ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 121, 122, and 124

[EPA–HQ–OW–2022–0128; FRL–6976.1–03–OW]

RIN 2040–AG12

Clean Water Act Section 401 Water Quality Certification Improvement Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Following careful reconsideration of the water quality certification rule the U.S. Environmental Protection Agency (EPA or the Agency) promulgated in 2020, the Agency is finalizing a rule revising and replacing the 2020 regulatory requirements for water quality certification under Clean Water Act (CWA) section 401. This final rule updates the existing regulations to better align with the statutory text and purpose of the CWA; to clarify, reinforce, and provide a measure of consistency with elements of section 401 certification practice that have evolved over the more than 50 years since EPA first promulgated water quality certification regulations; and to support an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles central to CWA section 401. An Executive order signed on January 20, 2021, entitled ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,'' directed the Agency to review the water quality certification rule EPA promulgated in 2020, and this final rule culminates that review. The Agency is also finalizing conforming amendments to the water quality certification regulations for EPA-issued National Pollutant Discharge Elimination System (NPDES) permits.

DATES: This action is effective on November 27, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2022–0128. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lauren Kasparek, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202–564–3351; email address: *cwa401@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary
II. General Information
A. What action is the Agency taking?
B. What is the Agency's authority for taking this action?
C. What are the incremental costs and benefits of this action?
III. Background
A. Development of Section 401
B. Overview of Section 401 Requirements
C. Prior Rulemaking Efforts Addressing Section 401
D. Summary of Stakeholder Outreach
IV. Final Rule
A. When Section 401 Certification Is Required
B. Pre-Filing Meeting Request
C. Request for Certification
D. Reasonable Period of Time
E. Scope of Certification
F. Certification Decisions
G. Federal Agency Review
H. EPA's Roles Under Section 401
I. Modifications
J. Enforcement and Inspections
K. Neighboring Jurisdictions
L. Treatment in a Similar Manner as a State Under Section 401
M. Implementation Considerations
N. Severability
V. Economic Analysis
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review
B. Paperwork Reduction Act (PRA)
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act (UMRA)
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All
K. Congressional Review Act

I. Executive Summary

Clean Water Act (CWA) section 401 provides states [1] and authorized Tribes [2] with a powerful tool to protect the quality of their waters from adverse impacts resulting from the construction and/or operation of federally licensed or permitted projects. Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into ''waters of the United States'' [3] unless the state or authorized Tribe where the discharge would originate either issues a CWA section 401 water quality certification ''that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307'' of the CWA, or waives certification. 33 U.S.C. 1341(a)(1). When granting a CWA section 401 certification, CWA section 401(d) directs states and authorized Tribes to include conditions, including ''effluent limitations and other limitations, and monitoring requirements,'' necessary to assure that the applicant for a Federal license or permit will comply with CWA sections 301, 302, 306, and 307, and with ''any other appropriate requirement of State law.'' *Id.* at 1341(d).

Congress originally created the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970, which amended the Federal Water Pollution Control Act (FWPCA).[4] Congress granted states this certification authority in response to Federal agencies' failure to achieve Congress's previously stated goal of assuring that federally licensed or permitted activities comply with water quality standards.[5] Two years

[1] The CWA defines ''state'' as ''a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.'' 33 U.S.C. 1362(3).

[2] The term ''authorized Tribes'' refers to Tribes that have been approved for ''treatment in a manner similar to a State'' status for CWA section 401. *See* 33 U.S.C. 1377(e).

[3] 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''.

[4] Water Quality Improvement Act of 1970, Public Law 91–224, 84 Stat. 91 (April 3, 1970).

[5] S. Rep. 91–351, at 26 (1969) (''Existing law declares it to be the intent of Congress that all Federal departments, agencies, and instrumentalities shall comply with water quality standards. This declaration of intent has proved unsatisfactory. One basic thrust of S. 7 is to require that all activity over which the Federal Government has direct control—. . . federally licensed or permitted activity—be carried out in a manner to assure compliance with applicable water quality standards.'')

later, Congress revised the Federal water quality protection framework [6] when it enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or CWA).[7] In those Amendments, Congress placed the water quality certification requirement in section 401, using ''substantially section 21(b) of existing law,'' with relevant conforming amendments ''to assure consistency with the [ ] changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.'' S. Rep. No. 92–414 at 69 (1971); *see also* H.R. Rep. No. 92–911 at 121 (1972) (''Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.''). 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.

EPA promulgated implementing regulations for water quality certification in 1971 (1971 Rule) [8] prior to enactment of the 1972 amendments to the CWA. In 1979, the Agency recognized the need to update its water quality certification regulations, in part to be consistent with the 1972 amendments. *See* 44 FR 32854, 32856 (June 7, 1979) (noting the 40 CFR part 121 regulations predated the 1972 amendments). However, the Agency declined to update the regulations at the time because it had not consulted with other Federal agencies impacted by the water quality certification process, and instead developed regulations applicable to water quality certifications on EPA-issued National Pollutant Discharge Elimination System (NPDES) permits. *Id.; see, e.g.,* 40 CFR 124.53 through 124.55. As a result, for a number of years, the 1971 Rule did not fully reflect the amended statutory language. 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. States have also developed and implemented their own water quality certification programs and practices aimed at protecting waters within their borders. During this time, the Agency supported state and Tribal water quality certification practices and the critical role states and Tribes play in protecting their waters under section 401.[9] But 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.

EPA revised the 1971 Rule in 2020.[10] The 2020 Rule did not update the regulations applicable to water quality certifications on EPA-issued NPDES permits but noted that the Agency would ''make any necessary conforming regulatory changes in a subsequent rulemaking.'' 85 FR 42219 (July 13, 2020). The 2020 Rule represented a substantive departure from some of the Agency's and certifying authorities' core prior interpretations and practices with respect to water quality certification. The 2020 Rule also deviated sharply from the cooperative federalism framework central to section 401 and the CWA. While the 2020 Rule reaffirmed some of the Agency's and the courts' prior interpretations, *e.g.,* the need for a potential point source discharge into waters of the United States to trigger the section 401 water quality certification requirement, it rejected nearly 50 years of Agency practice and over 25 years of Supreme Court precedent regarding the appropriate scope of certification review, *i.e.,* rejecting ''activity as a whole'' for the narrower ''discharge-only'' approach. Additionally, the 2020 Rule introduced new procedural requirements that disrupted state and Tribal certification programs that evolved over the last half century. In this final rule, the Agency is returning to those important core interpretations and practices, such as an ''activity'' approach to the scope of certification review and greater deference to the role of states and Tribes in the certification process, while retaining (and adding) elements that provide transparency and predictability for all stakeholders.

On January 20, 2021, President Biden signed Executive Order 13990 directing Federal agencies to review actions taken in the prior four years that are, or may be, inconsistent with the policies stated in the order (including, but not limited to, bolstering resilience to climate change impacts and prioritizing environmental justice).[11] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (published January 25, 2021, signed January 20, 2021). Pursuant to this Executive order, EPA reviewed the 2020 Rule. EPA identified substantial concerns with several of its provisions that were in tension with section 401's cooperative federalism approach to ensuring that states and Tribes are empowered to protect their water quality. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541, 29542 (June 2, 2021) (identifying the Agency's concerns with the 2020 Rule). As a result, the Agency announced its intention to revise the 2020 Rule so that it is (1) well-informed by stakeholder input, (2) better aligned with the cooperative federalism principles that have been central to the effective implementation of the CWA, and (3) responsive to the environmental protection and other objectives outlined in Executive Order 13990. *Id.*

Five months after EPA's announcement of its intent to reconsider and revise the 2020 Rule, on October 21, 2021, in a legal challenge to the 2020 Rule, a Federal district court remanded and vacated the 2020 Rule. *In Re Clean Water Act Rulemaking,* 568 F. Supp. 3d 1013 (N.D. Cal. 2021). While EPA had not asked the court to vacate the 2020 Rule,[12] the court found that vacatur was appropriate ''in light of the lack of reasoned decision-making and apparent errors in the rule's scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand.'' *Id.* at 1026–27. The effect of the court's vacatur was to reinstate the 1971 Rule, effective October 21, 2021. Defendant-intervenors appealed the vacatur order to the U.S. Court of Appeals for the Ninth Circuit. On April 6, 2022, the U.S. Supreme Court granted the defendant-

[6] *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310, 317 (1981).

[7] Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.*

[8] 36 FR 8563 (May 8, 1971), redesignated at 36 FR 22369, 22487 (November 25, 1971), further redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979).

[9] *See* Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (hereinafter, 1989 Guidance); Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) (hereinafter, 2010 Handbook) (rescinded in 2019, *see infra*).

[10] Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (hereinafter, 2020 Rule). For further discussion on the 2020 Rule, including legal challenges, please see section III of this preamble.

[11] EPA has defined environmental justice as the ''fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.'' *See https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.*

[12] *See* EPA's Motion for Remand Without Vacatur, No. 3:20–cv–04636–WHA (N.D. Cal. July 1, 2021).

intervenors' application for a stay of the vacatur pending the Ninth Circuit appeal. *Louisiana* v. *Am. Rivers,* 142 S. Ct. 1347 (2022).[13] As a result of the Supreme Court's stay, the 2020 Rule once again applied to section 401 certifications. On February 21, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's remand with vacatur order and remanded the case back to the U.S. District Court for the Northern District of California for further proceedings.[14] As a result of the Ninth Circuit's decision, the 2020 Rule applies until this final rule goes into effect.

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. The Agency is also finalizing conforming amendments to the water quality certification regulations for EPA-issued NPDES permits.

II. General Information

A. What action is the Agency taking?

In this action, the Agency is publishing a final rule to replace its currently effective water quality certification regulations at 40 CFR part 121 and to make conforming edits in 40 CFR parts 122 and 124.

B. What is the Agency's authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including but not limited to sections 101(d), 304(h), 401, 402, and 501(a).

C. What are the incremental costs and benefits of this action?

The Agency prepared the Economic Analysis for the Final ''Clean Water Act Section 401 Water Quality Certification Improvement Rule'' (''Economic Analysis for the Final Rule''), which evaluates the potential costs and benefits and is available in the rulemaking docket. The analysis is summarized in section V in this preamble. The Economic Analysis for the Final Rule is qualitative due to significant limitations and uncertainties associated with estimating the incremental costs and benefits of the final rule. *See* section V of this preamble for further discussion.

III. Background

A. Development of Section 401

In 1965, Congress amended the Federal Water Pollution Control Act (FWPCA) to require states, or, where a state failed to act, the newly created Federal Water Pollution Control Administration, to promulgate water quality standards for interstate waters within each state. Water Quality Act of 1965, Public Law 89–234, 79 Stat. 903 (October 2, 1965). These standards were meant ''to protect the public health or welfare, enhance the quality of water and serve the purposes of [the] Act,'' which included ''enhanc[ing] the quality and value of our water resources and [] establish[ing] a national policy for the prevention, control, and abatement of water pollution.'' *Id.* Yet, only a few years later, while debating potential amendments to the FWPCA, Congress observed that, despite that laudable national policy, states faced obstacles to achieving these newly developed water quality standards because of an unexpected source: Federal agencies. Instead of helping states cooperatively achieve these Federal policy objectives, Federal agencies were ''sometimes . . . a culprit with considerable responsibility for the pollution problem which is present.'' 115 Cong. Rec. 9011, 9030 (April 15, 1969). 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). As a result, states, industry groups, conservation groups, and the public alike ''questioned the justification for requiring compliance with water quality standards'' if Federal agencies themselves would not comply with those standards. *Id.* at 7.

In response to such concerns, Congress introduced language that would bolster state 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). Under this new provision, instead of relying on the Federal Government to ensure compliance with water quality standards, states would be granted the power to certify that there was reasonable assurance that federally licensed or permitted activities would meet water quality standards before such a Federal license or permit could be issued. Ultimately, Congress added this new provision as section 21(b) of the Water Quality Improvement Act of 1970, Public Law 91–224, 84 Stat. 91 (April 3, 1970).

Under section 21(b)(1), applicants for Federal licenses or permits were required to obtain state certification that there was reasonable assurance that any federally licensed or permitted activity that may result in any discharge into navigable waters would not violate applicable water quality standards. *Id.* Additionally, section 21(b) also provided a role for other potentially affected states, discussed scenarios under which state certification for both Federal construction and operation licenses or permits may be necessary, and provided an opportunity for a Federal license or permit to be suspended for violating applicable water quality standards. Section 21(b) embodied the cooperative federalism principles from the 1965 amendments by providing states with the opportunity to influence, yet not ''frustrate,'' the Federal licensing or permitting process. *See* 115 Cong. Rec. 28875, 28971 (October 7, 1969) (noting the idea of state certification ''[arose] out of policy of the 1965 Act that the primary responsibility for controlling water pollution rests with the States''); *see also* H.R. Rep. No. 91–940, at 54–55 (March 24, 1970) (Conf. Rep) (adding a timeline for state certification ''[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application'').

In 1972, with the enactment of the Clean Water Act, Congress significantly

[13] The Court's stay order does not alter EPA's legal conclusions discussed in this final rule. The request for a stay concerned only the appropriateness of the district court's vacatur of a rule before a decision on the merits. The stay request did not raise any issues related to the substance of CWA section 401 certification or the merits of the 2020 Rule. *See* Application for Stay Pending Appeal in *Louisiana* v. *Am. Rivers,* No. 21A539, pp. 1, 4, 16 (March 21, 2022) (identifying ''the core issue in this case'' to be the appropriateness of the district court's vacatur order) (identifying the Administrative Procedure Act (APA)—not the CWA or section 401—as the statutory provision involved in the application for stay) (starting the application for stay with the question: ''Can a single district court vacate a rule that an agency adopted through notice-and-comment rulemaking without first finding that the rule is unlawful?''). Neither the Court's majority—which did not issue an opinion explaining its stay order—nor the dissent discussed any aspect of section 401 certification or the 2020 Rule.

[14] The court found that ''the district court lacked the authority to vacate the 2020 Rule without first holding it unlawful.'' *In Re Clean Water Act Rulemaking,* 60 F.4th 583, 596 (9th Cir. 2023). The court did not address the merits of the 2020 Rule, noting that it could not ''engage in the factfinding that might be needed to identify any harms that keeping the 2020 Rule in place during a remand might cause. . . .'' *Id.*

revised the statutory water quality protection framework.[15] Clean Water Act, Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* While doing so, Congress reaffirmed ''the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'' [16] To this end, the 1972 amendments included section 401, which Congress considered to be ''substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.'' H.R. Rep. No. 92–911, at 121 (1972). These ''new requirements'' of the 1972 Act reflected a ''changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.'' S. Rep. No. 92–414, at 69 (1971). As a result, unlike section 21(b), which focused only on compliance with water quality standards, section 401 required applicants for Federal licenses and permits to obtain state certification of compliance with the newly enacted provisions focused on achieving effluent limitations. 33 U.S.C. 1341(a)(1). A few years later, Congress amended section 401 to correct an omission from the 1972 statute and clarify that it still intended for states to also certify compliance with water quality standards. *See* H.R. Rep. No. 95–830, at 96 (1977) (inserting section 303 in the list of applicable provisions throughout section 401).[17]

Section 401 of the 1972 Act also introduced a new subsection, subsection (d), that explicitly provided states with the ability to include ''effluent limitations and other limitations, and monitoring requirements'' in their certification to assure that the applicant will comply not only with sections 301, 302, 306, and 307, but also with ''any other appropriate requirement of State law.'' *Id.* at 1341(d). In subsection (d), Congress also provided that any certification ''shall become a condition on any Federal license or permit.'' *Id.; see also* S. Rep. No. 92–414, at 69 (1971) (''The certification provided by a State in connection with any Federal license or permit must set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law and such a certification becomes an enforceable condition on the Federal license or permit.''). Consistent with Congress's intent to empower states to protect their waters from the effects of federally licensed or permitted projects, this provision ''assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.'' S. Rep. No. 92–414, at 69 (1971).

