing to take action on a certification request. Therefore, the stakeholder concluded that EPA should restore the modification provision which the commenter asserted is within the statutory framework and worked well for decades prior to the 2020 Rule as a practical, common-sense tool to address changed circumstances.

Some of the stakeholders recommended that EPA develop a new modification provision with participation from the project proponent – arguing either 1) modifications should only be allowed at the request of the project proponent, or 2) the certifying authority should only be allowed to modify the certification if both the Federal agency and the project proponent agree to the modification. One stakeholder asserted that certification modifications should be authorized for conforming edits only after the lead Federal agency approves changes (e.g., re-routes to avoid newly identified resources or changes in construction methods to address site-specific constraints).

Most of the stakeholders asserted that the 2020 Rule approach to modifications did not provide clarity or flexibility for any of the stakeholders involved; some of the stakeholders stated that requiring a project proponent to seek a new certification instead of a modification is a bureaucratic exercise that serves no good purpose for any of the parties involved, wasting valuable agency resources, and frustrating the regulated public.

One stakeholder recommended that certifying authorities make changes to certifications, corresponding to license or permit changes, after following the appropriate state or Tribal procedures (e.g., public notice requirements).

Another stakeholder expressed support for the 2020 Rule's limits on a certifying authority's ability to unilaterally modify the certification decision after the reasonable period of time; however, the stakeholder encouraged adding flexibilities to the rule if the project proponent is involved in development of the modification with the certifying authority because such an approach is "common sense."

Agency's Response: *See* Section IV.I of the final rule preamble and the Agency's Response to Comments in Sections 9.1-9.6.

10. ENFORCEMENT AND INSPECTION

10.1 Enforcement

Most commenters supported EPA's proposal to remove the language at 40 CFR 121.11(c) regarding Federal agency enforcement of certification conditions. Almost all of these commenters argued that, at a minimum, states and Tribes should be able to enforce certifications and certification conditions where authorized under state or Tribal law, or alternatively, under the citizen suit provision of the CWA. Many commenters requested that EPA expressly state in the new rule that certifying authorities, including states and Tribes, have independent authority under the CWA to enforce certifications and certification conditions, and requested EPA clarify that enforcement under the citizen suit provision and state and Tribal law are simply alternative bases for enforcement.

Many commenters supported their positions by raising concerns over cooperative federalism and Federal agencies' willingness or capacity to enforce certifications and certification conditions. For example, some commenters asserted that Federal agency resource limitations coupled with the large jurisdictional territories necessitate that states and Tribes be able to enforce certifications and certification conditions, otherwise the conditions may never be enforced. Some of these commenters also argued that some Federal permitting or licensing agencies may not support a particular certification condition, and therefore the inability of certifying authorities to enforce conditions may result in discretionary enforcement or under-enforcement. At least one commenter asserted that, given recent Supreme Court case law on Indian Territory, EPA should clarify that state authority to enforce state law requirements within Tribal jurisdictions is preempted by Tribal and Federal jurisdiction over Tribal waters.

One commenter asserted that certifying authority enforcement of certification conditions makes sense, because there may be other state law requirements involved that may be outside the scope of the certification but involve the same operative set of facts.

A few commenters asserted that EPA should remain silent on the issue of enforcement because the statute and case law are sufficiently clear.

Some commenters disagreed with EPA's proposal to remove the language at 40 CFR 121.11(c) and argued that the enforcement of certification conditions incorporated into Federal license or permits must lie exclusively with the Federal permitting and licensing agencies. One commenter suggested that the final rule should include a statement to clarify that enforcement of conditions is the responsibility of the Federal agency and that enforcement of conditions is to be done through the inclusion of conditions into the Federal license or permit. Most of these commenters argued that there is no explicit authority in the CWA, including in the citizen suit provision, to allow certifying authorities to enforce certification conditions. One of these commenters argued that there is no provision in the CWA for enforcement of certification conditions other than through the requirement to incorporate the conditions into Federal licenses or permits. Many of these commenters argued the new regulatory text will lead to confusion, unnecessary litigation, and possibly duplicative or inconsistent enforcement actions and conditions. One commenter argued that by allowing certifying authorities to enforce subjective and expansive certification conditions, certifying authorities may cause adverse socioeconomic and environmental impacts by stalling federally licensed projects. A few commenters requested EPA clarify that the ability of any certifying authority to bring an enforcement action ends once the licensed or permitted activity ends. One commenter asserted that there is no mechanism under the CWA to give effect to a certification decision independent of a Federal license or permit and conditions do not have any effect pending the issuance of the license or permit.

> **<u>Agency's Response</u>: EPA observes that this final rule is generally focused on interpreting the text of section 401 itself, and not other provisions of the CWA. Section 401 does not directly address state or Tribal enforcement authority and the Agency is declining to add regulatory text on that issue. Consistent with the approach taken in the 2020 Rule, this rulemaking does not include interpretations of other enforcement-related sections of the CWA, such as section 505. As such, the Agency is not adding regulatory text to address state or Tribal enforcement authority with respect to section 505. EPA is not offering new**

interpretations or positions on the issues discussed below but appreciates the time and effort that commenters dedicated to this discussion.

As an initial matter, the Agency views section 401 certification conditions that are incorporated into the Federal license or permit as enforceable by Federal licensing or permitting agencies. This position is consistent with the statute and longstanding practice, and nearly every commenter agreed on this position. Section 401(d) provides that if a grant of certification includes any conditions, those conditions "shall become a condition on any Federal license or permit." As a result, the Federal agency can enforce any such conditions in the same manner as it can enforce any other conditions of its license or permit. EPA expressed this interpretation in the 2020 Rule, 85 FR 42275-76, and a decade prior to that rulemaking. *See, e.g.*, 2010 Handbook at 32 (rescinded in 2019). EPA also observes that Federal agencies have considerable discretion in deciding whether and when to enforce requirements and conditions in their licenses and permits. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (discussing why it is important for agencies to retain enforcement discretion).

However, EPA is not retaining Section 121.11 from the 2020 Rule, which included text regarding the enforcement of and compliance with certification conditions. As discussed in Section IV.J of the final rule preamble, this regulatory provision introduced ambiguity into the Agency's longstanding position that nothing in section 401 precludes states from enforcing certification conditions when authorized under state law (and not precluded by other Federal law besides section 401). It has also led to stakeholder confusion over whether the 2020 Rule prevented states and Tribes from exercising their independent enforcement authority and whether the 2020 Rule limited Federal agency discretion regarding their enforcement of section 401 conditions in their licenses or permits.

The Agency has consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law. In the 2020 Rule preamble, the Agency concluded that "[n]othing in this final [2020] rule prohibits States from exercising their enforcement authority under enacted State laws." 85 FR 42276. EPA did, however, consider this authority limited to "where State authority is not preempted by federal law." *Id.* A decade prior to the 2020 Rule, EPA had already recognized that states enforce certification conditions when authorized to do so under state law. *See e.g.*, 2010 Handbook at 32-33 (rescinded in 2019) ("Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority.").

EPA disagrees that Federal and certifying authority enforcement will lead to confusion or duplicative actions. After over 50 years of section 401 implementation experience, EPA expects that certifying authorities and Federal agencies are well-versed in coordinating enforcement actions. Nevertheless, EPA recommends that certifying authorities clearly indicate which certification conditions derive from state or Tribal law.

With respect to CWA citizen suits and their application to both the requirement to obtain section 401 certification and the requirement to comply with certification conditions, some courts have addressed these issues. First, the Ninth Circuit Court of Appeals held that citizen suits may be brought to enforce the requirement to obtain certification. *ONDA v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). In *ONDA*, the court rejected the argument that CWA section 505 authorizes only suits to enforce certification conditions but not the requirement to obtain a certification. The court pointed to the plain language of section 505, which cross-references the entirety of section 401 (and not, for example, only section 401(d), which concerns certification conditions). *Id.* Second, a few Federal courts have held that certification conditions can be enforced through CWA citizen suits. In *Deschutes River Alliance*, a U.S. district court considered the issue at length and ultimately held that CWA section 505 authorizes citizens to enforce certification conditions. *See Deschutes River Alliance v. Portland Gen. Elec. Co*., 249 F. Supp. 3d 1182, 1188 (D. Or. 2017) (considering the issue with respect to a FERC license); *see also Pub. Emps. for Envtl. Responsibility v. Schroer*, No. 3:18-CV-13-TAV-HBG, 2019 WL 11274596, at *8-10 (E.D. Tenn. June 21, 2019) (relying in part on *Deschutes River Alliance* and considering the issue with respect to a section 404 permit issued by the Corps). EPA is not aware of any Federal court that has considered the issue and reached the opposite conclusion. *Deschutes River Alliance* also noted that certifying states (in addition to the citizen group before the court) are among the persons that may enforce certification conditions via the CWA citizen suit provision. 249 F. Supp. 3d at 1191-92. The court reasoned that section 505 is the only provision of the CWA that could bestow Federal authority upon states to enforce certification conditions and, given this, interpreting section 505 to preclude state enforcement of certification conditions would run "contrary to the CWA's purpose and framework." *Id.* at 1191.

In response to comments regarding enforcement actions after the end of a licensed or permitted activity, EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. Therefore, EPA agrees that enforcement actions cannot be brought to enforce CWA section 401 certification conditions that were incorporated into since-expired Federal licenses or permits.

Regarding the commenters' request for clarification that Indian country waters would, for CWA purposes, be subject to federal and tribal, and not state, jurisdiction, EPA agrees, as the commenter notes, that prior EPA statements are relevant to, and to a large extent already address, that issue. See, e.g., 81 Fed. Reg. 30183, (May 16, 2016) (explaining that the CWA includes a delegation of authority from Congress to eligible Indian Tribes to administer CWA programs over reservation waters). EPA believes it is unnecessary to address the commenters' request further in the current rulemaking. EPA has explained in the preamble to the current rulemaking that in administering section 401 certification programs, approved Tribes would effectuate the delegation of congressional authority over

their entire reservations. It is outside the scope of the current rulemaking to address jurisdictional issues as between states and Tribes with greater specificity.

10.2 Inspection

10.2.1 Regulatory Text on Section 401(a)(4)

A few commenters recommended adding regulatory text regarding section 401(a)(4). A few of these commenters recommended that EPA adopt regulatory text regarding its proposed interpretation of the term "review" found in section 401(a)(4). One commenter recommended adding regulatory language that requires that certifying authorities be afforded the opportunity to conduct inspections of a facility prior, during, and after the certified project has commenced. Another commenter stated that EPA's interpretation of section 401(a)(4) is sound and recommended that EPA codify it to ensure that authorized Tribes' authority to inspect and review project facilities and activities is unequivocally clear.

Agency's Response: As mentioned in section IV.J of the final rule preamble, EPA is not retaining any of the regulatory text from the 2020 Rule regarding inspection authority, previously located at 40 CFR 121.11 (2020). The Agency finds that the statute clearly outlines the inspection authorities available under section 401. On its face, section 401(a)(4) applies to a limited circumstance where a Federal license or permit and certification are issued *prior to* operation of the facility or activity and a subsequent Federal operating license or permit is *not* necessary for the facility or activity to operate. Under these limited circumstances, the statute is clear that the licensee or permittee must provide the certifying authority with the ability to "review" the facility or activity to determine whether it will comply with effluent limitations, other limitations, or other water quality requirements.

Furthermore, after considering public comments, EPA finds it unnecessary to add regulatory text defining the term "review" as used in section 401(a)(4). The issue did not receive significant commenter interest, and EPA is not aware of current disputes regarding the issue. Nonetheless, EPA is restating in this final rule its interpretation that the term "review" found in section 401(a)(4) is broad enough to include inspection, but it is not necessarily limited to inspection. It arguably also includes the right to review preliminary monitoring reports or other such records that can assist the certifying authority in determining whether the operation of the facility or activity will comply with effluent limitations, other limitations, or other water quality requirements.

10.2.2 Removing Current 121.11(a)-(b)

One commenter expressed support for EPA's proposal to remove 121.11(a)-(b) from its certification regulations.

Agency's Response: EPA is removing section 121.11(a)-(b) from the 2020 Rule in this final rule because the 2020 Rule incorrectly interpreted the limited applicability of section 401(a)(4) and the statutory language does not need further clarification.

10.2.3 Whether Section 401(a)(4) or Section 401 Limits Certifying Authority Enforcement Authority

A few commenters agreed with EPA's proposed interpretation that section 401(a)(4) does not necessarily limit a certifying authority's ability to inspect facilities or activities before or during operation in accordance with the certifying authority's laws.

One commenter interpreted EPA's proposal as authorizing certifying authorities to inspect federally licensed or permitted facilities at any time and for any purpose. The commenter then asserted that such a proposal would be plainly precluded by section 401(a)(4), arguing that section 401(a)(4) describes the full extent of a state's post-certification inspection authority under Section 401. However, the commenter also stated that some states have state or federally delegated authority to inspect Federal facilities for environmental compliance outside of what section 401 authorizes. The commenter continued that, far from authorizing inspections at any time or opening the door to a certifying authority's enforcement of certification conditions, section 401(a)(4) only allows the certifying authorities to notify the permitting or licensing agency. The commenter concluded that section 401(a)(4) then expressly describes the Federal agencies' discretion to determine whether to bring an enforcement action pursuant to the certifying authority's recommendation.

> **Agency's Response: EPA emphasizes that section 401(a)(4) does not necessarily limit the certifying authority's ability to inspect facilities or activities before or during operation in accordance with the certifying authority's laws and regulations. The Agency is aware that states and Tribes may have their own authority to inspect a facility or activity to determine compliance with conditions set forth in a section 401 certification and section 401(a)(4) does not preclude those inspections pursuant to those authorities. Similarly, section 401(a)(4) does not necessarily limit a Federal agency's ability to inspect a facility during the life of the license or permit pursuant to that Federal agency's laws and regulations. The Agency disagrees that this interpretation enables certifying authorities to inspect federally licensed or permitted facilities at any time and for any purpose, as the purpose and scope of any inspection must be in accordance with certifying authority's laws and regulations as well as any other Federal laws or regulations limiting the ability of a certifying authority to inspect; EPA is simply concluding in this final rule that section 401(a)(4) is not one such Federal law.**

10.3 Input Received on Prior Rulemakings

10.3.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

In its comment on the 2019 proposed rule, one commenter suggested that EPA clarify that certifying authorities' authority to review an activity or facility prior to initial operation and Federal agencies' incorporation of conditions into the Federal license or permit are separate and distinct. The same commenter asserted that the inspection provision was appropriately limited to determining whether during

operation the discharge will comply with the certification already issued, and requested that EPA clarify that if the initial operation of the facility would not result in a discharge, then the certifying authority shall not be afforded an opportunity to inspect the facility, pursuant to Section 401, prior to operation.

Commenters on the 2019 proposed rule did not agree that enforcement should be limited to Federal agencies. One commenter requested that EPA clarify that state certifying authorities may retain independent authority to enforce states' legal requirements. Another commenter asserted that the 2019 proposed rule wrongly claimed that a state does not have any authority to enforce certification conditions, arguing that it was contrary to case law and cooperative federalism principles in the CWA. The commenter further argued that if states cannot enforce water quality protection measures it imposes on a project, then the process is meaningless. The commenter also stated that the 2019 proposed rule would attempt to substitute the state's expertise with the judgment of the Federal agency.

One commenter requested that EPA clarify that section 401 does not provide Federal agencies with independent authority to enforce certification conditions, but rather a Federal agency draws on its own licensing or permitting authority to enforce any provision of the Federal license or permit. Accordingly, the commenter recommended that EPA should limit the regulatory text to recognizing that certification conditions become conditions on the license or permit.

Agency's Response: *See* the Agency's Response to Comments in Sections 10.1-10.2; *see also* Section IV.J of the final rule preamble.

10.3.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

Stakeholders disagreed that certification condition enforcement should be limited to Federal agencies. One stakeholder asserted that states or Tribes may have independent authority to enforce the applicable water quality requirements upon which the condition is based. Another stakeholder argued that state agencies are best suited to enforce provisions of state law, not Federal agencies, and recommended that the 2020 Rule be modified to make it clear that a state may enforce certification conditions. The stakeholder also asserted that the 2020 Rule improperly purported to provide Federal agencies with exclusive enforcement authority, which is inconsistent with the CWA's cooperative federalism structure.

One stakeholder asserted that section 401 makes it clear that a certification is a state permit that may be enforced by the state. The stakeholder noted that just because Federal agencies gain the authority to enforce section 401 certification conditions as part of the Federal permit does not displace the state's authority to enforce the certification. The stakeholder also asserted that at least one Federal district court rejected a similar interpretation as the 2020 Rule in another context. *United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 980–81 (E.D. Cal. 2004). Another stakeholder, who argued that the 2020 Rule deprives states and Tribes of actual enforcement authority, asserted that courts have recognized that states and Tribes have primary responsibility for enforcing compliance with certification conditions. *See e.g.*, *Roosevelt Campobello Int'l Park com. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("the proper forum to

review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification"); *NRDC v. EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) ("the EPA does not act as a reviewing agency for state certification, and the proper forum for review of state certification is through applicable state procedures"); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) ("only the state may review the limits which it sets through the certification process"); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.").

One stakeholder requested that EPA provide states and Tribes with explicit enforcement authority in a new rule to ensure the project proponent complies with water quality requirements. The stakeholder discussed its experience with the 2020 Rule, noting that the 2020 Rule's approach to enforcement had severely limited its role in ensuring its water resources are protected.

One stakeholder asserted that EPA provided no legal analysis for its suggestion that the CWA citizen suit provision may apply to section 401 and noted that the citizen suit provision expressly recognizes that it is limited by the States' sovereign immunity.

Agency's Response: *See* the Agency's Response to Comments in Sections 10.1-10.2; *see also* Section IV.J of the final rule preamble.

11. NEIGHBORING JURISDICTIONS (SECTIONS 121.12-121.15)

11.1 General

11.1.1 Coordination and Engagement in the Neighboring Jurisdiction Process

Several commenters discussed the need for collaboration between EPA and other stakeholders prior to initiation of the neighboring jurisdiction process. A few commenters recommended that EPA provide a mechanism for notifying neighboring jurisdictions to determine whether there are objections to the project before the certification is granted by the certifying authority. These commenters argued that early coordination with the neighboring jurisdiction would limit the number of projects that are forwarded to the Regional Administrator and potentially delayed. One of these commenters said that EPA could make neighboring jurisdictions aware of existing public notice processes and develop a mapping tool that project proponents could review while scoping for their projects and before submitting a request for certification.

A few of these commenters suggested that EPA should consider establishing a collaboration between the Regional Administrators, Federal agencies, and certifying authorities to discuss the circumstances that may affect neighboring jurisdictions before certification decisions. One commenter suggested adding language which allows the option for a procedure to be developed between certifying agencies, Federal agencies, and the Regional Administrator. Similarly, another commenter said that there should be a collaborative process between the Regional Administrator, Federal agencies, and neighboring jurisdictions to develop a process and requirements for review and inter-jurisdictional discharges. The

commenter stated that this would ensure that increased discharges due to more intense precipitation events in upstream events will not adversely affect a neighboring jurisdiction's waters, and that it would aid in equity and environmental justice for disadvantaged communities.

A commenter said that EPA has a responsibility to proactively work with project proponents and other Federal agencies as early as possible in the project review and permitting process. The commenter suggested the incorporation of further information on the role of EPA in the final rule and/or in implementation guidance. The commenter stated that EPA should help identify water quality issues and anticipate any necessary evaluations of neighboring jurisdiction effects. This commenter added that outreach to potential jurisdictions should also occur to allow for early collaboration.

> **Agency's Response: EPA agrees that early coordination can generally be beneficial to all parties, though this may not always be necessary depending on project complexity and resources. The Agency has encouraged early coordination and communication throughout the final rule, including pre-filing meeting requests and request for certification. Additionally, EPA observes that section 401 requires certifying authorities to develop public notice procedures for requests for certification. *See* 33 U.S.C. 1341(a)(1). A certifying authority's public notice procedures for certification could provide an additional opportunity for neighboring jurisdictions and other stakeholders to participate in the process. Generally, early engagement can provide stakeholders the opportunity to communicate needs and requirements, potentially streamlining processes and helping ensure any concerns are noted and addressed.**
>
> **EPA disagrees with one commenter's assertion that EPA has a responsibility to proactively work with project proponents and other Federal agencies as early as possible in the Federal licensing or permitting process, or commenters' assertion that the Agency should develop a regulatory process for coordination between EPA, certifying authorities, and Federal agencies. EPA has a specific, statutorily defined role in the neighboring jurisdictions process, which does not require the Agency to proactively coordinate with other Federal agencies, project proponents, and/or certifying authorities. *See* Section IV.K.2.f for further discussion on EPA's role in the neighboring jurisdictions process.**

11.1.2 Neighboring Jurisdiction Procedures

A commenter expressed concern about additional time needed to complete the section 401(a)(2) process and asserted that the process adds delay and uncertainty. Similarly, another commenter asserted that the section 401(a)(2) analysis was overly burdensome on the regulated public and state agency staff.

One commenter supported EPA's proposal to largely retain the 2020 Rule's regulatory approach to Section 401(a)(2), asserting that this increased clarity and predictability of the procedural requirements in section 401(a)(2). Another commenter also supported EPA's proposed approach to addressing neighboring jurisdiction and encouraged the Agency to consider how to best balance the neighboring jurisdiction concerns with the benefits associated with timely approval of mining projects that offer societal benefits. The commenter also voiced general support for EPA's existing section 401(a)(2) best

practices document and stated support for a science-based approach that requires actual demonstration of effects before EPA makes a determination.

One commenter noted that additional detail provided in the proposed rule about the 401(a)(2) process would increase certainty and predictability and recommended that such clarifying detail should be included in the final rule preamble and rule text. The commenter asserted that EPA previously provided little, if any, information about factors it will consider when making a "may affect" determination, what EPA considers to be a "neighboring jurisdiction" for purposes of section 401(a)(2), what neighboring jurisdictions should include in a 401(a)(2) objection to a proposed permit, and other details. According to the commenter, many states and Tribes found the lack of detail in how section 401(a)(2) processes would work to be unhelpful, citing input provided by other commenters.

> **Agency's Response: In response to commenter concerns regarding the time or burden associated with the neighboring jurisdiction process, the Agency notes that the neighboring jurisdictions process is a component of the section 401 statutory regime established by section 401(a)(2) and is not a regulatory creation by EPA. Moreover, as section 401(a)(2) sets timelines for certain actions in the neighboring jurisdictions process, it is clear from the statutory text that Congress considered the timing of this process when it was established. As discussed in Section IV.K of the final rule preamble, EPA is adding clarity regarding the procedures involved in the neighboring jurisdictions process in the final rule, which are intended to improve efficiency and reduce the time necessary for this process.**
>
> **In response to the commenter asserting that the Agency must make an actual determination of effects before EPA makes a may affect determination, EPA strongly disagrees. Unlike the standard applied by notified neighboring jurisdictions in making a determination regarding an objection, the standard applied by EPA in its "may affect" analysis does not require consideration of whether water quality effects of discharge from the project will result in violation of water quality requirements. Instead, the standard applied by EPA in its "may affect" determination only requires analysis of whether discharge from the project may have water quality effects on a neighboring jurisdiction. Additionally, the "may affect" standard, in contrast to the standard applied by notified neighboring jurisdictions, does not require a finding that the discharge "will" effect water quality. Accordingly, EPA finds this standard may be met where there may be an effect to a neighboring jurisdiction's water quality, but such effect is not certain to occur.**

11.1.3 Defining Neighboring Jurisdiction

A few commenters provided input on the definition of "neighboring jurisdiction." One commenter supported the proposed definition of "neighboring jurisdictions." Another commenter stated that it was appropriate for EPA to clarify that a neighboring jurisdiction's status stems from its geographical location as opposed to EPA's determination that such jurisdiction may be affected by a discharge from another jurisdiction.

One commenter expressed support for the 2020 Rule definition of "neighboring jurisdiction" and argued that the definition should include language about a neighboring jurisdiction's water quality. A different commenter suggested the following definition: "neighboring jurisdiction means any state, or tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), which is adjacent to the jurisdiction in which the discharge originates or will originate, and whose water quality has the potential to be affected by a proposed discharge as a result of being down-gradient or having a similar hydrologic relationship with the project site." Another commenter suggested that EPA adopt a definition of neighboring jurisdiction that would limit this term as encompassing states and Tribes with TAS for section 401 only when they are adjacent to the jurisdiction where the discharge originates or will originate, and their water quality may be affected as a result of being downgradient or having a similar hydrologic relationship.

One commenter said that Tribal rights over waters within treaty ceded territories will continue to be overlooked in this process by continuing to limit "neighboring jurisdictions" to only Tribes that have TAS. The commenter said that ignoring the existence of these off-reservation water rights run contrary to the Administration's ongoing efforts to support water quality in these areas.

<u>Agency's Response</u>: The Agency is finalizing the definition of neighboring jurisdiction at section 121.1(g) as proposed. EPA disagrees with commenters suggesting a narrower definition of neighboring jurisdiction. EPA finds that a narrower definition of neighboring jurisdiction is not supported by the statutory text in section 401(a)(2), which establishes a process for considering water quality effects to "any other state." This statutory language does not impose any other requirement on a neighboring jurisdiction other than not being the jurisdiction in which the discharge originates or will originate, meaning the jurisdiction with certifying authority. Accordingly, EPA declines to adopt a narrower definition of neighboring jurisdiction. Additionally, EPA notes that the definition of neighboring jurisdiction makes clear that this term is not limited to adjacent or downstream states or Tribes with TAS for section 401, consistent with the relevant statutory language in section 401(a)(2).

In response to the commenter expressing support for the 2020 Rule's definition of neighboring jurisdiction, the Agency notes that the definition of "neighboring jurisdiction" in the 2020 Rule inaccurately suggested that a neighboring jurisdiction may only include a state or TAS Tribe that EPA determines may be affected by a discharge from another jurisdiction. A neighboring jurisdiction's status is not based upon EPA's "may affect" determination, but rather a neighboring jurisdiction has this status by being a jurisdiction other than the one where the discharge originates or will originate. Thus, the current definition is more consistent with the statutory text establishing the process set forth in section 401(a)(2) for purposes of considering the water quality effects to "any other state" than the previous definition for the 2020 Rule.

The Agency recognizes the importance of off-reservation water rights. However, expanding the definition of "neighboring jurisdiction" to include non-TAS Tribes is not supported by the statutory text in section 401(a)(2). Section 401(a)(2) applies to "any other state." CWA

section 518(e) authorizes EPA to treat eligible Tribes with reservations in a similar manner as a state for purposes of section 401. Neither section 518(e) nor section 401 authorize EPA to treat non-TAS tribes as a state for purposes of section 401(a)(2).

11.1.4 Scope of the Neighboring Jurisdiction Process

One commenter asserted that the scope of section 401(a)(2) is the same as section 401(a)(1), because section 401(a)(2) is inextricably linked to section 401(a)(1), noting the word "such" refers to the scope of discharges provided in section 401(a)(1). The commenter suggested that to the extent proposed section 121.13(a) reflects a narrower view, EPA should modify the regulation to ensure it reflects that section 401(a)(2) applies to "any discharge" that "may result" from any federally licensed or permitted activity.

Agency's Response: The neighboring jurisdictions process established in section 401(a)(2) is distinct from the process for certification, which is a prior step in the statutory regime. Whereas the text of section 401(a)(1) and section 401(d) refers to a "certification" of compliance with water quality requirements, the text of section 401(a)(2) does not refer to the actions taken by the Administrator or a neighboring jurisdiction as "certifications." Instead, the text of section 401(a)(2) is clear that the neighboring jurisdictions process is distinct from, and follows after, a "certification" made pursuant to section 401(a)(1) and section 401(d). EPA rejects the assertion that the scope of the neighboring jurisdictions process in section 401(a)(2) must be the same as the scope of certification, as there are different statutory provisions relating to certification and the neighboring jurisdictions process, and interpreting them the same would not be consistent with the language of these distinct statutory provisions. Section 401(d), which is key to EPA's conclusion regarding scope of certification, applies only to certification and not to the neighboring jurisdictions process established in section 401(a)(2). Likewise, the Supreme Court's reasoning in *PUD No. 1* regarding the proper scope of certification (which EPA agrees with) does not extend to the neighboring jurisdictions process in section 401(a)(2).

In contrast to statutory language pertaining to certification, which supports a broader scope, the text of section 401(a)(2) establishes that the Administrator and notified neighboring jurisdictions consider the potential discharges of the project. Specifically, pursuant to section 401(a)(2) the Administrator considers whether "such a discharge" may affect the water quality of a neighboring jurisdiction, and likewise, a notified neighboring jurisdiction considers whether "such discharge" will affect its water quality so as to violate water quality requirements. EPA interprets this language as limiting the neighboring jurisdictions process to discharges from the project.

In response to the commenter asserting that the scope of section 401(a)(2) is inextricably linked to section 401(a)(1) through the use of the word "such", EPA disagrees. While EPA agrees that the "such" language employed in section 401(a)(2) refers to discharges from "any activity" subject to certification pursuant to section 401(a)(1), the Agency does not conclude that section 401(a)(1) compels the scope of the neighboring jurisdictions process to be the same as the scope of certification. As discussed in the final rule preamble, the scope

of certification is based, in part, upon statutory text within both section 401(a)(1) and section 401(d), and nothing in either of these statutory provisions or section 401(a)(2) compels the neighboring jurisdictions process to have the same scope as certification. This interpretation is also consistent with the legislative history regarding the neighboring jurisdictions process in CWA section 401, and its predecessor section 21(b) of the Water Quality Improvement Act of 1970. The text of section 21(b)(2) in the Water Quality Improvement Act of 1970 also reflected the "such a discharge" and "such discharge" language later employed in section 401(a)(2), before the 1972 amendments changed the language in section 21(b)(1) from "such activity" to "such discharge" in CWA section 401(a)(1). The fact that the "discharge" language in section 401(a)(2) remained consistent throughout amendments supports that Congress intended the scope of the neighboring jurisdictions process to consider "discharges," and it adopted and maintained a statutory regime with differing scopes for certification and the neighboring jurisdictions process.

EPA's interpretation of the scope of the neighboring jurisdictions process is further supported by procedural differences between this process and certification. Several procedural differences reflect a more limited authority for notified neighboring jurisdictions than that of certifying authorities. As discussed further below, neighboring jurisdictions only receive notification under section 401(a)(2) when EPA determines that a discharge from the project may affect their water quality, unlike section 401(a)(1) certification where the project proponent for the Federal license or permit *must* request certification from the certifying authority regardless of the known or suspected potential impacts to water quality. Likewise, notified neighboring jurisdictions determine whether discharge from the project will affect the quality of their waters so as to violate any water quality requirements, a standard inverse to that of a certifying authority determining if it can certify compliance with water quality requirements pursuant to section 401(a)(1). This distinction matters because the neighboring jurisdiction must make an affirmative case to support a "will affect" determination, a higher bar than that of a certifying authority, which could deny certification because of a lack of information supporting a conclusion that the activity will comply with water quality requirements. Additionally, in contrast to the certification decision made by the certifying authority, the outcome of the neighboring jurisdictions process following a hearing is determined by the Federal licensing or permitting agency, based upon the recommendations of the neighboring jurisdiction and EPA, and any additional information presented at the hearing. Taken together, these procedural distinctions reflect a more limited authority for notified neighboring jurisdictions in the neighboring jurisdictions process than the role of a certifying authorities, which supports EPA's interpretation finding a more limited scope for the neighboring jurisdictions process.

In addition to the differences between the extent of authority of a notified neighboring jurisdiction and a certifying authority, the statutory text of section 401 also reflects differences in the timing of the neighboring jurisdictions process compared to the timing of certification, which likewise support EPA's interpretation of differing scopes for these steps. In the neighboring jurisdictions process, both EPA and notified neighboring jurisdictions

are provided less time to make determinations regarding the water quality effects to a neighboring jurisdiction (30 days and 60 days, respectively) than a certifying authority has for acting on a request for certification (up to a year). The difference in the timing of determinations at these steps supports differing scopes, as it may be possible for EPA and notified neighboring jurisdictions to complete determinations in the more limited time provided for in the neighboring jurisdictions process based upon a more discrete analysis focused on discharges.

11.2 Initiating the Neighboring Jurisdiction Process

11.2.1 Triggers for (a)(2) process

Several commenters provided input on the proposed approach to have a waiver trigger the section 401(a)(2) process. A few commenters agreed that a waiver should trigger the section 401(a)(2) process and asserted that it would improve the neighboring jurisdiction process. Conversely, a few other commenters argued that a waiver should not trigger the section 401(a)(2) process and asserted that there is no statutory basis for the inclusion of waivers. One of these commenters added that expanding the notification process beyond what the statute provides would lead to needless process and delays.

Several commenters also provided input on what a Federal agency must receive prior to notifying EPA pursuant to section 401(a)(2). One commenter asserted that a Federal agency must notify the Administrator only when it has received both an application for a license or a permit and the certification request, while another commenter argued that requiring the Federal agency to be in receipt of both the application and certification before notifying EPA would increase delays. Conversely, one commenter agreed that section 401(a)(2) may only be initiated upon the Federal agency's receipt of the Federal license or permit application and either a certification or waiver. The commenter noted that this clarification will ensure that EPA and neighboring jurisdictions have necessary information to make determinations, asserting that inconsistent information sharing between the Federal agency and EPA has led to confusion and information gaps in the past.

One commenter asserted that EPA should not require the Federal agency to have a draft license or permit when it notifies EPA under the neighboring jurisdiction process, while another commenter asserted that the draft permit should be included for making the "may affect" determination if the draft permit is to be provided before making a certification decision.

<u>Agency's Response</u>: EPA disagrees with the assertion that the statute does not support waiver initiating the neighboring jurisdictions process established in section 401(a)(2). As explained in the final rule preamble, EPA is interpreting waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2) based upon the purpose of this statutory provision.[6] Employing a more restrictive interpretation would

[6] In fact, the language in section 401(a)(1) describes waivers of certification as a substitute for a granted certification because the Federal licensing or permitting agency is unable to proceed with their licensing or permitting process "until the certification required by [section 401(a)(1)] has been obtained or has been

otherwise allow certifying authorities to circumvent the neighboring jurisdictions process by waiving certification on projects affecting the water quality of neighboring jurisdictions, which is counter to the purpose of the process established in section 401(a)(2). Additionally, EPA also does not agree that this interpretation will result in unnecessary delays for Federal licensing or permitting because the statute limits the time EPA and the notified neighboring jurisdiction have to respond to a notification (30 days and 60 days, respectively). Further, as the process established by section 401(a)(2) provides an important mechanism for notified neighboring jurisdictions to meaningfully engage with Federal agencies on objections where they find a discharge from a project will violate their water quality requirements, EPA does not find this approach results in unreasonable process.

EPA disagrees that notification provided by a Federal agency prior to receipt of certification satisfies the notification requirement in section 401(a)(2), as this is inconsistent with the statutory language, which provides that the Federal agency shall provide notification "[u]pon receipt of such application and certification." As a result, notification prior to receipt of certification or waiver would not be sufficient to satisfy a Federal agency's obligation pursuant to section 401(a)(2). Furthermore, EPA disagrees that notification after a Federal agency receives a certification decision will increase delays in the Federal licensing or permitting process. Rather, a certification decision may render the need to notify EPA under section 401(a)(2) moot (i.e., denial) or it may inform EPA's analysis for its "may affect" determination and make it unnecessary to make a "may affect" finding (i.e., a certification with conditions).

This final rule does not require a Federal agency to provide a copy of the draft license or permit in its notification to EPA pursuant to section 401(a)(2). However, EPA recognizes that with respect to general Federal licenses and permits, there is no formal "application," and for that reason acknowledges that Federal agencies may provide a draft Federal license or permit in notification to EPA pursuant to section 401(a)(2).

11.2.2 Timing for Federal Agency to notify EPA

Several commenters provided input on the proposed interpretation of "immediately" in section 401(a)(2). A few commenters asserted that five days is adequate and satisfies the statutory requirement of "immediately." Conversely, another commenter asserted that providing Federal agencies with five calendar days to notify EPA of the receipt of a 401 certification to start the neighboring jurisdiction process is an unrealistic timeframe, and asked EPA to consider interpreting "immediately" as five business days or 10 calendar days.

One commenter stated that it is not clear if there are consequences for the Federal agency failing to meet the five-day deadline.

waived." 33 U.S.C. 1341(a)(1). By listing the two scenarios under which the process continues, it is reasonable to consider a waiver of certification as a substitute for a certification.

<u>Agency's Response</u>: EPA agrees with commenters that five days is adequate and is finalizing its proposed interpretation of "immediately" to mean within five calendar days of the Federal agency's receipt of the application for a Federal license or permit and either receipt of certification or waiver. EPA disagrees that the five-day period is unrealistic. EPA did not encounter significant challenges in implementing this interpretation in the 2020 Rule. The Agency finds five days a prompt yet reasonable amount of time for Federal agencies to complete notification to EPA pursuant to section 401(a)(2). This interpretation reflects the urgency connotated in the statutory language of section 401(a)(2), while also recognizing that the Federal agency needs some amount of time to process receipt of the Federal license or permit application and certification or waiver from the project proponent or certifying authority, and then transmit notice to the appropriate EPA regional office. Additionally, EPA finds that this approach provides clarity to Federal agencies regarding the timing of notification to EPA pursuant to section 401(a)(2), and also ensures consistency in practices across Federal licensing and permitting agencies.

The Agency notes that a Federal agency's failure to notify EPA within five calendar days of receipt of the application and certification or waiver would not comply with this final rule. Nevertheless, even if a Federal agency notifies EPA after five calendar days, EPA is still entitled to a 30-day period to make its "may affect" determination, and the neighboring jurisdictions process must conclude before a Federal agency issues a license or permit.

11.2.3 Contents of Federal Agency notification to EPA

One commenter said that the Federal agency should not be required to provide EPA with any information other than the certification or waiver of certification and the Federal license or permit application because it would exceed EPA's authority under section 401(a)(2) and place excess burden on the Federal agency and the applicant. The commenter further asserted that if the final rule includes supplemental information requirements for section 401(a)(2) notification, then it should be limited to existing information that is readily available.

<u>Agency's Response</u>: EPA disagrees that the provision in section 121.12(b) of the final rule allowing the Regional Administrator to request supplemental information where needed to make a "may affect" determination exceeds the Agency's statutory authority pursuant to section 401(a)(2). The statutory text of section 401(a)(2) does not preclude the Agency from seeking supplemental information in such circumstances, and otherwise does not limit what information the Agency considers in making a "may affect" determination. *See* 33 U.S.C. 1341(a)(2). Additionally, the Agency finds that as a practical matter, it is both reasonable and in the best interests of the Federal licensing or permitting agency and the project proponent for the Agency to have adequate information to inform its "may affect" determination. Although EPA is not creating formalized strictures on the supplemental information the Regional Administrator may request pursuant to section 121.12(b) of the final rule, given the uncertainty of addressing unknown circumstances necessitating such supplemental information, it generally anticipates that such supplemental information would be information readily available to the Federal agency or project proponent. The

Agency included discussion of readily materials in section 3.1.3.2 above and in final rule preamble section IV.C.2.

11.2.4 Individual versus General Permits/Licenses

One commenter asked EPA to clarify how general permits, as opposed to individual permits, are treated under the neighboring jurisdiction process. Another commenter asserted that EPA should consider only requiring the neighboring jurisdiction process for larger, complex individual permit projects because of wide-ranging implications of the neighboring jurisdiction process.

Agency's Response: The Agency wishes to reiterate that *all* certifications or waivers will trigger the neighboring jurisdictions process, including general permits. EPA finds no basis in the statutory text supporting an exception to this process for general permits or less complex individual permits. Instead, the type of project and discharge covered in the Federal license or permit are factors that may be considered by EPA and any notified neighboring jurisdictions in their determinations regarding the water quality effects of a discharge from a project in the neighboring jurisdictions process.

The Agency is aware that there are instances where a Federal license or permit application does not accompany a certification or waiver (*e.g.*, certification on general permits or Corps civil works projects). Again, certifications or waivers on those projects are not exempt from the neighboring jurisdictions process. Rather, EPA expects Federal agencies to determine how best to comply with all section 401 requirements. For example, on a Corps civil works project, compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification.

11.3 "May Affect" Determination

11.3.1 Whether EPA is Required to Make a "May Affect" Determination

Commenters were divided on whether EPA is required to make a "may affect" determination under section 401. Some commenters asserted that section 401 provides EPA discretion whether to make a "may affect" determination, and that EPA need not make this determination with regard to all licenses or permits subject to section 401. Some of these commenters asserted additional rationales for this position, including that requiring EPA to make a "may affect" determination for all licenses or permits subject to section 401 would be an inefficient use of EPA resources and result in unnecessary delays in the licensing or permitting process. One commenter asserted that neighboring jurisdiction review is unnecessary in many cases where projects appear sufficiently distanced from the border of a neighboring jurisdiction and would result in lengthy and unnecessary delays for project proponents. Accordingly, the commenter recommended that the proposed rule should be revised to allow EPA greater discretion in subjecting projects to review under proposed section 121.12. The same commenter also supported the use of programmatic agreements between EPA and Federal agencies to reduce the number of routine projects distant from a neighboring jurisdiction border subject to neighboring jurisdiction coordination, arguing that it would provide a more efficient and timely authorization for the regulated public.

Some other commenters agreed with the language in the proposal stating that section 401 requires EPA to make a "may affect" determination upon receiving notice from the licensing or permitting Federal agency. Some such commenters referenced the case cited in the proposal, *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549 (D. Minn. 2021). Additionally, some of the commenters supporting the position that EPA is required to make "may affect" determinations noted that this approach better allows neighboring jurisdictions to protect their water quality and provides transparency.

<u>Agency's Response</u>: EPA finds that the statutory language in section 401(a)(2) provides EPA discretion when making a "may affect" determination. However, the Agency does not agree that the statutory text provides EPA with discretion to decide that the Agency will not make a may affect determination following appropriate notification from the Federal agency. As noted by the court in *Fond du Lac*, this interpretation would be inconsistent with the statutory text of section 401(a)(2) directing the Agency to provide notification within a set timeframe to a neighboring jurisdiction when it finds that a discharge from a project may affect its water quality. *See Fond du Lac*, 519 F.Supp.3d at 563 (noting that it would be odd "if a decisionmaker . . . was mandated by law to do everything that was necessary to make a particular type of decision . . . but was not mandated by law to actually *make* the decision."). Given the Agency's interpretation that it is required to make a "may affect" determination upon appropriate notification from the Federal licensing or permitting agency pursuant to section 401(a)(2), the Agency finds that use of resources for this purpose is necessary to comply with the statute. Finally, the Agency rejects the argument that making "may affect" determinations in accordance with section 121.13(a) of the final rule will add unnecessary delays to the Federal licensing or permitting process, as the Agency is finding that it is required to make a "may affect" determination pursuant to section 401(a)(2), and the statutory text provides a set, relatively short, timeframe for the Agency to make this determination (30 days). *See* 33 U.S.C. 1341(a)(2).

EPA disagrees with commenter suggesting that certain projects should be exempt from the neighboring jurisdictions process. Rather, section 401(a)(2) provides that *all* certifications or waivers will trigger the neighboring jurisdictions process, regardless of the project's distance from the border of a neighboring jurisdiction. EPA finds no basis in the statutory text supporting an exception to this process based on distance. Instead, the proximity of the project and discharge to neighboring jurisdictions is one factor that may be considered by EPA and any notified neighboring jurisdictions in their determinations regarding the water quality effects of a discharge from a project in the neighboring jurisdictions process.

11.3.2 Clarifying the "May Affect" Standard

Commenters asserted differing interpretations of the meaning of the "may affect" standard. A commenter argued that this standard examines the likelihood of whether a discharge will cause a downstream violation of federal, state, or Tribal requirements adopted pursuant to authority under sections 301, 302,

303, 306, and 307 of the CWA. Another commenter proposed that EPA require an actual demonstration that there may be an effect to find this standard met.

In contrast, another commenter asserted that EPA should determine the standard would be met where some reasonable possibility for an effect exists, even where EPA does not have conclusive evidence of such effect. Still another commenter asserted that the standard simply requires an analysis of whether the discharge has the possibility of affecting a neighboring jurisdiction's water quality, that this standard encompasses both beneficial and adverse effects, and that it is a low threshold. This commenter requested that EPA specifically clarify that this standard is a low threshold.

> **Agency's Response: EPA is not further defining the meaning of "may affect" in section 401(a)(2), aside from identifying factors that it may consider in making a "may affect" determination, as the statutory language provides sufficient clarity that this standard is met "[w]henever such a discharge may affect, as determined by the Administrator, the quality of the waters" of a neighboring jurisdiction. 33 U.S.C. 1341(a)(2). This standard is necessarily broadly applicable, as it must be applied to differing Federal licenses and permits in a wide range of factual circumstances. Moreover, section 401(a)(2) recognizes the Administrator's discretion applying this standard in a "may affect" determination.**
>
> **Although EPA is not attempting to further define the "may affect" standard in the final rule, it notes that this standard is distinguishable from the standard that notified neighboring jurisdictions apply to make a determination regarding an objection, which is whether "such discharge will affect the quality of its waters so as to violate any water quality requirements" in its jurisdiction. *See* 33 U.S.C. 1341(a)(2). Unlike the standard applied by notified neighboring jurisdictions in making a determination regarding an objection, the standard applied by EPA in its "may affect" analysis does not require consideration of whether water quality effects of discharge from the project will result in violation of water quality requirements. Instead, the standard applied by EPA in its "may affect" determination only requires analysis of whether discharge from the project may have water quality effects on a neighboring jurisdiction. Additionally, the "may affect" standard, in contrast to the standard applied by notified neighboring jurisdictions, does not require a finding that the discharge "will" effect water quality. Accordingly, EPA finds this standard may be met where there may be an effect to a neighboring jurisdiction's water quality, but such effect is not certain to occur.**

11.3.3 Consultation on "May Affect" Determinations

Some commenters also expressed views with regard to the role of neighboring jurisdictions or stakeholders more broadly in EPA's "may affect" determination. Some commenters suggested that EPA consult with or involve neighboring jurisdictions in making "may affect" determinations. Likewise, some of these commenters more specifically asserted that EPA should consult with Tribal neighboring jurisdictions in making "may affect" determinations. One such commenter requested that EPA codify a Tribal consultation requirement and commit to engaging potentially affected Tribes in making "may affect" determinations. Another commenter asserted that placing the "may affect" determination solely

within the purview of the Administrator would risk ignoring important information from neighboring Tribal jurisdictions that might inform EPA's determination. Although the commenter acknowledged the proposal's requirement that Federal agency notifications include whether the neighboring jurisdiction expressed concerns or provided comments on the project, the commenter stated that there may still be instances where a neighboring Tribe will not be informed by the Federal agency of a pending license or permit or does not have the resources to monitor or comment on every license or permit. The commenter further argued that without a process to ensure Tribal neighboring jurisdictions' views are sought and considered, EPA may make a "may affect" determination without considering impacts on Tribes and their reserved rights.

Additionally, a commenter argued that it was appropriate and reasonable for EPA to solicit input from the project proponent and Federal licensing or permitting agency in the process of making a "may affect" determination.

> **Agency's Response: EPA finds its position regarding its sole discretion in making a "may affect" determination and the role of stakeholders, including neighboring jurisdictions, in such a determination is reasonable and consistent with the statutory text of section 401(a)(2). Section 401(a)(2) specifically recognizes EPA's discretion in making a "may affect" determination, and does not establish a role for stakeholders in EPA's determination. Further, section 401(a)(2) provides EPA with only 30 days to make a "may affect" notification and provide any required notification to neighboring jurisdictions. EPA does not find the limited period of time that the statute affords the Agency for its "may affect" determination and any required notification consistent with a process in which it engages stakeholders and solicits their input, and imposing such a process would burden the Agency. Accordingly, EPA declines to adopt such a process for "may affect" determinations.**
>
> **Although EPA is not adopting a process to engage stakeholders and solicit their input in making "may affect" determinations, the Agency wishes to emphasize that it may consider factors relevant to the neighboring jurisdiction in making a "may affect" determination. For example, the Agency may consider various factors in making its "may affect" determination, such as the neighboring jurisdiction's water quality requirements and the views of the neighboring jurisdiction on the effect of discharge from the project on its water quality.**

11.3.4 Factors Considered by EPA in Making a "May Affect" Determination

Most commenters addressing factors for EPA to consider in "may affect" determinations supported EPA providing some identification of such factors in the final rule. Such commenters noted that identification of factors clarifies and provides broader understanding of the EPA's process in making a "may affect" determination and may improve efficiency in making this determination. Some commenters agreed that EPA has discretion in making a "may affect" determination, but asserted that this discretion is not unbounded, arguing that EPA is limited by the statutory bounds of section 401.

Some commenters recommended that EPA establish an exclusive list of factors it considers in making "may affect" determinations, limiting the factors considered in each determination to only those identified on this list. Collectively, these commenters asserted that this approach would limit subjectivity in such determinations, increase predictability, allow Federal agencies and project proponents to plan, and would focus the determinations and possible subsequent proceedings by Federal agencies on non-speculative assertions of impacts to water quality. A few commenters asserted that the proposed rule did not provide sufficient detail to make the Section 401(a)(2) process clear, predictable, or transparent because there are no substantive criteria to ascertain how EPA makes a "may affect" determination.

Some other commenters supported EPA codifying a list of factors it must consider in making a "may affect" determination, but providing that EPA may consider other factors. A commenter argued that this approach is supported by the fact that there are certain factors that are relevant to all circumstances. Another commenter asserted that this would allow EPA to establish a minimum standard for what it considers in "may affect" determinations.

Additionally, some other commenters supported EPA identifying examples of considerations to improve clarity but did not recommend requiring EPA to consider factors in recognition of the fact-dependent nature of "may affect" determinations.

Many commenters supported EPA considering the factors identified in the proposal in making a "may affect" determination, these factors included the type of the project and discharged covered in the permit, the proximity of the project and discharge to other jurisdictions, certification and other conditions already contained in the draft license or permit, and the neighboring jurisdiction's water quality requirements. A commenter raised concern about EPA considering certification and other conditions already contained in the draft license or permit as a relevant factor, stating that such conditions would not eliminate the possibility of effects to a neighboring jurisdiction, and asserting that a more relevant factor is the types of conditions typically included in the neighboring jurisdiction's certifications and permits.

Some commenters suggested other factors as relevant for EPA to consider in its "may affect" determination, including the water quality and characteristics of the water receiving the discharge; other discharges to the receiving water; uses of the receiving water (including Tribal, subsistence, and unique uses); Tribal treaty rights; concerns and interests of the neighboring jurisdiction; environmental justice; climate change factors; and health and safety concerns.

> **<u>Agency's Response</u>: As discussed in Section IV.K of the final rule preamble, EPA is finalizing the proposed approach to identify factors that EPA may consider in making a "may affect" determination and is not establishing specific factors that EPA must analyze in making a "may affect" determination. EPA is also reiterating the factors that it identified in the preamble of its proposal as factors it may consider in making a "may affect" determination.**
>
> **EPA agrees that its discretion regarding making a "may affect" determination is bounded by the statutory grant of authority in section 401. When EPA conducts its "may affect" analysis, EPA considers whether discharge from a project may affect the water quality of a**

neighboring jurisdiction, in accordance with the statutory language of section 401(a)(2). Thus, EPA is declining to adopt commenter suggestions to consider or identify factors that are not tailored to this analysis of water quality effects.

EPA disagrees with the approaches suggested by certain commenters that EPA identify either an exclusive list of factors for the Agency to consider in making this determination, or establish a minimum list of factors that EPA must consider, as these approaches do not recognize the fact-dependent nature of a "may affect" determination and do not provide the flexibility necessary for the Agency to make "may affect" determinations involving different types of licenses and permits. Identifying an exclusive list of factors for the Agency to consider in making a "may affect" determination could preclude the Agency from considering important information relevant to determining whether discharge from a project may affect the water quality of a neighboring jurisdiction. Additionally, this approach does not appear to be consistent with the statutory language in section 401(a)(2), which does not impose limitations on the information the Agency may consider in making this determination, but rather recognizes the Agency's discretion in making this determination. Likewise, establishing a minimum list of factors that EPA must consider in a "may affect" determination could require the Agency to consider factors even where they are not relevant to determining whether discharge may affect the water quality of a neighboring jurisdiction. This approach would not prove efficient, which is of particular concern as the Agency is only afforded 30 days to make a "may affect" determination and provide any required "may affect" notification. Instead, the Agency finds that identifying examples of factors that it may consider in making a "may affect" determination, as it has above, provides greater clarity without inappropriately limiting the Agency from considering other relevant factors or requiring it to apply factors where they are irrelevant.

In response to commenters' suggestions, EPA is identifying the current water quality and characteristics of the water receiving the discharge as factors it may consider in its "may affect" analysis, in addition to the factors previously identified at proposal. EPA finds these to be reasonable inclusions in the examples of factors it may consider in a "may affect" determination, and, as a result, is identifying these factors in the final rule preamble. However, EPA is declining to identify factors which appear to be already addressed by those identified at proposal or factors which relate only to specific factual circumstances for purposes of avoiding repetition or confusion. *See* Section IV.K of the final rule preamble for a non-exhaustive list of factors that the Agency may consider in making a "may affect" determination.

11.3.5 Other Procedural Recommendations

Some commenters offered procedural recommendations for EPA to adopt regarding its "may affect" determinations. A commenter argued that 30 days is too long of a period for EPA to make "may affect" determinations, and suggested EPA limit the period of time to complete these determinations to 15 days. Another commenter stated that general permits do not provide sufficient information for EPA to determine potential water quality impacts to a neighboring jurisdiction and requested that EPA use

information contained in the permit application to make its "may affect" determination for activities authorized under general permits. One commenter recommended that EPA should define a reasonable minimum period of time for the EPA to notify both the Federal and permitting agency and certifying authority from the date an individual certification is issued.

A few commenters expressed concern that EPA is not required to provide a response when not finding that a discharge may affect the water quality of a neighboring jurisdiction and suggested that lack of a response could have meaning other than this finding. One of these commenters argued that the neighboring jurisdiction may not agree with EPA that there is no impact but would not know about the proposed project without EPA's notice. Similarly, another commenter recommended that EPA publish its "may affect" determinations in the *Federal Register,* so Tribes may access this information, including in instances where EPA has not determined that a discharge will affect a neighboring jurisdiction's waters. One commenter said that EPA should notify neighboring jurisdictions when EPA determines that an activity does not have the potential to affect water quality to show that EPA carried out its role under section 401(a)(2). Another commenter suggested that EPA should revise proposed section 121.13(b) to provide notice to a neighboring jurisdiction within 5 days of determining that an activity does not have the potential to affect the water quality of a neighboring jurisdiction. The same commenter asserted that the notification should include the reason for reaching a negative decision, arguing that a notification is essential to show that EPA carried out the required assessment and to provide transparency to all interested parties as to how EPA arrived at its determination. One commenter recommended that EPA should provide notification to a neighboring jurisdiction for any projects that discharge into transboundary or shared waterways to allow certifying authorities to analyze any potential impact to their waters.

One commenter argued that the Agency should address the information EPA must provide to states and develop operating procedures with states to ensure effective implementation of section 401(a)(2). The commenter asserted that such involvement is important in their jurisdiction because of its investment in the Chesapeake Bay TMDL requirements and that it may aid environmental justice efforts. The commenter suggested that Federal agencies, the Regional Administrator, and certifying authorities work collaboratively to pre-identify locations, resources, or activity thresholds of concern, and establish an earlier process to address concerns before a permit or license is issued.

> **<u>Agency's Response</u>: As discussed in the final rule preamble, the statute provides EPA with a 30-day period to make a "may affect" determination and provide any required notification, and EPA declines to shorten the time period for the Agency to take such actions. EPA notes that the 2020 Rule also provided a 30-day time period for the Agency to perform these actions, and EPA did not find that this approach resulted in unnecessary Federal licensing or permitting delays. Accordingly, the Agency finds it reasonable to retain the 30-day time period reflected in statute for making a "may affect" determination and providing any required notification.**
>
> **The Agency also declines to adopt commenter suggestions to start EPA's time period to conduct a "may affect" determination analysis from the date a certification is issued. As discussed in Section IV.K of the final rule preamble, section 401(a)(2) requires a Federal**

agency to "immediately" notify EPA when it receives a Federal license or permit application and a certification or waiver. EPA's 30-day period to determine whether discharge may affect the water quality of a neighboring jurisdiction may only begin once it is notified by the Federal agency in accordance with section 401(a)(2) and this final rule. *See* Section IV.K of the final rule preamble for further discussion on the contents of a Federal agency's notification to EPA.

In response to the comment regarding the contents of a notification for a general permit, the Agency wishes to reiterate that the contents of a Federal agency's notification to EPA defined at section 121.12 of this final rule apply to all certifications and waivers, including certifications and waivers on general licenses or permits. As discussed in Section IV.K of the final rule preamble, the Agency is aware that there are instances where a Federal license or permit application does not accompany a certification or waiver (e.g., certification on general permits or Corps civil works projects). Certifications or waivers on those projects are not exempt from the neighboring jurisdictions process. Rather, EPA expects Federal agencies to determine how best to comply with all section 401 requirements. For example, on a project that obtained certification for authorization under a general permit, compliance may involve the Federal agency sending the PCN in conjunction with a certification or waiver of certification.

In consideration of the statutory constraints on EPA to make a "may affect" determination and provide "may affect" notification within 30 days of proper notice from the Federal agency, EPA is not expanding the notification requirements beyond the circumstances and to the parties it is required to provide such notification pursuant to section 401(a)(2). The neighboring jurisdictions process established in section 401(a)(2) does not direct the EPA to provide notification outside of circumstances in which the Agency has determined that a discharge from the project may affect a neighboring jurisdiction's water quality. Likewise, the statutory language does not provide for "may affect" notification to other parties besides the relevant neighboring jurisdiction, the Federal agency, and the project proponent. *See* 33 U.S.C. 1341(a)(2). Accordingly, the statutory language reflects a more limited process for the Agency to provide "may affect" notification than suggested by certain commenters, which is consistent with the limited duration of time afforded the Agency for making a "may affect" determination and providing such notification in section 401(a)(2). Given the limited 30-day period for Agency action in this context, and in consideration of the overall volume of "may affect" determinations made by the Agency, EPA finds it reasonable to maintain the notification requirements established in the statutory text of section 401(a)(2), and is not expanding these requirements beyond the statutory bounds.

Section 401(a)(2) also does not provide the specific manner in which the Agency must provide notification when it has determined that a discharge from the project may affect a neighboring jurisdiction's water quality. The Agency declines to adopt commenter suggestions to publish all "may affect" determinations in the Federal Register because of the limited duration of time afforded the Agency for making a "may affect" determination

and providing such notification in section 401(a)(2). As provided in section 121.13(b) of the final rule, the Agency will provide the neighboring jurisdiction, Federal agency, and project proponent with notice in accordance with section 121.13(c). The Agency finds this approach will ensure relevant stakeholders are notified in a timely manner consistent with section 401(a)(2).

As discussed in the preambles to the proposed rule and the final rule, the Agency is not identifying specific factors EPA must analyze in making a "may affect" determination, given the range of Federal licenses or permits that are covered by CWA section 401(a)(2) and EPA's discretion to look at various factors. 87 FR 35368; Section IV.K of the final rule preamble. The Agency notes that each "may affect" determination is likely to be fact-dependent and based on situation-specific circumstances and expressed uncertainty that it could provide a required list of factors for it to consider in making a "may affect" determination. The Agency is maintaining its position that it has sole discretion, pursuant to section 401(a)(2), to examine the facts and determine whether the discharge "may affect" the quality of a neighboring jurisdiction's waters. This interpretation regarding the Agency's discretion is consistent with the statutory language of section 401(a)(2), which directs EPA to notify neighboring jurisdictions "[w]henever such a discharge may affect, *as determined by the Administrator*. . . ." 33 U.S.C. 1341(a)(2) (emphasis added). The Agency is further maintaining its position that EPA is not required to engage with stakeholders or seek their input in making a "may affect" determination. However, the Agency may consider the neighboring jurisdiction's views on the effect of a discharge from the project on its water quality as a factor in making a "may affect" determination. Further, in section 121.12(a) of the final rule, EPA is finalizing the proposed regulatory text defining the contents of a Federal agency's notification to EPA to include an indication of whether any neighboring jurisdictions have expressed water quality concerns or provided such comment on the project. This provision may increase EPA's awareness of water quality concerns raised by neighboring jurisdictions at the time the Agency receives notice prompting it to make a "may affect" determination, and EPA reiterates its intention to consider such views of neighboring jurisdictions if provided in a timely manner. *See* Section IV.K of the final rule preamble for further discussion on the Agency's may affect determination; *see also* the Agency's Response to Comments in Section 11.3.3 and 11.3.4.