B. Overview of Section 401 Requirements

Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the certifying authority where the discharge would originate either issues a CWA section 401 water quality certification or waives certification. 33 U.S.C. 1341(a)(1). The applicant for the Federal license or permit that requires section 401 certification is responsible for obtaining certification or a waiver from the certifying authority, which could be a state, territory, authorized Tribe, or EPA, depending on where the discharge originates. To initiate the certification process, Federal license or permit applicants must submit a ''request for certification'' to the appropriate certifying authority. The certifying authority must act upon the request within a ''reasonable period of time (which shall not exceed one year).'' *Id.* Additionally, during the reasonable period of time, certifying authorities must comply with public notice procedures established for certification requests, and where appropriate, procedures for public hearings. *Id.*

If a certifying authority determines that the activity will comply with the listed provisions in section 401(a)(1), it may grant or waive certification. *See* section IV.E in this preamble for further discussion on the scope of certification. When granting a CWA section 401 certification, certifying authorities must include conditions (*e.g.,* ''effluent limitations and other limitations, and monitoring requirements'') pursuant to CWA section 401(d) necessary to assure that the applicant for a Federal license or permit will comply with applicable provisions of CWA sections 301, 302, 306, and 307, and with ''any other appropriate requirement of State law.'' 33 U.S.C. 1341(d). If a certifying authority grants certification with conditions, those conditions are incorporated into the Federal license or permit. *Id.* Once an applicant provides a Federal agency with a certification, the Federal agency may issue the license or permit. *Id.* at 1341(a)(1).

If a certifying authority is unable to provide such certification, the certifying authority may deny or waive certification. If certification is denied, the Federal agency cannot issue the Federal license or permit. If certification is waived, the Federal agency may issue the Federal license or permit. Certifying authorities may waive certification expressly, or they may waive certification by ''fail[ing] or refus[ing] to act on a request for certification within a reasonable period of time.'' *Id.* Either way, the Federal licensing or permitting agency may issue the Federal license or permit.

Although Congress provided section 401 certification authority to the jurisdiction in which the discharge originates, Congress also recognized that another state or authorized Tribe's water quality may be affected by the discharge, and it created an opportunity for such a state or authorized Tribe to raise objections to, and request a hearing on, the Federal license or permit. *See id.* at 1341(a)(2). Section 401(a)(2) requires the Federal agency to ''immediately notify'' EPA ''upon receipt'' of a ''[license or permit] application and certification.'' *Id.* EPA in turn has 30 days from that notification to determine whether the discharge ''may affect'' the water quality of any other state or authorized Tribe. *Id.* If the Agency makes a ''may affect'' determination, it must notify the other state or authorized Tribe, the Federal agency, and the applicant. The other state or authorized Tribe then has 60 days to determine whether the discharge will violate its water quality requirements. If the other state or authorized Tribe makes such a determination within those 60 days, it must notify EPA and the Federal agency, in writing, of its objection(s) to the issuance of the Federal license or permit and request a public hearing. *Id.* The Federal licensing or permitting agency is responsible for holding the public hearing. At the hearing, EPA is required to submit its evaluation and recommendations regarding the objection. Based on the recommendations from the objecting state or authorized Tribe and EPA's own evaluation and recommendation, as well as any evidence presented at the

[15] *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310, 317 (1981).

[16] 33 U.S.C. 1251(b).

[17] The conference report noted that ''[t]he inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306, and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402, and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed.'' *Id.*

hearing, the Federal agency is required to condition the license or permit ''in such manner as may be necessary to ensure compliance with applicable water quality requirements.'' *Id.* The Federal license or permit may not be issued ''if the imposition of conditions cannot ensure such compliance.'' *Id.*

Section 401 also addresses when an applicant must provide separate certifications for a facility's Federal construction license or permit and any necessary Federal operating license or permit. Under section 401(a)(3), an applicant 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].'' *Id.*[18]

Sections 401(a)(4) and (a)(5) describe circumstances where the certified Federal license or permit may be suspended by the Federal agency. First, a Federal agency may suspend a license or permit where a certifying authority determines during a pre-operation inspection of the facility or activity that it will violate applicable water quality requirements. *Id.* at 1341(a)(4). This pre-operation inspection and possible suspension apply only where a facility or activity does not require a separate operating Federal license or permit. Under section 401, the Federal agency may not suspend the license or permit unless it holds a public hearing.[19] *Id.* Once a Federal license or permit is suspended, it must remain suspended until the certifying authority notifies the Federal agency that there is reasonable assurance that the facility or activity will not violate applicable water quality requirements. *Id.* Second, a Federal agency may suspend or revoke a certified license or permit upon the entering of a judgment under the CWA that the facility or activity violated applicable provisions of section 301, 302, 303, 306, or 307 of the CWA. *Id.* at 1341(a)(5).

Section 401 not only identifies the roles and obligations of Federal license or permit applicants, certifying authorities, and Federal agencies, it also provides specific roles for EPA. First, EPA may act as a certifying authority where a state or authorized Tribe ''has no authority to give such certification.'' *Id.* at 1341(a)(1). Second, as discussed above, EPA is responsible for notifying other states or authorized Tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such other state or authorized Tribe's objections. *Id.* at 1341(a)(2). Lastly, EPA is responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id.* at 1341(b).

C. Prior Rulemaking Efforts Addressing Section 401

In the last 50 plus years, EPA has undertaken two rulemaking efforts focused solely on addressing water quality certification, one of which preceded the 1972 amendments to the CWA. The Agency has also developed several guidance documents on the section 401 process. This section of the preamble discusses EPA's major rulemaking and guidance efforts over the last 50 plus years, including most recently the 2020 Rule and EPA's review of it pursuant to Executive Order 13990.

1. 1971 Rule

In February 1971, EPA proposed regulations implementing section 401's predecessor provision, section 21(b) of the FWPCA. 36 FR 2516 (February 5, 1971). Those proposed regulations were divided into four subparts, one of which provided ''definitions of general applicability for the regulations and . . . provide[d] for the uniform content and form of certification.'' *Id.* The other three subparts focused on EPA's roles. *Id.* In May 1971, after receiving public comments, EPA finalized the water quality certification regulations with the proposed four-part structure at 18 CFR part 615. 36 FR 8563 (May 8, 1971) (''1971 Rule'').

The first subpart of the 1971 Rule (subpart A) established requirements that applied generally to all stakeholders in the certification process, including an identification of information that all certifying authorities must include in a certification. According to the 1971 Rule, a certifying authority was required to include several components in a certification, including the name and address of the project applicant; a statement that the certifying authority either examined the Federal license or permit application or examined other information from the project applicant and, based upon that evaluation, concluded that ''there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;'' any conditions that the certifying authority deemed ''necessary or desirable for the discharge of the activity;'' and any other information the certifying authority deemed appropriate. 40 CFR 121.2(a) (2019). Additionally, the 1971 Rule allowed for modifications to certifications upon agreement by the certifying authority, the Federal licensing or permitting agency, and EPA. *Id.* at § 121.2(b) (2019).

The second subpart of the 1971 Rule (subpart B) established a process for EPA to provide notification of potential water quality effects to other potentially affected jurisdictions. Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit application, the certification or waiver, and, where requested by EPA, any supplemental information provided by the Federal licensing or permitting agency.[20] If the Regional Administrator determined that there was ''reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,'' the Regional Administrator would notify each affected state within 30 days of receipt of the application materials and certification. *Id.* at §§ 121.13, 121.16 (2019). In cases where the Federal licensing or permitting agency held a public hearing on the objection raised by an affected jurisdiction, the Federal agency was required to forward notice of such objection to the Regional Administrator no later than 30 days prior to the hearing. *Id.* at § 121.15 (2019). At the hearing, the Regional Administrator was required to submit an evaluation and ''recommendations as to whether and under what conditions the license or permit should be issued.'' *Id.*

Subpart B also provided that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on

[18] Section 401(a)(3) identifies the bases a certifying authority may rely upon for finding that there is no longer reasonable assurance. These are changes after certification was granted in: construction or operation of the facility, characteristics of the water where the discharge occurs, or the applicable water quality criteria or effluent limits or other requirements. *Id.* at 1341(a)(3).

[19] Each Federal licensing or permitting agency may have its own regulations regarding additional processes for suspending a license or permit.

[20] If the documents provided are insufficient to make the determination, the Regional Administrator can request any supplemental information ''as may be required to make the determination.'' 40 CFR 121.12 (2019).

a request for certification; and second, when the Federal licensing or permitting agency sends written notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id.* at § 121.16 (2019). The 1971 Rule provided that the Federal licensing or permitting agency determined what constitutes a ''reasonable period of time,'' and that the period shall generally be six months, but in any event no more than one year. *Id.* at § 121.16(b) (2019).

The third subpart of the 1971 Rule (subpart C) established requirements that only applied when EPA acted as the certifying authority, including identifying specific information that must be included in a certification request. The project applicant was required to submit to the EPA Regional Administrator a signed request for certification that included a ''complete description of the discharge involved in the activity for which certification is sought,'' which included five items: the name and address of the project applicant, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge would begin and end, and a description of the methods to be used to monitor the quality and characteristics of the discharge. *Id.* at § 121.22 (2019). Once the request was submitted to EPA, the Regional Administrator was required to provide public notice of the request and an opportunity to comment. The 1971 Rule specifically stated that ''[a]ll interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determined that such a hearing is necessary or appropriate.'' *Id.* at § 121.23 (2019). If, after consideration of relevant information, the Regional Administrator determined that there was ''reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,'' the Regional Administrator would issue the certification. *Id.* at § 121.24 (2019).

The fourth and final subpart of the 1971 Rule (subpart D) provided that the Regional Administrator ''may, and upon request shall'' provide Federal licensing and permitting agencies with information regarding water quality standards and advise them as to the status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id.* at § 121.30 (2019).

In November 1971, EPA reorganized and transferred several regulations, including the water quality certification regulations, into title 40 of the Code of Federal Regulations. EPA subsequently redesignated the water quality certification regulations twice in the 1970s. *See* 36 FR 22369, 22487 (November 25, 1971), redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979). The last redesignation effort was part of a rulemaking that extensively revised the Agency's NPDES regulations. In the revised NPDES regulations, EPA addressed water quality certifications on EPA-issued NPDES permits separately from the 1971 Rule. EPA acknowledged that the 1971 Rule was ''in need of revision'' because the ''substance of these regulations predates the 1972 amendments to the Clean Water Act.'' 44 FR 32880 (June 7, 1979). However, EPA declined to revise the 1971 Rule because it had not consulted the other Federal agencies impacted by the water quality certification process. *Id.* at 32856. Instead, the Agency finalized regulations applicable only to certification on EPA-issued NPDES permits. *Id.* at 32880. EPA developed these regulations, which included a default reasonable period of time of 60 days, limitations on certification modifications, and requirements for certification conditions, in response to practical challenges and issues arising from certification on EPA-issued permits. *Id.* Ultimately, despite the changes Congress made to the statutory text in 1972 and opportunities the Agency had to revisit the regulatory text during redesignation efforts in the 1970s, EPA did not substantively change the 1971 Rule until 2020.

2. EPA Guidance on 1971 Rule

Although EPA did not pursue any additional rulemaking efforts until 2019, the Agency issued three national guidance documents on the water quality certification process set forth in the 1971 Rule. The first and second guidance documents recognized the vital role section 401 certification can play in protecting state and Tribal water quality, sought to inform states and Tribes how to use the certification program to protect their waters, and explained how to leverage available resources to operate or expand their certification programs. These documents provided states and Tribes with background on the certification process, discussed the relevant case law, and identified data sources that could inform the certification review process. Additionally, both documents provided tangible examples of state and Tribal experiences with section 401 that could inform other states and Tribes interested in developing their certification programs.

The first guidance document, issued in 1989, focused on how states and Tribes could use water quality certifications to protect wetlands. Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (''1989 Guidance''). While the 1989 Guidance focused on the use of water quality certifications in lieu of, or in addition to, state or Tribal wetlands regulatory programs, it provided helpful background information on the certification process in general. It also highlighted various state programs and water quality certification practices to demonstrate how other certifying authorities could approach the certification process. For example, the 1989 Guidance highlighted a certification denial issued by the then-Pennsylvania Department of Environmental Resources to illustrate that ''all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's certification review.'' *Id.* at 22–23. Additionally, the 1989 Guidance discussed considerations states and Tribes could examine when developing their own section 401 implementing regulations, as well as programs and resources states and Tribes could look to for technical support when making certification decisions. *Id.* at 30–37.

The second guidance document, issued in 2010, reflected the development of case law and state and Tribal program experiences over the two decades following the 1989 Guidance. Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) (''2010 Handbook'') (rescinded in 2019). Instead of focusing on certifications in the context of wetland protection, the 2010 Handbook described more broadly how the certification process could help states and Tribes achieve their water quality goals. Like the 1989 Guidance, the 2010 Handbook discussed the certification process, using state and Tribal programs as examples, and explored methods and means for states and Tribes to leverage available funding, staffing, and data sources to fully implement a water quality certification program. EPA

rescinded the 2010 Handbook on June 7, 2019, concurrent with the publication of the third guidance document.

EPA issued the third guidance document in 2019 pursuant to Executive Order 13868. Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 2019) (''2019 Guidance'') (rescinded). The 2019 Guidance was meant to ''facilitate consistent implementation of section 401 and 1971 certification regulations'' based on the view that the 2010 Handbook did not ''reflect current case law interpreting CWA section 401.'' 85 FR 42213. The 2019 Guidance focused on three topics: (1) timeline for certification review and action, (2) the scope of section 401, and (3) the information within the scope of a certifying authority's review. 2019 Guidance at 1. EPA rescinded the 2019 Guidance on July 13, 2020, concurrent with the publication of the final 2020 Rule.

3. Development of the 2020 Rule

In addition to directing EPA to review its 2010 Handbook and issue new section 401 guidance, Executive Order 13868, entitled Promoting Energy Infrastructure and Economic Growth, also directed EPA to propose new regulations governing section 401 consistent with the policy set forth in the order to ''promote private investment in the Nation's energy infrastructure.'' 84 FR 13495, 13496 (April 15, 2019). It is noteworthy that, even in the context of directing EPA to initiate changes to a water quality protection rule, the executive order did not direct the Agency to consider the water quality consequences of any such changes. EPA issued the proposed rule on August 22, 2019.[21] EPA promulgated a final rule on July 13, 2020. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (''2020 Rule'').

The 2020 Rule reaffirmed that Federal agencies unilaterally set the reasonable period of time, clarified that the certification requirement was triggered by a point source discharge from a federally licensed or permitted activity into ''waters of the United States,'' and reaffirmed that certifying authorities may explicitly waive certification. The 2020 Rule also introduced several new features, including one that allowed Federal agencies to review certification decisions for compliance with the 2020 Rule's requirements and, if the certification decision did not comply with these requirements, allowed Federal agencies to deem such non-compliant certifications as waived. The 2020 Rule also prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request and rejected the scope of certification review (''activity as a whole'') affirmed by the Supreme Court in *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology,* 511 U.S. 700 (1994), in favor of a more limiting interpretation (''discharge-only'' approach) favored by two dissenting Justices in that case.