11.4 Neighboring Jurisdiction's Role

11.4.1 General

A commenter asserted that requiring a Tribal neighboring jurisdiction to explain its reasons for opposing certification with an expectation that it will cite to its water quality requirements would continue the 2020 Rule's content requirements, which the commenter argued the preamble otherwise says it is rejecting. The commenter further explained that the proposed rule's approach to the neighboring jurisdiction's objection may be more burdensome than the 2020 Rule and injects uncertainty into the process (i.e., using "including but not limited to" language to describe requisite contents). Instead, the commenter recommended that the Agency remain silent on this issue like the 1971 Rule so that neighboring

jurisdictions have discretion to determine what information to include. The same commenter also rejected inclusion of certification conditions in the objection. Alternatively, the commenter recommended that EPA could include discretionary language at section 121.14 and develop guidance materials that indicate the types of evidence and information that would be helpful for the neighboring jurisdiction to include in its objection and/or prior to the public hearing for EPA to consider in its evaluation and recommendation. The commenter also stated that EPA could include discretionary language requesting conditions that the neighboring jurisdiction believes could resolve the objection, or else a statement that no condition can ensure compliance with applicable water quality requirements. Lastly, the commenter recommended that EPA should establish a Tribal consultation process to gather information from an objecting Tribe before the public hearing to have for development of EPA's evaluation and recommendation.

A few commenters asserted that the project proponent, as opposed to the neighboring jurisdiction, has the burden to show a license or permit should be issued. One of these commenters said that the permit applicant, not the neighboring jurisdiction, should have the burden or responsibility of proving that the permit should be issued, because the applicant and the Federal agency are responsible for ensuring compliance with the affected state's water quality requirements. Another of these commenters said that the Supreme Court has construed section 401(a)(2) to "prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured." *Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992). The commenter said that section 401 is a regulatory process triggered by an applicant that seeks a Federal license or permit and section 401(a)(2)'s purpose is to ensure compliance with a neighboring jurisdiction's water quality requirements. As such, the commenter argued that the applicant always has a burden of proof to show that the permit or license should be issued and not denied. The commenter said this was exemplified when the Tenth Circuit held that EPA erred by placing a burden of proof on a downstream jurisdiction in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990), *rev'd on other grounds sub nom*, *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). The commenter stated that the Tenth Circuit concluded that EPA "improperly transformed" the permit applicant's "burden of showing the permit should be issued into a burden on Oklahoma to show that it should be denied." 908 F.2d at 620. The commenter asserted that the statute requires the applicant and Federal agency to overcome the objection by demonstrating that there are sufficient conditions to "insure" such compliance. Accordingly, the commenter argued that this is the construction the Supreme Court has placed on section 401(a)(2) by finding it "prohibit[s] the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured." *Arkansas*, 503 U.S. at 103.

A commenter recommended that EPA provide further guidance and clarity in regulatory text on the neighboring jurisdiction review process that occurs after EPA makes a "may affect" determination. The commenter stated that, currently, it is unclear whether comments from neighboring jurisdictions are required to be addressed by the Federal licensing or permitting agency or by the state or Tribe that issues the certification. Given that some states may have more stringent water quality standards than others, the commenter said that neighboring jurisdictions should have the opportunity to incorporate certification conditions to protect their downstream water quality.

<u>Agency's Response</u>: EPA does not find that section 121.14(b) is too burdensome on the notified neighboring jurisdiction, and otherwise finds it reasonable that the notified

neighboring jurisdiction's notification of an objection and request for hearing include an explanation of the reasons supporting the "will violate" determination. Section 401(a)(2) of the CWA states that a notified neighboring jurisdiction may make an objection and request a hearing "[i]f … [the neighboring jurisdiction] *determines* that such discharge will affect the quality of its waters so as to violate any water quality requirements…." 33 U.S.C. 1341(a)(2) (emphasis added). To accomplish this, the neighboring jurisdiction necessarily must consider its water quality requirements and complete an analysis or evaluation to determine that a discharge from the project will violate such water quality requirements. All EPA is requiring in section 121.14(b)(2) of the final rule is that the neighboring jurisdiction provide an explanation of that analysis or evaluation in its notification of objection and request for hearing, including the identification of the water quality requirements that will be violated. This will inform the Federal licensing or permitting agency, EPA, and the project proponent of the reasoning for the objection; allow the Federal agency and EPA to prepare for a hearing on the objection; and may assist in determining whether there is a way to resolve the objection before the public hearing. EPA finds this requirement is reasonable to inform the neighboring jurisdictions process and does not find it imposes an unreasonable burden on the notified neighboring jurisdiction.

EPA observes that section 401(a)(2) only provides the notified neighboring jurisdiction, the Federal licensing or permitting agency, and EPA with explicit roles and duties in the neighboring jurisdictions process. CWA section 401(a)(2) requires the neighboring jurisdiction to determine whether the discharge will violate its water quality requirements after EPA makes a "may affect" determination, and if so, object to the issuance of the Federal license or permit and request a public hearing. After that, if the neighboring jurisdiction does not withdraw its objection, the Federal licensing or permitting agency must hold a public hearing and determine whether any conditions are necessary to ensure that the neighboring jurisdiction's water quality requirements are met. *See* 33 U.S.C. 1341(a)(2) ("Such Agency…shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.").

Section 401(a)(2) provides no specific role for the certifying authority and in fact, the neighboring jurisdictions process occurs *after* the certifying authority has acted on a request for certification. Accordingly, the certifying authority is not responsible for addressing the neighboring jurisdiction's objection in its certification. The Federal agency must consider the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the Federal license or permit as may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall not issue the license or permit. Additionally, section 401(a)(2) does not provide an explicit role for the project proponent in the neighboring jurisdictions process, although the project proponent may provide input at the public hearing. Accordingly, this final rule cannot require a project proponent to demonstrate that a Federal license or permit should be issued through the neighboring jurisdictions process.

As discussed in Section IV.K of the final rule preamble, the Agency revised sections 121.13-121.15 to more closely reflect the statutory language in section 401(a)(2) and provide greater clarity. Accordingly, the Agency finds that sections 121.13-121.15 of the final rule provide sufficient clarity regarding the process that occurs after EPA makes a "may affect" determination.

11.4.2 Sending the Objection Notification to the Certifying Authority

Some commenters said that the neighboring jurisdiction should be required to send the objection notification to the certifying authority. Conversely, another commenter said that the neighboring jurisdiction should not be required to send the objection notification to the certifying authority because this requirement as proposed in sections 121.13(c)(3) and 121.14(a) is contrary to section 401(a)(2). The commenter argued that EPA identifies no statutory basis for this requirement and asserted it exceeds the requirements expressly provided in section 401(a)(2), which provides that the neighboring jurisdiction need only "notif[y] the Administrator and the licensing or permitting agency in writing of its objection." The commenter went on to say that if Congress wanted to require the neighboring jurisdiction to notify the certifying authority, Congress would have so provided. Further, the commenter said that the reason Congress consciously chose not to require notification to the certifying authority of the "will affect" determination is that section 401(a)(2) provides no role for the certifying authority; the matter is exclusively among the objecting jurisdiction, EPA, and the relevant Federal licensing or permitting agency, therefore a certifying authority has no immediate need for the "will affect" determination.

<u>Agency's Response</u>: EPA has eliminated the requirement that the notified neighboring jurisdiction send the notification to the certifying authority to conform the regulatory text more closely with the statutory language in section 401(a)(2), which does not require notification to the certifying authority. EPA agrees that, unlike the Regional Administrator and the Federal agency, the certifying authority does not have a specific role under CWA section 401(a)(2). In fact, the neighboring jurisdictions process occurs *after* the certifying authority has acted on a request for certification. However, like the project proponent, the certifying authority may participate in the neighboring jurisdictions process by providing comments during the public hearing. EPA encourages the Federal agency to involve the certifying authority in conversations that occur prior to the public hearing, if it believes that the certifying authority may have information that could inform discussions with the notified neighboring jurisdiction.

11.4.3 Identifying and Justifying the Reasons for an Objection

Some commenters concurred that a neighboring jurisdiction's objection to a certification should include identifiable and justifiable reasons supporting the determination that the discharge will violate the neighboring jurisdiction's water quality requirements.

Alternatively, some commenters argued that EPA should not include a requirement that the neighboring jurisdiction's objection include an explanation of the reasons supporting its determination that the

discharge will violate its water quality requirements, including but not limited to identifying any water quality requirements that will be violated. A commenter said EPA should withdraw its proposal to add requirements for a neighboring jurisdiction's notification that go beyond section 401(a)(2)'s express language. Another commenter asserted that EPA should only require a neighboring jurisdiction to lodge its objection and request a public hearing in its notification, consistent with section 401(a)(2), which the commenter claimed does not allude to content or form requirements for objection notifications. The commenter argued that while proposed section 121.14(b)(1) and (3) are in line with section 401(a)(2), proposed section 121.14(b)(2) would impose a burden that is not required under the statue. A commenter argued that this wording invites abuse of the process by encouraging a neighboring jurisdiction to inject issues beyond the water-quality focus of the statute generally and the notification provision in particular. Therefore, this commenter recommended that objections be limited to claims that water quality requirements will be violated.

Another commenter said that much of the information proposed to be required in the objection would already be in a neighboring jurisdiction's notification. Further, the commenter argued that EPA's proposal creates the possibility for parties to challenge a neighboring jurisdiction's objection notification simply because it did not comply with EPA's extra-statutory requirements in regulation. For example, the commenter said that an objecting jurisdiction could comply with section 401(a)(2)'s express requirements but fail to satisfy the proposed requirements in the regulation to notify the certifying jurisdiction. The commenter asserted that a party could argue the "will affect" jurisdiction is defective and of no effect for failing to comply with the proposed regulation. Accordingly, the commenter recommended that proposed sections 121.13(c)(3) and 121.14(a) should be revised to remove this requirement.

> **<u>Agency's Response</u>: EPA does not find that section 121.14(b) is too burdensome on the notified neighboring jurisdiction, and otherwise finds it reasonable that the notified neighboring jurisdiction's notification of an objection and request for hearing include an explanation of the reasons supporting the "will violate" determination. Section 401(a)(2) of the CWA states that a notified neighboring jurisdiction may make an objection and request a hearing "[i]f … [the neighboring jurisdiction] *determines* that such discharge will affect the quality of its waters so as to violate any water quality requirements…." 33 U.S.C. 1341(a)(2) (emphasis added). To accomplish this, the neighboring jurisdiction necessarily must consider its water quality requirements and complete an analysis or evaluation to determine that a discharge from the project will violate such water quality requirements. All EPA is requiring in section 121.14(b)(2) of the final rule is that the neighboring jurisdiction provide an explanation of that analysis or evaluation in its notification of objection and request for hearing, including the identification of the water quality requirements that will be violated. This will inform the Federal licensing or permitting agency, EPA, and the project proponent of the reasoning for the objection; allow the Federal agency and EPA to prepare for a hearing on the objection; and may assist in determining whether there is a way to resolve the objection before the public hearing. EPA finds this requirement is reasonable to inform the neighboring jurisdictions process and does not find it imposes an unreasonable burden on the notified neighboring jurisdiction.**

In response to the comment regarding notification to the certifying authority, EPA has eliminated the requirement that the notified neighboring jurisdiction send the notification to the certifying authority to conform the regulatory text more closely with the statutory language in section 401(a)(2), which does not require notification to the certifying authority. *See* the Agency's Response to Comments in Section 11.4.2 for further discussion.

11.4.4 Identifying Water Quality Requirements that would be Violated

Some commenters said that neighboring jurisdictions should be required to include a citation to the water quality requirements that they believe would be violated in their objections.

Agency's Response: The Agency is declining to require the notified neighboring jurisdiction to include a citation to the water quality requirements it believes would be violated in its notification of objection and request for hearing. All EPA is requiring in section 121.14(b)(2) of the final rule is that the neighboring jurisdiction provide an explanation of its analysis or evaluation for its "will violate" determination in its notification of objection and request for hearing, including the identification of the water quality requirements that will be violated. This will inform the Federal licensing or permitting agency, EPA, and the project proponent of the reasoning for the objection; allow the Federal agency and EPA to prepare for a hearing on the objection; and may assist in determining whether there is a way to resolve the objection before the public hearing. EPA finds this requirement is reasonable to inform the neighboring jurisdictions process and does not find it imposes an unreasonable burden on the notified neighboring jurisdiction.

11.4.5 Identifying the "Potentially Affected" Receiving Waters

Some commenters asserted that the neighboring jurisdiction should be required to identify the "potentially affected" receiving water. One of these commenters stated that including only the list of water quality requirements but not the receiving body would make it impossible to determine the validity of the concerns raised and to resolve the neighboring jurisdiction's concerns. The same commenter also asserted that it would invite a neighboring jurisdiction to raise arbitrary concerns to slow the licensing or permitting process.

Another commenter stated that the proposal set no boundaries for what a downstream state may consider and does not require a downstream state to identify the body of water it anticipates will be impaired by approval of a project, even though the entire process for a certification is initiated by determining a discharge may affect a particular navigable water. The commenter asserted that this gives downstream states too much authority to impose their political will on upstream states. Accordingly, the commenter recommended that EPA devise a more focused approach that allows potentially affected downstream states to review and respond to certifications but set parameters that require a downstream state to truly justify any actions it proposes and to focus only on the navigable water where the discharge will occur.

Agency's Response: EPA declines to require the notified neighboring jurisdiction to specifically identify affected receiving waters in its notification of objection and request for

hearing. However, as EPA noted in its proposal, the Agency anticipates that this information is likely to be included in a notified neighboring jurisdiction's explanation of the reasons supporting its "will violate" determination, and EPA encourages neighboring jurisdictions to include this information where possible, as it may assist the Federal agency in evaluating the objection. As the notified neighboring jurisdiction has a limited time period of 60-days to make its "will violate" determination and issue any notification of an objection and request for hearing, imposing a requirement that this notification identify all waters where discharge will violate water quality requirements may not be feasible in all circumstances. Accordingly, EPA is not including this requirement.

The Agency also declines to limit the notified neighboring jurisdiction's focus to the navigable water where the discharge will occur.[7] While the water directly receiving discharge from the project may be the water affected, section 401(a)(2) does not limit a notified neighboring jurisdiction to only considering this water. Moreover, it is possible for discharge from a project to violate water quality requirements in waters other than the immediate receiving water and for discharge from a project to effect multiple waters in a manner that would violate water quality requirements.

11.4.6 Identifying a Permit Condition that Would Resolve the Objection

Some commenters recommended that EPA should require the neighboring jurisdiction to identify a license or permit condition that it thinks would resolve the objection. One commenter said that the process would be more efficient if the neighboring jurisdiction proposes a condition, and the public hearing testimony and comments can respond to the proposed condition. Additionally, the commenter said that a proposed license or permit condition could help the Federal agency or agencies focus on resolution of the objection and possibly reduce a delay in license or permit issuance. Another commenter expressed concern that without this requirement, objections without any proposed solution could delay or deny needed projects.

Alternatively, one commenter said that the neighboring jurisdiction should not be required to identify a license or permit condition that it thinks would resolve the objection. The commenter stated that section 401(a)(2) ultimately contemplates two possible actions by the Federal licensing/permitting agency at the conclusion of the section 401(a)(2) process: (1) the imposition of conditions "to insure compliance with applicable water quality requirements," or (2) the denial of the permit or license because the "imposition of conditions cannot insure such compliance." As such, the commenter argued that a neighboring jurisdiction is fully within its rights to object on the basis that there are no such conditions that could "insure" compliance and has no duty to offer conditions. Therefore, the commenter said that in cases where the neighboring jurisdiction determines no such conditions exist, EPA's proposed requirement would be meaningless as the neighboring jurisdiction would likely say there are no such conditions. Further, the commenter asserted that EPA's proposed requirement also appears to place a burden on the

[7] The CWA, including section 401, uses the term "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). This final rule uses the term "waters of the United States" interchangeably with "navigable waters".

neighboring jurisdiction to come up with a condition to resolve its objection even where the neighboring jurisdiction believes no such condition exists.

> **Agency's Response: EPA is not requiring the notified neighboring jurisdiction to include conditions with its objection notification and request for hearing; however, EPA recommends that the neighboring jurisdiction provide Federal license or permit conditions that will resolve the objection, if this is possible. Identifying conditions to resolve an objection, where possible, may help inform the hearing process, and could also help resolve an objection in advance of a hearing. In circumstances where the notified neighboring jurisdiction does not find any conditions would resolve the objection, EPA notes that the neighboring jurisdiction could simply state this in its objection notification and hearing request.**

11.4.7 "Will Affect" Standard

A commenter said that EPA should modify proposed section 121.14 to ensure it reflects that the "will affect" standard includes a discharge's contributions to water quality violations, i.e., that the type of "affect" for the "will affect" may be direct, secondary, or cumulative effects. The commenter argued that consistent with EPA's interpretations in similar contexts, the "will affect" standard includes a discharge's contributions to water quality violations and does not require a discharge be the sole cause, citing 54 Fed. Reg. 23868, 23873 (June 2, 1989) (discussing the addition of "contribute to" language in NPDES regulations because EPA does not intend "that a single point source discharge must be responsible for the entire pollutant loading that exceeds the water quality criterion").

A commenter asserted that the neighboring jurisdiction should be shown great deference when making a reasonable judgment on the "will affect" determination since they administer their water quality requirements.

> **Agency's Response: EPA finds that the statutory text of section 401(a)(2), and the consistent text of section 121.14(a), sufficiently establish the "will violate standard," and therefore declines to further define this standard. Like the Agency's "may affect" standard, the "will violate" standard is necessarily broadly applicable, as it must be applied to differing Federal licenses and permits in a wide range of factual circumstances. Accordingly, the Agency is not modifying section 121.14 as suggested by the commenter; however, EPA agrees that the "will violate" standard includes a discharge's contributions to water quality violations. Therefore, the neighboring jurisdiction does not have to find that the discharge itself violates water quality requirements and, instead, can find that the discharge contributes to violations of water quality requirements to determine the "will violate" standard is met. EPA further notes that the public, including interested stakeholders, will have the opportunity to participate in any hearing on an objection conducted by the Federal licensing or permitting agency, pursuant to section 401(a)(2) and section 121.15 of the final rule.**

The Agency disagrees with commenter assertions that the Federal agency should afford great deference to the neighboring jurisdiction with regard to its "will violate" determination, as this is not reflected in section 401(a)(2). After conducting the public hearing, pursuant to CWA section 401(a)(2), the Federal licensing or permitting agency must consider the recommendations of the notified neighboring jurisdiction and EPA, as well as any additional evidence presented at the hearing, as it determines whether additional permit or license conditions are necessary to ensure compliance with applicable water quality requirements. 33 U.S.C. 1341(a)(2). The Act does not accord special status to any particular component; rather, the section appears to contemplate that the Federal agency will consider all of the information presented in making its decision.

11.4.8 Withdrawal of Objection

Multiple commenters recommended that EPA include language allowing neighboring jurisdictions to withdraw their objection before the hearing, therefore eliminating the requirement to hold a public hearing. A commenter said that given that section 401(a)(2) provides a neighboring jurisdiction with the sole discretion to make the objection and request in the first place, the neighboring jurisdiction may decide to withdraw the objection. This commenter further said that this addition would help because if a neighboring jurisdiction withdraws its objection, other parties likely would not be able to be relieved of the public hearing. A different commenter said that to not allow for this would leave process and delay, and another commenter said that a neighboring jurisdiction should be able to withdraw its objection if they receive information that addresses their concerns or for any other reason. One commenter said that all notices for a proposed public hearing should include reference to this rule language that a hearing may be canceled. One commenter said that allowing a neighboring jurisdiction to withdraw its objection falls within a state or Tribe's authority and is in line with section 401's cooperative federalism structure.

<u>Agency's Response</u>: EPA agrees that including a provision addressing withdrawal of an objection improves the efficiency of the neighboring jurisdictions process, as it recognizes the possibility that neighboring jurisdictions may be able to resolve objections before the hearing stage of the neighboring jurisdictions process, conserving resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances. EPA observes that nothing in the statute prohibits withdrawal of an objection, which would remove the prerequisite condition for a Federal agency to hold a public hearing. EPA also finds that including a provision addressing the circumstances of withdrawal provides added clarity by establishing a uniform procedure for executing withdrawal of an objection. Accordingly, EPA has included a provision in section 121.14(c) that allows a notified neighboring jurisdiction to withdraw its objection prior to the public hearing. The final rule states that if the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and Federal agency in writing of the withdrawal. *See* 40 CFR 121.14(c). If the neighboring jurisdiction withdraws the objection, the Federal agency would not need to proceed with a public hearing and could move forward with issuing the Federal license or permit. EPA has also added language to this effect at section 121.15(a). It should be noted that the Federal agency might have to comply with its own public notice

procedures if it agreed to add certain Federal license or permit conditions in return for withdrawal of the objection.

11.5 Public Hearing

11.5.1 General

One commenter supported EPA's proposed approach to the public hearing process but suggested that EPA should develop hearing procedures that can act as a default for Federal agencies that do not have public hearing procedures. Conversely, another commenter said that EPA should not impose a minimum notice requirement for Federal agency hearings under section 401(a)(2).

A commenter said that if a public hearing is necessary, it is reasonable for the neighboring jurisdiction to hold their hearing at the same time as the certifying authority.

A few commenters suggested EPA create a timeline of the neighboring jurisdiction process and specifically include timelines for establishing the public hearing, making determinations, and finishing the post-public hearing process.

One commenter asserted that the certifying authority should be invited to contribute information leading up to and at the public hearing, because it understands its own water quality standards and processes best, spent up to a year reviewing the decision, and has resources pertinent to the decision-making process. Accordingly, the commenter requested that the proposed rule be modified to ensure the certifying authority received a copy of the final Federal license or permit; notification if a neighboring jurisdiction is granted a section 401(a)(2) hearing; information on how to participate in the section 401(a)(2) process; and notification of the section 401(a)(2) determination.

<u>Agency's Response</u>: EPA is finalizing the proposed requirement that the Federal agency must provide notice at least 30-days prior to the public hearing. EPA is also adding language in section 121.15(b) that requires the Federal agency to provide public notice "to interested parties, including but not limited to the neighboring jurisdiction, the certifying authority, the project proponent and the Regional Administrator," at least 30 days prior to the public hearing. 40 CFR 121.15(b). This language was included to ensure that all interested parties will have notice of the public hearing such that they can prepare for and provide their testimony or comments at the public hearing. Otherwise, the Agency is maintaining the approach of not defining the type of public hearing that the Federal agency must hold, since many Federal agencies have their own regulations regarding public hearings on licenses and permits, and the Federal agencies are better suited to determine the appropriate process for holding their own public hearings. However, EPA recommends that the Federal agency accept comments and additional evidence on the objection at the public hearing.

The Agency disagrees that it would be reasonable for the neighboring jurisdiction to hold their hearing at the same time as the certifying authority. Assuming the commenter was

referring to a certifying authority's potential public hearing on a request for certification and the neighboring jurisdiction's request for a public hearing when it objects to the issuance of a license or permit, the Agency observes such coordination would be impracticable. The neighboring jurisdictions process is only initiated after a certifying authority issues a certification or waiver. Conversely, section 401(a)(2) requires a certifying authority to develop public notice procedures, and as appropriate public hearing procedures, for requests for certification. As a result, any public hearing on a request for certification must occur prior to the issuance of a certification decision and the neighboring jurisdictions process.

Other than the 30-day timeline for EPA to make a "may affect" determination and 60-day timeline for the neighboring jurisdiction, if notified by EPA, to object to the issuance of the license or permit, section 401(a)(2) does not provide any timeframes for establishing the public hearing. Aside from the timeframe for the Federal agency to provide public notice before the public hearing, the Agency is declining to include further timeframes for the neighboring jurisdictions process in the final rule. First, the Agency observes that various types of projects and Federal licenses and permits may be subject to the section 401(a)(2) process. As a result, the Agency does not find it practicable to impose a singular timeframe on all projects. Second, the Agency has included a provision in section 121.14(c) that allows a notified neighboring jurisdiction to withdraw its objection prior to the public hearing. If the neighboring jurisdiction withdraws the objection, the Federal agency will not need to proceed with a public hearing and can move forward with issuing the Federal license or permit. Allowing for withdrawal of an objection recognizes the possibility that neighboring jurisdictions may be able to resolve objections before the hearing stage of the neighboring jurisdictions process, conserving resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances. To ensure Federal agencies and neighboring jurisdictions are able to fully avail themselves to this potential resource saving opportunity, the Agency declines to place any timeframes on establishing the public hearing. *See* Section 11.6 of the Agency's Response to Comments document for further response and discussion on why the Agency is declining to place any timeframes on the Federal agency's determination after the public hearing.

Regarding the certifying authority's role in the neighboring jurisdictions process, unlike the Regional Administrator and the Federal agency, EPA holds that the certifying authority does not have a specific role under CWA section 401(a)(2). However, like the project proponent, the certifying authority may participate in the neighboring jurisdictions process by providing comments during the public hearing. EPA encourages the Federal agency to involve the certifying authority in conversations that occur prior to the public hearing, if it believes that the certifying authority may have information that could inform discussions with the notified neighboring jurisdiction. EPA declines to prescribe how a Federal agency must engage with stakeholders after the public hearing. However, EPA encourages the Federal agency to consult with the objecting neighboring jurisdiction and certifying authority, as well as all necessary parties, before making a decision under CWA section 401(a)(2).

11.5.2 Location of the Public Hearing

A commenter stated that EPA should require that the public hearing be held in the neighboring jurisdiction, citing to Corps of Engineers' regulations implementing section 401(a)(2), which require the public hearing to be held in the neighboring jurisdiction. 33 CFR 325.2(b)(1)(i) ("the district engineer will hold a public hearing in the objecting state"). However, the commenter also said that in appropriate cases, the Federal agency could consult with the neighboring jurisdiction and agree to allow for a different location or for the public hearing to be held virtually; but if the neighboring jurisdiction and Federal agency are unable to come to agreement, the default should be a public hearing in the neighboring jurisdiction. The commenter said that one purpose of section 401(a)(2) is to provide an opportunity for the views of a neighboring jurisdiction in the Federal licensing or permitting process and in order to achieve this, the public hearing must be held in the neighboring jurisdiction to maximize transparency and elicitation of views from the objecting jurisdiction. The commenter said that by the time a public hearing is held under section 401(a)(2), the certifying authority would have already had an opportunity for a public hearing to elicit the views of that jurisdiction. The commenter also said that holding the public hearing in the neighboring jurisdiction is practical in cases where a neighboring jurisdiction is located a great distance from the certifying authority, noting that they were aware of instances where EPA notified neighboring jurisdictions that were located hundreds of miles downstream of the certifying authority.

> **Agency's Response: Many Federal agencies have their own regulations regarding public hearings on licenses and permits, and the Federal agencies are better suited to determine the appropriate process for holding their own public hearings. EPA notes that, as a commenter stated, there is at least one other Federal agency that has specific regulations governing where a public hearing under CWA section 401(a)(2) will be held. EPA defers to the Federal agency to decide whether the public hearing would be conducted in-person and/or remotely through telephone, online, or other virtual platforms depending on the circumstances and the Federal agency's public hearing regulations. In determining the method for conducting the hearing and hearing location, EPA encourages the Federal agency to take into consideration the purpose of CWA section 401(a)(2) to establish a mechanism allowing notified neighboring jurisdictions an opportunity to object to the issuance of a Federal license or permit in circumstances where they find a discharge from the licensed or permitted project will violate their water quality requirements. Thus, interested parties, which include representatives of the neighboring jurisdiction, should be able to easily attend the public hearing.**

11.5.3 EPA's Evaluation and Recommendation

One commenter said that EPA needs to recognize its additional obligations in cases involving Tribes with TAS. The commenter stated the obligations are imposed by the trust relationship between the United States and Tribes, *see Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and any trust duties that may apply regarding a specific Tribe. The commenter said that it is unclear why EPA would not want to consult with the neighboring jurisdiction, and they further said that specifically for Tribes, EPA's

statement that it only "may" consult with neighboring jurisdiction "where it deems appropriate" would violate EPA's Tribal consultation obligations to Tribes with TAS. The commenter stated that the purpose of EPA's evaluation and recommendation is to examine the determination of the objecting jurisdiction because section 401 does not provide the Federal agency with expertise or authority regarding water quality to make that evaluation itself. Lastly, the commenter asserted that the Federal agency needs to consult with both the objecting jurisdiction and EPA on any evidence to ensure a well-informed decision for the section 401(a)(2) process.

Similarly, another commenter recommended that EPA notify Tribes and provide an opportunity to consult prior to finalizing a neighboring jurisdiction determination to ensure that Tribes themselves are decision-makers over what project types may impact their treaty resources and interests. The commenter argued that Tribes are best suited to identify the project impacts that affect their interests and fear that the EPA Administrator may inadvertently miss important projects with impacts to Tribes, given the unique geography, history, and uses of the lands and waters within Tribal jurisdiction.