Following publication, the 2020 Rule was challenged in three Federal district courts by states, Tribes, and non-governmental organizations.[22] Industry stakeholders and eight states intervened on behalf of EPA to defend the 2020 Rule. On October 21, 2021, following briefing and a hearing on EPA's motion for remand without vacatur, the U.S. District Court for the Northern District of California both remanded and vacated the 2020 Rule. *In re Clean Water Act Rulemaking,* 568 F. Supp. 3d 1013 (N.D. Cal. 2021) (*reversed and remanded by* 60 F.4th 583 (9th Cir. 2023)). The court found that vacatur was appropriate ''in light of the lack of reasoned decision-making and apparent errors in the rule's scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand.'' *Id.* at 1026–27. The court order required a temporary return to EPA's 1971 Rule until EPA finalized a new rule.[23] After the Ninth Circuit denied intervenors' motion for stay pending appeal on February 24, 2022, intervenors filed an application for a stay of the vacatur pending appeal in the Supreme Court on March 21, 2022. On April 6, 2022, the U.S. Supreme Court granted the application for a stay of the vacatur pending resolution of the appeal of the vacatur in the Ninth Circuit. *Louisiana* v. *Am. Rivers,* No. 21A539 (S. Ct. April 6, 2022). On February 21, 2023, the Ninth Circuit reversed the remand with vacatur and remanded the case back to the U.S. District Court for the Northern District of California for further proceedings. *In Re Clean Water Act Rulemaking,* No. 21–16958 (9th Cir. February 21, 2023).

4. Executive Order 13990 and Review of the 2020 Rule

On January 20, 2021, President Biden signed Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Order). 86 FR 7037 (published January 25, 2021, signed January 20, 2021). The Order provides that ''[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.'' *Id.* at 7037, Section 1. The Order ''directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.'' *Id.* ''For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.'' *Id.,* section 2(a). The Order also revoked Executive Order 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth), which initiated development of the 2020 Rule, and specifically identified the 2020 Rule for review. *See* Fact Sheet: List of Agency Actions for Review, available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/* (last visited on January 27, 2022).

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

[21] Updating Regulations on Water Quality Certifications, 84 FR 44080 (August 22, 2019).

[22] *In Re Clean Water Act Rulemaking,* No. 3:20–cv–04636–WHA (N.D. Cal.); *Delaware Riverkeeper et al.* v. *EPA,* No. 2:20–cv–03412 (E.D. Pa.); *S.C. Coastal Conservation League* v. *EPA,* No. 2:20–cv–03062 (D.S.C.).

[23] The two other courts also remanded the 2020 Rule to EPA, but without vacatur. Order, *Delaware Riverkeeper* v. *EPA,* No. 2:20–cv–03412 (E.D. Pa. August 6, 2021) (determining that vacatur was not appropriate because the court ''has not yet, and will not, make a finding on the substantive validity of the Certification Rule''); Order, *S.C. Coastal Conservation League* v. *EPA,* No. 2:20–cv–03062 (D.S.C. August 2, 2021) (remanding without vacating).

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.

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*''); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 42 (1983); *see also Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016) (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.''). Such a decision need not be based upon a change of facts or circumstances. A revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion.'' *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (*citing Fox,* 556 U.S. at 514–15). The Agency reviewed the 2020 Rule, determined that the rule should be replaced, and proposed a replacement rule. Some commenters on the proposed rule opposed reconsideration of the 2020 Rule and asserted that EPA did not provide a basis for reconsideration of the 2020 Rule. EPA disagrees. 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 in this 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.[24] *See e.g.,* section IV.E of this 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. 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.

D. Summary of Stakeholder Outreach

Following the publication of EPA's notice of intent 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. The Agency received nearly 3,000 recommendations from members of the public, which can be found in the pre-proposal docket. *See* Docket ID No. EPA–HQ–OW–2021–0302. The **Federal Register** publication requested feedback related to key issues identified during implementation of the 2020 Rule, including but not limited to issues regarding pre-filing meeting requests, certification requests, reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, modifications, neighboring jurisdictions, data and other information, and implementation coordination. *See* 86 FR 29543–44 (June 2, 2021).

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). EPA also met with stakeholders upon request during development of the proposed rule. 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. Additionally, EPA also met with other Federal licensing and permitting agencies to solicit feedback on the **Federal Register** publication. At the virtual listening sessions, the Agency gave a presentation that provided background on section 401 and prior Agency actions and sought input on the Agency's intent to revise the 2020 Rule and the specific issues included in the **Federal Register** publication described above.

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. Some certifying authorities expressed concern about the limited role of states and Tribes under the 2020 Rule, and they called for increased flexibility in implementing section 401 to fully protect their water resources. During the project proponent listening session, project proponents shared feedback about the need to streamline the certification process and recommended that the new rule prevent delays in determining certification decisions. In the public listening sessions, speakers from non-governmental environmental and water conservation organizations reinforced the idea that states and Tribes should be accorded greater deference in the certification process. An overarching theme articulated by many speakers from various stakeholder groups was the need for EPA's new rule to provide increased guidance and clarity.

The Agency also initiated a Tribal consultation and coordination process on June 7, 2021. The Agency engaged with Tribes over a 90-day consultation period during development of the

[24] For example, commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Army Corps of Engineers' (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.

proposed rule that concluded on September 7, 2021, including two Tribal consultation kickoff webinars on June 29, 2021, and July 7, 2021. The Agency received consultation letters from eight Tribes and three Tribal organizations. The Agency did not receive any requests for consultation during that time, although several Tribes expressed an interest in receiving additional information and ongoing engagement throughout the rulemaking process. Several Tribes commented that the 2020 Rule impaired or undermined Tribal sovereignty and their ability to protect Tribal waters. Many Tribes provided input regarding section 401 certification process improvements. Most Tribes were generally positive about a provision for a pre-filing meeting request, however, some had concerns that the 30-day wait period (before a project proponent could request certification) is very rigid and preferred flexibility in allowing certifying authorities to waive the 30-day requirement. Some Tribes expressed ''the reasonable period of time'' should start when the application is deemed complete, not when the initial request for certification is received. Most Tribes argued that the 2020 Rule's narrowing of the scope of certification was inconsistent with congressional intent for Tribes and states to have an effective tool to protect the quality of waters under their jurisdiction. A few Tribal organizations expressed concern that current implementation of section 401(a)(2) does not protect off-reservation treaty rights from discharges. Additional information about the Tribal consultation process can be found in section VI.F in this preamble and the ''Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule,'' which is available in the docket for this final rule.

The Agency signed a proposed rule updating the CWA section 401 water quality certification process on June 1, 2022. On June 9, 2022, the Agency published the proposed rulemaking in the **Federal Register**, 87 FR 35318 (June 9, 2022), 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 rule. A complete response to comments document is available in the docket for this rule (Docket ID No. EPA–HQ–OW–2022–0128).

IV. Final Rule

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 is finalizing revisions to the section 401 regulations to better align its regulations with the cooperative federalism and water quality protection principles enshrined in the text and legislative history of the CWA. Additionally, the final rule provides greater clarity and acknowledgment of essential water quality protection concepts from Executive Order 13990. In addition to providing a necessary regulatory reset on significant issues such as the scope of certification, the reasonable period of time, and Federal agency review, the Agency is finalizing its revisions to clarify and update the regulatory text to foster a more efficient and predictable certification process. As demonstrated by the extensive pre-proposal and proposed rule outreach, this rulemaking is well-informed by stakeholder input on all aspects of the section 401 certification process.

In addition to the revisions to part 121, EPA is also finalizing conforming changes to the part 124 regulations governing CWA section 401 certifications for EPA-issued NPDES permits. The final part 121 regulations apply to all Federal licenses or permits subject to CWA section 401 certification, including EPA-issued NPDES permits.[25] The purpose of these conforming changes is to ensure that the part 124 regulations are consistent with the revised provisions of part 121. In the proposal for this rule, EPA requested comment on whether the Agency had identified all changes to the part 124 regulations that conflict or potentially conflict with the proposal and therefore warrant amendment. EPA is finalizing targeted revisions to specific provisions of the NPDES regulations at 40 CFR 124.53, 124.54, and 124.55 that implement section 401. Specifically, EPA is finalizing targeted revisions to 40 CFR 124.53(b) through (e), 124.54(a) and (b), and 124.55(a) through (d). In addition, EPA is finalizing targeted conforming revisions to the regulations at 40 CFR 122.4(b), 122.44(d)(3), and 122.62(a)(3)(iii). EPA explains in further detail the reasons for each conforming change (beyond mere technical revisions) in the preamble discussion at sections IV.C, IV.D, IV.E, IV.F, IV.G, and IV.I of this preamble.

EPA is also finalizing several revisions to the definitions section of the final rule at § 121.1. EPA is finalizing minor revisions to the definition of ''Administrator,'' located at § 121.1(a), to remove the reference to authorized representatives. Instead, the Agency is adding a separate definition for ''Regional Administrator.'' *See* § 121.1(i). The Agency is removing the definition for ''certification,'' which was located at § 121.1(b) in the 2020 Rule, because it is not necessary to define the term. Additionally, the Agency is removing the definitions for ''certified project''[26] and ''proposed project''[27] because the final rule does not include those terms. EPA is also clarifying the roles of the stakeholders in the certification process. First, the Agency is finalizing non-substantive modifications to the definition of ''Federal agency'' located at final rule § 121.1(c). Second, the Agency is retaining the term ''project proponent'' from the 2020 Rule to define the stakeholder seeking certification. 40 CFR 121.1(h). While the term ''applicant'' is used in section 401, that term does not clearly reflect and include all the stakeholders who might seek certification. For example, Federal agencies themselves (and not third-party applicants) seek section 401 certification on the issuance of general permits (*e.g.,* Corps' Nationwide Permits, EPA's Construction General Permits). Additionally, contractors or other agents often seek certification on

[25] *See* § 121.1(c), (f) (defining ''Federal agency'' to mean ''any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401,'' and similarly defining ''license or permit'' to mean ''any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United States'').

[26] 40 CFR 121.1(d) (2020).

[27] 40 CFR 121.1(k) (2020).

behalf of a project applicant. The term ''project proponent'' 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 National Pollutant Discharge Elimination System (NPDES) permit). Lastly, the Agency is finalizing non-substantive changes to the definition of ''certifying authority'' located at final rule § 121.1(b). Other revisions to regulatory definitions are discussed throughout this preamble.

This section of the final rule preamble includes 12 sub-sections that each discuss: (1) the final rule provisions, (2) a summary of the Agency's final rule rationale and public comments (where applicable), and (3) implementation considerations for the final rule provisions (where applicable). Section IV.A of this preamble discusses when section 401 certification is required. Sections IV.B through IV.F of this preamble walk readers through the section 401(a)(1) certification process in chronological order (*i.e.,* pre-filing meeting request through the certification decision). Section IV.G of this preamble discusses the Federal agency review process that follows the section 401(a)(1) certification process. Section IV.K of this preamble discusses the section 401(a)(2) neighboring jurisdictions process that occurs after the section 401(a)(1) certification process (if the certification was granted or waived), but before the Federal license or permit may be issued. Sections IV.I through IV.J of this preamble discuss events that may occur after the certification is granted until the Federal license or permit expires, including certification modifications (section IV.I of this preamble) and enforcement and inspection (section IV.J of this preamble). Section IV.H of this preamble discusses EPA's roles under section 401, including EPA's role as the certifying authority. Section IV.L of this preamble discusses the new provisions for Tribes to obtain treatment in a similar manner as a state (TAS) for section 401 or section 401(a)(2). Section IV.M of this preamble discusses general implementation considerations for this final rule. Lastly, section IV.N discusses severability of this final rule. This final rule is structured in a manner to clearly and transparently convey to stakeholders the CWA section 401 certification and post-certification processes.

A. When Section 401 Certification Is Required

1. What is the Agency finalizing?

EPA is finalizing the regulatory text located at final rule § 121.2 to affirm that a ''[c]ertification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.'' 40 CFR 121.2. The regulatory text clarifies the circumstances under which a section 401 certification is required and is consistent with the Agency's longstanding interpretation of section 401, including in the 2020 Rule, that an applicant for a Federal license or permit to conduct any activity that may result in any discharge from a point source [28] into waters of the United States must obtain a section 401 certification or waiver. The Agency made minor revisions to the proposed text at § 121.2 to better match the statutory language in section 401(a)(1) and clarify when certification is required, including adding the word ''Federal'' before license or permit, ''any'' before both ''activity'' and ''discharge,'' and changing from ''a water of the United States'' to ''waters of the United States.'' To be clear, these changes do not represent a change in substance from proposal.

2. Summary of Final Rule Rationale and Public Comment

a. Federally Licensed or Permitted Activity

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). The Agency is retaining the 2020 Rule's definition for a ''license or permit'' with minor modifications to clarify that section 401 is required for any federally licensed or permitted activity which may result in any discharge into waters of the United States. EPA is also adding the word ''Federal'' before ''license or permit'' throughout the final rule to further clarify that the license or permit subject to certification must be Federal.

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. This conclusion is supported by the legislative history of CWA section 401, which noted that ''since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.'' H.R. Rep. No. 92–911, at 127 (1972). Additionally, the legislative history of the CWA amendments of 1977, discussing state assumption of section 404, noted that ''[t]he conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority.'' H.R. Rep. No. 95–830, at 104 (1977).

Section 401 certification is not required for licenses or permits issued by a state or Tribe that administers a federally approved permit program. For example, states and Tribes may be authorized to administer the section 402 NPDES permitting program [29] or the section 404 dredge and fill permitting program.[30] 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.

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. The most common examples of Federal licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits issued by EPA in jurisdictions where the EPA administers the NPDES permitting program; CWA section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act sections 9 and 10 permits issued by the Army Corps of Engineers; and hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission (FERC).[31] *See*

[28] For ease of discussion and comprehension, the Agency uses the term ''discharge'' interchangeably with the more precise ''discharge from a point source'' or ''point source discharge.'' As discussed in section IV.A.2.c of this preamble, several years after *PUD No. 1,* the Ninth Circuit clarified that the type of ''discharge'' that triggers section 401's certification requirement is a ''point source'' discharge. *ONDA* v. *Dombeck,* 172 F.3d 1092 (9th Cir. 1998).

[29] 33 U.S.C. 1342(b).

[30] 33 U.S.C. 1344(g).

[31] The Corps also requires section 401 certification for its civil works projects, even though there is no Federal license or permit associated with those projects. The Corps' current regulations require the Corps to seek section 401 certification for discharges of dredged material or fill into waters of the United States. *See* 33 CFR 336.1(a)(1) (''The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.''); 33 CFR 335.2

Continued

section IV.A.3 *infra* for further discussion on the types of Federal licenses or permits subject to section 401.

b. Potential for a Discharge To Occur

Consistent with the 2020 Rule and the proposal, a certification or waiver is required for any Federal license or permit that authorizes any activity which *may* result in any discharge from a point source into waters of the United States. 40 CFR 121.2. The presence of, or potential for, a discharge is a key determinant for when a water quality certification is required. 33 U.S.C. 1341(a)(1) (''A certification is required for ''a Federal license or permit to conduct any activity . . . which *may result* in any discharge into the navigable waters . . .'') (emphasis added); *see* 40 CFR 121.2. Most commenters supported the clarification in proposed § 121.2 that section 401 is triggered by a point source discharge as well as when any Federal license or permit authorizes any activity that *may* result in any point source discharge. A few commenters, seeming to refer to the proposal preamble as opposed to regulatory text, expressed concern that the addition of the word ''potential'' would change the universe of projects requiring 401 certification; EPA disagrees. EPA's approach is consistent with the plain language of the statutory phrase ''may result in any 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. This approach is also consistent with the Agency's longstanding implementation of section 401. *See, e.g.,* 85 FR 42236 (July 13, 2020) (''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, *see supra*) (''It is important to note that [section] 401 is triggered by the potential for a discharge; an actual discharge is not required.'').

EPA requested comment on whether it should develop 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. Some commenters asserted that EPA should not develop such a process because 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. Conversely, 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 for various reasons, asserting that such a process would allow for consistent implementation.

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.

c. Discharge

Consistent with the Agency's longstanding position and the 2020 Rule, EPA is finalizing that a discharge from a point source (or ''point source discharge''), or potential for one, is required to trigger section 401. *See* 40 CFR 121.2. Additionally, the Agency is clarifying that, consistent with *S.D. Warren* v. *Maine Board of Environmental Protection,* 547 U.S. 370 (2006), discussed below, a point source discharge triggering section 401 does not require the addition of pollutants. 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'' [32] and instead incorporating those definitional concepts into the regulatory text at final rule § 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.

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) (emphasis added). 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). EPA and the Corps [33] 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.'' Many commenters supported the Agency's clear articulation of its longstanding interpretation that any discharge triggering a section 401 certification does not require an addition of pollutants. On the other hand, some commenters argued that eliminating the requirement that there be an addition of pollutants goes beyond the plain language of CWA section 401. As an initial matter, 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.''). EPA strongly disagrees that the plain language of section 401 requires that any discharge triggering section 401 include an addition of pollutants. As discussed above, the statutory definition of ''discharge'' is broad and is not limited to a discharge of pollutants. Additionally, as discussed below, this interpretation is consistent with the text

(''[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.''). In these instances, EPA understands that the Corps will follow the certification process as described in the final rule.

[32] 40 CFR 121.1(f) (2020).

[33] In the context of section 404, the Corps does the day-to-day work of conducting jurisdictional determinations though EPA has final administrative authority over the scope of CWA jurisdiction. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act (''Civiletti Memorandum''), 43 Op. Att'y Gen. 197 (1979).

of the statute as interpreted by the U.S. Supreme Court.

In *S.D. Warren,* a hydropower dam operator asserted that its dams did not result in discharges that would require section 401 certification because the dams only released water that ''adds nothing to the river that was not there above the dams.'' 547 U.S. 370, 374–75, 378 (2006). The Court stated that the term discharge is broader than ''discharge of a pollutant'' and ''discharge of pollutants.'' *Id.* Observing that the term ''discharge'' is not specifically defined in the statute, the Court applied the ordinary dictionary meaning, ''flowing or issuing out.'' *Id.* In applying this meaning to hydroelectric dams, the Court held that releasing water through a dam constituted a discharge for purposes of section 401 and, thus, the CWA provided states with the ability to address water quality impacts from these releases through the certification process. *Id.* at 385–86. The Court explicitly rejected the argument that an ''addition'' was necessary for a ''discharge,'' stating ''[w]e disagree that an addition is fundamental to any discharge.'' *Id.* at 379 n.5.

While the Supreme Court has held that the addition of a pollutant is not necessary for a discharge to prompt the need for a CWA section 401 certification, the Ninth Circuit has held that such certification-triggering discharges must be from point sources. *Or. Natural Desert Ass'n (ONDA)* v. *Dombeck,* 172 F.3d 1092, 1095–99 (9th Cir. 1998) (''*ONDA*'').[34] In *ONDA,* the Ninth Circuit addressed the issue of whether ''the term 'discharge' in [section 401] includes releases from nonpoint sources as well as releases from point sources.'' *Id.* at 1094–95. The court held that the ''term 'discharge' in [section 401] is limited to discharges from point sources.'' *Id.* at 1097. The court found its holding to be consistent with the Supreme Court's holding in *PUD No. 1.* 511 U.S. 700 (1994).[35] The court in *ONDA* found that although *PUD No. 1* held that certification conditions may address water quality impacts from the certified activity beyond its discharges, a triggering discharge is still required for section 401 to apply and ''*PUD No. 1* did not broaden the meaning of the term 'discharge' under § 1341.'' *Id.* at 1098–99.[36] EPA has consistently implemented the Ninth Circuit's interpretation of section 401 as requiring the potential for a point source discharge (with or without the addition of pollutants) to trigger section 401. *See* 85 FR 42238; 2010 Handbook at 5–6 (rescinded in 2019, *see supra*) (discussing requirement of section 401 certification when there is a point source discharge).[37]

EPA is finalizing the text at § 121.2, including the phrase ''from a point source,'' because it is consistent with the case law discussed above 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.[38] 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.[39]

Several commenters supported adding the phrase ''from a point source'' at proposed § 121.2. These commenters stated that the change is consistent with applicable case law and the text and structure of the CWA. In addition, these commenters appreciated that EPA clarified that section 401 was triggered by any discharge from a point source versus a discharge from a nonpoint source. Conversely, other commenters opposed adding the phrase ''from a point source'' at proposed § 121.2, arguing that EPA's reliance on the definition of point source at 33 U.S.C. 1362(14) implicitly requires the addition of pollutants to trigger section 401 certification in contravention of *SD Warren.* The commenters also asserted that it appears to conflict with EPA's concurrent proposal that the scope of review is restored to the ''activity as a whole.'' A few 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.

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) (emphasis added). 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 in this 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 this section of the preamble and will continue to do so in implementation of the final rule.

Many commenters who provided input on this topic urged EPA to revise the regulation to include discharges from both point and nonpoint sources.

[34] In *ONDA,* the United States took the position that the term ''discharge'' at 33 U.S.C. 1362(14) did not include nonpoint sources because there was nothing in the definition or the legislative history of the term that suggested it extended to nonpoint source pollution. Brief of the United States in *Or. Natural Desert Ass'n* v. *Dombeck,* Nos. 97–3506, 97–35112, 97–35115, at 18–21 (9th Cir. 1997). Additionally, the United States argued that section 401's legislative history did not suggest that ''discharge'' included nonpoint sources. *Id.* at 23–24.

[35] *See* section IV.E of this preamble for further discussion of on *PUD No 1.*

[36] Following the Supreme Court's decision in *S.D. Warren* that the addition of a pollutant was not needed to trigger section 401, the Ninth Circuit reaffirmed its earlier decision that section 401 was only triggered by a discharge from a point source. *Or. Natural Desert Ass'n* v. *USFS,* 550 F.3d 778 (9th Cir. 2008). The Ninth Circuit held that ''[n]either the ruling nor the reasoning in *S.D. Warren* is inconsistent with this court's treatment of nonpoint sources in [section] 401 of the Act, as explained in *[ONDA].*'' *Id.* at 785.

[37] The United States argued that section 401 requires the discharge to be from a point source in briefs filed before the Ninth Circuit. *See, e.g.,* Briefs of the United States in *ONDA* v. *Dombeck,* Nos. 97–3506, 97–35112, 97–35115 (9th Cir. 1997), *ONDA* v. *USFS,* No. 08–35205 (9th Cir. 2008).

[38] The CWA defines point source as ''any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.'' 33 U.S.C. 1362(14).

[39] *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).

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 discharges from nonpoint sources will ensure that states and Tribes are able to exercise their section 401 authority to protect water quality from federally licensed or permitted activities that would result in a nonpoint source discharge. One 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, while another commenter asserted that the Federal Government and the Supreme Court recognized that all discharges trigger section 401.

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 above, the *ONDA* court held that the ''term 'discharge' in [section 401] is limited to discharges from point sources.'' *Id.* at 1097. EPA also disagrees that the Federal Government has recognized that all discharges trigger section 401. As noted above, this was the Federal Government's position before the Ninth Circuit in *ONDA, see* footnote 37, 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.

d. ''Into the Navigable Waters''

Consistent with the 2020 Rule and proposal, 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] 40 CFR 121.2. 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). Requiring section 401 certification for any federally licensed or permitted activity that may result in any discharge into waters of the United States is consistent with the plain language of section 401(a)(1) and legislative history of the CWA. *See* H.R. Rep. No. 91–911, at 124 (1972) (''It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters.''). This reading is also consistent with the Agency's longstanding position and practice. *See, e.g.,* 2010 Handbook at 3, 5 (rescinded in 2019, *see supra*) (''Since [section] 401 certification only applies where there may be a discharge into waters of the [United States], how states or tribes designate their own waters does not determine whether [section] 401 certification is required.'').

Potential discharges into state or Tribal waters that are not ''waters of the United States'' do not trigger the requirement to obtain section 401 certification. However, as discussed in section IV.E in this preamble, 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.

3. Implementation

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. These may include, but are not limited to, CWA section 404 permits issued by the Corps for the discharge of dredge or fill material, Rivers and Harbors Act section 10 permits issued by the Corps for construction of wharfs, piers, etc., Rivers and Harbors Act section 9 permits issued by the Corps (for the construction of dams and dikes) and the Coast Guard (for construction of bridges and causeways), FERC licenses for the construction and operation of non-Federal hydropower projects, FERC certificates for the construction and operation of interstate natural gas pipeline projects, shoreline permits issued by the Tennessee Valley Authority for shoreline construction activities, EPA-issued CWA section 402 permits for the discharge of pollutants, nuclear power plant licenses issued by Nuclear Regulatory Commission, permits for wineries and distilleries issued by the Alcohol and Tobacco Tax and Trade Bureau, and mine plans of operation for mining activities on National Forest Service Lands approved by the Forest Service. *See also* Economic Analysis for the Final Rule at section 3.4. As discussed above, the operative question is whether the federally licensed or permitted activity may result in any discharge into waters of the United States.

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). Several commenters requested clarification that the section 401 certification process only applies to individual Federal licenses or permits. Another commenter said that it is not clear how the proposed rule would apply to nationwide permits and state programmatic permits, and further suggested that these permits be exempted from the rule. EPA disagrees with these comments. 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

[40] In *County of Maui, Hawaii* v. *Hawaii Wildlife Fund, et al.,* the Supreme Court addressed the question of whether the CWA requires a NPDES permit under section 402 of the Act when pollutants originate from a point source and travel through groundwater before reaching navigable waters. 140 S. Ct. 1462 (2020). The Court held that ''the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.*'' *Id.* at 1476 (emphasis in original). The Court articulated several factors that may prove relevant for purposes of determining whether a section 402 permit is required. *Id.* at 1476–77. Consistent with the rationale of the Court's decision in *County of Maui,* any point source discharge that is the functional equivalent of a direct discharge to navigable waters would also trigger section 401 if a Federal agency issues the applicable license or permit.

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) and (e)(2) (2020) (describing requirements for certification on the issuance of a general license or permit); 2010 Handbook at 29–30 (rescinded in 2019, *see supra*) (discussing the application of section 401 to general permits). Accordingly, EPA cannot adopt commenter suggestions to exempt general permits from the certification process.

Several commenters requested that EPA affirmatively state that the section 401 certification process does not apply to ''verifications'' of Federal general permit actions; instead, commenters suggested that the certification process should occur at the time the Federal general permit is issued. Federal agencies seek certification on general permits before the permits are issued. Accordingly, final rule § 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.[41] 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 § 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.

As discussed above, section 401 is triggered by a potential point source discharge from a federally licensed or permitted activity into waters of the United States. A few commenters recommended that the Agency explicitly acknowledge that point sources include discharges from CWA section 404 dredge and fill activities (*e.g.,* equipment, construction activities) in the regulatory text. Considering the broad applicability of section 401 to all Federal licenses or permits, the Agency does not find it necessary to focus the regulatory text on point sources from one type of federally licensed or permitted activity. Rather, the Agency intends to rely on the definition of point source at 33 U.S.C. 1362(14), which defines point source as ''any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.'' As emphasized above, a point source does not require the addition of pollutants, but rather is a conveyance from which pollutants are or may be discharged. For example, a point source includes the turbine or tailrace of a hydroelectric dam, and bulldozers or other construction equipment. In both instances, the equipment (*e.g.,* turbine, bulldozer) acts as a discernable, confined, or discrete conveyance that pollutants could be discharged from, but the addition or existence of such pollutants is not necessary for the equipment to be considered a point source.

B. Pre-Filing Meeting Request

1. What is the Agency finalizing?

EPA is finalizing the requirement that ''[t]he project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for the pre-filing meeting request.'' 40 CFR 121.4. This requirement will ensure that certifying authorities have an opportunity, should they desire it, to receive early notification and to discuss the project with the project proponent before the statutory timeframe for review begins. If a certifying authority does not 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. The Agency is not defining the ''applicable submission procedures'' or other procedural aspects of a pre-filing meeting request or subsequent meeting. Accordingly, the Agency is finalizing the removal of the 2020 Rule's recommendations for pre-filing meetings. *See* 40 CFR 121.4(c) and (d) (2020). The Agency is also finalizing the removal of regulatory text discussing the certifying authority's obligations in response to a pre-filing meeting request because the final rule does not compel any action by the certifying authority. *See* 40 CFR 121.4(b) (2020).

2. Summary of Final Rule Rationale and Public Comment

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 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.

The 2020 Rule proposal originally limited the pre-filing meeting request requirement to project proponents seeking certification in jurisdictions where EPA acts as the certifying authority. However, in response to stakeholder feedback on the proposed 2020 Rule, the Agency extended the pre-filing meeting request requirement to all project proponents. As a result, the final 2020 Rule required all project proponents to request a pre-filing meeting at least 30 days prior to submitting a water quality certification

[41] If a certifying authority denies certification on an EPA-issued NPDES general permit, dischargers could always apply for an individual NPDES permit. That individual permit would also require a 401 certification.

request. 85 FR 42241 (July 13, 2020). The 2020 Rule did not provide any mechanism for certifying authorities to waive or otherwise alter the 30-day period between a project proponent requesting a pre-filing meeting and subsequently submitting a certification request. Instead, there was a mandatory 30-day period that had to pass before the project proponent could submit a certification request.

During pre-proposal outreach on this rulemaking, some stakeholders found the pre-filing meeting request requirement to be essential to an efficient certification process, while others expressed concern about the mandatory 30-day ''waiting period'' between the pre-filing meeting request and the certification request, particularly in emergency permit situations. Stakeholders suggested that EPA should add flexibility to the process and give certifying authorities the ability to waive the pre-filing meeting request (*e.g.,* for smaller and less complex projects and emergencies). In response to pre-proposal input, the Agency proposed to retain a pre-filing meeting request provision with modifications to provide certifying authorities the flexibility to waive or shorten this requirement.

Many commenters recognized that pre-filing meetings have the potential to facilitate and help streamline the certification process through early coordination. Conversely, other commenters expressed concern that the pre-filing meeting request requirement creates delays and administrative burden. Some commenters said that, in lieu of an actual requirement, EPA should only encourage pre-filing meeting requests. Several commenters supported the flexibility included in the proposed rule giving certifying authorities the ability to waive or shorten the requirement.

After considering public comment, EPA is finalizing the pre-filing meeting request requirement as proposed, with minor, non-substantive revisions. 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. 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.

EPA requested comment on whether it should define the pre-filing meeting request process and ''applicable submission procedures'' for other certifying authorities in regulatory text. A few commenters stated that there should be procedures for the pre-filing meeting requests to increase clarity and consistency, including a list of minimum information to include in the meeting request. Other commenters opposed the idea of EPA setting procedures for pre-filing meetings to maintain flexibility. EPA finds that certifying authorities are best equipped to determine their procedures and needs for pre-filing meetings and requests. Like the approach taken under the 2020 Rule, EPA is not defining the process or manner to submit pre-filing meeting requests. Rather, EPA intends the term ''applicable submission procedures'' to mean the submission procedures deemed appropriate by the certifying authority. *See infra* for discussion on EPA's applicable submission procedures when EPA acts as the certifying authority. The Agency is also not defining a pre-filing meeting process (*e.g.,* identifying meeting subject matter or meeting participants) nor retaining the 2020 Rule's recommendations for pre-filing meetings. In the 2020 Rule, the Agency ''encouraged'' but did not require the project proponent and the certifying authority to take certain steps with respect to the pre-filing meeting process. *See* 40 CFR 121.4(c) and (d) (2020). The Agency is removing these recommendations from the regulatory text because (1) they were not expressed as, or intended to be, regulatory requirements, and (2) certifying authorities and project proponents are best suited to determine the optimal pre-filing meeting process on a project-by-project, project type, or general basis.