> **Agency's Response: As stated in its proposal, EPA interprets its role in providing the evaluation and recommendations on the notified neighboring jurisdiction's objection as that of an objective and neutral evaluator providing recommendations to the Federal licensing or permitting agency based upon its expert, technical analysis of the record before it. 87 FR 35369. EPA intends to conduct its evaluation and make any recommendations based on the information before it, giving equal consideration to the information and views—if provided—by interested parties, including the objecting neighboring jurisdiction, project proponent, and certifying authority. *Id.* Consistent with this approach, as a general matter EPA does not intend to invite public comment and input from, or engage with, interested parties when developing its evaluation and recommendations on the objection. However, EPA may, where it deems it appropriate, seek additional information regarding a notified neighboring jurisdiction's objection to be sure EPA is able to develop an informed and well-supported evaluation and accompanying recommendations. This approach to developing its evaluation and recommendations is consistent with the hearing process established by section 401(a)(2), which recognizes a role for the notified neighboring jurisdiction independent of the Agency and allows for presentation of evidence at the hearing by any interested stakeholder, including the notified neighboring jurisdiction. If a stakeholder agrees or disagrees with EPA's evaluation and recommendations presented at the hearing, such stakeholder may have an opportunity to provide additional information and comment directly to the Federal agency for its consideration.**
>
> **When a neighboring jurisdiction is a Tribe, the Agency notes that EPA's "may affect" determination and any subsequent evaluation and recommendations are informed by its Tribal policies, including its Tribal consultation policies,[8] and the Federal trust responsibility to federally recognized Tribes. The Agency maintains its position that it has sole discretion, pursuant to section 401(a)(2), to examine the facts and determine whether the discharge "may affect" the quality of a neighboring jurisdiction's waters, including**

[8] For further discussion of the Agency's Tribal consultation policies, please see the Agency's Response to Comments Section 8.1.

those of a Tribe with TAS. The Agency further notes that tribal consultation would not be possible on a "may affect" determination, given the limited statutory timeline. However, as described in Section IV.K.2 of the final rule preamble, the Agency may consider a neighboring jurisdiction's views on the effect of a discharge from the project on its water quality as a factor in making a "may affect" determination, and the Agency intends to consider such views of neighboring jurisdictions if provided in a timely manner. Consistent with the role of the Agency in the section 401(a)(2) hearing process, as described in Section IV.K.2.h of the final rule preamble, EPA does not intend to invite public comment and input from, or engage with, interested parties when developing its evaluation and recommendations on an objection. However, as indicated above, EPA may seek additional information regarding a neighboring Tribe's objection to be sure EPA is able to develop an informed and well-supported evaluation and accompanying recommendations.

11.6 Federal Agency Decision

Several commenters recommended that EPA set a deadline for the Federal agency to make a decision after conducting a public hearing pursuant to section 401(a)(2). Commenters recommended different timelines following the public hearing, including 7 days, 30 days, 60 days, and 90 days. One of these commenters also added that EPA could propose that EPA has the discretion to extend a 90-day deadline if the Federal agency requests it in writing with their reasons for the delay. Another commenter recommended that EPA require the Federal agency to make their decision in a timely manner. Conversely, one commenter stated that establishing a deadline would be inappropriate and inconsistent with section 401(a)(2). The commenter asserted that Congress consciously chose not to impose a deadline on the Federal agency and did not include language that would allow EPA to establish a deadline.

A few other commenters suggested that the Federal agency should set a deadline to make a final decision within several days of the public hearing to ensure the timeline is not open-ended. One commenter said that there should be a predictable timeline for the public hearing and recommended that the number of days be limited for the addition of more information or conditions into the certification..

A couple of commenters said a 7-day deadline should apply to the certifying authority to decide and/or incorporate more information into their certification. One commenter asserted that the Federal agency should consult with the certifying authority if it determines additional permit conditions are required or to discuss how the certifying authority's conditions could address a neighboring jurisdiction's concerns.

<u>Agency's Response</u>: In the final rule, the Agency is declining to add specific timelines for the neighboring jurisdictions process beyond those already established in the statute. There are many factors, including the complexity of the facts at issue in an objection and a Federal agency's own regulations, that impact the duration of time necessary for a Federal agency to complete its determination following a hearing on a neighboring jurisdiction's objection. However, EPA encourages Federal agencies to communicate with the notified neighboring jurisdiction and other interested stakeholders regarding its expectations or considerations in determining the time to make a decision on the Federal license or permit after a public hearing.

In response to commenters suggesting that the timeframe to make a determination after the public hearing applies to the certifying authority, the Agency observes that section 401(a)(2) provides no specific role for the certifying authority. In fact, the neighboring jurisdictions process occurs *after* the certifying authority has acted on a request for certification. Accordingly, the certifying authority is not responsible for addressing the neighboring jurisdiction's objection in its certification. The Federal agency must consider the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the Federal license or permit as may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall not issue the license or permit. In response to the commenter suggesting that the Federal agency should consult with the certifying authority if it decides to add permit conditions, EPA declines to prescribe how a Federal agency must engage with stakeholders after the public hearing. However, EPA does encourage the Federal agency to consult with the objecting neighboring jurisdiction and certifying authority, as well as all necessary parties, before making a decision under CWA section 401(a)(2).

11.7 Input Received on Prior Rulemakings

11.7.1 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

A couple stakeholders asserted the importance of the neighboring jurisdiction process in safeguarding Tribal water quality. One stakeholder stated that any revised section 401 rule should clarify that the section 401(a)(2) "may affect" determination is not discretionary and is required under the plain text of the CWA. Another stakeholder urged EPA to always notify neighboring jurisdiction of licensed activities, allowing them to chance to analyze any potential impacts to their waters.

On the other hand, another stakeholder said that EPA should have greater discretion in subjecting projects to review for neighboring jurisdictions to provide efficiency and prevent unnecessary delays for projects that appear sufficiently distant from borders of neighboring jurisdictions.

One stakeholder encouraged EPA to consider how to best balance the concerns of neighboring jurisdictions and the benefits associated with the timely approval of projects. This stakeholder expressed support for EPA's section 401(a)(2) best practices guidance and asserted that it specifically state that any decision by an EPA Region to issue a "may affect" determination should be supported by data that demonstrates the water quality effects on the neighboring jurisdiction's waters.

<u>Agency's Response</u>: *See* the Agency's Response to Comments in Sections 11.1-11.6; *see also* Section IV.K of the final rule preamble.

12. TREATMENT IN A SIMILAR MANNER AS A STATE (TAS) (SECTION 121.11)

12.1 Proposal to Add TAS Provisions for Solely Section 401 and 401(a)(2)

Many of the commenters addressing the proposal to add provisions enabling Tribes to obtain TAS solely for section 401 and for 401(a)(2) supported the proposal. Commenters identified reasons for supporting the proposed TAS provisions as including interest in supporting Tribal agency, increasing Tribal participation in Federal licensing and permitting processes, providing Tribes a tool for protecting water quality and treaty rights, recognizing the vast knowledge of Tribal communities and their sovereignty, respecting the role waters play in their cultures, and affording Tribes more options regarding administration of CWA programs. Several commenters specifically expressed support for providing a TAS provision for participation in the section 401(a)(2) neighboring jurisdiction process. A commenter noted that the proposed TAS provision for section 401(a)(2) is responsive to concerns regarding the inability of Tribes to participate in the neighboring jurisdiction process without TAS. One commenter said that waters on reservations are susceptible to degradation from upstream, off-reservation discharges, so it is therefore essential that Tribes have a mechanism for objecting to and requesting a hearing on the issuance of permits or licenses for these discharges. The commenter also said that EPA's proposal creates such a mechanism while avoiding the administrative burdens associated with obtaining full section 401(a)(1) authority.

Some commenters opposed or expressed concerns regarding the approach in the proposal to add provisions enabling Tribes to obtain TAS. Commenters taking this position raised concerns including concern that the proposed provisions would expand the number of certifying authorities and potentially complicate or delay the certification process, and concern that Tribes seeking or obtaining TAS under such provisions may lack technical resources, experience, or capability to administer section 401 programs. Some of the commenters expressing opposition or concern regarding the proposed TAS provisions asserted the position that section 401 is limited to ensuring compliance with EPA-approved water quality standards, and questioned how Tribes without a water quality standards program under section 303(c) of the CWA would implement section 401. Additionally, a commenter expressing opposition to the proposed TAS provisions further asserted that the statutory language of section 401 implies that the certifying authority has authority to administer sections 301, 302, 303, 306, and 307 of the CWA, and argued that TAS should be limited Tribes administering such programs. Another commenter asserted that EPA should provide additional legal support for finding that the section 401(a)(2) process is severable from section 401 for purposes of the proposed TAS provision for administering solely section 401(a)(2).

Some of the commenters opposing or expressing concerns regarding the proposed TAS provisions offered alternative approaches. Some such commenters suggested that EPA should make TAS available only to Tribes with TAS for section 303(c) or Tribes that are implementing water quality standards programs. Another commenter expressed concern that EPA did not provide adequate notice to potential stakeholders on the TAS proposals, and suggested that EPA defer addressing a TAS provision for section 401 until a subsequent rulemaking effort.

Agency's Response: EPA appreciates commenters' support of the section 401 TAS provisions. Promulgating a regulation expressly providing a process and requirements for section 401 TAS in the absence of section 303(c) TAS is consistent with section 518 and would provide clarity and increased opportunities for interested Tribes to participate in section 401. CWA section 518 authorizes the Agency to treat eligible Tribes with reservations in a similar manner to states "for purposes of subchapter II of this chapter and sections . . . 1341, . . . of this title to the degree necessary to carry out the objectives of this section." *See* 33 U.S.C. 1377(e). Section 518(e) establishes eligibility criteria for TAS.[9] Additionally, developing regulations on section 401 TAS as a standalone process for Tribes seeking this authority who are not concurrently applying for section 303(c) TAS may encourage more Tribes to seek TAS for section 401. Decoupling section 401 TAS from section 303(c) recognizes that section 401 and section 303(c) administration are related, but distinct functions and is responsive to Tribal stakeholders who have expressed an interest in participating in the section 401 certification process. The Agency recognizes that the number of certifying authorities is likely to increase as a result of the new TAS provisions, and it does not view this increase as problematic. Increasing the opportunities for interested Tribes to participate in section 401 through the new TAS provisions is consistent with the cooperative federalism principles and intent of section 401. The final rule includes provisions, such as pre-filing meeting requests and request for certification, that may help streamline the certification process and limit delays. Additionally, the final rule clarifies that certifying authorities, including Tribes with TAS, may request technical assistance during the certification process, as provided for in section 121.18. *See* 40 CFR 121.18.

The final rule promotes Tribal engagement by providing an opportunity for Tribes to protect their water quality through participating in the section 401 certification process without needing to assume all of the authorities and responsibilities of section 401. Tribes applying for TAS solely for section 401(a)(2) will still need to meet the same four criteria discussed in section IV.L of the final rule preamble. However, since participating as a neighboring jurisdiction under section 401(a)(2) does not involve any exercise of regulatory authority and involves carrying out fewer functions than acting as a certifying authority, EPA anticipates that demonstrations that the applicant Tribe satisfies the criteria will be more streamlined than the demonstrations in applications for TAS for purposes of administering the entirety of section 401.

[9] Section 518(e) authorizes EPA to treat eligible Tribes in a similar manner as a state if "(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations." *See* 33 U.S.C. 1377(e).

EPA disagrees that section 401 is limited to ensuring compliance with Clean Water Act section 303(c) water quality standards. The term "water quality requirements" is used throughout section 401, and EPA has defined "water quality requirements" to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state or Tribal laws or regulations implementing the enumerated provisions, and any other water quality-related requirement of state or Tribal law regardless of whether they apply to point or nonpoint source discharges. 40 CFR 121.1(j). Under this approach, authorized Tribes can base their section 401 certification decisions on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c). Examples include Tribal ordinances or other Tribal laws related to water quality, or, if present, Federal water quality standards promulgated by EPA for reservation waters.[10]

Likewise, EPA disagrees that certification authority under section 401 is contingent upon authority to administer sections 301, 302, 303, 306, and 307 of the CWA. The assertion that certification authority for section 401 requires administration of sections 301, 302, 303, 306, and 307 of the CWA is inconsistent with the text of section 401, which does not impose such a requirement. Additionally, this is inconsistent with EPA's practices prior to this final rulemaking regarding obtaining TAS for section 401 in conjunction with TAS for section 303(c) pursuant to the TAS provision for the water quality standards program in 40 CFR 131.8.

The Agency finds that the neighboring jurisdictions process established in section 401(a)(2) is distinct from the process for certification. For further discussion and comparison of the processes, see Section IV.K.2.b in the final rule preamble.

The Agency disagrees with commenter assertions that the Agency did not provide adequate notice on the proposed TAS provisions. On June 9, 2022, the Agency published the proposed rulemaking in the Federal Register, 87 FR 35318, which initiated a 60-day public comment period that lasted through August 8, 2022. EPA held a virtual public hearing on July 18, 2022, and hosted a series of stakeholder listening sessions throughout June 2022, including one listening session for project proponents on June 14, 2022, three listening sessions for States and territories on June 15, 22, and 28, 2022, and three listening sessions for Tribes on June 15, 22, and 28, 2022. The Agency also hosted a Federal agency listening session on June 14, 2022. In finalizing the proposed rule, the Agency reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the certification process, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule.

[10] Federal water quality standards are currently in place for the Confederated Tribes of the Colville Reservation. *See* 40 CFR 131.35. EPA recently published a proposed rule that would establish Federal baseline water quality standards for waters on Indian reservations that do not have water quality standards in effect for CWA purposes. 88 FR 29496 (May 5, 2023). Upon finalizing the rule, those Federal baseline water quality standards would serve as the applicable water quality standards in effect for CWA purposes.

The Agency discusses comments received and responses in the applicable sections of the preamble to this final rule. The APA requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. 553(c). The APA does not specify a minimum number of days for accepting comments on a proposed rule. The Agency complied with its obligation under the APA to provide a reasonable length of time for interested parties to comment on the proposed rule. Moreover, a pre-publication version of the proposed rule was posted on the EPA's website on June 2, 2022, which was 7 days prior to its publication in the Federal Register and the date the public comment period began.

12.2 Oklahoma-Specific Concerns

Some commenters discussing the TAS provisions in the proposal noted, or raised concerns regarding, special circumstances involving the ability of Oklahoma to oversee environmental programs in Indian Country pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA). A few commenters requested that EPA provide explicit acknowledgement of the specific circumstances regarding Oklahoma's authority under SAFETEA and note that TAS provisions for section 401 are subject to limitations consistent with this authority. Another commenter requested that EPA provide an explicit statement of its intent if it intends the proposed TAS provisions not to be subject to limitations pursuant to SAFETEA.

<u>Agency's Response</u>: EPA is aware that section 10211(b) of SAFETEA established a unique TAS requirement with respect to Indian Tribes located in the State of Oklahoma. Under section 10211(b), Tribes in Oklahoma seeking TAS under a statute administered by EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the EPA statute, enter into a cooperative agreement with the state that is subject to EPA approval and that provides for the Tribe and state to jointly plan and administer program requirements. This requirement of SAFETEA exists apart from, and in addition to, the TAS criteria established by statutes administered by EPA, including the TAS criteria set forth in section 518 of the CWA. The provisions of today's final rule establishing an opportunity for interested Tribes to obtain TAS for purposes of administering certifications under section 401 without separately needing to obtain TAS for section 303(c) relate solely to the TAS requirements of CWA section 518. They have no effect on the separate TAS requirement of section 10211(b) of SAFETEA, which must also be satisfied by any Tribe in Oklahoma seeking TAS for purposes of administering section 401 certifications. In this regard, the requirement of section 10211(b) of SAFETEA applies identically whether a Tribe in Oklahoma seeks TAS to administer section 401 certifications under today's final rule, or under existing regulations authorizing TAS for section 401 certifications as an adjunct to TAS for section 303(c) water quality standards. EPA notes, however, that consistent with the terms of section 10211 of SAFETEA and established practice, the requirements of section 10211(b) apply only where a Tribe in Oklahoma seeks TAS for the purpose of administering a regulatory program under a statute administered by EPA. Such requirements do not apply

where a Tribe in Oklahoma seeks TAS for non-regulatory functions – *e.g.*, receiving grants under EPA programs or performing other functions that do not involve any exercise of regulatory authority by the applicant Tribe. Functioning as a neighboring jurisdiction under section 401(a)(2) does not involve any exercise of regulatory authority by a Tribe (or state) who may be affected by a federally licensed or permitted discharge from another jurisdiction. The neighboring jurisdiction role involves an opportunity to provide input regarding water quality impacts and to inform decision making of the Federal licensing or permitting agency. Ultimately, it is the Federal agency that exercises regulatory authority through its licensing or permitting decision, and the certifying agency in the other jurisdiction where the discharge originates that exercises authority to grant, grant with conditions, deny, or waive certification. In this regard, the section 401(a)(2) neighboring jurisdiction role is similar to the affected state commenting role established under section 505(a)(2) of the Clean Air Act. *See* 87 FR 35372. EPA has approved numerous Tribes (including Tribes in Oklahoma) for TAS for the severable Clean Air Act affected state role. Such Tribal applications for Tribes in Oklahoma have not triggered the requirements of SAFETEA section 10211(b). Similarly, a TAS application from a Tribe in Oklahoma for the limited neighboring jurisdiction role of section 401(a)(2) would not implicate section 10211(b) of SAFETEA. A TAS application for the section 401 certification role, however, would trigger the SAFETEA requirements.

12.3 TAS Application Process

Some of the commenters addressing the TAS provisions in the proposal discussed the application process for Tribes seeking TAS under these provisions. Some such commenters requested that EPA provide transparency on TAS applications, for example, by establishing clear standards for applications, identifying necessary materials for applications, and communicating application status with applicants. A commenter noted the criteria stated in the proposal for evaluating TAS applications for section 401 and expressed support for such criteria. Several commenters raised concerns regarding the duration of time EPA may take to process TAS applications for section 401 and section 401(a)(2), and some requested that EPA employ measures such as monitoring application processing time and establishing rules to ensure efficient processing of applications. Additionally, a commenter requested that EPA clarify how it will inform Tribes regarding application status. Some commenters noted that EPA may request additional information from Tribes seeking TAS under the proposal and raised concerns about the burdens this may impose on applicants. A commenter argued that EPA should narrowly tailor information requests to the issue of a Tribe's ability to manage the program it is seeking to administer and establish clear guidelines on the materials needed for an application. Additionally, a commenter requested that EPA clarify whether it will require notice of a TAS application to a broader group than the "appropriate governmental entities" as currently defined, and opposed EPA adopting broader notice procedures due to concerns regarding process delay, increased Tribal administrative costs, and providing a platform for hostility against Tribes.

Another commenter said that under the proposed rule it is unclear whether the process set forth in section 121.11 applies to both Tribes seeking full certification authority and "neighboring jurisdiction authority;" or whether the EPA will use a separate process to evaluate Tribes' requests for "neighboring jurisdiction" only. The commenter recommended clarifying this.

Another commenter asserted that it was unclear from publicly available materials what steps EPA has taken to consult with Tribes regarding the proposed TAS process, and argued that EPA must consult Tribes on the proposed TAS application process and ensure that this process does not impose unnecessary or burdensome obligations that may discourage or prevent Tribes from seeking TAS status.

Agency's Response: EPA agrees that the TAS application process should be transparent and has included provisions in this final rule to create clarity and efficiencies in the application process. To provide direction on how a Tribe may meet the criteria described in section IV.L.1 of the final rule preamble, EPA has described the contents of an application for TAS for section 401. *See* 40 CFR 121.11(b). To assist applicant Tribes, the Agency is also developing a template which would provide explanations and instructions for documenting how the Tribe meets the eligibility requirements. The template would consist of areas for Tribes to include a statement that the Tribe is recognized by the Secretary of the Interior, a descriptive statement that demonstrates the Tribal government carries out substantial duties and powers, a descriptive statement of the Tribe's authority to regulate water quality, and a narrative statement that describes the Tribe's capability to administer a section 401 water quality certification program.

Consistent with existing TAS regulations for other programs, this final rule also provides that Tribal applicants include additional documentation that may be required by EPA to support the Tribal application. Each TAS application will present its own set of legal and factual circumstances, and EPA anticipates that in some cases it may be necessary to request additional information when reviewing a Tribe's application. Such requests would, for instance, generally relate to ensuring that the application contains sufficient complete information to address the required statutory and regulatory TAS criteria. This could include, for instance, information relating to a unique issue pertaining to the applicant Tribe or its reservation or an issue identified during the comment process described below. Consistent with longstanding practice, the Agency would work with Tribes in an appropriately streamlined manner to ensure that their TAS applications contain all necessary information to address applicable statutory and regulatory criteria. If a Tribe has previously qualified for TAS under another EPA program, the Tribe is only required to submit information that was not previously submitted as part of a prior TAS application.

The final rule also describes EPA's procedures to review and process an application for section 401 TAS. *See* 40 CFR 121.11(c). Once EPA receives a complete Tribal application, it will promptly notify the Tribe of receipt and process the application in a timely manner. Within 30 days after receipt of the Tribe's complete application for section 401 TAS, EPA shall provide notice to appropriate governmental entities[11] of the application, including

[11] EPA defines the term "appropriate governmental entities" as "States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State." 56 FR 64876, 64884 (December 12, 1991).

information on the substance of and basis for the Tribe's assertion of authority to regulate reservation water quality. Appropriate governmental entities will be given 30 days to provide comment on the Tribe's assertion of authority. Consistent with prior practice regarding such notice in connection with TAS applications for other programs, EPA also intends to provide sufficiently broad notice (*e.g.,* through local newspapers, electronic media, or other appropriate media) to inform other potentially interested entities of the applicant Tribe's complete application and of the opportunity to provide relevant information regarding the Tribe's assertion of authority. If the Tribe's assertion of authority is challenged, EPA will determine whether the Tribe has adequately demonstrated authority to regulate water quality on the reservation after considering all relevant comments received.

The eligibility requirements in CWA section 518(e) and the process in section 121.11 of the final rule apply to Tribes seeking TAS status for section 401 and section 401(a)(2). However, as noted above, the Agency is also developing a template which would provide explanations and instructions for documenting how the Tribe meets the eligibility requirement for both section 401 TAS and section 401(a)(2) TAS.

As discussed in Section IV.F, EPA consulted with Tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this rulemaking to allow them to have meaningful and timely input into its development. EPA has developed a final Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule which further describes EPA's efforts to engage with Tribal representatives and is available in the docket for this rulemaking. *See* Section IV.F for further discussion on the Agency's Tribal consultation and coordination efforts for this rulemaking; *see also* Section 15.2.2 of the Agency's Response to Comments document.

12.4 Implementation Considerations

Some commenters addressing the proposed TAS provisions requested that EPA take certain actions to assist in implementation of these provisions. A commenter requested that EPA provide updated policy guidance to clarify the TAS application process. Another commenter requested that EPA provide further detail in the final rule to clarify what water quality standards a Tribe with TAS for section 401 but not section 303 would apply in a certification analysis. Additionally, a commenter urged EPA to affirmatively state the position in the final rule that the Federal government and Tribal governments hold exclusive jurisdiction over waters in Indian country in order to reduce jurisdictional uncertainty and unnecessary litigation for Tribes with TAS for section 401.

<u>Agency's Response</u>: The Agency is developing materials to aid the implementation of this aspect of the final rule. To implement the TAS provisions in the final rule, EPA will need to communicate how Tribes can apply and process any incoming TAS applications from Tribes. To provide direction on how a Tribe may meet the criteria described in section IV.L.1 of the final rule preamble, EPA has described the contents of an application for TAS

for section 401. *See* 40 CFR 121.11(b). To assist applicant Tribes, the Agency is also developing a template which would provide explanations and instructions for documenting how the Tribe meets the eligibility requirements. The template would consist of areas for Tribes to include a statement that the Tribe is recognized by the Secretary of the Interior, a descriptive statement that demonstrates the Tribal government carries out substantial duties and powers, a descriptive statement of the Tribe's authority to regulate water quality, and a narrative statement that describes the Tribe's capability to administer a section 401 water quality certification program.

In the final rule preamble, EPA clarifies that authorized Tribes can base their section 401 certification decisions on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c). Examples include Tribal ordinances or other Tribal laws related to water quality, or, if present, Federal water quality standards promulgated by EPA for reservation waters.[12]

The Agency notes that CWA section 518(e) requires a Tribe to have appropriate authority to regulate and manage water resources within the borders of the Tribe's reservation as one criterion to obtain TAS for section 401. To meet the third criterion that the Tribe has the authority to manage the water resources within the borders of the Tribe's reservation, the Tribe would submit a descriptive statement comprised of two components: (1) a map or legal description of the area over which the Tribe has authority to regulate surface water quality, and (2) a statement signed by the Tribe's legal counsel or equivalent explaining the legal basis for the Tribe's regulatory authority. EPA notes that section 518 of the CWA includes a delegation of authority from Congress to eligible Indian Tribes to regulate the quality of waters of their reservations under the CWA. See 81 FR 30183 (May 16, 2016). Absent rare circumstances that may affect a Tribe's ability to effectuate the delegation of authority, Tribes may rely on the congressional delegation of authority included in section 518 of the statute as the source of authority to administer a section 401 water quality certification program. The Agency believes this criterion should reduce any jurisdictional uncertainty for projects seeking certification in waters where a Tribe has obtained section 401 TAS.

13. IMPLEMENTATION

13.1 Effective Date

A commenter said that EPA should consider the time of year when promulgating the proposed rule, for example, promulgating prior to springtime when construction project activities tend to accelerate to allow

[12] Federal water quality standards are currently in place for the Confederated Tribes of the Colville Reservation. *See* 40 CFR 131.35. EPA recently published a proposed rule that would establish Federal baseline water quality standards for waters on Indian reservations that do not have water quality standards in effect for CWA purposes. 88 FR 29496 (May 5, 2023). Upon finalizing the rule, those Federal baseline water quality standards would serve as the applicable water quality standards in effect for CWA purposes.

Federal agencies, certifying authorities, and authorized Tribes to become familiar with the contents and implementation of the proposed rule requirements.

Another commenter said that a delayed effective date would provide certifying authorities and Federal agencies an opportunity to make process improvements and draft or revise coordination agreements, regulatory templates, and guidance documents, as well as give project proponents time to become educated about the new rule and its requirements. One commenter requested that applications that were received before the proposal rule and had not had its reasonable period of time officially determined be governed by the proposed rule.

> **Agency's Response: EPA appreciates commenter input on the effective date of the final rule. This final rule will be effective 60 days after the final rule publishes in the *Federal Register*. The Agency does not find it necessary to delay the effective date. First, given that EPA intends many of the provisions of the final rule to represent a return to past practices with added clarity, the Agency anticipates that implementation of the final rule will not require a significant overhaul of state, Tribal, or other Federal regulations. Second, EPA will support implementation of the final rule through training sessions for each of the various stakeholder groups, as well as through engagement with an interagency Federal CWA section 401 workgroup.**
>
> **The Agency also wishes to clarify the applicability of the final rule to ongoing certification actions. As of the effective date of this final rule, which will be 60 days after publication of the final rule in the *Federal Register,* all actions taken as part of the section 401 certification process must be taken pursuant to the final rule. However, the final rule does not apply retroactively to actions already taken under the 2020 Rule. For example, if a certifying authority received a request for certification, prior to the effective date of this final rule, and the certifying authority has not acted on the request for certification as of the effective date, any decision issued by the certifying authority after the effective date of this final rule must comply with the requirements in the final rule (*e.g.*, scope of certification) and any Federal agency review of a certification decision must comply with section 121.8. However, the validity of the request for certification would be determined under the 2020 Rule and the project proponent would not need to re-request certification consistent with the final rule. The certifying authority may request more information to help inform its decision-making on the request for certification, including information relevant to determining water-quality impacts from the activity subject to certification, but the certifying authority must still issue its certification decision within the reasonable period of time, which would not pause while the certifying authority is seeking more information.[13] A "reasonable period of time" determined under the 2020 Rule prior to the effective date of the final rule would**

[13] Under both this final rule and the 2020 Rule, a certifying authority may request more information to help inform its decision-making after a request for certification is made and the reasonable period of time has begun. *See* section IV.C and 85 FR 42245 ("Nothing in the final rule's definition of "certification request" precludes a project proponent from submitting additional, relevant information or precludes a certifying authority from requesting and evaluating additional information within the reasonable period of time").

not automatically change because this final rule went into effect; however, the certifying authority may request an extension to the reasonable period of time pursuant to section 121.6(e) of the final rule, or avail itself to an automatic extension to the reasonable period of time pursuant to section 121.6(d) – provided that the reasonable period of time does not exceed one year from the date that the request for certification was received. Additionally, after the effective date, if a project proponent has not submitted a request for certification or if the project proponent has only submitted a pre-filing meeting request by the time the final rule goes into effect, the project proponent is responsible for submitting a request for certification in accordance with section 121.5 of the final rule. Finally, after the effective date, a certifying authority and Federal agency can apply the final rule's modification process at section 121.10 to any certification decision, even if that decision was provided while a prior rule (*e.g.*, 1971 Rule or 2020 Rule) was in effect.[14] Similarly, if a Federal agency determined pursuant to the 2020 Rule and prior to the effective date of the final rule that a certifying authority constructively waived certification for failure to comply with the procedural requirements of the 2020 Rule, that determination is not affected by this final rule going into effect, even if the relevant Federal license or permit has not yet been issued. As discussed above, if a "reasonable period of time" was established under the 2020 Rule prior to the effective date of the final rule, that reasonable period of time would not automatically change because this final rule went into effect.

The approach the Agency adopts here regarding the applicability of the final rule to ongoing certification actions is consistent with the approach taken by the Agency after a court vacatur of the 2020 Rule in 2021 and the Supreme Court's stay of that vacatur in 2022. *See* Section III.C.3 in the final rule preamble for background on the litigation to the 2020 Rule. The Agency is not aware of any disruptions or delays in the certification process as the result of the Agency's approach to ongoing certification actions in those instances.

13.2 Implementation Challenges and Coordination

Another commenter said that state agencies have experienced challenges implementing their section 401 responsibilities over the years due to insufficient resources, such as limited staff and time that is split between other responsibilities. The commenter said this has led to difficulties addressing all the correspondence and inquiries received about section 401 certifications as well as ensuring that the project certified (e.g., based on a Federal permit application) was the project actually permitted and built. According to the commenter, before the 2020 Rule was issued, the Corps allowed state agencies to issue their certifications after a final Federal permitting decision was reached, which fostered more efficient certification decisions.