EPA also requested comment on whether it should specify that all certifying authorities should respond with written acknowledgement and determination of the need for a pre-filing meeting and timeline within five days of receipt of the pre-filing meeting request. Many commenters suggested that certifying authorities should be required to provide a written response within five days informing the project proponent if a pre-filing meeting is needed. 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 § 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 certification request.

EPA requested comment on whether project proponents should have the opportunity to participate in determining the need for a pre-filing meeting request. Some commenters argued that the project proponent should be involved in determining the need for a pre-filing meeting. 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.

3. Implementation

Pre-filing meeting requests ensure that certifying authorities can receive early notification of requests for certification and discuss the project and potential

information needs with the project proponent before the statutory ''reasonable period of time'' for certification review begins (*e.g.,* they allow the certifying authority to collect important details about a proposed project and its potential effects on water quality). The intent of the pre-filing meeting request provision is to support early engagement and coordination between certifying authorities and project proponents as needed. However, EPA recognizes that there are various project types and complexities. 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).

Additionally, the final rule allows certifying authorities to determine appropriate submission procedures for pre-filing meeting requests. When EPA acts as the certifying authority, EPA would generally find the following submission procedures to be appropriate. First, EPA recommends that project proponents submit a pre-filing meeting request to the Agency in writing.[42] Second, the Agency 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.

These are good practices for any pre-filing meeting requests to any certifying authority.

The final rule allows certifying authorities flexibility to determine the procedures and content of pre-filing meetings. EPA, however, 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. Generally, EPA recommends that certifying authorities provide clear expectations for pre-filing meetings to ensure they are used efficiently and effectively.

C. Request for Certification

1. What is the Agency finalizing?

At § 121.5(a), EPA is requiring that all requests for certification be in writing, signed, and dated and include defined minimum contents. Unlike the proposed rule, which required a copy of the draft Federal license or permit for all requests for certification, the Agency is bifurcating the minimum content requirements for an individual Federal license or permit and the issuance of a general Federal license or permit. Under the final rule, 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. For all requests for certification, the final rule requires a certifying authority to send written confirmation to the project proponent and Federal agency of the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures.

Additionally, the final rule provides that where a project proponent is seeking certification from EPA when the Agency is the certifying authority, or from a state or authorized Tribe that does not specify additional contents of a request for certification (*e.g.,* through regulation, forms, etc.), the project proponent must also submit seven additional components, as applicable, including: (1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity; (2) The specific location of any discharge(s) that may result from the proposed activity; (3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways; (4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; (5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence; (6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and (7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing

[42] Under final rule § 121.5(b)(7), a project proponent must submit documentation that a pre-filing meeting was requested, unless the pre-filing meeting request requirement was waived. *See* section IV.C in this preamble for further discussion on the contents of a request for certification when EPA is acting as the certifying authority.

meeting request requirement was waived. 40 CFR 121.5(b).

The Agency is also finalizing the ability for state or Tribal 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, in lieu of relying on EPA's default list of additional contents. Therefore, under this final rule, where a project proponent is requesting certification from a certifying authority other than EPA and that certifying authority has identified additional required contents of a request for certification beyond the minimum contents outlined in 40 CFR 121.5(a), then the request for certification must include those additional required contents.

The Agency restructured § 121.5 to clarify which components are required for all requests for certification versus which components depend on the certifying authority. Section 121.5(a) defines the minimal contents for all requests for certification, no matter the certifying authority (*i.e.,* states, Tribes, or EPA). Section 121.5(b) defines the additional contents in a request for certification when EPA is 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. Lastly, § 121.5(d) clarifies that if the certifying authority is a state or authorized Tribe that has not identified additional contents for a request for certification, then the project proponent must include those additional contents defined at § 121.5(b) in a request for certification. This structural change is intended to provide greater clarity for stakeholders in implementation of this final rule.

2. Summary of Final Rule Rationale and Public Comment

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.'') (emphasis added). The statute does not define either ''request for certification'' or ''receipt.''

In the 2020 Rule, the Agency defined ''certification request'' for all certifying authorities and asserted that ambiguities in the statutory language had led to inefficiencies in the certification process. 40 CFR 121.5 (2020); *see* 85 FR 42243 (July 13, 2020). In particular, the 2020 Rule preamble provided that states and authorized Tribes could not rely on state or tribally defined ''complete applications'' to start the certification process, but rather must rely on a certification request as defined in EPA's regulation to initiate the process. The Agency relied on *New York State Department of Environmental Conservation* v. *FERC,* in which the Court of Appeals for the Second Circuit rejected New York's argument that the section 401 process ''begins only once [the state agency] deems an application 'complete' '' and, instead, agreed with FERC that the section 401 review process begins when the state receives a request for certification. 884 F.3d 450, 455 (2d Cir. 2018) (''*NYSDEC*''). The court found that ''[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review'' and reasoned that ''[i]f the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide they have all the information they need.'' *Id.* at 455–56.

Some commenters asserted that the 2020 Rule's approach provided clarity about the requirements for project proponents to request certification and when the reasonable period of time begins. These commenters stated that the 2020 Rule created a predictable and transparent certification process by defining a clear list of contents of certification requests. Conversely, some commenters highlighted challenges with implementing the 2020 Rule's approach for certification requests. Commenters stated that 2020 Rule requirements were disconnected from longstanding cooperative processes established among stakeholders and created confusion due to differences from certifying authorities' requirements.

EPA agrees 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 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.

EPA is also finalizing conforming changes to the part 124 regulations governing the contents of a request for certification of EPA-issued NPDES permits. EPA proposed to delete § 124.53(b) because the provision allowed a request for certification to precede development of a draft NPDES permit, which was inconsistent with the proposed rule. EPA also proposed to delete § 124.53(c) because the list of contents at § 124.53(c) differed from the proposed list of contents. *See* 87 FR 35336–57 (June 9, 2022). In light of changes in the final rule, EPA is not deleting in full § 124.53(b) or (c), and instead is making targeted revisions to be consistent with the final rule. First, EPA is revising 40 CFR 124.53(b), which provided that when EPA received a permit application without certification, EPA shall forward the application to the certifying authority with a request that certification be granted or denied. EPA is revising § 124.53(b) to clarify that EPA may forward permit applications for individual NPDES permits to a certifying authority and request certification consistent with final rule §§ 121.4 and 121.5 (*e.g.,* EPA will request a pre-filing meeting and include contents for a request for certification consistent with this final rule). It is worth noting that although § 124.53(b) allows EPA to request certification on a permit application for individual permits (consistent with this final rule), this approach is not common practice. Under the final rule and § 124.53(c), EPA may continue to request certification after the draft individual or general NPDES permit is prepared (and include a copy of draft permit in the request for certification). Nevertheless, EPA is retaining § 124.53(b) with the revisions discussed above to provide stakeholders and EPA with flexibility to request certification prior to developing a draft individual NPDES permit.

Second, EPA is also revising 40 CFR 124.53(c), which identified the required contents of a request for certification of an EPA-issued NPDES permit if a certification had not been received by the time the draft permit is prepared.

EPA is revising § 124.53(c) to specify that if certification has not been requested by the time a draft NPDES permit is prepared, EPA will send a request for certification consistent with final rule § 121.5, and will include a copy of the draft permit with that request. EPA is finalizing deletions of the required contents of a request for certification in § 124.53(c)(2) and (3) because the list of contents at § 124.53(c)(2) and (3) differ from the list of contents in § 121.5. Also, as explained in section IV.D in this preamble, the statement required at § 124.53(c)(3) regarding the reasonable period of time was not consistent with the approach to the reasonable period of time at § 121.6.

The following sections discuss the minimum contents for all requests for certification, state and Tribal authority to define additional contents, the additional contents defined by EPA and their application in instances where states and Tribes decline to define such additional contents, and when a certifying authority is in ''receipt'' of a request for certification.

a. Minimum Contents of a Request for Certification

i. Application or Draft Federal License or Permit

In a change from the proposed rule, EPA is finalizing that all requests for certification on an individual Federal license or permit shall include ''[a] copy of the Federal license or permit application submitted to the Federal agency,'' while all requests for certification on the issuance of a general Federal license or permit shall include ''[a] copy of the draft Federal license or permit.'' 40 CFR 121.5(a). EPA proposed in § 121.5(a) that all requests for certification ''shall include a copy of the draft license or permit'' to ensure that states and Tribes have the critical information to make a timely and informed certification decision. 87 FR 35332. Many commenters opposed this approach 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.

In response to 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). 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.

ii. Water Quality-Related Materials

In the final rule, EPA is requiring project proponents to include ''any readily available water quality-related materials that informed the development of the application'' for requests for certification for individual Federal licenses or permits. *See* 40 CFR 121.5(a)(1)(ii). In the case that the request for certification is for the issuance of a general Federal license or permit, it must include ''any readily available water quality-related materials that informed the development of the draft Federal license or permit.'' *See* 40 CFR 121.5(a)(2)(ii). The term ''readily available water quality-related materials that informed the development of'' either the application or the draft license or permit refers to existing water quality-related materials that are in the project proponent's possession or easily obtainable [43] and informed the project proponent's development of the application or draft license or permit. These materials for either request may include, but are not limited to, water quality baseline conditions from the project site, sediment and erosion control plans, restoration plans, alternatives analyses, mitigation plans, modeling, and/or other materials that have already been developed for the Federal license or permit application or draft license or permit and would help inform the certifying authority of the water quality-related impacts from the activity.[44]

The Agency had proposed that, at a minimum, all requests for certification include ''any existing and readily available data or information related to potential water quality impacts from the proposed project.'' 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 Environmental Assessment (EA) or other water quality monitoring data, would reduce the need for duplicative studies and analyses. 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,'' and a few commenters noted that this information is important for decision-making and allows certifying authorities to better evaluate potential impacts of a project. Conversely, many commenters did not support the inclusion of ''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. Some of these commenters added that the requirement would create confusion and delays in the certification process.

In response to commenter concerns, EPA is adjusting the regulatory text in the final rule to read ''any readily available water quality-related materials that informed the development of'' the application or draft general Federal license or permit. *See* 40 CFR 121.5(a)(1)(ii), (a)(2)(ii). EPA 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 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

[43] For example, this could 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.

[44] These examples are not intended to be exhaustive, nor does EPA expect that all of the example materials listed will be readily available and/or materials that informed the develop of the application or draft Federal license or permit in all cases. Rather, EPA is providing these examples because these are materials that EPA has previously asked for and found informative when conducting its reviews of requests for certification.

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.

A few commenters asserted that while they supported the minimum requirements of the proposed rule, they believed that 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. EPA appreciates these concerns, however, as discussed above, the Agency finds it reasonable and appropriate for the rule to balance certifying authority information needs with legitimate implementation concerns by limiting the default requirements to existing, readily available information. However, 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 may also 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.

b. Additional Contents in a Request for Certification

Consistent with the proposed rule, EPA is finalizing that where a ''certifying authority has identified contents of a request for certification'' that are relevant to the water quality-related impacts from the activity, in addition to the minimum requirements discussed above, ''the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.'' 40 CFR 121.5(c). The Agency is also finalizing a set of additional contents that a project proponent must include in a request for certification when EPA acts as the certifying authority. 40 CFR 121.5(b). For further clarity, the additional contents listed at § 121.5(b) are required in each request for certification to a state or authorized Tribe that has not established its own list of requirements. If a state or authorized Tribe has established its own list for a request for certification, then EPA's list of additional contents would not apply. The Agency has restructured § 121.5 to clearly distinguish between requirements that apply to all requests for certification, *see* § 121.5(a), versus requirements that only apply to requests for certification to EPA or states or Tribes that fail to define additional contents, *see* § 121.5(b) and (d), or requirements that apply to requests for certification to states or Tribes that define additional contents, *see* § 121.5(c).

EPA acknowledges that this final rule's approach contrasts with the approach taken in the 2020 Rule, which defined the contents of a certification request for all certifying authorities. However, this final rule is a better—and more flexible—approach to defining the term ''request'' and consistent with *NYSDEC.* That decision holds that the reasonable period of time begins after receipt of a request for certification and not when a state deems it ''complete;'' it does not preclude EPA or other certifying authorities from defining—in advance—those contents a certification request must contain. As discussed below, this approach is consistent with stakeholder input and the cooperative federalism principles central to section 401 and the CWA.

i. State and Tribal Certifying Authorities

Under § 121.5(c), ''[w]here a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of [§ 121.5], the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.'' This approach is consistent with the proposal and 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.

Many commenters supported certifying authorities having the ability to define the contents of a request for certification, saying that it ensures states and Tribes have the information they need to protect their water quality. 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 comply with their water quality requirements. Several commenters argued that this approach is an improvement over the 2020 Rule's ''one-size fits all'' approach to request for certification. EPA agrees that certifying authorities are best suited for determining their needs in making their certification decisions.

As an initial matter, 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's 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. 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). 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.

Some commenters opposed the proposed rule and argued that the Agency cannot delegate the ability to define additional requirements for a certification request to certifying authorities under *NYSDEC.* The Agency does not agree. 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 define the term ''request for certification,'' EPA and other certifying authorities may 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. No court has considered this issue 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.

Most commenters that opposed this approach argued that, as an implementation matter, EPA is inviting certifying authorities to engage in the types of practices that were rejected by the Second Circuit in *NYSDEC.* Specifically, commenters asserted that the proposed approach would allow certifying authorities to issue regulations that expand the required contents of a request for certification without any oversight or limits and for reasons other than potential water quality impacts. Other commenters asserted that the proposed approach did not enforce any transparency requirements against certifying authorities, and, therefore, 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. Still other commenters argued that the ability of states and authorized Tribes to define the contents for a request for certification would result in a patchwork of different requirements, placing burdens on project proponents, especially for projects that span multiple states. The Agency acknowledges these concerns and has incorporated reasonable changes into the final rule that establish 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, as identified in § 121.3, the scope of the certifying authority's review is explicitly limited in the final rule to ''the water quality-related impacts.'' To clarify that such limitations extend to the contents of a request for certification, EPA added text at § 121.5(c) that such additional contents are ''relevant to the water quality-related impacts from the activity.'' Hence, 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. The regulatory text provides flexibility within the scope for certifying authorities interested in developing their own additional contents of requests for certification.

Next, § 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 before 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.

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 rely on to continually deem requests incomplete. When developing their lists of additional contents in a request for certification, EPA recommends that certifying states and authorized Tribes look to § 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.

The Agency originally proposed that the contents of a request for certification be established by a state or authorized Tribe in regulation. Several commenters disagreed that certifying authorities should be limited to defining the contents of a request for certification in regulation. A few commenters asserted that the contents do 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 would be an unnecessary burden, time consuming (*e.g.,* may require legislative approval before going into effect), and interfere with a state's ability to describe the information in certification request. Conversely, 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 time begins and ends. One 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.

After considering public comments, the Agency is not requiring a state or authorized Tribe to define additional contents of a request for certification in regulation. The Agency agrees that the required contents of a request do not need to be 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 authorized Tribes use different approaches to define the required contents of a request for certification, including statute, 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 legislative approval before going into effect), and may interfere with certifying authorities' ability to describe the information they expect in a request for certification.

The final rule approach also addresses project proponent concerns about certifying authorities that, in the past, may have unexpectedly required additional information from the project proponent to satisfy the request for certification requirement before starting the clock on the ''reasonable period of time.'' Under the approach EPA is finalizing, the reasonable period of time starts on the date that a ''request for certification'' was received in accordance with the certifying authority's applicable submission procedures. As discussed above, the request for certification is defined to mean a request that contains the contents required by EPA's final regulations and any additional state or Tribal requirements *identified prior to when the request for certification was made.* 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.