A couple of commenters said that it is essential that EPA coordinate closely with other Federal agencies (such as with the Corps and FERC) to avoid circumstances where regulations could be interpreted as inconsistent with one another and to fully educate Federal licensing/permitting authorities of the changes

[14] However, if the relevant Federal license or permit has not yet been issued, the project proponent could request certification anew, and the certifying authority would then need to act on that request consistent with this final rule.

in the water quality certification process so that they are fully informed of their roles, responsibilities, and legal limitations. One of these commenters further asserted that EPA should explore joint applications, or a single multi-purpose application process, for similar CWA permitting schemes to foster a better use of state and Federal government resources while increasing efficiency in the permitting process.

Agency's Response: The Agency appreciates commenter input regarding implementation challenges. The Agency notes that this final rule provides several benefits to the certification process including regulatory certainty and transparency, efficient certification reviews, and enhanced cooperative federalism. These benefits may alleviate some implementation challenges.

In response to the comment regarding past practices issuing certifications after a final Federal permitting decision is reached, the Agency observes this practice is inconsistent with section 401. A final Federal license or permit may not be issued until after a certification or waiver is obtained by the project proponent. 33 U.S.C 1341(a)(1) ("No license or permit shall be granted until certification required by this section has been obtained or has been waived as provided in the preceding sentence.") Therefore, requiring a copy of the final Federal license or permit to initiate the certification process would be inconsistent with the plain language of section 401.

The Agency appreciates commenter input regarding the importance of interagency coordination. EPA has hosted a CWA Section 401 Interagency Workgroup since 2019. The Agency intends to continue coordinating with other Federal agencies to support the rollout and implementation of the final rule.

The Agency recognizes that certifying authorities and Federal agencies coordinated in a variety of ways prior to the 2020 Rule, such as joint applications and joint public notice processes. Nothing in this final rule precludes such coordination, to the extent it is consistent with this final rule. However, this final rule does not require certifying authorities and Federal agencies to use joint applications or joint public notices.

13.3 Implementation Tools

A couple of commenters said that EPA should update and finalize the Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) interim guidance handbook (rescinded in 2019). One commenter also said that other useful implementation materials would include a frequently asked questions document that is available online and downloadable, a dedicated webpage linking to other Federal agency procedures and requirements for certification, and interactive digital mapping that identifies resources that will trigger neighboring jurisdictional effects determinations automatically for project proponents and jurisdictions (*i.e.*, use of the Watershed Resources Registry for additional layers) in the planing and review of a project.

Another commenter said that EPA should provide guidance on how the proposed rule's various components apply to existing certifications issued prior to the proposed rule's effective date, specifically for actions taken under the 2020 Rule.

A commenter also said that an EPA-sponsored fact sheet or more detailed guidance document that Federal agencies and certifying authorities could make available to project proponents would ensure all parties have clear guidance on the new rule's requirements.

> **Agency's Response: The Agency appreciates commenter suggestions regarding implementation tools. The Agency intends to develop several implementation resources, including fact sheets and webinars, and will make them available on the EPA section 401 webpage, https://www.epa.gov/cwa-401. The Agency will continue to explore development of implementation resources as time and resources are available.**
>
> ***See also* Section 13.1 of the Agency's Response to Comments.**

13.4 Input Received in Prior Rulemakings

13.4.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

A few commenters discussed prior guidance documents in their comments on the 2019 proposed rule. One commenter recommended that EPA codify the statutory principles described in the 2019 Guidance to support effective implementation of Section 401 because the 1971 Rule predated the 1972 amendments to the CWA. Another commenter recommended that EPA consider the implementation guidance provided in the 2010 Handbook when updating the 1971 Rule.

One commenter recommended that EPA develop a dispute resolution process for certification decisions when updating the 1971 Rule to support implementation of a new rule.

Another commenter proposed a process for early and frequent communication between project proponents, certifying authorities, and Federal agencies to support best practices for implementation of the section 401 regulations. The commenter also asserted that early communication allows for informed certification decisions. For implementation, the commenter recommended clearly defined application requirements, templates, and clear instructions.

One commenter recommended that EPA give certifying authorities a substantial amount of time to evaluate and properly implement the 2019 proposed rule, so EPA should determine the applicability date through consultation with the states.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 13.1-13.3.**

The Agency notes that both the 2010 and 2019 guidance documents were rescinded. *See* Section III.C.2 for further discussion on these documents.

The Agency declines to develop a dispute resolution process for certification decisions. *See* Section IV.F and G of the final rule preamble for further discussion on certification decisions and Federal agency review.

The Agency notes that several aspects of this final rule support early engagement and coordination between certifying authorities, project proponent, and Federal agencies. *See, e.g.*, Section IV.B, C, D of the final rule preamble.

13.4.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

One stakeholder stated that some states had concerns with implementation of the 2020 Rule because the 2020 Rule did not account for the impact on existing state certification decisions. The stakeholder asserted that states are issuing more denials of certification due to complications and time constraints with implementation of the 2020 Rule. The stakeholder described the NOI to review and revise the 2020 Rule as causing confusion around implementation of the 2020 Rule because the certifying authorities were unsure whether to continue implementing the 2020 Rule or wait for EPA's efforts to review and revise the 2020 Rule.

Agency's Response: EPA recognizes stakeholder confusion around implementation of the 2020 Rule after EPA announced its NOI to review and revise the 2020 Rule; however, EPA indicated on its website that the 2020 Rule was still in effect while EPA began a new rulemaking effort. *See* Question 5 of the "Q&A on EPA's Intent to Revise 2020 Rule," available at https://www.epa.gov/cwa-401/qa-epas-intent-revise-2020-rule ("5. Is the 2020 Clean Water Act Section 401 Certification Rule still in effect? Yes. The Clean Water Act Section 401 Certification Rule is still in effect and will remain in effect until the Agency finalizes a new regulation following the public notice and comment process.").

***See* the Agency's Response to Comments in Sections 13.1-13.3.**

14. ECONOMIC ANALYSIS

14.1 Claims Relative to 1971 and 2020 Rules

A commenter said that the Economic Analysis did not identify any instance in which the 2020 Rule's request for certification provisions caused an adverse environmental or economic impact. One commenter stated that EPA did not identify any adverse environmental impacts associated with the 2020 Rule approach and did not identify any clearly beneficial environmental outcomes potentially attributable to rescinding the 2020 Rule. Another commenter questioned whether any stakeholder had sufficient

experience implementing the 2020 Rule after less than nine months of being in effect to provide feedback warranting reconsideration.

A commenter added that the Economic Analysis claimed both that the proposed approach to the request for certification would have positive environmental benefits relative to the 1971 Rule, because it would support more consistency in a request for certification, and that it would have positive environmental benefits relative to the 2020 Rule, because certifying authorities would be able to retain their own requirements for a request for certification. The commenter claimed that these two points do not make sense, because it means EPA is saying the proposal is environmentally beneficial because it is both more and less prescriptive. This commenter also stated that through this economic analysis, EPA did not articulate and justify the revisions to the 2020 Rule's provisions on requests for certification.

Agency's Response: EPA did not use a case study approach in the Economic Analysis for the final rule due to the difficulty of representing the large variety and complexity of projects subject to section 401 review and, thus, did not highlight any specific projects with adverse environmental or economic impacts under the 2020 Rule. However, the Agency strongly disagrees with commenter assertions that the 2020 Rule did not warrant reconsideration. As discussed in Section III.C of the final rule preamble, EPA found, and continues to find, it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment. For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F of the final rule preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (i.e., cause noncompliance with water quality requirements) may proceed without any input from the certifying authority. *See, e.g.*, section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification.

The Agency disagrees that the impact assessments for revisions to the request for certification provision, relative to the 1971 Rule and 2020 Rule baselines, "do not make sense." The 1971 Rule did not define what is required in a "request for certification" when states or Tribal governments are the certifying authorities. Since requests for certification with insufficient information are a common problem, as noted in public comment and stakeholder input, the final rule includes minimum requirements for all requests for certification (*see* Section IV.C of the final rule preamble) to improve information

consistency in requests for certification. However, unlike the 2020 Rule, the final rule recognizes that it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the license or permit application and any water quality-related materials that informed the development of the application (or draft general permit or license and any water quality-related materials that informed the development of the draft general license or permit for requests for certification on the issuance of a general permit or license), is necessary to make an informed decision regarding protecting the quality of their waters from adverse effects from a federally licensed or permitted activity. Defining an exhaustive list of components for all requests for certification for all certifying authorities could inhibit a comprehensive review under section 401 within the reasonable period of time. The diverse nature of Federal licenses and permits, and the variety of potential water quality impacts from those different types of activities, does not lend itself to a one-size-fits-all approach. The minimum requirements help to improve information consistency in requests for certification, while providing certifying authorities with flexibility to define additional requirements beforehand that ensure they have the information needed for effective section 401 reviews.

For each provision of the final rule, the Economic Analysis provides a brief overview and justification for the revisions and describes potential economic impacts of the revision. For a more detailed justification of the revisions to the 2020 Rule's provisions on requests for certification, please see Section IV.C of the final rule preamble.

14.2 Data and Evidence

Another commenter said that the Economic Analysis is vague and did not provide any quantification of costs or benefits for either the 1971 or 2020 Rule baselines. The commenter added that the short time period that the 2020 Rule has been implemented makes EPA's claims a challenge to substantiate. However, the commenter said that EPA has an obligation to make specific data or evidence to support its finding that the 2020 Rule resulted in lower water quality, if it has that data or evidence. The commenter stated that EPA needs to rectify its past record of all permitting processes conducted under section 401 and put procedures in place to track certifications moving forward.

<u>Agency's Response</u>: The Agency disagrees with commenter assertions that the Economic Analysis is vague or that a qualitative analysis is problematic. The Economic Analysis includes a careful qualitative assessment of potential impacts under the final rule. The qualitative analysis consisted of characterizing baseline conditions and identifying impacts of the regulatory changes based on information shared in pre-proposal input letters and public comments. The lack of a national-level dataset on section 401 certification reviews and the short timeframe under which the 2020 Rule was in effect limited EPA's ability to quantify the incremental impacts of the final rule. Although both baselines (1971 and 2020 Rules) include the requirement that the Federal agency notify EPA upon receipt of an application for a Federal license or permit and a certification, the Agency has historically only received copies of the application and certification when EPA is the permitting Federal agency or is acting as the certifying authority. Thus, the Agency does not have

comprehensive data to estimate the number of certification decisions (grant, grant with conditions, deny, or waive) per year, nor does the Agency have data to suggest how these decisions will change under the final rule. Given these data limitations, the Agency completed a careful qualitative assessment in accordance with Federal guidance for conducting an economic analysis as described in Executive Order 12866: "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." Circular A-4 also states that, although quantitative estimates of benefits and costs are preferrable when feasible for ease of comparison across potential regulatory options, "some important benefits and costs (e.g., privacy protection) may be inherently too difficult to quantify or monetize given current data and methods. You should carry out a careful evaluation of non-quantified benefits and costs." (U.S. Office of Management and Budget, 2003) Thus, the absence of quantification does not mean that the Economic Analysis does not support a reasoned determination of the final rule.

EPA agrees that procedures would be helpful to track section 401 certifications moving forward. Final rule revisions related to the neighboring jurisdictions process will provide an opportunity for obtaining information about future section 401 certifications.

14.3 Information Collection Request

A commenter said that the hourly burden estimate for how long a project proponent will spend on a request for certification is flawed, because: 1) four hours is likely low due to the proposed open-ended request for certification provisions and 2) four hours is the same burden EPA estimated under the 2020 Rule, which they argued is not a reasonable assumption.

Agency's Response: EPA disagrees with both of the commenter's points. First, the Agency disagrees that the request for certification provision is open-ended. The final rule identifies minimum contents for all requests for certification. Additionally, the final rule provides important limiting principles for additional contents in a request for certification, such as emphasizing that additional contents must be water quality-related and identified prior to when the request for certification is made. Second, the Agency maintains that the same average hourly burden as under the 2020 Rule is reasonable, because it is an average estimate and the final rule includes similar levels of requirements as the 2020 Rule (e.g., pre-filing meeting requests, minimum contents of requests for certification) with some added flexibility. Additionally, the minimum contents in a request for certification should be readily available and already developed as part of the license or permit application process. Furthermore, not all requests for certification will involve the same associated burden. The requests for certification for small projects can be prepared by the project proponent with relatively little associated burden. The requests for certification for larger, more complex projects may require significantly more associated burden to prepare.

14.4 Input Received in Prior Rulemakings

14.4.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

One commenter asserted that in its 2019 proposed rule Economic Analysis, EPA acknowledged that the 2019 proposed rule would cause uncertainty and delays, especially for complex projects that require a longer timeframe for review, because the narrower scope and shorter time for review could result in the issuance of more denials of certification based on lack of information. The commenter concluded that this would also cause more litigation and lengthy appeals.

A few commenters argued that the 2019 proposed rule's Economic Analysis did not accurately describe the impacts and benefits of the 2019 proposed rule's changes. One commenter argued that EPA did not follow its own Guidelines for Preparing Economic Analysis in preparing the 2019 proposed rule's economic analysis concerning a general effect-by-effect approach to benefit analysis. The commenter stated that EPA failed to meaningfully consider the challenges associated with the 2019 proposed rule in the Economic Analysis because the Agency did not identify "major effects," "benefit categories," and "significant endpoints" or "values"; therefore, the commenter concluded that the 2019 proposed rule was arbitrary and capricious for failing to consider important aspects of the rulemaking.

Another commenter reacting to the 2019 proposed rule Economic Analysis expressed concern that EPA had not drawn a rational connection between the facts found and the choices made. The commenter asserted that the data in the 2019 proposed rule's Economic Analysis does not support the Agency's position that Section 401 places a hinderance on development because over 95% of the CWA Section 404 permits issued by the Corps are general permit authorizations, so the majority of projects subject to Section 401 do not require individual-level review. The commenter noted that EPA's 2019 proposed rule Economic Analysis used case studies involving FERC-licensed projects which the commenter asserted means that the regulatory revisions were being driven by a handful of energy project. Furthermore, the commenter stated that the 2019 proposed rule's Economic Analysis had not included any economic impacts and benefits from the avoidance of degradation of water resources because good water quality supports public health and many outdoor industries. The commenter concluded that it is both unwise and inappropriate to upend a well-crafted system of cooperative federalism that has given states and Tribes power to protect aquatic habitat and waters for nearly a half-century due to frustration over a small number of controversial projects.

> **<u>Agency's Response</u>: *See* Section 14.1-14.3 in the Agency's Response to Comments. Although the case study approach used in the Economic Analysis for the 2020 Rule was helpful for illustrating some of the issues under the 1971 Rule framework, the Agency agrees that it did not provide a representative assessment of the section 401 review process as a whole. In the Economic Analysis for the final rule, EPA did not include any case studies due to the difficulty of representing the full spectrum of projects subject to section 401 review.**

15. RULEMAKING PROCESS

15.1 Rulemaking Process – General

15.1.1 Reconsideration of the 2020 Rule

Some commenters expressed support for reconsideration of the 2020 Rule and encouraged EPA to finalize a new rule. Many of these commenters urged EPA to expedite the new rulemaking process, and some of these commenters asserted an expeditious rulemaking process is needed to reduce harm and uncertainty caused by the 2020 Rule. One commenter recommended that EPA repeal the 2020 Rule and asked EPA to clarify in the new rule that if any or all of the final new rule is stayed or vacated by a court, the 1971 Rule would come back into effect rather than the 2020 Rule.

A number of commenters who wrote in general support of the proposed rule requested that EPA move quickly to implement the proposed rule and/or expressed a sense of urgency to repeal the 2020 Rule. In many cases, commenters connected that urgency to purported harm(s), such as a narrowed scope of review, caused by the 2020 Rule. Most, but not all, of these commenters also critiqued the 2020 Rule.

Some commenters opposed reconsideration of the 2020 Rule. Many of these commenters asserted that EPA did not provide a basis for reconsideration of the 2020 Rule. One commenter argued that neither Executive Order (E.O.) 13990 nor the "Fact Sheet: List of Agency Actions for Review" identified any specific problems with the 2020 Rule. The commenter further asserted that the "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule" and the proposed rule only offered vague reasons for reconsideration of the 2020 Rule. One commenter asserted that the "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule" failed to mention "well-documented abuses" that preceded the 2020 Rule or EPA's determination in the 2020 Rule that "some certifying authorities [had] implemented water quality certification programs that exceed the boundaries set by Congress in section 401. 85 FR 42215. Another commenter noted that many of EPA's proposed revisions fail to consider improper certification actions that the 2020 Rule addressed.

One commenter asserted that it was unnecessary for EPA to revise the 2020 Rule, because the 2020 Rule is currently in litigation. The commenter asserted that EPA's proposal was in tension with ongoing litigation, a misallocation of public resources, and reminiscent to EPA's actions regarding the Clean Power Plan.

> **Agency's Response: The Agency appreciates commenter support for the proposed rule and appreciates commenter requests for an expeditious rulemaking process. In finalizing the proposed rule, the Agency reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the certification process, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule. The Agency discusses comments received and responses in the applicable sections of the preamble to this final rule.**

EPA disagrees that it did not provide a basis for reconsideration of the 2020 Rule or that litigation on the 2020 Rule made the rulemaking effort unnecessary. EPA proposed the replacement rule only after reviewing the statutory text, legislative history, case law, and public comments. EPA found, and continues to find, it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment.[15] *See e.g.,* section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification. Accordingly, EPA is now finalizing revisions to the 2020 Rule to be fully consistent with the 1972 and 1977 CWA amendments, the Agency's legal authority, and the principles outlined in Executive Order 13990.

15.1.2 Stakeholder Engagement and Opportunity for Public Comment

Some commenters expressed appreciation for EPA's engagement with states and other stakeholders throughout the rulemaking process and commended the efforts EPA took to consider stakeholder feedback in developing the proposed rule.

Some commenters requested that EPA continue to engage with states and Tribes and other stakeholders throughout the rule development process. These commenters expressed a variety of reasons for continued engagement, such as ensuring a rule that eliminates ambiguity, communicating stakeholder issues and concerns, balancing a variety of land and water uses, and ensuring protection of state waters, habitat, and communities. Some commenters observed room for improvement in the proposed rule and the need for EPA to engage stakeholders further to improve the final rule. One commenter encouraged EPA to hold a series of interactive meetings with co-regulator states and Tribes to discuss key issues, including implementation challenges and opportunities. The commenter recommended interactive meetings at both the national level and between EPA regions and their relevant states and Tribes.

In voicing support for the proposed rule and/or critiquing the 2020 Rule, several commenters discussed stakeholder engagement in general. Most of these commenters expressed appreciation for the stakeholder engagement and outreach process and/or opportunity to comment, with a few commenters specifically mentioning outreach to states and/or Tribes.

[15] For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F in this preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed *without* any input from the certifying authority.

Several of these commenters expressed appreciation for EPA incorporating their previous comments (e.g., on the 2020 Rule), including for example, regarding: scope of certification (e.g., state's authority, activity as a whole), reasonable period of time, Tribal sovereignty, and collaborative federalism.

Some commenters argued that EPA failed to provide adequate notice and opportunity to comment on the proposed rule. One commenter stated that the numerous requests for comment about regulatory options in the proposed rule, involving numerous possible combinations of provisions, made it difficult to comment. The commenter said EPA should provide another opportunity for comment after the Agency has a more firm proposed rule in mind.

Agency's Response: The Agency appreciates commenter support for EPA's engagement during the rulemaking. *See* Section III.D of the final rule preamble for further discussion on stakeholder engagement during this rulemaking process.

EPA strongly disagrees with commenters asserting that the Agency failed to provide adequate notice and opportunity to comment on the proposed rule. On June 9, 2022, the Agency published the proposed rulemaking in the *Federal Register*, 87 FR 35318, which initiated a 60-day public comment period that lasted through August 8, 2022. EPA held a virtual public hearing on July 18, 2022, and hosted a series of stakeholder listening sessions throughout June 2022, including one listening session for project proponents on June 14, 2022, three listening sessions for States and territories on June 15, 22, and 28, 2022, and three listening sessions for Tribes on June 15, 22, and 28, 2022. The Agency also hosted a Federal agency listening session on June 14, 2022. In finalizing the proposed rule, the Agency reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the certification process, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule. The Agency discusses comments received and responses in the applicable sections of the preamble to this final rule. The APA requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. 553(c). The APA does not specify a minimum number of days for accepting comments on a proposed rule. The Agency complied with its obligation under the APA to provide a reasonable length of time for interested parties to comment on the proposed rule. Moreover, a pre-publication version of the proposed rule was posted on the EPA's website on June 2, 2022, which was 7 days prior to its publication in the Federal Register and the date the public comment period began.

15.2 Executive Orders/Statutory Requirements

15.2.1 Regulatory Flexibility Act

A few commenters asserted that EPA improperly certified the proposed rule under the Regulatory Flexibility Act (RFA). The commenters recommended that EPA include more qualitative discussion of the impact of various features of the proposed rule on small entities, even if EPA is unable to quantify the impacts. A commenter asserted that the proposed rule replaces the regulatory certainty of the 2020 Rule with regulation by more than 50 certifying authorities and regulation by litigation.

One commenter described the requirements of the RFA, including the requirement to include a response to written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*. The commenter stated that for all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. The commenter asserted that because EPA failed to analyze the impact of requiring small entities to obtain and submit draft Federal licenses and permits as part of a certification request, EPA did not provide a comprehensive factual basis to certify that there will not be a significant impact on a substantial number of small entities as required by section 605(b) of the RFA. Of the five provisions of the proposed rule that may have an impact on small entities (i.e., pre-filing meeting request process, contents of a request for certification, scope of water quality certification, modifications, and section 401(a)(2) process), the commenter suggested that EPA did not provide a quantitative analysis, nor did include a qualitative summary of the impacts on small entities relating to the contents of a request for certification. Citing Section 4 of EPA's Economic Analysis for the Proposed Rule, the commenter highlighted EPA's position that requiring a copy of a draft Federal license or permit "may postpone when the section 401 review process could begin." The commenter concludes that delays of project approvals will increase costs for regulated small entities, so EPA should prepare and publish an initial regulatory flexibility analysis. Another commenter also asserted that the requirement for a draft license or permit implicates costly delay.

> **Agency's Response: EPA disagrees with commenter assertions that the Agency improperly certified the rule under the RFA. As an initial matter, the Agency disagrees that it must conduct a quantitative analysis to certify no significant impact on a substantial number of small entities (SISNOSE). RFA Section 605(b) does not require an in-depth analysis for a no SISNOSE certification, but rather "a statement providing a factual basis for such certification." RFA does not say the factual basis must include data analysis, interviews, or detailed industry analysis. The Agency finds that its analysis in this final rule provides a factual basis for the Agency's certification of no SISNOSE and notes that changes in this final rule are responsive to input from small industry entities and representatives. For example, the Agency made changes in the minimum contents for a request for certification in response to comments, including comments from small industry entities and representatives, and eliminated the requirement for a draft license or permit in a request for certification on an individual license or permit.**

Despite EPA not being able to quantify the impacts on small entities due to significant data limitations, EPA has included a qualitative assessment of the potential impacts of the rulemaking on project proponents that are small entities in the Economic Analysis for the Final Rule. Based on the qualitative analysis, the Agency has determined that some small entities may experience some impact from the rulemaking but that the impact would not be significant, nor would the number of small entities be substantial. Please see Section 7.4 of the Economic Analysis for the Final Rule for an in-depth, qualitative analysis of potential impacts of the final rule on project proponents that are small entities.

15.2.2 Executive Order 13132: Federalism

One commenter expressed support for the proposed rule because the proposed rule reverses much of the 2020 Rule and significantly expands the authority of States and Tribes to review, condition, and approve or deny certifications. The commenter noted that CWA guidance, implementation regulations, and court interpretations supported the role of certifying authorities in the implementation of the CWA, in contrast to the 2020 Rule which narrowed the authority of States and Tribes to deny Section 401 certifications, in part by limiting the time frame for review and the scope of conditions that certifying authorities could impose on Federal permits. The commenter appreciated the restoration of certifying authority in the proposed rule's specified timeline for certification review, scope of review, and requirements for certification.

Another commenter asserted that EPA's determination that the proposed rule does not have federalism implications is misplaced because there is a well-documented history of certain States abusing their CWA authority to effectively block projects in other States for non-water quality reasons. Since EO 13132 requires EPA to "closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action," the commenter concluded that the abusive use of CWA certifying authority to block projects in other States on non-water quality reasons inherently limits the policymaking discretion of the State in which the blocked project would be located. The commenter recommended that EPA acknowledge as much and perform the appropriate analysis under EO 13132.

<u>Agency's Response</u>: Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), EPA has determined that this rulemaking does not have federalism implications but expects that this rulemaking may be of significant interest to state and local governments. Consistent with EPA's policy to promote communication between EPA and state and local governments, EPA conducted outreach and engagement with state and local government officials and representatives prior to the finalization of this rule to permit them to have meaningful and timely input into its development. Please see Section VI.E of the final rule preamble for further discussion on EPA's outreach and engagement with state and local government officials and representatives on this rulemaking and how this rulemaking may impact states.

In response to the comment regarding state usage of water quality certifications for non-water quality reasons, the Agency notes that based on commenter feedback and EPA's

experience implementing section 401, EPA finds that the vast majority of certification decisions are based entirely on water quality considerations. Nevertheless, the final rule reiterates that certifying authorities are limited to considering the water quality-related impacts from an activity when determining whether to issue a section 401 certification. *See* Section IV.E of the final rule preamble and Section 5 in this Response to Comments document for further discussion on the scope of certification.

15.2.3 Executive Order 13175: Tribal Consultation

One commenter reserved the right to request government-to-government consultation and provide additional input beyond the public comment period as they deem necessary. Another commenter recommend that EPA hold additional Tribal information sessions and offer Tribal consultation opportunities prior to finalizing the rule.

One commenter argued that EPA did not adequately consult with Tribes before developing the proposed rule, thereby not acting consistently with its Federal agency trust responsibility, emphasizing the proposed rule's impacts on water resources and therefore treaty-reserved rights.

Agency's Response: EPA disagrees with the commenter asserting that the Agency did not adequately consult with Tribes. EPA consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this rulemaking to allow them to have meaningful and timely input into its development. EPA has developed a final Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, which further describes EPA's efforts to engage with Tribal representatives and is available in the docket for this rulemaking. As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action. For further discussion on the tribal consultation and coordination process on this final rule, please see Section VI.F of the final rule preamble.

15.2.4 Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

One commenter suggested that EPA's certification without explanation that the proposed rule is not a 'significant' energy action is inappropriate given the domestic and geopolitical issues discussed in their public comment letter. The commenter stated that the proposed rule is irrational for not including discussion of the requirement to consider energy impacts in the economic analysis and the proposed rule preamble. The commenter asserted that EPA cannot evade the simple fact that its proposal would provide more opportunities for extending the deadline for their consideration and for modifying a certification after it is issued and broaden the scope of aspects of the project and aspects of state or Tribal law which certifying authorities could bring to bear when considering certification requests, which the commenter argued will inevitably increase uncertainty, delay, burden, and in many cases may lead to de facto denial of needed energy and other infrastructure projects.

<u>Agency's Response</u>: Some Federal licenses and permits that relate to the supply and distribution of energy, such as Federal construction and operation licenses or permits, are subject to CWA section 401 certification if the activity may result in a discharge into waters of the United States. However, this rulemaking does not impact existing federally licensed or permitted projects – except for making it easier to modify elements of a previously issued grant of certification. As discussed in the Economic Analysis for the Final Rule, EPA anticipates that this final rule will improve the efficiency of the certification review process for new requests for certification, which will support efficiency in the related Federal license or permit review processes. Therefore, there are no direct impacts from this rulemaking on the supply, distribution, or use of energy, and any indirect impacts of this final rule will be neither adverse nor significant on the supply, distribution, or use of energy.

The Agency also disagrees with the commenter's assertion that the rule will delay or bringing uncertainty to infrastructure projects. *See* Section 16.3 of the Agency's Response to Comments for further response to comments on the proposed rule and infrastructure projects.

15.2.5 Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

One commenter highlighted EO 13990 and the importance of restoring the broad authority of States and, in particular, Tribes under Section 401 to ensure clean water, water quality, public health, protection of the environment, and aquatic habitat is secured for environmental justice communities. A few commenters recommended that EPA prioritize environmental justice and address disproportionate harm to communities of color and low-income communities and concerns about climate change – which poses immense threats to state and Tribal waters.

<u>Agency's Response</u>: The Agency recognizes that the burdens of environmental pollution disproportionately fall on certain communities with environmental justice concerns, and EPA is responsive to environmental justice concerns through multiple provisions in this rule. *See* Section VI.J of the final rule preamble and Section V of the Economic Analysis for the Final Rule for further discussion on environmental justice and this final rule.

15.3 Input Received in Prior Rulemakings

15.3.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

Administrative Procedure Act

Multiple commenters argued that the 2019 proposed rule, if finalized, would violate the APA because of the expedited consultation did not provide adequate public notice and comment opportunity. Some of the commenters asserted that the Agency did not conduct enough outreach before issuing the 2019 proposed rule, which lead to the development of a flawed 2019 proposed rule. A few commenters stated that the 2019 proposed rule did not heed, acknowledge, or respond to the early input that they had provided when EPA began the 2019 rulemaking process.

One commenter recommended that EPA provide additional guidance upon completion of the 2019 rulemaking and rescind the 2019 Guidance after the final rule on the 2019 proposed rule is issued.

One commenter recommended that EPA hold additional state and Tribal listening sessions or workshops throughout development of the 2019 proposed rulemaking.

One commenter recommended that EPA host more than one public hearing because the proposed rule focused on actions of states like NY, but the one public hearing was held on the other side of the country in Salt Lake City, UT.

One commenter asserted that because of EO 13868, EPA initiated the section 401 rulemaking in 2019 for purely political reasons rather than conducting the appropriate administrative and deliberative processes that should proceed the development of a rulemaking.

One commenter described the 2019 CWA section 401 rulemaking process in similar terms to the circumstances in New York v. U.S. Department of Labor, 363 F. Supp. 3d 109 (D.D.C. 2019), in which the Department of Labor implemented an executive order to undo the Affordable Care Act before the court said their action, "scraps [Employment Retirement Income Security Act]'s careful statutory scheme" and "exceeds the statutory authority delegated by Congress." *Id*. at 117-118. The commenter concluded that EPA's 2019 proposed rule needed to be withdrawn as the rulemaking represented a pre-determined attempt to overturn decades of Agency practice and elevate the interests of developers over the water quality interests of state and Tribal certifying authorities.

One commenter argued that the 2019 proposed rule will violate the APA by failing to: (1) consider and analyze relevant issues, including the CWA's overarching objective to restore and maintain water quality; and (2) provide a reasoned explanation or rational basis for EPA's decision to repeal the existing section 401 regulations without consideration of the states' significant reliance on the existing regulations.

One Federal Decision

One commenter argued that EPA's 2019 proposed rule is at odds with the One Federal Decision Executive Order. The commenter asserted that states and Tribes told EPA during pre-proposal consultation that states and Tribes lack the staff needed to run their section 401 programs already. The commenter asserted that the 2019 proposed rule could potentially lead to increased denials of certification if a certifying authority does not have adequate information to make their decision. Furthermore, the

commenter recommended that EPA provide an opportunity for all certifying authorities to participate in pre-application coordination.

Executive Order 13175: Tribal Consultation

In response to the 2019 proposed rule, one Tribal nation stated that EPA did not adequately consult with their nation prior to developing the 2019 proposed rule. The commenter stated that the Federal government is required to preserve Tribal resources (such as fish stocks) – which the Supreme Court has characterized as a duty that should be judged by "the most exacting fiduciary standards." *Seminole Nation v. U.S.*, 316 U.S. 286, 296-297 (1942). Because of the Federal government's trust obligation, the requirements under Executive Order 13175, and guidance in EPA's Policy on Consultation and Coordination with Indian Tribes, the commenter argued that consultation "the process of meaningful communication and coordination," should be conducted "early enough to allow tribes the opportunity to provide meaningful input" on the proposed action. However, the commenter concluded that EPA did not offer enough opportunity for the Tribe to provide substantive input either during the public hearing or the webinars on the 2019 proposed rule and therefore should engage in direct consultation with the Tribe.

> **Agency's Response: EPA reviewed the 2020 Rule in accordance with Executive Order 13990 and, in the spring of 2021, determined that it would propose revisions to the 2020 Rule through a new rulemaking effort. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021). EPA considered several factors in making this determination, including but not limited to the text of CWA section 401; Congressional intent and the cooperative federalism framework of CWA section 401; concerns raised by stakeholders about the 2020 Rule, including implementation-related feedback; the principles outlined in the Executive Order; and issues raised in litigation challenging the 2020 Rule. *Id*. In particular, the Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. The Agency identified this and other concerns as they related to different provisions of the 2020 Rule, including certification requests, the reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, and modifications. *See id*. at 29543-44.**
>
> ***See* the Agency's Response to Comments in Sections 15.1-15.2.**

15.3.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

Executive Order 12898

In response to EPA's NOI to reconsider and revise the 2020 Rule, one stakeholder asked that EPA correct the mistakes of the 2020 Rule and ensure that a new rule is developed with adequate consideration for

environmental justice. The stakeholder argued that the 2020 Rule resulted in a real and significant disparate impact on Tribes, communities of color, and low-income families.

Rulemaking Process

In response to EPA's NOI to reconsider and revise the 2020 Rule, one stakeholder recommended that EPA work with the Army Corps to develop, and publish for comment, interim guidance regarding implementation of the 2020 Rule to provide states with the time, information and flexibility they need to make certification decisions within the limits of the statute. The stakeholder recommended that EPA engage with states as co-regulators for the review of any potential Agency action before it is published for public comment.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 15.1-15.2; *see also* Section III.D of the final rule preamble for further discussion on the Agency's stakeholder outreach.**
>
> **The Agency would also like to clarify that this rulemaking effort is not a joint rulemaking. EPA is the Federal agency tasked with administering and interpretating the CWA, *see* 33 U.S.C. 1351(d), 1361(a), including section 401.**

16. GENERAL

16.1 General input on the 2020 Rule and 1971 Rule

16.1.1 General input on the 2020 Rule

Oppose 2020 Rule

Approximately half of the commenters who wrote in general support of the proposed rule critiqued the 2020 Rule. Many of these commenters discussed environmental harm(s) and/or lack of protection(s) that they argued resulted from the 2020 Rule. For example, a couple of commenters provided detailed discussions of specific projects that they argued had caused harm under the 2020 Rule, including the following: Brunswick Harbor Dredging, Georgia; Riverport Development, South Carolina; U.S. 278 Corridor Improvements, South Carolina; and Conowingo Hydroelectric project, Susquehanna River. Some commenters claimed that the 2020 Rule favored economic interests over environmental and/or public health concerns. A commenter asserted that the 2020 Rule was driven by a few projects and upended a half century of continuity of regulatory practice and stripped state and Tribal authority over thousands of projects each year in contravention of the statutory language and Supreme Court precedent. A number of commenters critiqued the 2020 Rule for being inflexible, cumbersome, and/or ineffective, and a number of commenters characterized the 2020 Rule as illegal and/or subject to litigation. One commenter stated that the 2020 Rule exacerbated confusion and uncertainty and led to litigation and certification denials.

Several commenters asserted that prior to the 2020 Rule, the section 401 process worked as Congress intended for fifty years and disagreed with assertions that states had used their authority to block development. Similarly, another commenter noted that thousands of certification applications were reviewed yearly over the last 50 year and that the vast majority were granted without incident, and that the 2020 Rule departed from prior rules and went against the text and purpose of the CWA and curtailed state and Tribal authority to protect their waters.

One commenter requested that EPA should clearly state that the 2020 Rule's interpretations of section 401 contravene the text and purpose of the CWA, including the 2020 Rule's approach to the reasonable period of time, scope of certification, Federal agency review, enforcement, and modification. The commenter asserted that while the proposal included explicit and implicit admission that the 2020 Rule was unlawful, the proposal equivocated that the 2020 Rule might be legally permissible where it casts the rulemaking as a discretionary change in policy. The commenter further argued that such equivocation was confusing because if the 2020 Rule is inconsistent with principles of cooperative federalism central to section 401, then it cannot be consistent with the CWA. Instead, the commenter recommended that the Agency should clearly state that a number of the 2020 Rule's key components are unlawful, asserting that EPA is legally required to do so and would be beneficial in defending a final rule in future litigation.

Qualified Support for 2020 Rule

A few commenters who expressed support for the proposed rule also expressed support for elements of the 2020 Rule. One commenter conveyed appreciation for the proposed rule incorporating elements of the 2020 Rule that the commenter characterized as increasing the certification process' clarity and efficiency. For example, one commenter critiqued the 2020 Rule in terms of timing, scope, and Federal agency roles with regard to certification conditions and denials and wrote in support of clarifications in the proposed rule. However, this commenter also argued in favor of maintaining some elements of the 2020 Rule in order to not overburden the farming and food production sectors, including fishing, especially in the context of global population growth and the need for drinking water protection. Another commenter voiced support for the proposed rule as being more consistent with the Clean Water Act and critiqued the 2020 Rule, but also recommended the proposed rule provide better guidance on what is not federally regulated, which the commenter argued the 2020 Rule did in a clear manner.

Support 2020 Rule

Conversely, many of the commenters who did not support the proposed rule voiced support for the entirety or certain aspects of the 2020 Rule. Generally, these commenters asserted that the 2020 Rule addressed specific issues better than the proposed rule. For example, one commenter asserted that the 2020 Rule defined the procedures, timeframes, and scope of Section 401 in a clear and specific manner. A couple commenters voiced support for the 2020 Rule's approach to timeframes, arguing that these approaches in the 2020 Rule would prevent the Section 401 process from indefinitely slowing down infrastructure projects, including hydropower projects and pipelines. One commenter voiced support for the 2020 Rule in providing a balance between water quality protection compliance and project proponents.

A number of the commenters who voiced support for the 2020 Rule raised concerns about states improperly applying Section 401, argued against too broad a scope of certification, and/or called for limiting state authority. A few commenters asserted the 2020 Rule addressed problems caused by misinterpretations of the statute that led to vetoing projects for non-water quality reasons. One commenter asserted that section 401 is not the only means by which states and Tribes may protect water quality or other concerns, arguing that neither section 401 nor the 2020 Rule limited the authority of states or Tribes to regulate any activity under state or Tribal law, other Federal laws, and other provisions of the CWA. Another commenter argued that the proposed rule would be improved if EPA included limitations on states' certifying authority. This commenter warned that a lack of these limitations could lead to social and environmental consequences; overtake Federal jurisdiction; more frequently cause licenses or permittees to decommission or abandon projects where certifications conditions' costs exceed project benefits. This commenter further argued that the proposed rule's changes from the 2020 Rule that purportedly broaden the scope of certification would remove efficiencies from the 2020 Rule, thereby increasing costs and potentially resulting in substantial job losses.

Agency's Response: EPA has considered these diverse comments and discussed the Agency's rationale for regulatory revisions to the 2020 Rule throughout the final rule preamble, in this Response to Comments document, and in the Final Rule Economic Analysis.

In the Agency's reconsideration of the 2020 Rule pursuant to Executive Order 13990, EPA found multiple reasons to revise the 2020 Rule. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment.[16] *See e.g.,* section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification.

EPA is finalizing revisions to the 2020 Rule to be fully consistent with the 1972 and 1977 CWA amendments, the Agency's legal authority, and the principles outlined in Executive Order 13990. This final rule revises the 2020 Rule to better reflect the CWA's statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act. In addition, the final rule clarifies certain aspects of section 401

[16] For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F in this preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed *without* any input from the certifying authority.

implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

16.1.2 General input on the pre-2020 Rule regulatory regime

Oppose pre-2020 Rule

A couple of commenters asserted that the proposed rule was more consistent with the CWA and would improve clarity by reflecting practices that have "evolved" since the 1971 Rule.

A few commenters voiced concern with the pre-2020 regulatory regime, including asserting that the pre-2020 Rule regime was confusing and led to delays. A couple commenters expressed concern that the proposed rule, or aspects of it, would re-create issues that existed prior to the 2020 Rule. A number of commenters discussed scope of certification, including states' purported misuse of Section 401. Several commenters wrote about the Section 401 regulations prior to the 2020 Rule and argued that states blocked, modified, and/or delayed projects on grounds unrelated to water quality (according to commenters, this included climate change, opposition to fossil fuels, air pollution, public health, hydraulic fracturing, energy plans more broadly, sampling and monitoring requirements). These commenters explicitly or indirectly appeared to voice support for the 2020 Rule and one other argued that EPA action is needed to avoid this misuse. A couple commenters specifically discussed hydropower projects and asserted that before the 2020 Rule, hydropower projects could be delayed for years, with certifying authorities improperly expanding the scope of Section 401, usurping FERC authority, and preventing license updates and preventing some projects from ever being financed or built.

Support pre-2020 Rule

In the context of critiquing the 2020 Rule and/or voicing general support for the proposed rule, a number of commenters wrote favorably about the pre-2020 approaches and/or processes, including supporting a return to those. Some characterized their support in terms of decades of longevity, consistency, comprehensiveness, and/or clarity of the pre-2020 regulatory regime. One commenter voiced support for EPA's intentions in the proposed rule, returning to pre-2020 approaches and grounding it in legal and regulatory precedent but argued that the proposed rule also included practices beyond the CWA.

One commenter voiced support for EPA returning to pre-2020 approaches, arguing that the proposed rule does that in some cases, but also raising concerns that the proposed rule goes beyond the CWA.

Agency's Response: EPA appreciates the comments in support of the proposed rule. The Agency has discussed its rationale for regulatory revisions to the 2020 Rule and, where appropriate and relevant, how the final rule compares to the 1971 Rule and pre-2020 Rule practice throughout the final rule preamble, in this Response to Comments document, and in the Final Rule Economic Analysis.

The Agency views the final rule as consistent with the 1972 and 1977 CWA amendments and considerate of longstanding practices since the 1971 Rule. The final rule clarifies certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

16.2 General input on CWA, Congressional Intent, and Cooperative Federalism

16.2.1 Consistency with Clean Water Act and Congressional Intent

In voicing general support for the proposed rule and/or critiquing the 2020 Rule, approximately half the commenters also argued that the proposed rule was consistent with the CWA and/or Congressional intent and/or more consistent than the 2020 Rule. These commenters framed consistency in terms of elements such as statutory text, intent, purpose, and/or goals (e.g., "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Most of these commenters made that argument explicitly, while others alluded to it by voicing support for consistency more generally. Many of these commenters tied their comments about consistency with the CWA and Congressional intent to other themes discussed throughout this summary, such as cooperative federalism, state authority, and water quality protection. A few commenters characterized Section 401 as reflecting the CWA's intended balance between states and projects, and states' or Tribes' water quality protections. Another commenter called for implementing the proposed rule as part of strengthening the CWA to the maximum extent possible. Another commenter suggested that the Agency should go further to ensure its rulemaking restores the ability of states to assure Federal projects meet state requirements and are consistent with the CWA and Supreme Court precedent. One commenter stated that Congress delegated authority to the EPA Administrator to develop regulations to resolve gaps in the statutory text in a manner consistent with the statutory framework that and that the proposed rule represented the Agency's exercise of that authority in a manner that recognized and restores the balance of state, Tribal, and Federal authorities consistent with the cooperative federalism principles central to CWA section 401.

A few commenters argued that the proposed rule was inconsistent with the CWA and/or congressional intent in terms of cooperative federalism and a sense of overreach. A couple of commenters argued that the proposed rule exceeded the language and/or requirements of Section 401. A different commenter said that Congress did not delegate authority to EPA to interpret section 401 in regulations other than its own roles.

A couple commenters argued that the 2020 Rule was consistent with Congress's intent with Section 401 and created a proper balance between state involvement, protection, and timing and certainty. One of these commenters asserted that states have ample authority under the 2020 Rule to ensure consistency with water quality requirements.

Several commenters asserted that Congress intended for states to have a primary responsibility in addressing water pollution and in achieving the goals of the Act, citing to CWA sections 101(b) and 510. These commenters argued that Section 401 was intended to fill a gap in the regulatory structure to ensure

Federal licenses or permits complied with state laws to protect water quality. A few of these commenters stated that Federal and state courts have found that state authority to deny or condition water quality certifications is broad. One commenter further noted that as long as certification denials or conditions are founded in protecting water quality or imposing other appropriate state law environmental considerations, the decisions have been upheld by the courts as a valid exercise of state statutory authority.

A few commenters expressed concern that the proposed rule was at odds with Congressional intent and would provide states with the power to stop projects without water quality justifications. Another commenter asserted that the proposed rule interpreted cooperative federalism and the CWA too narrowly and did not consider interest of other states (aside from the certifying state), such as those where energy is produced or used. The same commenter argued that the CWA provides a balanced approach by which a certifying state can only block a project under specific conditions defined in statute. One commenter claimed that the proposed rule would lead to practices that are inconsistent with the CWA, such as state misuse of Section 401.

Agency's Response: The Agency agrees with commenters asserting that the proposed rule was consistent with the CWA and Congressional intent, and accordingly, disagrees with commenters asserting that the proposed rule was inconsistent with the CWA and Congressional intent. As discussed throughout the final rule preamble and this Response to Comments document, the Agency is finalizing revisions to the 2020 Rule to be fully consistent with the 1972 and 1977 CWA amendments, the Agency's legal authority, and the principles outlined in Executive Order 13990. This final rule revises the 2020 Rule to better reflect the CWA's statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act. In addition, the final rule clarifies certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

The Agency disagrees with the commenter asserting that the Agency does not have authority to interpret section 401 in regulations. EPA is the primary agency responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including section 401. *See* 33 U.S.C. 1251(d), 1361(a).

The Agency disagrees with commenters asserting that the 2020 Rule was consistent with Congress's intent with Section 401. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as

evidenced in public comment.[17] *See e.g.*, section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification.

The Agency also disagrees with the commenter asserting that the proposed rule would provide states with the power to stop projects without water quality justifications. *See* Section IV.E of the final rule preamble and Section 5 of the Agency's Response to Comments for further discussion on the water quality limitations inherent to Section 401, and as a result, this final rule. In response to the commenter asserting that the proposed rule did not consider the interests of other states, aside from the certifying state, the Agency observes that Section 401(a)(2) provides an opportunity for potentially affected jurisdictions to object to the issuance of a Federal license or permit that will violate their water quality requirements. *See* Section IV.K of the final rule preamble. Outside of this subsection, section 401 does not provide an explicit role for other jurisdictions whose water quality in not otherwise impacted by the Federally licensed or permitted activity. When a certifying authority determines how it will act on a request for certification, section 401 is clear that the certifying authority must determine whether the activity will comply with applicable water quality requirements, and not whether it will impact another state's interest in energy production or usage. *See* Section IV.E and F for further discussion on the scope of certification and certification decisions.

16.2.2 Cooperative Federalism, Balance, and Similar Concepts

Many commenters voiced support for the proposed rule and/or critiqued the 2020 Rule in terms of cooperative federalism, cooperation, partnership, balance and/or co-regulator relationship between states and/or Tribes and the Federal government. Many of the commenters who discussed consistency with the CWA framed their argument(s) around this theme. Some of these commenters appeared to draw directly from the language of the proposed rule (e.g., preamble) in framing these discussions. Many of these commenters connected arguments around cooperative federalism (or similar themes) to other themes, for example, flexibility.

Most commenters who wrote generally in favor of the proposed rule - including a large number of those who discussed cooperative federalism, consistency with the CWA, and similar themes - wrote in favor of state, Tribal, and/or local roles in providing protections. One of these commenters asserted that states and Tribes are most acutely aware of the unique threats facing their waters, claiming they know the pollutants of concern, how climate change is already impacting their region, and what needs to be done to protect the health and safety of their most vulnerable residents. A few commenters specifically cautioned that Federal agencies may not be familiar with state laws and regulations around water quality and/or lack

[17] For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F in this preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed *without* any input from the certifying authority.

local knowledge of ecosystems. One of these commenters asserted that restoring state and Tribal authority over 401 decisions is essential for achieving environmental justice and provided a detailed example of a proposed New York pipeline, claiming that this example illustrates that it is imperative for state and Tribal authority to be restored in Section 401.

Some commenters wrote in favor of Tribal roles and protections and/or sovereignty in particular, with some of them mentioning a history of unfavorable treatment of Tribal populations. Several of these commenters discussed Tribes' stewardship role and encouraged listening to Tribes. A few of these commenters discussed Tribal cultural values around natural resources. One commenter provided a detailed discussion of Tribal treaty rights relevant to Section 401 and cited treaty rights and congressional intent in support of certifying authorities. The commenter asserted that the 2020 Rule usurped Tribal authority, providing detailed descriptions of the role of the Tribe in protecting waters and fishing rights from pollution and climate change.

In slightly different arguments, a couple of commenters generally voiced support for the proposed rule and critiqued the 2020 Rule, but also suggested additional support for state and Tribal authority, framing this argument around cooperative federalism and the CWA's intent. After voicing support for the proposed rule, compared to the 2020 Rule, including in terms of the CWA's federal-state balance, one of these commenters requested that EPA include in the proposed rule additional flexibilities and clarifications in order to fully address the federal-state balance. One commenter voiced support for "meaningful, substantive, and early consultation" and working in collaboration with states.

A few commenters argued that the proposed rule was not consistent with cooperative federalism principles because it ran counter to state authority under the CWA. One commenter argued that the proposed rule expanded EPA authority beyond the bounds of the CWA. Another commenter argued that the proposed rule seeks to define the form, substance, and timeline of state review, which runs counter to states' authority under the CWA, and argued that states can best define procedures. Similarly, another commenter argued that the proposed rule's certification process will impede certifying authorities' regulatory abilities. Another commenter argued that the proposed rule did not adequately acknowledge state primacy and failed to recognize state authorities under the CWA and other state programs that go beyond Federal requirements. Similarly, another commenter argued that the CWA section 401 provided authority to the states and allowed states to regulate beyond Federal standards. One commenter argued that cooperative federalism, Federal-state balance, and Federal respect for state authority are key to the CWA, and Section 401 changes do not supplant state authority and law. This commenter further wrote that they would not support any reduction in states' roles or authorities. One commenter recommended more autonomy for certifying authorities, for example allowing the certifying authority to define its own request for certification process and requirements, decide the length of the reasonable period of time, and enforce certification conditions.

Several commenters called for a sense of balance and/or consistency, between certifying authorities and the Federal government and/or between water quality protections and advancing projects and other concerns, such as economic, national, and energy interests. A few commenters expressed concern over certifying authorities' use of section 401 or a broad interpretation of cooperative federalism. A couple commenters raised concerns about certain projects being restricted in an unfair manner or delayed, with

one commenter specifically pointing to states' and local jurisdictions' political agendas. One commenter argued that the 2020 Rule adhered to cooperative federalism principles by preventing states from stopping fossil fuel projects based on policy agendas as opposed to water quality standards. Another commenter raised concerns about states' use of Section 401 and conflicts in cases where impacts cross state boundaries. Another commenter raised concerns about decisions being left to states in situations where, according to the commenter, the state has not demonstrated adequate capabilities, and cited Louisiana.

A few commenters asserted that the proposal would remove Federal authority, including one commenter who asserted that the proposed rule would cede EPA authority to states, inconsistent with the Agency's role and cooperative federalism, and another commenter who argued that Congress intended Federal agencies to have the primary authority for decision-making and states a more limited role in Section 401.

Agency's Response: The Agency agrees with commenters that states and Tribes, as opposed to Federal agencies, are the most knowledgeable of state and Tribal waters and their applicable water quality requirements. As discussed above, this final rule supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401. *See* the Agency's Response to Comments in Section 16.2.1. The Agency disagrees with commenters asserting that the final rule will impede certifying authority regulatory abilities or expand EPA's authority. On the contrary, this final rule enshrines the cooperative federalism principles central to section 401 while respecting the substantive and procedural guardrails Congress intended. For example, several aspects of this final rule provide certifying authorities with the ability to inform the certification process, *e.g.*, pre-filing meeting requests, contents of a request for certification, reasonable period of time, while at the same time recognizing the need for predictable and transparent backstops. *See* the final rule preamble and the Agency's Response to Comments document for further discussion on the Agency's rationale for these and other final rule provisions.

The Agency appreciates commenter concerns regarding projects being restricted in an unfair manner or delayed. As discussed above, this final rule supports an efficient certification process that is grounded in the water quality protection goals central to the CWA and section 401. For example, the final rule provides greater certainty around the scope of certification by clarifying that a certifying authority's analysis of any given activity is limited to adverse water quality-related impacts that may prevent compliance with water quality requirements. Neither section 401 nor this final rule authorizes certifying authorities to deny or condition a certification due to impacts from the activity that do not adversely affect water quality. *See* Section IV.E of the final rule preamble and the Agency's Response to Comments Section 5. As another example, the final rule clarifies that while certifying authorities and Federal agencies may jointly set the reasonable period of time, the reasonable period of time cannot be greater than one year, consistent with the statutory text. *See* Section IV.D of the final rule preamble and the Agency's Response to Comments Section 4. These and other provisions in the final rule should ensure federally licensed or permitted projects are able to proceed as Congress envisioned – that is, proceed in a timely

manner consistent with the water quality protection goals central to the CWA and section 401.

The Agency strongly disagrees with commenter assertions that Congress intended for Federal agencies to have the primary authority for decisionmaking under section 401. On the contrary, the legislative history regarding section 401 and its predecessor, section 21(b) of the 1970 Water Quality Improvement Act, reveal Congress' clear intent to ensure states had the authority to protect their waters and ensure federally licensed or permitted projects would not "in fact become a source of pollution" either through "inadequate planning or otherwise." 115 Cong. Rec. 9011, 9030 (April 15, 1969). *See* Section III of the final rule preamble for further discussion on the history and development of Section 401. Consistent with the overall cooperative federalism framework of the CWA, section 401 authorizes states and authorized Tribes to play a significant role in the Federal licensing or permitting process. Accordingly, as discussed throughout the final rule preamble, this final rule reflects these same cooperative federalism principles.

16.3 General Input on Infrastructure, Industry, Etc.

A couple of commenters more generally requested that in making changes to the 2020 Rule, EPA should consider the impacts to infrastructure projects (e.g., timing, scope of certification), without explicitly voicing support or opposition to previous regulatory regimes in these particular statements. Similarly, a few commenters who supported the 2020 Rule asserted that the Agency should consider impacts on industry and/or infrastructure in final rule development. One commenter asserted that EPA should consider the proposed rule's effects on all types of infrastructure, while another specifically called on EPA to ensure the final rule enables clean energy infrastructure. A different commenter raised concerns with project delays in terms of costs, time, and legal challenges, citing that permitting and National Environmental Policy Act assessments typically take more than a decade for new mines and mine expansions. This commenter argued that EPA should recognize the importance of, and assess the permitting impacts on, mining projects in an effort to advance a green economy, infrastructure, and rural development.

Conversely, in the context of the 2020 Rule, several commenters raised particular concerns about economic and/or political interests taking precedence over environmental and/or public health concerns with regard to these types of projects. A few commenters called for balance of development with environmental protections and/or between states, Tribes, and the Federal government.

A number of commenters discussed impacts related to infrastructure and/or specific types of infrastructure in their comments when voicing general opposition to the proposed rule (and/or support for the 2020 Rule). Most of these commenters referenced the energy sectors (exploration, generation, and/or transportation, including specific mention of pipelines by several). A few commenters referenced the hydropower sector, providing examples of projects that were delayed prior to the issuance of the 2020 Rule and asserting that the 2020 Rule appropriately corrected issues related to timing and scope of certification and conditions. A couple commenters specifically asserted that the 2020 Rule would ensure expeditious licensing of clean energy projects that would meet the Administration's goals. Another

commenter argued the mining sector is one of the most regulated by the Federal government and states, and discussed apparent misuse and resulting inefficiency, delay, modification, and blocking of projects under Section 401.

Several of the commenters who discussed infrastructure emphasized infrastructure of purported national importance, and several commenters emphasized infrastructure of purported international impact. A few commenters asserted that the proposed rule was inconsistent with the Administration's energy infrastructure priorities and/or climate change goals and would slow or delay energy development during global and domestic energy challenges (referencing the war in Ukraine) and delay nationally important projects. Several commenters highlighted the role of their industries (e.g., clean energy, natural gas, nuclear energy) towards clean energy and decarbonization goals. One commenter called on EPA to consider regulations' impact on national security policy.

More than half of the commenters who made general comments discussed specific industry sectors, including infrastructure, such as the following: agriculture, clean energy (e.g., decarbonization efforts, renewables, solar, electrical transmission and interconnection), energy, including from fossil fuels (e.g., gas, natural gas, oil, pipelines), nuclear energy, mines (e.g., coal, hardrock), and transportation (e.g., roads, bridges, airports). These commenters tended to connect their comments on the proposed rule to impacts on their particular sector(s) (e.g., delays, financial impacts), with some connecting those arguments to broader interests, such as economic development, interstate commerce, infrastructure upgrades, national security, climate change mitigation and clean energy, environmental protection, and equity.

Some commenters discussed concerns with infrastructure and/or specific industry project delays under the proposed rule, focusing on the time it takes to plan and develop various projects and the importance of timely certifications for infrastructure and energy projects. A number of commenters argued that timing issues (e.g., delays) can cause substantial impacts (e.g., timing, financial) to these projects that some argued jeopardize their completion. Several commenters expressed concern that the proposed rule would lead to ambiguities that would prevent or delay projects. In very similar language, a couple of commenters raised concerns about lengthy permitting processes and resulting timing and financial impacts for mining projects in the U.S., including compared to other countries, in the context of Section 401. These commenters argued that these permitting requirements do not provide substantial environmental benefits and put the U.S. at a competitive disadvantage, impacting communities that would benefit from the projects for jobs, tax revenues, and other socioeconomic factors. A couple of commenters asserted that the proposed rule would create inconsistencies that would lead to reduced investments in the context of energy related projects. One of these commenters claimed that the proposed rule would lead to permitting delays and would eliminate the well-defined timeline review process that Congress intended. They asserted that a well-defined timeline review process was critical for the development of reliable and affordable energy infrastructure which all Americans depend on.

One commenter cited a July 27, 2022, press release about the Inflation Reduction Act and anticipated permitting reform, urging EPA to wait to implement any changes to Section 401 regulations until after those changes.

Conversely, one commenter argued that the proposed rule would help streamline the process for infrastructure improvements. Another commenter asserted that more stringent regulation and consistency is needed to hold the construction industry liable for its negative impacts. The commenter observed that issuance of construction permits involves limited analysis on the impact proposed buildings will have on water quality even though the buildings have the potential to impact many who rely on the waters they are built in.

Agency's Response: The Agency appreciates commenter input on infrastructure and development. The Agency recognizes that a variety of federally licensed or permitted projects, including infrastructure related projects and projects in other industries, may be subject to the certification process. As discussed in the final rule preamble, the final rule supports a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990. Although the final rule may impose some burdens on certifying authorities (e.g., reasonable period of time negotiations) and project proponents (e.g., pre-filing meeting requests), the Agency expects that clear, unambiguous procedural requirements will improve section 401 procedural efficiencies for both certifying authorities and project proponents. The final rule clarifies ambiguities in the section 401 process, including scope, modifications, neighboring jurisdictions assessments, and procedures, that would apply when EPA acts as the certifying authority. These revisions will help standardize the certification process, reduce confusion, and promote efficient section 401 reviews. *See* the Final Rule Economic Analysis for a qualitative discussion on the potential impacts of the final rule; *see also* the Agency's Response to Comments in Section 16.2.2 regarding commenter concerns over project delays.

The Agency strongly disagrees with commenter assertions that the certification process does not provide substantial environmental benefits. On the contrary, section 401 allows states, territories, and tribes to ensure that federally licensed or permitted activities will comply with their applicable water quality requirements. *See* Section 4 of the Final Rule Economic Analysis for further discussion on the incremental benefits anticipated from the final rule, including incremental water quality improvements resulting from efforts to standardize information included in requests for certification and changes in scope of certification relative to the 2020 Rule.