In 1971, the Agency opted to not define what information, if any, was sufficient to start the review process for all certifying authorities and instead opted to define the information only for EPA when it acts as the certifying authority. 40 CFR 121.22 (2019). As a result, over the last approximately 50 years, many states and authorized Tribes established their own requirements for what constitutes a request for certification, also called a ''certification request,'' typically defining it as a so-called ''complete application.'' *See, e.g.,* Cal. Code Regs. Tit. 23, sec. 3835; La. Admin. Code tit. 33, sec. IX–1507; Ohio Admin. Code 3745–32–03. Prior Agency guidance acknowledged this practice. *See* 1989 Guidance, at 31 (April 1989) (''Thus, after taking the federal agencies' regulations into account, the State's 401 certification regulations should link the timing for review to what is considered receipt of a complete application.''); *see also* 2010 Handbook at 15–16 (rescinded in 2019, *see supra*) (''States and tribes often establish their own specific requirements for a complete application for water quality certification. . . . The advantage of a clear description of components of a complete [section] 401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun.''). 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.''

The use of a ''completeness'' standard for applications or similar documents is not a novel concept in CWA implementing regulations.[45] 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.''

While acknowledging the ruling in *NYSDEC,* the Agency also notes 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.

States' and authorized Tribes' 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. The limitations referenced above do 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. 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.

ii. Requirements When EPA Is the Certifying Authority

The Agency is finalizing a list of additional contents required for requests for certification submitted to EPA when EPA acts as a certifying authority.[46] This list also applies to requests for certification submitted to states and authorized Tribes that have not identified additional contents of a request for certification. As discussed below, these components contain some similarities to the 1971 Rule and 2020

[45] The use of ''complete'' applications is also applied in other Federal environmental realms (*e.g.,* the Safe Drinking Water Act, the Clean Air Act). *See, e.g.,* 40 CFR 144.31, 40 CFR 51.103, appendix V to part 51.

[46] 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). 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.

Rule, with revisions to provide further clarification and efficiency for project proponents, EPA when it acts as a certifying authority, and when a state or authorized Tribe has not established its own definition of ''request for certification.''

EPA proposed a list of contents that shall be included in requests for certification to the Regional Administrator shall include the following, if not already included in the draft license or permit:

1. The name and address of the project proponent;

2. The project proponent's contact information;

3. Identification of the applicable Federal license or permit, including Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency;

4. Where available, 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; and

5. Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission requirements, unless a pre-filing meeting request has been waived. 40 CFR 121.5(c)

Proposed § 121.5(b) also provided that ''[w]here a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified in regulation additional contents of a request for certification, the project proponent shall submit a request for certification as defined in [§ 121.5(c)].''

In this final rule at § 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:

1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

2. The specific location of any discharge(s) that may result from the proposed activity;

3. A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;

6. A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

7. Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

A few commenters agreed that EPA's additional contents for a request for certification should be the default contents for a request to a certifying authority that does not define additional contents. However, some commenters expressed concern that EPA's default list of additional certification request components was inadequate and did not capture all the items a state or authorized Tribe may need for its analysis. One commenter asserted that EPA's default additional components create a presumption that EPA's list is sufficient for a request for certification, and recommended that EPA make clear that states and authorized Tribes have the authority to specify the contents of a request for certification where they are the certifying authority.

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 § 121.5(b). *See* § 121.5(d). However, this final rule does not create the presumption that the contents identified at § 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 above, the additional contents in § 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 § 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.

EPA requested comment on an alternative list of additional contents to accompany a request for certification on a Federal license or permit application. Under this alternative approach, the project proponent would be required to submit ''proposed activity information'' with six components, including the following:

1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

2. The specific location of any discharge(s) that may result from the proposed activity;

3. A map and/or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, highways;

4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) on which any discharge(s) will take place; and

6. Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements. 87 FR 35336.

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. On the other hand, some commenters provided suggestions for the default additional contents. A few commenters recommended supplementing the default additional request components with the six additional components listed in the proposal preamble as an alternative, and as suggested by one of these commenters, revising as appropriate to address any duplication.

EPA does not agree with commenters asserting that additional components are unreasonable. While some commenters said doing so was unnecessary, the relevant inquiry is whether EPA's

inclusion of additional components is ''reasonable,'' not whether it is ''necessary.'' EPA anticipates that the list of additional required contents at § 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 § 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 § 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.

EPA agrees with commenters who suggested that the Agency combine the proposed and alternative lists of additional contents. As discussed below, the Agency has revised the list of additional contents to reduce duplication among the minimal contents of a request for certification. Additionally, the Agency recognizes that some of the components listed at § 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 § 121.5(b) to clarify that only the applicable additional components need to be included in a request for certification to EPA.

First, based on commenter recommendations, EPA is not finalizing the components of the proposed list that are expected to be captured by the requirements in § 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.

Second, 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, Tribal, 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 project applicants in the future. 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.

Third, like the 2020 Rule, the Agency is finalizing a requirement that the project proponent submit documentation that it requested a pre-filing meeting, unless the pre-filing meeting request has been waived. The documentation should be in writing, such as a copy of the email requesting the pre-filing meeting. As discussed in section IV.B in this preamble, a certifying authority may waive the requirement for a pre-filing meeting request. In that event, the project proponent would not need to produce documentation of a pre-filing meeting request.

Fourth, the Agency is adding five components that were offered as alternatives to the final rule text to provide EPA with information about the proposed activity, including a description of the proposed activity, the location of any discharge from the proposed activity, a map or diagram of the proposed activity site, a description of current activity site conditions, and the date(s) on which the proposed activity will begin and end. These components are similar to those in the 2020 Rule, *see* § 121.5(b)(4) (2020), and the 1971 Rule, *see* § 122.22(b), (d) (2019). These components are necessary to initiate EPA's analysis of a request for certification on a Federal license or permit application.

The Agency is not including the sixth alternative component offered at proposal, which would have required a project proponent to submit any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements. EPA finds that such a component would be too vague and would not provide project proponents with a clear, predictable set of a requirements for a request for certification. However, if EPA later determines additional information would be helpful to inform its decision-making on a request for certification, this final rule does not preclude EPA from asking for additional information after a certification request is submitted. But EPA cannot require additional components, aside from contents listed at § 121.5(a) and (b), in a request for certification.

The Agency is also finalizing the removal of the contents of the 2020 Rule at § 121.5(b)(5), (8), and (9); the 1971 Rule also contained similar contents to § 121.5(b)(5) of the 2020 Rule. *See* 40 CFR 121.22(c), (e) (2019). Section 121.5(b)(5) of the 2020 Rule, which required the project proponent to ''[i]nclude 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,'' is unnecessary since the final rule requires a project proponent to provide the Federal license or permit application or draft Federal license or permit, as appropriate, and any readily available water quality-related materials that informed the development of the application or draft Federal license or permit in its request. The Agency also finds it unnecessary to retain the requirements at § 121.5(b)(8) and (9) of the 2020 Rule. In 2020, EPA required the project proponent to include an attestation statement that the project proponent ''certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief'' at § 121.5(b)(8) ''to create additional accountability on the part of the project proponent to ensure that information submitted in a certification request accurately reflects the proposed project.'' 85 FR 42245. EPA is unaware of any issues or concerns that project proponents will not provide accurate information in the request for certification without such attestation. Furthermore, the final contents for a request for certification include either the license or permit application or a copy of the draft Federal license or permit, which presumably incorporates accurate information about the proposed project. Additionally, § 121.5(b)(9) of the 2020 Rule, which required the project proponent to include a statement that it ''hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time,'' is unnecessary because a project proponent is required to submit a request for certification as defined in this final rule. Submitting a request for certification as defined in this final rule should be a clear

indication to the certifying authority that the project proponent is seeking certification.

A few commenters provided detailed, lengthy lists of additional contents, beside the seven that EPA is finalizing, that could be required 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.

EPA appreciates commenter suggestions and while EPA is not including additional contents in § 121.5(b), aside from those discussed above, the Agency emphasizes that certifying authorities are free to define additional contents for their requests for certification. As discussed in the prior subsection, 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.

c. Defining ''Receipt'' of a Request for Certification

The Agency is clarifying at § 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 § 121.5, in accordance with the certifying authority's applicable submission procedures.'' In proposed § 121.6(a), EPA stated that ''the reasonable period of time shall begin upon receipt of a request for certification.'' The Agency proposed to define ''receipt'' at § 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 § 121.6(a).

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 1971 Rule did not address or define the term ''receipt,'' however, the Agency opted to define the term in the 2020 Rule. 40 CFR 121.1(m) (2020). The 2020 Rule defined the term ''receipt'' as ''the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.'' *Id.* In implementation of the 2020 Rule, there was some confusion regarding whether it was the Federal agency's or certifying authority's responsibility to determine that a certification request, as defined by the 2020 Rule, was received.

Consistent with the statutory text, the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined at § 121.5, and is submitted in accordance with the certifying authority's applicable submission procedures. 40 CFR 121.6(a). As discussed in more detail below, the certifying authority must send written notification to the project proponent and Federal agency of the date the request for certification was received.

Some commenters asserted that, due to the wide variety of project types, the regulations should not dictate when the reasonable period of time begins. These commenters added that states and authorized Tribes should determine when the reasonable period of time starts, and when they have sufficient information to conduct a proper review, provided it does not exceed the statutory one-year limit. As described above, EPA provides in the final rule at § 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 § 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.

Some commenters stated that the proposed definition of ''receipt'' would limit predictability and could allow certifying authorities to delay the certification process by saying they have not received the request for certification in full and in accordance with its submission procedures. 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. While not retaining a definition of ''receipt'' in the final rule, EPA maintains that 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 § 121.5 of the final rule, in accordance with the certifying authority's applicable submission procedures. *See* 40 CFR 121.6(a). 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. Similarly, the Agency disagrees that the concept of ''completeness'' is inherently subjective. As discussed above, 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. *See* discussion *supra.*

The project proponent must submit the request for certification in accordance with the certifying authority's applicable submission procedures. 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.

As mentioned above, 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 § 121.5(d). However, the Agency has moved this provision to § 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. 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 § 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.

3. Implementation

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. Because the final rule allows certifying authorities to require additional contents in a request for certification as long as they are identified prior to when the request for certification is made, certifying authorities should make their additional contents for request for certification and applicable submission procedures readily available and transparent to the regulated public. EPA 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.

Another way a certifying authority may further support the efficient review of requests for certification would be for the certifying authority to make available draft certification conditions that project proponents can consider while developing their project design plans and request for certification materials. Project proponents can save time and money by preparing for and mitigating the impacts from an activity that will not comply with applicable water quality requirements. EPA acknowledges that not all certifying authorities will be able to provide conditions that anticipate potential water quality impacts from various types of activities that will not comply with their applicable water quality requirements; however, some certifying authorities have made example certification conditions for certain project types or waterbodies available prior to receipt of requests for certification for those project types or geographic areas.

The Agency wishes to clarify several implementation questions or issues related to the request for certification that have previously arisen or were revealed through public comment on this rulemaking. 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 § 121.5(a)(1). For example, if a state or authorized 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 authorized Tribe. In those cases, the ''application'' part of the request for certification may take the form of a pre-construction notification (PCN), along with any readily available water quality-related materials that informed the development of the application (*e.g.,* the general permit). Second, regarding 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 to 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 for 50 years under the 1971 Rule.

A few commenters also raised various implementation-related questions with the proposed inclusion of the draft Federal license or permit in all requests for certification. 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 (*e.g.,* license or permit is ready for issuance, final draft license or permit). Commenters also questioned what would occur if the project changed after receiving a draft Federal license or permit, as well as whether the project proponent was best suited to provide the certifying authority with a copy of the draft Federal license or permit.

As discussed above, in this final rule, a draft Federal license or permit is only required for requests for certification on the issuance of general Federal licenses or permits. Currently, the Agency is only aware of general permits for two Federal agencies: the Corps (section 404 program) and EPA (section 402 program). 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 the process of requesting certification on these Federal licenses or permits and Federal agencies will be acting as the ''project proponent'' in

these instances. 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 nationwide permits (NWPs) when they are renewed every five years. First, the Corps proposes the draft NWPs and takes comment on the proposals, 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 proposals 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 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, 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.[47] 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. *See* section IV.F in this preamble for further discussion on adaptive management conditions.

Neither the CWA nor this final rule require project proponents to submit the request for certification for an individual license or permit at the time a Federal license or permit application is submitted. Accordingly, project proponents would not be precluded from providing a copy of the draft Federal license or permit, in addition to the Federal license or permit application, when requesting certification for individual Federal licenses or permits. For example, EPA can continue its longstanding practice of submitting a copy of the draft individual CWA section 402 NPDES permit to the certifying authority for its review. However, project proponents would not be required to wait to request certification for an individual Federal license or permit until a copy of the draft Federal license or permit is obtained, unless the certifying authority has defined in its additional contents for a request for certification that the request must include a copy of the draft Federal license or permit.

A few commenters recommended allowing certifying authorities to issue certification decisions in the absence of a request for certification. 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 this preamble for further discussion on when certification is required.[48] 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 this preamble regarding the Agency's position on the legality of the practice of withdrawing and resubmitting requests for certification.

As mentioned above, 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. 40 CFR 121.6(a). If a project proponent submits a request for certification that does not meet the requirements of § 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 § 121.5 of this final rule. However, as discussed previously, 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.

D. Reasonable Period of Time

1. What is the Agency finalizing?

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). At § 121.6(a), EPA clarifies that the reasonable period of time begins on the date that a request for certification, as discussed in the previous section, is received by the certifying authority in accordance with its applicable submission procedures. Section 121.6(b) provides Federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided it does not exceed one year from the date that the request for certification was received. The final rule clarifies that the joint determination of the reasonable period of time may happen on a case-by-case basis or categorically. *See* 40 CFR 121.6(b).

Under this final rule, if the Federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time will be six months from the date that the request for certification was received. *See* 40 CFR 121.6(c). This default approach obviates the need for a dispute resolution process in the event the certifying authority and Federal agency are not able to agree on the reasonable period of time. The Agency proposed a 60-day default reasonable period of time. However, for several reasons discussed below, the Agency is not finalizing the proposed 60-day default reasonable period of time.

The pre-filing meeting could be a venue for the Federal agency and certifying authority to discuss the length of the reasonable period of time, particularly because the project proponent participates in that meeting and will, therefore, be informed of any reasonable period of time-related discussions and decisions. EPA also recognizes that the Federal agency and the certifying authority may benefit from discussing the length of the reasonable period of time before the pre-filing meeting to then use the pre-filing meeting to inform the project proponent of the agreed-upon length. 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

[47] 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.

[48] 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.

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. Federal agencies and certifying authorities might also elect to establish joint reasonable period of time procedures and/or agreements through a memorandum of agreement (MOA) or similar. Such MOAs could apply to all federally licensed or permitted activities or only to specific types of activities (*e.g.,* activities covered by general permits). The requests for certification that fall under these MOAs would not require individual written agreements confirming the reasonable period of time between the Federal agency and certifying authority for each Federal license or permit. Alternatively, Federal agencies and certifying authorities might prefer to agree and establish the reasonable period of time in writing on a case-by-case basis.

EPA is finalizing as proposed that after the reasonable period of time is set, the Federal agency and certifying authority may agree to extend the reasonable period of time, provided that it does not exceed one year from the date that the request for certification was received. *See* 40 CFR 121.6(e). Section 121.6(d) also provides automatic extensions for certain situations, as EPA recognizes there are circumstances under which the Federal agency must extend the reasonable period of time without the certifying authority needing to negotiate an agreement. Such circumstances are where a certification decision cannot be rendered within the negotiated or default reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters) and when state or Tribal public notice procedures necessitate a longer reasonable period of time.