The Agency also strongly disagrees with the commenter who asserted that the proposed rule would eliminate the well-defined timeline review process that Congress intended. On the contrary, this final rule is consistent with the plain language of section 401, which provides that the reasonable period of time shall not exceed one year from the date the request for certification is received.

In response to the commenter who requested that the Agency delay any section 401 rulemaking efforts until permitting reform occurs, the Agency notes that the commenter appears to refer to permitting reform related to the Inflation Reduction Act, which has already been enacted and did not address section 401 certification. More broadly, the

Agency declines to delay rulemaking regarding section 401 until there no longer any possibility of Congressional action on the matter. EPA found, and continues to find, it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment.[18] *See e.g.,* section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification. Accordingly, it is appropriate for the Agency to promulgate this final rule to ensure effective implementation of Section 401. If in the future Congress revises section 401, EPA would revise its regulations implementing CWA as appropriate.

16.4 General input on Biden Administration priorities

16.4.1 Biden Administration Goals

Several commenters discussed the Biden Administration's priorities in their comments, voicing general support for the proposed rule and/or critiquing the 2020 Rule. Nearly all of those commenters argued that the proposed rule is consistent with and/or would advance the principles of Executive Order 13990. One of these commenters argued that revising and replacing the existing Section 401 regulations would advance EPA's priorities around access to clean air and water and climate change resilience. One commenter called for a rule that was consistent with the CWA and the Biden administration's goals around environmental protection, while also providing regulatory certainty and efficiency in certifications for clean energy projects.

Many of the commenters who discussed industry sectors, including infrastructure, framed their comments around the Biden Administration goal(s). Most of these commenters presented their sector(s)' (e.g., natural gas, nuclear energy, mining) role in supporting such goals, such as around decarbonized (i.e., "clean") energy, infrastructure, supply chains, manufacturing, and/or economic growth and argued that issues with the Section 401 process (e.g., delays, misuse) could hinder achievement of these goals. One of these commenters mentioned the importance of mining for the Bipartisan Infrastructure Law's (BIL) implementation. This commenter argued that delays and expanded permitting issues will make implementation of the Bipartisan Infrastructure Law - as well as goals to advance clean energy, reduce

[18] For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F in this preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed *without* any input from the certifying authority.

reliance on adversarial countries (e.g., China) for critical minerals, and strengthen supply chains for critical minerals – unachievable.

> **Agency's Response: The Agency agrees that the proposed rule, and this final rule, support a certification process consistent with the principles of Executive Order 13990. *See* Sections II and IV of the final rule preamble for further discussion on Executive Order 13990, including how the final rule provides greater clarity and acknowledgment of essential water quality protection concepts from Executive Order 13990.**
>
> **In response to comments regarding Administration goals and industry, the Agency disagrees that the final rule will hinder achievement of Administration goals, including implementation of the Bipartisan Infrastructure Law. Rather, the final rule supports a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990. *See* the Agency's Response to Comments in Section 16.4.1 for further discussion on how the final rule supports an efficient certification process.**

16.4.2 Equity and Environmental Justice Issues

A couple of commenters called for EPA to consider environmental justice in revising the 2020 Rule. A few commenters discussed environmental justice implications from the 2020 Rule. One commenter highlighted the importance of meaningful participation in this context and argued that the proposed rule is an improvement over the 2020 Rule in that regard. Another commenter expressed support for the proposed rule, arguing that the 2020 Rule striped state, Tribal, and local authority and participation, and that such agency decision-making is critical for environmental justice. One commenter raised concerns about the U.S. 278 Corridor Improvements project in South Carolina and argued that the 2020 Rule limited the ability to consider environmental justice concerns. After calling for restoration of state and Tribal authority and autonomy, another commenter argued that removal of that authority imposed risk on a population without compensation, which the commenter characterized as a sacrifice for short-term corporate profits and an injustice. This commenter specifically mentioned the extraction, transportation, and use of fossil fuels in this context.

Several other commenters mentioned environmental justice considerations outside the context of Biden Administration priorities. After discussing Tribal authority, another commenter argued that the proposed rule reflected the Federal government's commitment to environmental justice. The commenter also suggested that EPA take seriously and continue to advance its environmental justice obligations, particularly in terms of meaningful public participation. One commenter argued that by supporting Tribal authority, the proposed rule would support implementation of the Biden Administration's priorities around Tribal authority and environmental justice, especially if implemented with EPA's proposal to draft a rule on Tribal off-reservation water resources. Another commenter framed their comments in support of state and Tribal authority in terms of environmental justice, providing an example from a New York pipeline, and mentioned that restoring state and Tribal authority was critical to meeting the Biden Administration's environmental justice goals.

Another commenter characterized the proposed rule as a beneficial first step towards quality-of-life improvement and identified existing disproportionate effects on low-income populations and communities of color, citing large populations - especially Native American populations - without access to clean water and plumbing, along with economic, pollution, and health disparities. In their support of the proposed rule, one commenter argued that water pollution burdens those who are least able to afford or find alternatives, a situation they characterized as an environmental justice issue.

Among commenters who discussed industry sectors, including infrastructure, a couple discussed equity or justice issues, arguing that an efficient certification process was key for advancing these ideals (along with climate change efforts). One of these commenters provided a detailed discussion of the role of nuclear energy in these efforts, including "in a socially and environmentally just transition to a decarbonized electrical grid" and "climate justice."

Another commenter argued that reviewing and revising the CWA may be necessary to improve clean water in areas without access to clean drinking water, which they attributed to corruption and lax laws, and called for accommodating underprivileged areas. One commenter voiced concern about CWA loopholes and gaps and provided detailed examples from California, some of which pertained to environmental justice.

> **Agency's Response: The Agency appreciates commenter input on environmental justice and section 401. The Agency recognizes that the burdens of environmental pollution disproportionately fall on certain communities with environmental justice concerns, and EPA is responsive to environmental justice concerns through multiple provisions in this rule. *See* Section VI.J of the final rule preamble for further discussion on how the final rule considers environmental justice and Section 5 of the Final Rule Economic Analysis for further discussion on how the Agency qualitatively assessed whether the change in benefits from the rulemaking may be differentially distributed among communities with environmental justice concerns.**
>
> **Regarding comments more generally addressing environmental justice and the CWA, the Agency notes that these comments are outside the scope of this rulemaking, but appreciates commenter input.**

16.5 General – Other Topics

16.5.1 Other Federal Licenses/Permits and Statutory and Regulatory Provisions

A few commenters discussed other Federal permits and regulations. One of these commenters recommended that EPA coordinate and accommodate timelines of other Federal permits for ease of review but did not mention specific industry sector(s) in that statement. Another commenter argued that the proposed rule added or maintained procedures that are not aligned with some Federal agencies' existing procedures.

A few of the commenters who discussed specific sectors discussed roles of Federal agencies other than EPA. One of these commenters mentioned FERC and the Corps in their discussion of Federal and state roles in the Section 401 process and called on EPA to consider the interactions between Section 401 certifications and FERC policies. Another one of these commenters also called for not delaying Federal application processes. This commenter also cited the intergovernmental Organisation for Economic Co-operation Development (OECD) Nuclear Energy Agency (NEA) in highlighting the need for efficiency in licensing to meet U.S. goals.

One commenter asserted that certification decisions that address issues beyond the specific requirements in section 401 undercut the scope of exclusive authority that Congress delegated to other Federal agencies, like FERC under the Federal Power Act, and argued that the broader the scope of section 401, the more limited a Federal agency's exclusive authority. The commenter noted that the Federal Power Act does not require FERC to adopt recommendations of state agencies if they are not in the national public interest, but states often make these recommendations conditions in their section 401 certifications since FERC must include them in a license. As a result, the commenter asserted that section 401 can become a mechanism to undermine Congress's express directive in the Federal Power Act that FERC has exclusive authority to balance competing interests, citing a FERC report that provided that certification do not take into account the benefits of hydropower or other competing interests.

One commenter noted that section 401 is one of the exceptions to FERC's exclusive jurisdiction under the Federal Power Act and has been critical to restoring water quality and designated beneficial uses on rivers where FERC issued original project licenses prior to the enactment of the CWA. The commenter further noted that some of these original licenses permitted diversion and dewatering of entire river sections and destroyed aquatic habitat and recreational opportunities. The commenter also argued that the Nation's water quality goals cannot be achieved if Federal licenses can be used as a shield against compliance with applicable water quality requirements.

One commenter asserted that EPA permit requests for offshore wind must fully account for cumulative displacement of fisheries over time and space and set criteria that protects and preserves nearby fish dependent communities from harm. The commenter also asserted that section 401 should extend into a state's offshore waters to the exclusive economic zone (EEZ), whether coastal zone management certified or not, if the pollutant, i.e., offshore wind, affects access to fisheries resources in the EEZ for adjacent or nearby communities that rely on access to ocean waters for their vitality and socioeconomic stability. The commenter also argued that EPA has a responsibility to protect communities and ensure that offshore wind development is not in fishing grounds that cause displacement of community natural resource fish assets necessary to sustain the coastal communities, including ensuring dungeness crab fatalities are not the result of EPA issuing offshore industrial permits. The commenter also suggested that EPA should require socioeconomic impact analysis that avoids loss of coastal income as a regulatory requirement when it updates the PR&Gs associated with section 401 certifications.

One commenter stated it supported continued exemption from NPDES permits for commercial fishing vessels under 79 feet in length whose discharge does not have a significant effect on overall ocean water quality or people's health.

<u>Agency's Response</u>: Section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge into "waters of the United States." 33 U.S.C. 1341(a)(1). EPA recognizes that there is an array of licenses and permits that may trigger the need to seek certification. The Agency made several changes from the proposed rule, in part in response to commenter concerns over impacts to the Federal licensing or permitting process (i.e., contents of a request for certification). As discussed throughout the final rule preamble and this Response to Comments document, the final rule clarifies certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

In response to comments discussing the Federal Power Act, the Agency finds that questions and comments regarding statutory interpretation of the Federal Power Act are outside the scope of this rulemaking. As noted above, section 401 provides that *any* federally licensed or permitted activity that may result in any discharge into waters of the United States are subject to section 401; this includes FERC licenses. In response to commenters asserting that certifications do not take factors, such as the benefit of hydropower or competing interest, into account, the Agency notes that the scope of certification requires certifying authorities to evaluate whether the activity will comply with applicable water quality requirements. Accordingly, certifying authorities only need to consider factors that are relevant to performing such evaluation.

In response to the comment regarding offshore wind projects, the Agency notes that Section 401 states that certification is required for any activity that "may result in any discharge into the navigable waters." 33 U.S.C. 1341(a)(1). The term "navigable waters" is defined as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Therefore, federally licensed or permitted projects in the EEZ do not trigger the need to obtain section 401 certification, assuming they would not result in any discharge into navigable waters. The Agency appreciates comments regarding coastal communities and offshore wind; however, such comments are outside the scope of this rulemaking.

In response to the comment regarding NPDES permit exemptions, while the Agency appreciates the comment, the comment is outside the scope of this rulemaking.

16.5.2 Protections and Environmental Outcomes

Approximately half of the commenters who wrote in general support of the proposed rule framed their arguments around protections and/or environmental outcomes, for example in terms of ecosystems, wildlife, water quality, drinking water, public health, public access, recreation, impacts from Federal (e.g., FERC) projects, impacts of the 2020 Rule, and/or economic factors. Those commenters tended to highlight state, Tribal, and/or local roles in providing such protections. A few of the commenters who framed their arguments around protections also characterized the proposed rule as better reflective of science and/or fostering management based on science.

A few other commenters voiced support for the proposed rule in terms of general protections such as around the following issues: future generations, growth, international environmental threats, limited availability of water resources, public health and corporate oversight, and stopping pollution and not sacrificing water access or water quality for jobs or commerce.

One commenter asserted that recent years have shown that section 401 remains a key procedural and informational tool for states to use in maintaining water quality in waterways and wetlands containing fish and other aquatic species for which they possess primary management authority and argued that the 2020 Rule weakened the states' ability to utilize this tool in furtherance of sustainable fish, wildlife, and habitat. The same commenter further asserted that restoring and clarifying key aspects of state authority under section 401, including conditions for certification approvals, the scope of review of a project, and Federal agency reviewability, will improve regulatory certainty and support healthy waters and habitats.

A couple of commenters discussed specific infrastructure projects that they argued had caused harm under the 2020 Rule, such as: Brunswick Harbor Dredging, Georgia; Riverport Development, South Carolina; U.S. 278 Corridor Improvements, South Carolina; and Conowingo Hydroelectric project, Susquehanna River. One commenter also discussed specific impacts, such as ditching and clear-cutting resulting from pipeline projects, and the importance of state and Tribal authority in providing protections. One commenter pointed out that certification approvals for projects like the Conowingo project can last a long time or be permanent, so these projects should avoid long-term adverse impacts and consider adapting to future conditions. Another commenter highlighted the role that Section 401 had played stopping a coal terminal in Washington and imposing additional protections for a dam in Maryland.

Several other commenters argued that their concerns around the 2020 Rule were exacerbated by climate change considerations. In that context, some of the commenters mentioned the need for restoring the state and Tribal authorities and protections lost in the 2020 Rule. One commenter called for local authority and decision-making in providing protections especially because of what the commenter described as "landscape" differences, particularly in light of climate change. Another commenter voiced support for state and Tribal authority based on local knowledge, including of climate change impacts already being experienced. Several commenters specifically highlighted fossil fuels and expressed a sense of urgency, for example in encouraging EPA to implement the revised rule quickly. One of these commenters argued that the impact of the Conowingo Dam project under the 2020 Rule would be exacerbated by climate change impacts.

Conversely, a couple of commenters cited climate change as one of the purported improper reasons states utilized to block energy projects under the regulatory regime prior to the 2020 Rule. One commenter highlighted climate change as one of water quality's greatest threats and argued that the proposed rule should not improperly burden greenhouse gas emissions reduction efforts, such as solar energy projects.

One commenter called for a well-defined process based on science and without political bias, characterizing project proponents as "customers of water quality certifications and Federal permits."

One commenter stated that EPA must retain authority for section 401 certifications in Federal waters with incorporation of any Coastal Zone Management Certifications from adjoining and neighboring states. The commenter provided the example of offshore wind facilities that require point source discharge permits that must obtain certification for a specific number of turbines in the offshore wind farm. Specifically, the commenter stated that the 401 water quality certification rule update must be enacted in a way that the update will prevent the depletion of fish and fishermen.

Agency's Response: The Agency appreciates commenter input regarding the importance of the certification process for water quality protection and the harms from the 2020 Rule. As discussed in Section IV.E of the final rule preamble, EPA is concerned that some water quality-related impacts identified by commenters might fall outside the scope of review under the 2020 Rule's "discharge-only" approach to scope of review. The Agency is finalizing revisions to the 2020 Rule to better reflect the cooperative federalism framework and text of the 1972 and 1977 statutory amendments. The final rule also clarifies issues such as scope of certification and the reasonable period of time for a certifying authority to act. The final rule modifies the regulatory text implementing section 401 to support a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990.

In response to comments regarding climate change, the Agency notes that the scope of certification requires certifying authorities to evaluate whether the activity will comply with applicable water quality requirements. Accordingly, certifying authorities only need to consider factors that are relevant to performing such evaluation. EPA encourages certifying authorities to develop certification conditions in a way that enables projects to adapt to future water quality-related changes, i.e., so-called "adaptive management conditions." For example, if a certifying authority is concerned about future downstream, climate change-related impacts on aquatic species due to increased reservoir temperatures during the lifespan of a hydropower dam license, the certifying authority might develop a condition that would require a project proponent to take subsequent, remedial action in response to reservoir temperature increases (e.g., conditions that might require monitoring and, as necessary, a change in reservoir withdrawal location in the water column, a change in the timing of releases, etc.).

The Agency disagrees with the commenter asserting that EPA has authority for section 401 certifications in all Federal waters. EPA only acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). *See* Section IV.H of the final rule preamble for further discussion when EPA acts as the certifying authority. The Agency also notes that Section 401 does not require certifying authorities to incorporate coastal zone management certificates in their certifications.

16.5.3 Public notice

A few commenters wrote about public notice. After voicing support for pre-filing meetings and early engagement and coordination between the certifying authority and project proponent, a commenter also proposed an early public notice, where certifying authorities provide a notice of pre-filing meeting request to affected communities. The commenter argued that early engagement can advance community involvement and environmental justice, with communities identifying issues of potential concern.

Another commenter provided a detailed discussion of the experience with public notice in their state, which focused on U.S. Army Corps of Engineers permitted projects. The commenter raised concerns about the lack of a memorandum of understanding between the Corps and the two Section 401 certifying agencies in their state and the lack of a Corps standardized approach to soliciting public comment on certifications. The commenter added that state law only explicitly recognizes Army Corps and NPDES permits for public notice provisions, not hydropower and interstate natural gas pipeline and liquid natural gas terminal licenses issued by the FERC that also can trigger Section 401 requirements, which makes public notices even less consistent and protections more difficult. The commenter suggested that the proposed rule require Federal agencies to develop and follow standard methods for public notice and certification procedures. While Section 401 requires state procedures, the commenter argued that states like theirs rely on Federal agencies for providing consistent public notice. The commenter concluded this discussion by suggesting that EPA should encourage cooperation between Federal agencies and certifying authorities in developing public notice procedures, so that public notice is provided for all certification applications, per Section 401.

One commenter called for EPA to prioritize the public's right to participate in water and community protection.

One commenter argued that EPA should remove the 2020 Rule, but also consider public participation. This commenter argued in support of the value of public input in the Section 401 process, including sharing technical analyses and concerns.

> **<u>Agency's Response</u>: The Agency agrees that public notice can provide an important opportunity for public awareness and engagement in the certification process. However, the Agency disagrees with commenters asserting that Federal agencies should establish procedures for public notice on certifications. Rather, section 401(a)(1) requires a certifying authority to establish procedures for public notice, and a public hearing where necessary, on a request for certification. 33 U.S.C. 1341(a)(1).**
>
> **For discussion on the public notice and hearing associated with a notified neighboring jurisdiction's objection under section 401(a)(2), please see Section IV.K of the final rule preamble and Section 11.5 of the Agency's Response to Comments.**

16.5.4 General input on efficiency

Many commenters framed their arguments in support of the proposed rule (and/or against the 2020 Rule) around process and administrative issues, such as in terms of the following terms (in alphabetical order):

- Administrative burden, procedural burden,
- Certainty,
- Clarity,
- Consistency
- Durability
- Effectiveness
- Efficiency,
- Flexibility,
- Focus,
- Predictableness,
- Streamlined process,
- Timeliness (e.g., decisions), and
- Transparency.

A few commenters voiced concerns about project delays and/or inefficiencies from the proposed rule more generally. One commenter argued that Section 401 rule changes would lead to uncertainty and resulting timeline confusion. Another commenter argued EPA should revise the rule to avoid delays in issuing 401 certifications, licenses, and permits. One commenter wrote that EPA should withdraw the proposed rule, and if not, the Agency should revise the rule to make sure that unnecessary delays are avoided for project proponents and Federal agencies. This commenter went on to argue that EPA must remember that Congress statutorily determined the absolute maximum timeline of one year for the Section 401 certification process.

Several commenters raised concerns about project delays because of purported misuse of Section 401 and/or inefficiencies, including in some cases under the regulatory regime prior to the 2020 Rule. One commenter argued that prior to the 2020 Rule, states ignored or manipulated the one-year timeframe for certification. One commenter asserted that the proposed rule would lead to lengthy certification processes because it would return the scope, certification deadlines, and certification conditions to pre-2020 Rule status, and argued that EPA did not adequately explain why these consequences would not occur or why they are desirable or justified. The same commenter also asserted that prior to the 2020 Rule, the certification process involved lengthy delays due to the regulation lacking clear deadlines, states imposing conditions beyond the statutory scope, and the scope of certification being ill-defined and confusing, citing the 2020 Rule's Economic Analysis in support of these assertions.

Another commenter argued that the proposed rule eliminated all accountability by the certifying authority at the expense of the Federal permitting process and project proponent and failed to sufficiently explain the Agency's change that removed the 2020 Rule's requirements, stating that the 2020 Rule required

certifying authorities to act in the reasonable period of time, explain their action, and cite to a legal authority for conditions.

One commenter raised concerns about the proposed rule leading to different requirements imposed by more than 50 certifying authorities, in the commenter's characterization. Another commenter asserted that the CWA authorizes EPA to create uniform regulations, citing *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992), and that EPA had previously recognized that uniformity was critical, citing the proposal to the 2020 Rule.

One commenter wrote in support of EPA's efforts around improved predictability and timeliness by removing the 2020 Rule's apparent ambiguities, but argued the proposed rule was in opposition with these goals and might run contrary to Section 401's intent, as the proposed rule still included ambiguity that could affect projects' timing in terms of permitting and implementation, causing confusion for project proponents. Another commenter argued that the proposed rule would improve efficiency, but voiced concern that the proposed rule left some "inefficiencies" unaddressed.

> **Agency's Response: The Agency appreciates commenter concerns regarding delays or inefficiencies. As discussed in the final rule preamble, the final rule supports a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990. *See* the Agency's Response to Comments in Section 16.2 and 16.3 for further response to comments on delays and/or inefficiencies from the final rule. The final rule also addresses stakeholder concerns regarding the pre-2020 Rule landscape, *e.g.*, by clarifying important concepts such as how certifying authorities are limited to considering adverse impacts to water quality.**
>
> **The Agency disagrees with commenter assertions that the proposed rule would remove all accountability by the certifying authority, and that it would lead to a lengthy process. On the contrary, this final rule enshrines the cooperative federalism principles central to section 401 while respecting the substantive and procedural guardrails Congress intended. For example, several aspects of this final rule provide certifying authorities with the ability to inform the certification process, *e.g.*, pre-filing meeting requests, contents of a request for certification, reasonable period of time, while at the same time recognizing the need for predictable and transparent backstops. See the final rule preamble and the Agency's Response to Comments document for further discussion on the Agency's rationale for these and other final rule provisions. The Agency also disagrees with commenter assertions that the Agency failed to sufficiently explain the removal of the 2020 Rule's requirements for the contents of a certification decision. *See* Section IV.F of the final rule preamble for discussion of the Agency's rationale for removing the required contents in certification decisions. *See also* the Agency's Response to Comments in Section 6.**
>
> **The Agency agrees that certainty and transparency are important and disagrees with commenter assertions that this final rule introduces ambiguity or inefficiencies. This final rule introduces several important process improvements (*e.g.*, how to set the reasonable**

period of time, when extensions are permissible, what are the elements of a request for certification, when and how to modify a grant of certification) that provide benefits to the certification process, including regulatory certainty and transparency, efficient certification reviews, and enhanced cooperative federalism. *See* the final rule preamble for further discussion of these and other aspects of this final rule that support an efficient, clear certification process.

In response to the commenter expressing concerns over different certifying authority requirements, the Agency disagrees that having different certifying authority requirements for requests for certification is inherently problematic. As an initial matter, defining an exclusive list of components for requests for certification for all certifying authorities could inhibit a comprehensive review under section 401 in the reasonable period of time. The diverse nature of Federal licenses and permits and the variety of potential water quality impacts from those different types of activities do not lend themselves to a one-size-fits-all approach. Indeed, to define an exclusive list of contents would frustrate the intent of the Act's emphasis on cooperative federalism and lead to procedural inefficiencies. Specifically, a framework requiring the reasonable period of time to begin before the certifying authority has essential information that it has transparently publicized as necessary to make its own certification decision would be inconsistent with the language, goals, and intent of the statute. Congress clearly did not intend section 401 reviews to turn on incomplete applications, and the reasonable period of time and one-year backstop were added by Congress to ensure that "sheer inactivity by the State…will not frustrate the Federal application." H.R. Rep. No. 92-911, at 122 (1972). However, this final rule places several guardrails on a certifying authority's ability to define additional contests in a request for certification, including limiting the scope of additional contents to those that are "relevant to the water quality-related impacts from the activity" and limiting the ability of a certifying authority to request materials to those "identified prior to when the request for certification is made." If a state or tribe fails to define such additional contents as described above, the final rule defines additional contents for requests for certification to provide stakeholders with greater certainty and predictability in the certification process. Ultimately, the final rule establishes an approach that provides efficiency for requests for certification, while staying consistent with cooperative federalism principles and case law. *See* Section IV.C of the final rule for further discussion on the request for certification.

16.5.5 Other Critiques

A number of commenters made other suggestions for additional improvements in the proposed rule, despite voicing general support for the proposed rule. One commenter suggested that the proposed rule could be strengthened by allowing states to regulate water quality more holistically, claiming that the proposed rule is limited to individual projects. Another commenter requested that the proposed rule be used to protect water quality in ephemeral and isolated wetlands and that activities for certification should include cumulative impact analysis, environmental justice, and climate change impact analysis. One commenter voiced support for revising the 2020 Rule but argued that EPA should "go farther" in providing protections. Another commenter called for empowering states and Tribes and for the

"strongest" rule, which would authorize states and Tribes to review all federally-authorized activities, including activities with only nonpoint source pollution.

Several commenters discussed perceived litigation risks associated with the proposed rule. One commenter voiced support for the 2020 Rule and argued that the proposed rule favors "proceeding by litigation," instead of the 2020 Rule's purported certainty. One commenter claimed that the proposed rule's certification definitions, scope, and requirements were ambiguous, which would subject certifying authorities to litigation, leading to issues such as diminished efficiency, predictability, and resources. Another commenter wrote about a lack of clarity in certification requirements leading to delays, which the commenter mentioned can lead to further delays from court challenges. A different commenter argued that the proposed rule would be more likely to pass judicial scrutiny if it more narrowly defined state authority. Another commenter wrote favorably about the 2020 Rule, arguing that it incorporated case law on Section 401 and suggested that EPA withdraw or modify the proposed rule to better reflect current and pending legal decisions. One commenter acknowledged that there will always be debate and legal challenges over Congress' intent with regard to the CWA, and that a 2020-like rule may return. Another commenter wrote favorably about the 2020 Rule, claiming that there was frequent litigation and resulting issues (e.g., lack of clarity) prior to the 2020 Rule's passage, which the commenter argued sought to address these issues. This commenter also critiqued the proposed rule for going back on the 2020 Rule's improvements.

One commenter argued that the proposed rule was unsupported by case law, including Supreme Court precedent.

One commenter suggested that EPA revise the current version of 40 CFR 124.53(a) to read "may originate" to be consistent with section 401(a)(1).

> **<u>Agency's Response</u>: EPA appreciates commenters' suggestions, and the Agency made several changes to make the final rule efficient (e.g., pre-filing meeting requests and requests for certification provisions). The Agency disagrees that the rule is ambiguous. EPA included multiple provisions in the final rule to increase clarity for the certification process. For example, the final rule introduces several important process improvements (*e.g.*, how to set the reasonable period of time, when extensions are permissible, what are the elements of a request for certification, when and how to modify a grant of certification) that provide benefits to the certification process, including regulatory certainty and transparency, efficient certification reviews, and enhanced cooperative federalism. *See* the final rule preamble for further discussion of these and other aspects of this final rule that support an efficient, clear certification process.**
>
> **In response to the commenter suggesting that the rule should be used to protect water quality in ephemeral and isolated wetlands, please see Section IV.E of the final rule preamble and Section 5.5 of the Agency's Response to Comments for further discussion on the scope of waters.**

In response to commenter assertions regarding the 2020 Rule, the Agency notes that the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment. *See e.g.*, section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification. EPA is finalizing revisions to the 2020 Rule to be fully consistent with the 1972 and 1977 CWA amendments, the Agency's legal authority, and the principles outlined in Executive Order 13990. This final rule revises the 2020 Rule to better reflect the CWA's statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act. In addition, the final rule clarifies certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

The Agency also strongly disagrees with commenter assertions that the proposed rule was unsupported by case law, including Supreme Court precedent. *See* the final rule preamble and this Response to Comments document generally for discussion on the relevant case law that informed the Agency's development of this final rule.

The Agency is declining to revise section 124.53(a) to read "may originate" as suggested by the commenter. The current text at 40 CFR 124.53(a) provides that "[u]nder CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate." This language is consistent with section 401(a)(1), which provides that a project proponent "shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." Accordingly, the Agency does not find it appropriate to revise the text at section 124.53(a).

16.5.6 Other Rulemakings

Several commenters submitted comments about other rulemakings, with all of them discussing the definition of "waters of the United States." All but one of those commenters specifically discussed the Revising the Definition of "Waters of the United States" rulemaking. One of those commenters argued that if the "waters of the United States" rulemaking decreased the scope of protected waters, it would lead to difficulties in protecting waters. This commenter called for a strong section 401 certification rule and broad authority for states and Tribes.

A couple of commenters requested explanation or clarification on how the Section 401 proposed rule could be affected by the "waters of the United States" rulemaking, including the *Sackett v. EPA* case. Another commenter called for a balanced, not too wide reaching, publicly supported, and stable definition of "waters of the United States" and called for environmental justice and equality. This commenter discussed the territorial seas and wrote that they assumed that the term refers to the area from 3 to 200 miles offshore, so the commenter expects that offshore wind turbines will require a National Pollutant Discharge Elimination System (NPDES) or Section 401 permit.

A few commenters who submitted general comments in support of the proposed rule and/or critiqued the 2020 Rule discussed the definition of "waters of the United States." In similar language, most of these commenters argued in favor of state and Tribal authority in the context of an upcoming (unnamed by the commenters) Supreme Court case that they warned could reduce the number of waters covered by the Clean Water Act. One other commenter called for upholding the definition and went on to discuss states' and Tribes' role as co-regulators for providing protections through Section 401.

A few commenters mentioned the *Sackett v. EPA* case, discussing that a ruling for that case could affect Section 401 certifications. One commenter appeared to allude to the *Sackett v. EPA*, No. 21-454 case without explicitly naming it and requested that EPA wait on the Section 401 rulemaking to incorporate the ruling from the case. The same commenter also doubted that Section 401 jurisdiction could apply to waterbodies not considered "waters of the United States."