If a longer period of time to review the request for certification is necessary due to either of these circumstances, upon written notification to the Federal agency by the certifying authority prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the amount of time necessitated by public notice procedures or the force majeure event, as long as it does not cause the reasonable period of time to exceed one year from the date that the request for certification was received. In its notification, the certifying authority must provide the Federal agency with a written justification for the automatic extension. The justification must describe the circumstances supporting the extension (*i.e.,* accommodating the certifying authority's public notice procedures, government closures, or natural disasters) and does not require Federal agency approval before taking effect. The extended reasonable period of time would take effect upon notification by the certifying authority to the Federal agency.

Aside from these automatic extensions, the Agency expects that certifying authorities and Federal agencies will collaboratively agree to discretionary extensions to the reasonable period of time where appropriate. For example, the certifying authority and Federal agency could develop, in a MOA or similar instrument, a process to identify scenarios where changes to the reasonable period of time would be appropriate. Such scenarios may include situations where relevant new information becomes available during the reasonable period of time. EPA notes that the final rule promotes early collaboration and pre-filing meetings to allow the Federal agency, certifying authority, and the project proponent to discuss project complexity, seasonal limitations, and other factors that may influence the amount of time needed to complete the certifying authority's analysis. These opportunities may reduce the need to extend the jointly established or default reasonable period of time.

Consistent with the proposal, EPA is not taking a position on the legality of withdrawing and resubmitting a request for certification. While there may be situations where withdrawing and resubmitting a request for certification is appropriate, drawing a bright regulatory line on this issue is challenging, and the law in this area is dynamic. *See, e.g., Hoopa Valley Tribe* v. *FERC,* 913 F.3d 1099, 1105 (D.C. Cir. 2019) (holding that repeated, coordinated withdrawal and resubmittal of a certification request resulted in a waiver); *N.C. Dep't of Envtl. Quality (NCDEQ)* v. *FERC,* 3 F.4th 655, 676 (4th Cir. 2021) (finding that the record did not support FERC's determination that the state and project proponent withdrew and resubmitted the certification request in a coordinated fashion resulting in waiver). For these reasons, the final rule does not take a position on this issue, instead allowing the different state and Tribal certifying authorities, Federal agencies, and/or possibly project proponents to make case-specific decisions addressing the practice.

The Agency is also finalizing deletions in the part 124 provisions regarding the reasonable period of time for certification on EPA-issued NPDES permits, formerly located at 40 CFR 124.53(c)(3), in favor of the reasonable period of time provisions in the final rule at § 121.6. The approach to the reasonable period of time taken in § 124.53(c) was not fully consistent with the approach at § 121.6. For instance, the standard reasonable period of time was 60 days instead of the default six months in § 121.6(c). Further, unlike § 121.6(b), § 124.53(c)(3) did not include a provision allowing certifying authority collaboration in setting the reasonable period of time. And unlike § 121.6(d), § 124.53(c)(3) did not allow for automatic extensions to accommodate a certifying authority's public notice procedures or force majeure events (instead allowing extensions beyond the default 60 days only if EPA finds ''unusual circumstances'' require a longer time). Consequently, EPA has deleted § 124.53(c)(3). In addition, EPA has made conforming changes in § 124.53(c) for consistency with the request for certification requirements in § 121.5.

2. Summary of Final Rule Rationale and Public Comment

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.'' The 1971 Rule explained that a certifying authority would waive its opportunity to certify if it did not act within ''a reasonable period of time'' and provided that: (1) the Federal licensing or permitting agency determines the length of the reasonable period of time, and (2) the reasonable period of time ''shall generally be considered to be six months, but in any event shall not exceed one year.'' *See* 40 CFR 121.16(b) (2019).

The 2020 Rule provided that the Federal agency alone sets the reasonable

period of time and defined a process for how it should be determined. *See* 40 CFR 121.6 (2020). This process specified when a Federal agency must communicate the reasonable period of time to the certifying authority and identified factors that the Federal agency must consider when setting the reasonable period of time. *See id.;* 85 FR 42259–60 (July 13, 2020). The 2020 Rule did not maintain the 1971 Rule's six-month default and reiterated that the reasonable period of time could not exceed one year from receipt of the certification request. 40 CFR 121.6 (2020). The 2020 Rule also defined the term ''reasonable period of time'' as the length of time during which the certifying authority may act on a request for certification. 40 CFR 121.1(l) (2020).

Some Federal agencies promulgated regulations describing a reasonable period of time for section 401 certification in relation to those agencies' licenses or permits prior to the 2020 Rule. For example, FERC has explicitly defined the reasonable period of time to be one year. *See* 18 CFR 4.34(b)(5)(iii), 5.23(b)(2), 157.22(b).[49] The Corps has routinely implemented a 60-day reasonable period of time for section 401 decisions commencing when the certifying authority receives a section 401 certification request. *See* 33 CFR 325.2(b)(1)(ii). EPA established a 60-day reasonable period of time for NPDES permits. *See* 40 CFR 124.53(c)(3).

In pre-proposal input on the rulemaking, project proponents generally supported the reasonable period of time provisions in the 2020 Rule, whereas most states, Tribes, and non-governmental organizations expressed concern with various aspects of it. Some certifying authorities also pointed out that short reasonable periods of time (*e.g.,* 60 days) do not allow the state or authorized Tribe sufficient time to fulfill certain state or Tribal law requirements, such as public notice procedures, or allow them to obtain all the information they need about a project to make an informed certification decision. As a result, these certifying authorities asserted that for complex projects, their only realistic options are to waive or deny certification. EPA expressed similar concerns in its notice of intent to revise the 2020 Rule. *See* 86 FR 29543 (June 2, 2021) (''Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests . . . .'').

The Agency proposed at § 121.6(b) that the Federal agency and certifying authority may jointly set the reasonable period of time on a case-by-case or project type basis. Additionally, the proposal included a default reasonable period of time of 60 days if the Federal agency and certifying authority are not able to come to an agreement within 30 days of receipt of the request of certification at § 121.6(c). Proposed § 121.6(c) and (d) also introduced extensions of the reasonable period of time. It was proposed that the negotiated or default reasonable period of time would automatically be extended to accommodate public notice and comment processes or due to force majeure events. The Federal agency and certifying authority could also agree to extend the reasonable period of time for any reason, provided it did not exceed the statutory one-year maximum. Lastly, in the proposal, the Agency did not take a stance on the legality of the withdrawal and resubmittal approach to restart the clock. 87 FR 35341–42 (June 9, 2022).

Similar to the proposal, this final rulemaking not only affirms and clarifies that—consistent with the statutory text—the reasonable period of time may not exceed one year from the date the request for certification is received, but it also finalizes 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). Under this final rule, in a change from proposal, if the Federal agency and certifying authority do not agree upon the reasonable period of time in writing, the default reasonable period of time would be six months from the date the request for certification is received. 40 CFR 121.6(c). The final rule also allows for extensions under certain circumstances. 40 CFR 121.6(d) and (e). Additionally, the Agency is removing as unnecessary the definition for ''reasonable period of time.'' *See* 40 CFR 121.1(l) (2020). Like that definition, the final rule language in § 121.6(b) itself provides that the reasonable period of time is the time during which the certifying authority must act on the request for certification. As a result, the Agency finds it duplicative and unnecessary to include a separate definition for the term ''reasonable period of time.''

a. Reasonable Period of Time Determination

i. Joint Setting of the Reasonable Period of Time

The collaborative approach in this final rule (*i.e.,* the Federal agency and certifying authority may jointly set the reasonable period of time with a default of six months if an agreement is not reached) differs from the approach in both the 1971 Rule and the 2020 Rule where the reasonable period of time was determined solely by the Federal agency. *See* 40 CFR 121.16(b) (2019); 40 CFR 121.6(a) (2020). The approach taken in the 1971 and 2020 Rules 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 below, 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. Under this approach, 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.[50] Given that

[49] FERC proposed and finalized regulations to codify FERC's practice of a one-year reasonable period of time on natural gas or liquefied natural gas infrastructure projects after the 2020 Rule. *See* 86 FR 16298 (March 29, 2021).

[50] Section 401(a)(1) requires a State or interstate agency to establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. However, section 401(a)(1) does not set any requirements or time limits on those public notice procedures or how those procedures should be considered when setting the reasonable period of time. Some certifying authorities have public notice procedures that exceed the default reasonable period of time in place for some Federal agencies (*e.g.,* longer than the Corps' or EPA's

Continued

EPA is deferring to the combined expertise of the Federal agencies and certifying authorities for establishing the reasonable period of time, this final rule does not retain the list of factors that a Federal agency shall consider, under the 2020 Rule at § 121.6(c), when establishing the reasonable period of time. However, the Agency notes that 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. Importantly, this final rule approach addresses state and Tribal stakeholders' concerns that, under the 2020 Rule, certifying authorities did not have enough influence in determining the length of the reasonable period of time for a particular project.

Many commenters expressed support for the collaborative approach of the Federal agency and certifying authority setting the reasonable period of time together. These commenters said that the joint determination is consistent with cooperative federalism principles and allows certifying authorities to provide input as the stakeholder that conducts the review of the request for certification. Some commenters also supported the setting of reasonable periods of time through MOAs between the Federal agency and certifying authority to reduce the need to determine the reasonable period of time on a case-by-case basis. Commenters also suggested that the final rule should provide that Federal and state agencies can agree to categorical time periods for state review of certain types of permits, licenses, or projects, pursuant to written agreements, which many did before the 2020 Rule. A few commenters raised concerns about the time and resources that would be needed to set a reasonable period of time for every review of a request for certification and suggested that the final rule should clarify that categorical agreements, in addition to case-by-case agreements, are permissible.

While the Agency agrees that the joint agreement approach promotes cooperative federalism, 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.

Other commenters did not support setting the reasonable period of time through a joint agreement between the Federal agency and certifying authority. Some commenters said that EPA should remain silent on who sets the reasonable period of time and that certifying authorities should apply their own procedures. Some of these commenters argued that the Federal agency should not be placed on the same footing as the certifying authority in determining the reasonable period of time because the certifying authority is the expert regarding their own procedures, resources, and applicable state and Tribal laws. Conversely, other commenters stated that the Federal agency should set the reasonable period of time. One commenter stated that having a Federal agency set the default serves to minimize the arbitrary delays and bureaucratic gamesmanship, and thus EPA should continue to have Federal agencies establish it, as they have done for decades. Several commenters also expressed concern that the collaborative approach would cause instability or inefficiencies for various reasons, including the fact that there could be different reasonable periods of time if it is set on a case-by-case basis or may differ by certifying authority.

This joint agreement approach is the optimal interpretation of the statute as it balances equities between the Federal agency and certifying authority and utilizes the expertise of both stakeholders. EPA disagrees 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 decision-making process. And as stated above, 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 would create efficiency while still taking advantage of the knowledge of both parties for determining the time necessary for reviewing each request for certification.

One commenter asked that the joint agreement between the Federal agency and the certifying authority be made in consultation with the project proponent to allow for greater regulatory predictability for project proponents and reduce any confusion among the parties. EPA disagrees that any joint agreement between the Federal agency and the certifying authority must be made in consultation with the project proponent. Considering the high annual average number of requests for certification,[51] 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 with project proponents on *every* request for certification. Consistent with the cooperative federalism principles imbued in section 401, Federal agencies and certifying authorities, not project proponents, have primary roles in the certification process. That is, it is the Federal agency whose license or permit is subject to section 401, and the certifying authority is responsible for determining compliance with applicable water quality requirements in accordance with section 401.

Additionally, requiring project proponent consultation in every case would add unnecessary across-the-board procedure and coordination into the certification process. 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 serve to gather input from project proponents that may help in setting the reasonable period of time. Federal agencies and certifying authorities may also choose to include input from project proponents when setting categorical reasonable periods of time via MOAs.

Some commenters who also expressed concern about the 30-day negotiation period between the Federal agency and certifying authority in the proposed

current default 60-day reasonable period of time for federally issued CWA section 404 and 402 permits).

[51] EPA estimates that the average annual number of certification requests is 1,947 requests per certifying authority. *See* Supporting Statement for the Information Collection Request (ICR).

rule. Some of these commenters stated that certifying authorities would need to expend their resources on both negotiating the reasonable period of time and trying to review the request for certification due to the clock already running during the negotiation period. 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. However, the Agency encourages prompt negotiations between the Federal agencies and certifying authorities for both individually determined reasonable periods of time and categorical reasonable periods of time to give clarity to project proponents as early as possible.

ii. Default Reasonable Period of Time

Section 401(a)(1) provides that the reasonable period of time ''shall not exceed one year.'' 33 U.S.C. 1341(a)(1). The phrase ''shall not exceed one year'' means that the reasonable period of time need not be one full year and that a certifying authority should not necessarily expect to be able to take a full year to act on a section 401 request for certification. If Congress had meant for the reasonable period of time to be one year in all cases, it would have simply written ''shall be one year'' instead of ''shall not exceed one year.'' Under this final rule, the certifying authority could be subject to a shorter than one-year reasonable period of time to render its decision, provided that the Federal agency and the certifying authority have agreed to a shorter time, or as discussed below, when the parties do not reach agreement and instead rely on the default reasonable period of time of six months. This approach is consistent with case law. *See Hoopa Valley Tribe* v. *FERC,* 913 F.3d 1099, 1104 (D.C. Cir. 2019) (''[W]hile a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year.'').

As discussed in more detail below, many commenters opposed the default 60-days for a variety of reasons and offered alternative reasonable periods of time, such as 90 days, 120 days, 180 days, and one year. For the final rule, EPA decided on six months as the default reasonable period of time for several reasons. First, as stated above, 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 is consistent with almost 50 years of program implementation under EPA's 1971 regulations. Second, 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. Third, 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 period serves as a default should Federal agencies and certifying authorities fail to agree on a different time period. Finally, EPA's proposed 60-day default reasonable period of time was based largely on EPA's concurrent proposal to require that requests for certification include a copy of the draft Federal license or permit. Since the certifying authority would have more information upfront (the draft Federal license or permit instead of only the application), the Agency proposed that the default reasonable period of time could be shorter. But since EPA has decided not to finalize the proposed draft Federal license or permit requirement (for individual Federal licenses and permits) and instead only require that a request for certification include the Federal license or permit *application,* certifying authorities will have less information and may need more time to review requests for certification, hence the six-month default reasonable period of time (which only applies if the certifying authority and Federal agency do not agree on an alternative).

Although EPA proposed 60 days as the default reasonable period of time, the Agency requested comment on whether and, if so, why the default should be longer than 60 days (*e.g.,* 120 days, six months, one year). 87 FR 35339–40 (June 9, 2022). EPA noted that the default may depend on when certification is requested during the Federal licensing or permitting process, *e.g.,* if EPA were to decide that a draft Federal license or permit is not a required component of a certification request, a longer default reasonable period of time may be appropriate. *Id.* 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, as described in this section.

A few commenters supported the proposed 60-day default and pointed out that certifying authorities often review many simpler projects in 30 days or less, and in some jurisdictions, applicable law already requires certifying authorities to approve or deny the certification request within 60 days of receipt of a complete application. A few commenters argued that the 60-day default would ensure consistency and predictability for stakeholders. One 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. Relatedly, other commenters opined 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.

EPA agrees in part and disagrees in part with these comments. 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. EPA disagrees that 60 days as a default reasonable period of time for all projects is practical for the reasons provided in the Agency's rationale above, 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 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 encourages certifying authorities and Federal agencies to enter into categorical agreements that will allow project proponents to anticipate timelines for certification processes. The default reasonable period of time would not apply if the Federal agency and certifying authority agree to a different time. EPA does not agree that Federal agency defaults in regulation that are less than one year should 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, 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. In these circumstances, individual written agreements for each request for certification would not be necessary, since a negotiation between the certifying authority and Federal agency would not need to occur.