> **<u>Agency's Response</u>: Comments regarding other rulemakings, including rulemakings on defining "waters of the United States" are outside the scope of this rulemaking. Similarly, the Agency notes that comments regarding the *Sackett* Supreme Court case are outside the scope of this rulemaking.**
>
> **As discussed in Section IV.A of the final rule preamble, the final rule provides that section 401 certification is required for Federal licenses or permits that authorize any activity which may result in any discharge from a point source into waters of the United States. 40 CFR 121.2. Therefore, any changes in the scope of waters of the United States will impact the scope of waters in which federally licensed or permitted activities must seek section 401 certification.**

16.5.7 Tribal consultation, generally

Another commenter highlighted the importance of Tribal treaty rights, including implicit rights to a certain level of environmental quality or water quality to ensure that the explicit Tribal treaty rights are possible. The commenter recommended that EPA codify EPA's consultation obligations (e.g., appropriate scheduling timelines and procedures), as well as how Tribal leader's recommendations must be incorporated into EPA's decision-making process as it related to EPA's role and authority under CWA section 401. The commenter supported their recommendation by asserting that there has been inconsistency in approaches to government-to-government consultation and incorporation of Tribal recommendations, therefore consistency in Tribal consultation practices is needed to enhance the predictability of the section 401 process for all.

Another commenter, citing the 2010 Handbook, highlighted how section 401 provides Tribes with veto authority over Federal licenses or permits that are subject to section 401 and do not comply with Tribal or State water quality requirements. The commenter suggested that the certification process gives permit applicants and Federal agencies opportunities to address Tribal concerns about their water quality, which helps protect Tribal treaty rights and *Winters* rights.

Agency's Response: The Agency appreciates commenter recommendations to codify EPA's consultation obligations. Although the Agency is declining to incorporate EPA's consultation policy in the final rule regulatory text, the Agency notes that when EPA certifies on behalf of Tribes without TAS, its actions as a certifying authority are informed by its Tribal policies and the Federal trust responsibility to federally recognized Tribes. EPA's 1984 Indian Policy, recently reaffirmed by EPA Administrator Regan, recognizes the importance of coordinating and working with Tribes when EPA makes decisions and manages environmental programs that affect Indian country. See EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984), available at https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf; *see also* Memorandum from Michael S. Regan to All EPA Employees, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy (September 30, 2021), available at https://www.epa.gov/system/files/documents/2021-09/oita-21-000-6427.pdf. This includes coordinating and working with Tribes on whose behalf EPA reviews and acts upon requests for certification on federally licensed or permitted projects.

The Agency agrees that section 401 authorizes states and authorized Tribes to play a significant role in the Federal licensing or permitting process, including the ability to deny certification for a federally licensed or permitted project that will not comply with water quality requirements. *See* Section IV.E and F for further discussion on the scope of certification and certification decisions.

16.6 Input Received in Prior Rulemakings

16.6.1 Input on the 2019 Proposed Rule

This sub-topic summarizes comments that were made on a previous proposed rulemaking and were resubmitted by commenters in the docket for the 2022 proposed rule.

16.6.1.1 General Support v. Opposition

Some commenters voiced their opposition to the 2019 proposed rule, describing the 2019 proposed changes as illegal and/or unlawful, unnecessary, unjustified, flawed, lacking evidence, or irrational. Some commenters explicitly urged EPA not to weaken its guidance and regulations.

Other commenters voiced their support for the 2019 proposed rule and encouraged EPA to finalize it. Some of these commenters described the proposed rule as balanced, holistic, coherent, modernized, focused, or efficient.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 16.1-16.5; *see also* Section III and IV of the Final Rule Preamble.**
>
> **EPA reviewed the 2020 Rule in accordance with Executive Order 13990 and, in the spring of 2021, determined that it would propose revisions to the 2020 Rule through a new rulemaking effort. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021). EPA considered several factors in making this determination, including but not limited to the text of CWA section 401; Congressional intent and the cooperative federalism framework of CWA section 401; concerns raised by stakeholders about the 2020 Rule, including implementation-related feedback; the principles outlined in the Executive Order; and issues raised in litigation challenging the 2020 Rule. *Id*. In particular, the Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. The Agency identified this and other concerns as they related to different provisions of the 2020 Rule, including certification requests, the reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, and modifications. *See id*. at 29543-44.**

16.6.1.2 States' & Tribes' Roles Under Section 401

Some commenters argued that Congress intended for states and Tribes to have authority in protecting and enhancing the waters within their borders, with some of the commenters pointing to 33 U.S.C. 1251(b) as evidence of this. Some other commenters discussed the vital role that states and Tribes play under section 401 of the CWA. A few commenters emphasized that section 401 is pertinent in ensuring states' authority in protecting water within its borders. One commenter emphasized that any revisions to EPA's guidance or regulations must preserve the states' broad authority to protect water quality. A few commenters argued that states have a unique understanding of waters within their jurisdiction and are therefore best positioned to provide that input via the section 401 certification process. One commenter mentioned that the Assistant EPA Administrator for Water, David Ross, testified in September of 2019 before the House Committee on Transportation and Infrastructure, Subcommittee on Water, and acknowledged that states have the best understanding of their water resources and that states can and should regulate what is important to them in terms of their water resources.

One commenter explained that until early 2019, every EPA guidance document for state section 401 certifications issued by EPA recognized states' broad authority to condition or deny federally permitted or licensed projects within their borders, specifically pointing to EPA's 1989 guidance. This commenter claimed that EPA's assertion in the 2019 proposal that section 401 does not discuss the scope of states' authority to protect the waters within their boundaries is "unfounded" and that the intent of Congress is reflected in the plain language of the CWA. Another commenter argued that because the 2019 proposed

rule confines states to regulate discharges when the water quality effects of federally licensed activities may equal or exceed them, it is inconsistent with the principles of the CWA.

Many commenters argued that the 2019 proposed rule would "strip" or "curtail" states and Tribes' roles under section 401. One commenter argued that EPA would "strip the states of their specifically prescribed authority" and described the action as "arbitrary and capricious." Another commenter explained that southeastern states have a "tremendous stake" in preserving their section 401 authority and that they have relied on section 401 certifications to ensure that some of the region's largest, and potentially most destructive projects, do not degrade state waters. One commenter contended that the 2019 proposed rule would be detrimental to water quality and states' rights, creating more problems for project proponents than it aims to solve. One commenter argued that the 2019 proposed rule would require states to violate their own statute and regulations (or change their own administrative processes) which goes beyond EPA's authority to implement section 401.

A few commenters argued that states have been responsibly exercising their authority under section 401 for decades. One commenter added that states efficiently and effectively review thousands of water quality certifications each year. Another commenter emphasized that the certification process in place has shown that states have exercised their authority "efficiently and responsibly." A few commenters argued that contrary to what then Administrator Wheeler said, states have not been exceeding their authority or abusing the section 401 process. One of the commenters further stated that EPA twisted facts to fit into the Trump administration's "false narrative" about section 401. Another commenter mentioned that EPA did not identify any specific examples of a state abusing its power.

A few commenters argued that EPA cannot interpret "appropriate requirement of state law" in a way that conflicts with *PUD No. 1*. These commenters added that EPA's position in the 2019 proposed rule that a state may only impose water quality limitations specifically tied to a discharge contradicts section 401. One of the commenters further elaborated that because *PUD No. 1* interpreted the unambiguous terms of section 401 to allow states to impose conditions on a permitted activity as a whole, EPA's 2019 proposal to limit state conditions to specific discharges is an "unconstitutional administrative revision of a Supreme Court holding."

Some commenters discussed the importance of cooperative federalism. A few commenters emphasized that cooperative federalism is best served by clear and harmonious Federal and state roles. Another commenter contended that expanded Federal authority disregards cooperative federalism. One commenter emphasized that the cooperative federalism system Congress established in section 401 makes it clear that "decisions related to the scope of state agency review are vested in state agencies as long as they are at least as stringent as the Clean Water Act, not EPA or other federal agencies." The commenter added that it is the statutorily mandated authority that allows a state to deny an application for section 401 under the cooperative federalism system. One commenter argued that the 2019 Guidance undermines cooperative federalism by attempting to limit state review of application for section 401 certifications.

A few commenters who were generally supportive of the 2019 proposed rule expressed that it presented a good balance. One commenter stated that the 2019 proposed rule balances the states' interest in water quality while insuring access to markets for all states' important products and services. Another

commenter voiced their appreciation for EPA's efforts and expressed that the 2019 proposed rule struck an appropriate balance between "regulatory efficiency and environmental stewardship."

Agency's Response: *See* the Agency's Response to Comments in Section 5, Sections 16.6.1.1.

16.6.1.3 Consistency with Clean Water Act & Legislative History and Statutory Text

Many commenters argued that the 2019 proposed rule is inconsistent with the language in the CWA and/or legislative history. Some commenters emphasized that the main goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity" of the waters of the United States and any rule must strive to achieve this objective. One commenter emphasized that any changes to EPA's guidance or regulations must be consistent with the CWA and intent of section 401. One commenter contended that the 2019 Guidance directly contradicts both the language and intent of the statute as well as applicable case law and the CWA. The commenter urged EPA to refrain from incorporating the "improper positions" in the Guidance into EPA's future revisions to section 401 implementing regulations.

One commenter argued that the 1971 Rule are already consistent with the CWA and should not be changed. This commenter stated that legislative history supports EPA's decades-old interpretation of section 401 and contended that the 1971 Rule and the 2010 guidance better reflect the statutory text than the 2019 proposed rule.

Other commenters posited that the 2019 proposed rule was consistent with the CWA. One of the commenters contended that the 2019 proposed rule offers the first holistic, coherent reconciliation of the statute, taking into consideration the context and structure of section 401 and the focus and purposes of the CWA.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

16.6.1.4 2019 Proposed Rule Process

A couple of commenters shared their opinion on specific language used within the 2019 proposed rule. One of the commenters recommended that the final rule and any associated guidance maintain language consistent with the current section 401 text. The commenter added that EPA should continue to use the term "applicant" instead of "project proponent" or at least provide a reasoning behind the change. Another commenter argued that EPA's 2019 proposed rule interpretation that the term "applicant" is limited by, and effectively interchangeable with, the term "discharge" falls outside the scope of ambiguity in the statute and is therefore unreasonable.

A few commenters discussed the 2019 proposed rule's timing, with one commenter arguing that the 2019 proposed rule will "improperly hinder" review by certifying authorities. The commenter suggested that the time on reviews should begin running once the certifying authority concludes that it has received a complete request. Another commenter argued that the 2019 proposed rule's timing provisions are restrictive and could lead to the waiver of state certification, which could lessen protection of species and their habitats. One commenter stated that the 2019 proposed rule mandates a certification process that will

frustrate the ability of certifying authorities to regulate water quality. One commenter expressed concern that the 2019 proposed rule would result in increased certification denials, delays, and confusion. One commenter added that the 2019 proposed rule must not limit the one-year review period prescribed by Congress and allow states to follow their own administrative processes. This commenter stated that the 2019 Guidance improperly attempts to restrict the timing for state review of water quality certification applications under section 401, to limit the information states can require to evaluate such applications, and to impose Federal oversight of state decisions on certification applications.

A few commenters discussed the 2019 proposed rule with respect to how it will prevent states from imposing conditions. One commenter emphasized that the power of states to reject 401 applications, or to place strong protective conditions on projects as part of approving a 401 certification have been instrumental in carrying out the goals of the CWA. One commenter voiced concern that if the 2019 proposed rule is made final, states would be prevented from imposing conditions on section 401 certifications that protect endangered species and their habitats from a variety of impacts. One commenter suggested that EPA should not require that a certifying authority explain why a condition is necessary.

One commenter provided a specific suggestion and stated that when EPA is acting as the certifying authority, the "public notice" requirement should be expanded to include the general public.

Other commenters claimed the 2019 proposed rule would bring regulatory certainty and clarity. One commenter argued that the 2019 proposed rule would reduce the potential for conflicting interpretations of the certifying authority's role. The commenter also added that the 2019 proposed rule clarifies the ambiguity with respect to the scope of section 401, specifically the certifying authority's review, determination, and condition-setting. Another commenter suggested that the 2019 proposed rule properly defined the period for review, the proper scope of the CWA, and the conditions were appropriately included. The commenter added that this will effectively curtail abuses of section 401 and reduce ambiguity. One commenter emphasized the importance of regulatory certainty, including a process that is reasonable, predictable, and cost effective. Another commenter applauded the clarity of the timing and scope of section 401 certifications in the 2019 proposed rule, as well as the information requirements certifying states may impose.

Agency's Response: *See* the Agency's Response to Comments in Sections 3, 4, 5, 6, 16.6.1.1.

16.6.1.5 Infrastructure/Development

One commenter voiced their opinion about the importance of balancing states' rights with the necessity that states be allowed to move products in interstate commerce, and added that under the 1971 Rule, too many states were using it to "frustrate and impede" interstate commerce. Another commenter argued that states have used section 401 to delay or halt projects, such as natural gas pipeline, energy, and mining projects. The commenter argued the implementation of section 401 has been inconsistent, which "frustrates" the CWA's Federal-state balance, and has resulted in delays to interstate natural gas pipeline projects. One commenter contended that the previous clarity and direction on section 401 certification process led to significant delays in Federal permitting of projects, such as major mining projects. One

commenter argued that pipeline construction permits have been delayed or denied in New York, Oregon, and other states for reasons that "stretch the intent of the Clean Water Act beyond protecting water."

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

16.6.1.6 Analysis/Justification

Some commenters mentioned that the 2019 proposed rule was not justified. A couple of commenters contended that the post-1971 amendments to section 401 do not justify the changes in the 2019 proposed rule or a full regulatory overhaul. Some commenters argued that there was a lack of evidence that the 1971 Rule and procedures were inadequate. One of the commenters contended that EPA failed to provide a "reasoned explanation" for "upending 47 years of precedent" in the 2019 proposed rule in a manner which ignores the statute's plain purpose and meaning. The commenter added that promoting energy infrastructure development is not a reasoned explanation and it falls outside the scope of the statute as EPA "relied on factors which Congress has not intended it to consider."

A couple of commenters did not agree with EPA's statement that the 2019 proposed rule is the Agency's first, holistic reading of the CWA. One commenter argued that EPA offered a weak attempt to justify the 2019 proposed rule based on the argument that EPA has never taken a "holistic" approach to interpreting the statute and that it contradicts the Supreme Court and every Federal court to consider important questions regarding the implementation of section 401. The commenter further stated that EPA has already spoken twice on the application of section 401 in the broader context of the CWA – in the 1989 memo and 2010 Handbook.

Another commenter argued that EPA's interpretation differs dramatically from that of numerous U.S. Supreme Court rulings, such as *PUD No. 1* and *S.D. Warren*.

A couple of commenters argued that necessary analyses were not done prior to the publication of the 2019 proposed rule. One of the commenters emphasized that they were unaware of any thorough analysis that the 2019 proposed changes would (1) achieve E.O. 13868's objectives or (2) protect the nation's water resources according to the objective of the CWA. Another commenter contended that the 2019 proposed rule fails to comply with the National Environmental Policy Act (NEPA). A couple of commenters argued that EPA disregarded the consultation requirement of the Endangered Species Act (ESA) in the 2019 proposed rule. One of the commenters further stated that any agency action that may affect a listed species or its critical habitat triggers the consultation requirement. Another commenter explicitly stated that they rejected any regulatory changes related to environmental permitting without comprehensive and effective consultation between states and the Federal government. Several commenters voiced their concern that EPA did not consult with states, Tribes, or agencies prior to the publication of the 2019 proposed rule.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

16.6.2 Pre-proposal Input from 2021

This sub-topic summarizes input that was received prior to the 2022 proposed rule and was resubmitted by commenters in the docket for the 2022 proposed rule.

16.6.2.1 General Support v. Opposition

Many stakeholders supported EPA's decision to reconsider and revise the 2020 Rule and urged EPA to promptly repeal it. Some of these stakeholders described the 2020 rule as unlawful, illegal, harmful, politically driven, flawed, ill-conceived, arbitrary and capricious, and/or "an affront to the cooperative federalism at the heart of the Clean Water Act." One stakeholder pointed to several court challenges of the 2020 Rule to demonstrate "just how badly EPA erred when it issued this Rule." The stakeholder explained that these pending court cases sought restoration of certifying authorities' power under the CWA and relief from the harm the rule was causing. This stakeholder also argued that EPA has no choice but to repeal most or all of the 2020 Rule due to pending lawsuits and basic statutory interpretation.

A few stakeholders were in opposition to EPA revising or repealing the 2020 Rule. One stakeholder described the 2020 Rule as effective and consistent.

> **Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.**
>
> **The Agency has discussed its rationale for regulatory revisions to the 2020 Rule and, where appropriate and relevant, how the final rule compares to the 1971 Rule and pre-2020 Rule practice throughout the final rule preamble, in this Response to Comments document, and in the Final Rule Economic Analysis.**

16.6.2.2 States' & Tribes' Roles Under Section 401

Several stakeholders discussed why section 401 is a foundational part of the CWA and emphasized its importance to states and Tribes, particularly related to their role in protecting their waters. A few stakeholders emphasized that they rely on section 401 to protect their waters.

Stakeholders argued that the 2020 Rule "stripped" or "curtailed" states' and Tribes' authority under section 401. Several stakeholders claimed that the 2020 Rule undermined the ability of states and Tribes to protect their waters. Some stakeholders further argued that this led the 2020 Rule to negatively impact water quality. One stakeholder argued that the 2020 Rule threatened long-standing state water quality protections and undid decades of progress in protecting and preserving state water quality.

Multiple stakeholders urged EPA to restore section 401 authority to states and Tribes, including one commenter who asserted that it must be restored to meet the CWA's objectives. One stakeholder emphasized the importance of state and Tribal expertise in reviewing projects. Another stakeholder emphasized that states have responsibly exercised their authority under section 401 and under state water quality statutes to protect water quality, while another commenter asserted that the 2020 Rule favored a few projects inconvenienced by complying with the law. One stakeholder stated that any new rule should

allow flexibility to accommodate certifying authority procedures that govern the processing of water quality certification requests.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1, 16.6.2.1.

16.6.2.3 Consistency with Clean Water Act, Statutory Text, Supreme Court Precedent/Court Cases

Some stakeholders claimed that the 2020 Rule was inconsistent with the plain language of the CWA, the objectives of the Act, and contrary to Supreme Court precedent. One commenter contended that the 2020 Rule was a Federal power grab and urged EPA to correct the previous administration's attempt to subvert the plain intent of Congress.

Conversely, one stakeholder argued that the 2020 Rule aligned with the statutory text of section 401, and reduced the potential for conflicting interpretations of the certifying authority's role in the implementation of section 401.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1, 16.6.2.1.

16.6.2.4 Impacts of the 2020 Rule and Pre-2020 Rule on Efficiency

Some stakeholders discussed delays and/or denials that they experienced prior to the 2020 Rule. One stakeholder claimed that important infrastructure projects were being delayed or cancelled due to the section 401 regulations being outdated. Another stakeholder contended that lengthy and costly delays were often caused by lack of clarity in how proponents and agencies should address specific authorization requirements, which leads to additional delays where project-specific interpretations are challenged in Federal and state courts. The stakeholder urged EPA to carefully consider the regulatory context as they evaluate whether to revise the 2020 Rule.

Alternatively, other stakeholders argued that there were very few delays or denials prior to the 2020 Rule. A few stakeholders asserted that when delays occur, they are often due to the applicant (e.g., incomplete information) and that denials are rare. One of these stakeholders contended that reverting to the previous section 401 regulations in place would reduce denials or delays, while another one of these stakeholders noted that denials increased when the 2020 Rule was promulgated. Another stakeholder contended that pre-2020 Rule, for the vast majority of applications and projects, the section 401 certification process was not controversial, and most requests were granted by states within a reasonable timeframe.

A couple of stakeholders argued that more delays will occur if the 2020 Rule is retained. For example, one stakeholder claimed that if the 2020 Rule is retained, the rule itself and projects certified under the rule will face litigation, which will create additional delay and uncertainty. Another stakeholder claimed that the 2020 Rule likely slowed down the certification process because it allowed applicants to submit just basic information to "start the clock" for the state or Tribe's decision. The stakeholder explained that receiving insufficient information to ensure a project will comply with their laws, certifying authorities

may just decide to deny certification entirely, which may trigger additional litigation or reapplication. Another stakeholder argued that the limitations on the timing of state review resulted in inadvertent waivers of section 401 authority for major Federal permits. The stakeholder contended that the 2020 Rule created administrative confusion and unnecessary regulatory burdens for applicants and administrative agencies.

On the other hand, one stakeholder voiced their support for the 2020 Rule because the commenter contended it helped define the specific procedures, timeframes, and scope for section 401 certifications.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1, 16.6.2.1.

16.6.2.5 Environmental Impacts

Some stakeholders discussed how section 401 was important for protecting not just water quality, but other aspects of the environment.

A couple of stakeholders discussed how the 2020 Rule affected different species. One stakeholder claimed that the 2020 Rule affected species because it prevented certifying authorities from imposing conditions that protected endangered species and their habitat (e.g., installing fish ladders, preserving instream flows, reducing sediment pollution caused by upland activity). The stakeholder also expressed concern that the time constraints limited certifying authorities' ability to gather sufficient information about harms to species. Another stakeholder stated that the section 401 certification process was used to protect endangered species for many years. The stakeholder provided firsthand experiences of how the section 401 process has played a role in species protection in their region.

One stakeholder emphasized that broad certification authority that existed prior to the 2020 Rule was instrumental in ensuring that federally licensed and permitted projects proceeded in a manner that protected important water uses that communities and wildlife relied on (e.g., safe drinking water, adequate flow, fish passage, and recreational access). This stakeholder emphasized that section 401 authority has been paramount to allowing states and Tribes protect communities and wildlife. The stakeholder provided an example stating that both Arizona and Colorado imposed conditions in the early 2000s requiring project proponents to offset increase in pollution from their federally permitted activity by cleaning up pollutants from abandoned mines elsewhere in the watershed.

Agency's Response: *See* the Agency's Response to Comments in Sections 5, 16.6.1.1, 16.6.2.1.

16.6.2.6 Infrastructure

A few stakeholders argued that improving infrastructure and protecting water quality does not have to be an either-or, and that both can happen simultaneously.

One stakeholder contended the nation would benefit from a clear section 401 certification rule that is consistent with both statutory text of the CWA and facilitates certifications for clean energy projects and

considers environmental protection goals. Another stakeholder stated that review under section 401 must be efficient and predictable to ensure that developers have the certainty needed to develop infrastructure projects, and that states have the ability to oversee the quality of their waters.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

EPA agrees that improving infrastructure and protecting water quality are not mutually exclusive, and the Agency holds that the final rule clarifies issues such as scope of certification and the reasonable period of time for a certifying authority to act, which in turn creates a more efficient, effective, and predictable certifying authority-driven certification process.

16.6.2.7 Stakeholder Engagement/Consultation

A couple of stakeholders stated that EPA must consult with various organizations prior to new rules being promulgated as required by the Endangered Species Act (ESA) regarding impacts on imperiled species. Relatedly, one stakeholder contended that there was no meaningful analysis about the effects on the environment, including endangered species, prior to the promulgation of the 2020 Rule. The stakeholder emphasized that EPA must comply with all relevant Federal laws and policies, including the Endangered Species Act (ESA).

One stakeholder emphasized the importance of states acting as co-regulators and engaging with EPA to provide feedback on the implementability of a proposed rule.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

Consultation under section 7(a)(2) of the ESA may be required when an agency exercises power under its enabling act to authorize, fund, or carry out an action that may affect listed species or designated critical habitat. 16 U.S.C. 1536(a)(2); 50 CFR 402.14(a). The consultation requirement only applies if the agency has discretion under its enabling legislation to modify the proposed action for the benefit of listed species. *See* 50 CFR 402.03. For the reasons discussed below, this rulemaking does not trigger consultation under section 7(a)(2) of the ESA.

EPA's action addresses various aspects of Section 401, but the Agency's action is limited by the text of the CWA and congressional intent. Section 7(a)(2) serves as a check on affirmative action that an agency takes or authorizes under its enabling act, but "does not expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992). Section 7 confers no substantive powers, "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA." *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998).

Therefore, EPA does not have the discretionary involvement or control over this action that is necessary to require ESA consultation and the rule does not implicate section 7(a)(2) of the ESA.

Even assuming the ESA applied, the proposed rule's impacts would not exceed the ESA's "may affect" threshold and trigger the agencies' section 7(a)(2) consultation duties. The final rule does not authorize any activity that could affect a listed species or designated critical habitat. Moreover, the relationship between the final rule (which establishes a consistent framework for States and Tribes) and any potential effects from future third-party activities is too attenuated to establish legal causality. *See, e.g.*, 50 CFR 402.17(b) (providing that "[c]onsiderations for determining that a consequence . . . is not caused by the proposed action" include where "(1) [t]he consequence is so remote in time from the action . . . that it is not reasonably certain to occur . . . or (3) [t]he consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur"). The potentially harmful effects of future third-party projects (i.e., discharges to water that could affect water quality) would only result from a lengthy causal chain that is too speculative and hypothetical to be meaningfully analyzed in a consultation on this rulemaking. The consequences of any such projects would depend on a host of factors unrelated to the final rule, including the specific federal licenses or permits at issue and the actions of certifying authorities to grant, grant with conditions, or deny certification requests, the nature of the proposed activity, and the applicability of other federal, State, and local laws, including section 9 of the ESA. As such, those future third-party projects—not the final rule—would be the appropriate actions triggering consultation under the ESA, to the extent that section 7 were found to apply to those actions. *See, e.g., Ctr. for Biological Diversity v. DOI*, 563 F.3d 466, 483 (D.C. Cir. 2009) (finding consultation not triggered where agency's approval of leasing program itself did not affect listed species and species welfare was, "by design, only implicated at later stages of the program, each of which requires ESA consultation").

EPA engaged with various stakeholders before and during the development of this final rule. Following the publication of EPA's NOI to revise the 2020 Rule, the Agency opened a public docket to receive written pre-proposal recommendations for a 60-day period beginning on June 2, 2021 and concluding on August 2, 2021. *See* Docket ID No. EPA-HQ-OW-2021-0302. EPA also held a series of virtual listening sessions for certifying authorities (June 14, June 23, and June 24, 2021), project applicants (June 15, 2021), and the public (June 15, and June 23, 2021) to gain further pre-proposal input. *See id.* at 29544 (announcing EPA's intention to hold multiple webinar-based listening sessions). The Agency heard from stakeholders representing a diverse range of interests and positions and received a wide variety of recommendations during this pre-proposal outreach process. More information about the outreach and engagement conducted by EPA during the pre-proposal input period can be found in Docket ID No. EPA-HQ-OW-2022-0128. Upon publishing the proposed rule in the Federal Register, 87 FR 35318, on June 9, 2022, a 60-day public comment period was initiated. In finalizing the proposed rule, the Agency

reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties.

16.6.2.8 Justification for 2020 Rule or Revision

A couple of stakeholders, generally in opposition to reconsidering or revising the 2020 Rule, argued that there is no justification for this action. One stakeholder argued that EPA lacked data on how effective the 2020 Rule was in protecting water quality because it was not in place for long enough to gather the information. The stakeholder contended that revising the rule should only happen once EPA and regulated entities have had time for the rule to be in effect. Another stakeholder pointed out that neither EO 13990 nor the Fact Sheet identified any specific problem with the 2020 Rule and that they were "deeply troubled" by EPA's reconsideration of a significant rule adopted less than one year prior. The stakeholder also stated that EPA's NOI to Reconsider did not mention any of the "well-documented abuses" that preceded the implementation of the 2020 rule.

Some stakeholders stated that the section 401 certification process worked for almost 50 years prior to the promulgation of the 2020 Rule, so there was no need for it to change. One stakeholder argued that there was no justification for the promulgation of the 2020 Rule in the first place. Another stakeholder further stated that the Trump administration had neither a legitimate regulatory purpose nor any rational explanation for its decision to propose the 2020 Rule, nor did they explain how it would be consistent with EPA's mission or the goals of the CWA. The stakeholder claimed that the 2020 Rule never explained why the EPA's new conclusions and interpretations were so different from its longstanding interpretations EPA had stood behind for decades.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.1.1.

The Agency disagrees with commenters asserting that there was no justification for reconsidering and revising the 2020 Rule. EPA found, and continues to find, it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E of the final rule preamble for further discussion on why the 2020 Rule's interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or Congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment. *See e.g.*, section IV.E of the final rule preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule's interpretation of the scope of certification.

The Agency also disagrees with commenters asserting that there was no need to change the 1971 Rule. While the 1971 Rule was in practice for nearly 50 years before the 2020 Rule, the 1971 Rule did not fully reflect the amended statutory language. In addition, following the promulgation of the 1971 Rule, several seminal court cases have addressed fundamental

aspects of the water quality certification process, including the scope of certification review and the appropriate timeframe for certification decisions. The 1971 Rule did not reflect or account for water quality certification practices or judicial interpretations of section 401 that evolved over the 50 years since 1971.

16.6.2.9 2020 Rule Revision Concerns

Several stakeholders discussed their general concerns regarding the retention of the 2020 Rule during the revision process. One stakeholder expressed concern about EPA's intention to keep the 2020 Rule in place for the duration of the two-step rulemaking process and that EPA may use the 2020 Rule as a starting point and revise it as opposed to completely rewriting it. Another stakeholder stated that the longer the 2020 Rule is in place, the more harm it will cause to the environment and to the states' ability to protect it. Another stakeholder argued that leaving the 2020 Rule in place until at least 2023 will result in additional negative impacts to water quality, delays for project proponents, and wasted resources for state certifying agencies. A different stakeholder urged EPA to not only issue its revisions as quickly as possible but to apply its new rule to ongoing certification decisions moving forward. The stakeholder claimed that applying the new rule to pending projects is both fairer and less disruptive than allowing the 2020 Rule to control decisions made after it has been revised.

One stakeholder advised against efforts to concomitantly make regulatory changes with other Federal agencies as such an effort to revise other Federal regulations could delay the critical revisions to the 2020 Rule that the stakeholder recommended be finalized as soon as possible, such as rescinding the 2020 Rule.

Conversely, one stakeholder claimed that EPA's plan to revise the 2020 Rule is "misguided" and stated that EPA must reconsider repealing the 2020 Rule in whole or part prior to undertaking additional substantive changes.

Agency's Response: *See* the Agency's Response to Comments in Sections 16.6.6.1.