Most commenters opposed the 60-day default reasonable period of time. Commenters noted that while 60 days may be enough time for simpler or more routine projects, which may include some projects covered by general or nationwide permits, 60 days would be insufficient for especially novel, complicated, controversial, or complex projects. Some commenters provided various examples of such project types, including FERC pipeline authorizations, relicensing of hydroelectric dams, water supply projects, liquefied natural gas (LNG) terminals, deep-water ports, and projects that trigger the need for an environmental impact statement (EIS) or multiple Federal permits. Commenters also added that each request is different and carries unique implications to be examined based on the specific characteristics of the water bodies and proposed project and Federal license or permit in question. Some commenters said that because the proposed rule would require agreement between the Federal agency and certifying authority on a different amount of time, the proposal would effectively and inappropriately give Federal agencies veto power over certifying authorities, infringing on principles of collaborative federalism. Commenters also said that states and Tribes know their own procedures, resources, and applicable requirements and should have input into deciding the length of the reasonable period of time. Lastly, commenters argued that the 60-day default would be inadequate if the final rule does not require submittal of the draft Federal license or permit in a request for certification, noting that the proposed default appeared to be predicated on the assumption that the ''request'' the certifying authority will receive will include a draft Federal license or permit.

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. As discussed above, Federal agencies and certifying authorities offer different types of relevant expertise for setting the reasonable period of time, and EPA encourages them to establish categorical 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 (half of the maximum one year) in the event an agreement cannot be reached. EPA acknowledges that 60 days may not be a sufficient default for certain project types and has accordingly shifted the default reasonable period of time to six months. However, the Agency emphasizes that the default only applies in the absence of a written agreement between the certifying authority and Federal agency, either categorically or on a case-by-case basis. The Agency encourages consideration of project complexities when setting the reasonable period of time.

Some commenters alleged that the proposed default reasonable period of time is contrary to the plain language and intent or purpose of CWA section 401. These commenters said Congress did not authorize EPA to contravene the statute by mandating action, or allowing the Federal agency to mandate action, in less than one year; and if there should there be any default, it should simply be the one year allowed under the statute. EPA disagrees with these commenters. As discussed above, 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. As stated above, 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 this section, 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.

b. Extensions to the Reasonable Period of Time

As mentioned previously, the final rule provides that Federal agencies and certifying authorities may agree to extend the reasonable period of time, provided it does not exceed the statutory one-year limit. Additionally, there may be circumstances where the established or default reasonable period of time is not sufficient to allow the certifying authority to complete its review. Therefore, the final rule provides automatic extensions to accommodate public notice procedures or due to force majeure events. In these two circumstances, the reasonable period of time is extended by the time needed by public notice procedures or the force majeure event, which would be communicated in the written justification by the certifying authority to the Federal agency. 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, and this language is consistent with the final rule language for certification decisions and Federal agency review at §§ 121.7 and 121.8. 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

certification is received. The statute also does not specify who may extend the reasonable period of time or the terms on which it may be extended. The 1971 Rule was also silent on extensions. However, 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.''). The 2020 Rule allowed certifying authorities to request an extension of the reasonable period of time. 40 CFR 121.6(d) (2020). However, only the Federal agency had the power to extend the reasonable period of time. *Id.; see also* 85 FR 42260. Under the 2020 Rule, the Federal agency was not required to grant extension requests. *See* 40 CFR 121.6(d)(2) (2020). As a result, Federal agencies 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.

The Agency proposed at § 121.6(d) to allow certifying authorities and Federal agencies to jointly extend the reasonable period of time in a written agreement, as long as the project proponent was consulted, and the extension did not exceed one year from the receipt of request for certification. The Agency also recognized that there were circumstances under which the Federal agency *should* extend the reasonable period of time without the certifying authority needing to negotiate an agreement. Accordingly, the Agency proposed at § 121.6(c) to identify two scenarios that would require the extension of the reasonable period of time: force majeure events and public notice procedures. Under the proposed rule, the certifying authority had to notify the Federal agency through a written justification prior to the end of the reasonable period of time. Upon notification, the reasonable period of time would be extended by the period needed to fulfill public notice procedures or the force majeure event, provided such extension did not exceed one year from receipt of the request for certification.

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) and (e). The final rule approach balances Federal agency and certifying authority equities better than the 1971 Rule and the 2020 Rule for the reasons explained in this section. This approach is consistent with the approach for joint establishment of the reasonable period of time. It also aligns with cooperative federalism principles central to the CWA. Although the Agency is not finalizing the requirement to consult with the project proponent, the final rule does allow for input from the project proponent. The certifying authority and Federal agency should communicate any extensions to the reasonable period of time to the project proponent.

Most of the commenters who addressed extensions of the reasonable period of time supported allowing certifying authorities and Federal agencies to agree to extensions. A few commenters said that the Federal agency should have the sole discretion to extend the reasonable period of time, and another commenter said that the certifying authority should be the only one to determine the extension. One commenter suggested that extensions should be granted only if EPA finds that unusual circumstances require a longer time. Some commenters recommended that the project proponent should also be engaged in the determination of extending the reasonable period of time. Multiple commenters said that extensions agreed on by the Federal agency and certifying authority should have justifiable and reasonable limits that address the concerns of the project proponent. Conversely, other commenters recommended that project proponents not be consulted but rather notified about any extensions.

Consistent with the final rule's 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 extensions, provided any extension does not exceed one year from the receipt of the request for certification. 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. 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 § 121.6(b), so it is unnecessary to provide the project proponent with a role in extensions. Additionally, considering the annual average number of certification requests,[52] 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. EPA also notes that 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: 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 takes longer than the negotiated or default reasonable period of time.

All commenters who addressed extensions of the reasonable period of time expressed support for extensions due to unforeseen circumstances such as government closures or force majeure events. Several commenters suggested that extensions should be limited only to such events and not include public comment and other known procedures that were in place at the time the reasonable period of time was established. 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 supported defining specific situations warranting extensions for efficiency and predictability, while a few commenters stated that the final rule should not

[52] *See* footnote 51.

include a defined list that would limit the circumstances under which an extension can occur.

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 automatic extensions 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. However, 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.

Some commenters noted that the rule should provide more clarity such as specifically defining public notice procedures and providing more details on how extensions would work. In response to these comments, the Agency has revised § 121.6 to clearly differentiate automatic extensions from agreed-upon extensions. Additionally, the Agency has revised what is now § 121.6(d) to clarify that in the certifying authority's written notification to the Federal agency, it must identify how much additional time is required by either the public notice procedures or the force majeure event in addition to the justification for such extension.

c. Withdrawal and Resubmissions of Requests for Certification

As proposed, EPA is removing § 121.6(e) from the 2020 Rule, which prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. Instead, the Agency is finalizing as proposed to take no position on the legality of withdrawing and resubmitting a request for certification.

Several commenters expressed opposition regarding EPA's decision not to retain the 2020 Rule's regulatory text at § 121.6(e) and the approach not to take a position on the permissibility of withdrawing and resubmitting a request for certification. Some commenters supported the 2020 Rule's position on withdrawals and resubmittals, stating that this position has helped ensure that the certification process cannot be misused to delay or prevent issuance of the Federal license or permit. Commenters expressed concern that EPA's proposed approach to refrain from taking a position on the legality of withdrawing and resubmitting a request for certification suggested that this process may be used as a loophole to circumvent the one-year time limit described in section 401, which would increase uncertainty, costs, and indefinitely delay Federal licensing or permitting processes, especially if there is an increase in litigation. Most of the commenters opposed to EPA's proposed approach pointed out that Congress was clear in its 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). 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.

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 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. To be clear, EPA does not find that mere coordination between the certifying authority and project proponent, as encouraged throughout this preamble, rises to a withdrawal and resubmittal scheme. 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.

Other commenters expressed support for EPA's proposed approach of not taking a position on the legality of withdrawal and resubmittal. Some commenters acknowledged that flexibility is important for project proponents and certifying authorities, while others described the need for more guidance to reduce litigation on the withdrawal and resubmittal practice. Conversely, some commenters expressed support for withdrawal and resubmission in certain situations, encouraging EPA to make clear in the final rule 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 commenters asserted that withdrawal and resubmission of requests for certification may occur to avoid denials of certification, and a few 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.

EPA recognizes that the practice of withdrawal and resubmittal has been subject to litigation. The 2020 Rule prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. 40 CFR 121.6(e) (2020). In support of that position, the 2020 Rule relied on a broad reading of the D.C. Circuit's decision in *Hoopa Valley Tribe* and asserted that the regulatory text at § 121.6(e) is a ''clear statement that reflects the plain language of section 401 and . . . is supported by the legislative history.'' 85 FR 42261. In that case, which featured highly unusual facts,[53] the court rejected the particular

[53] The court held that the project proponent and the certifying authorities (California and Oregon) had improperly entered into an agreement whereby the ''very same'' request for state certification of its relicensing application was automatically withdrawn and resubmitted every year for a decade by operation of ''the same one-page letter''

''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).[54] Additionally, EPA's guidance prior to the 2020 Rule acknowledged use of the withdrawal and resubmittal approach, as well as the ''deny certification without prejudice to refile'' approach, but noted that ''[t]his handbook does not endorse either of the two approaches. . . .'' 2010 Handbook at 13, n.7 (rescinded in 2019, *see supra*). With the dynamic case law related to the topic of withdrawal and resubmittal and the complexities of certain certification situations,[55] 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. This final rule approach resets EPA's interpretive position to silent and neutral on withdrawal and resubmittal, where it was before the 2020 Rule.

3. Implementation

As previously explained, EPA has added regulatory text to clarify that the certifying authority and Federal agency may enter into written agreements that establish categorical reasonable periods of time for certain types of Federal licenses or permits. This regulatory text gives the certifying authority and Federal agency the option of establishing the reasonable period of time for certain categories of Federal licenses or permits at any time without needing to wait until a Federal license or permit application (or draft general Federal license or permit) is submitted. For example, the certifying authority and Federal agency could enter into an agreement that establishes a reasonable period of time for all NPDES permits or for certain categories of NPDES permits such as some general permits or minor individual permits. The addition of the regulatory text regarding written agreements was supported by some commenters who stated that the final rule should allow the Federal agency and certifying authority to agree in writing to categorical time periods for the certifying authority to review certain types of permits, licenses, and/or projects. These commenters noted that this was done prior to the 2020 Rule, and in the past, such agreements improved efficiency and predictability by allowing Federal agencies, certifying authorities, and project proponents (if applicable) to understand the reasonable period of time prior to submitting an application. EPA agrees that the addition of the regulatory text will allow for more efficiency and predictability.

Commenters also noted that the proposed rule stated that the reasonable period of time must be agreed upon within 30 days of the receipt of request for certification, which suggested that categorical agreements entered into prior to the date that the request for certification was received would not satisfy the regulatory requirement. EPA has addressed this concern by deleting the phrase ''within 30 days of receipt of a request for certification.'' By deleting this phrase, the regulation makes clear that the Federal agency and certifying authority may agree to a reasonable period of time through written agreements that can be entered into prior to a request for certification.

Several commenters identified specific types of permits and/or processes that require a longer reasonable period of time than the proposed 60-day default. Specifically, several commenters stated that the 60-day default reasonable period of time would not align with the concurrent Federal consistency reviews that are required for some projects pursuant to the Coastal Zone Management Act (CZMA). In addition, several commenters noted that FERC pipeline authorizations or relicensing of hydroelectric dams can require up to one year. 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 above, 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.

E. Scope of Certification

1. What is the Agency finalizing?

The Agency is finalizing its proposed approach to the scope of certification at § 121.3 with modifications to the regulatory text to better clarify the extent of the activity subject to certification and the water quality limitations inherent to section 401. 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. In addition, EPA's final rule makes clear that a certifying authority's review is limited to considering impacts to waters of the United States except where a state or authorized Tribe has

repeatedly submitted to the states before the statute's one-year waiver deadline. 913 F.3d at 1104.

[54] The respondent-intervenors in the Ninth Circuit case petitioned the Supreme Court for certiorari but the Supreme Court denied the petition on May 15, 2023. *Nevada Irrigation District, et al.* v. *Cal. State Water Res. Control Bd.,* et al., Docket. No. 22–753.

[55] Historically, certifying authorities and project proponents have used the ''withdraw and resubmit'' approach for dealing with the one-year deadline for complex projects. There are a multitude of permutations, but the basic idea is that the project proponent would withdraw the certification request and then resubmit a new certification request either immediately or at some later date. 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.

state or Tribal laws that apply to waters of the state or Tribe.

The 2020 Rule substantially narrowed the scope of a certifying authority's review. Before the 2020 Rule, a certifying authority considered whether the whole ''activity'' subject to the Federal license or permit will comply with applicable water quality requirements. Under the 2020 Rule, the certifying authority could only consider potential water quality impacts from the project's point source ''discharges.'' *See* 85 FR 42229 (July 13, 2020). This interpretation was heavily criticized by many states, Tribes, and non-governmental organizations as unlawfully narrowing the certifying authorities' scope of review under section 401 and was subject to multiple legal challenges.

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, 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. Consistent with this interpretation, EPA is finalizing revisions to § 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 § 121.3 that clarify important limiting principles and provide greater regulatory certainty.

The final rule at § 121.3 provides that when a certifying authority reviews a request for certification, the certifying authority ''shall evaluate whether the activity will comply with applicable water quality requirements.'' It further provides that the certifying authority's evaluation by the certifying authority is ''limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation.'' Finally, it provides that a certifying authority ''shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.'' 40 CFR 121.3

The final rule adopts the proposed scope of certification but with textual edits made in response to public comment. First, the final rule no longer divides its regulatory text regarding scope between two separate sections of part 121. The Agency proposed a definition of ''activity as a whole'' at § 121.1 and also addressed scope of certification at § 121.3. After considering public comment, the Agency finds this structure unnecessary and confusing and instead has incorporated its full interpretation of scope in final rule § 121.3. *See* section IV.E.2.b of this preamble for further discussion.

Second, the Agency removed the phrase ''as a whole'' from the regulatory text throughout part 121. This does not represent a change in substance from proposal. The Agency does not interpret the terms ''activity'' and ''activity as a whole'' as having different meanings; rather, EPA included the phrase ''as a whole'' in the proposed rule simply to emphasize that a certifying authority's evaluation extends to the activity in its entirety, as opposed to only the point source discharges associated with the activity. After considering public comment and the statutory text, EPA concludes that the final regulatory text at § 121.3 makes this clear without the need to add ''as a whole'' and best reflects the statutory text. *See* section IV.E.2.b of this preamble for further discussion.

Third, the final rule adds regulatory text clarifying that a certifying authority's evaluation ''is limited to the water quality-related impacts'' from the activity subject to the Federal license or permit. This is not a change in substance from proposal. This concept was captured in the proposed definition of activity as a whole at § 121.1(a) (''activity as a whole means any aspect of the project activity with the potential *to affect water quality*) and, in the preamble at proposal, EPA was clear that section 401 is limited to addressing only water quality-related impacts. 87 FR 35343 (June 9, 2022). EPA finds that this clarification best reflects the statutory language and purpose of section 401. *See* section IV.E.2.c of this preamble for further discussion.

Fourth, the proposal defined ''activity as a whole'' to mean any aspect of the activity ''with the potential'' to affect water quality. As discussed above, EPA is not finalizing that definition, and further, the final regulatory text does not refer to ''potential'' to affect water quality. 40 CFR 121.3(a). EPA made this change in response to several commenters who questioned the breadth of the term ''potential,'' suggesting that the term ''potential'' authorized certifying authorities to consider purely speculative ''potential'' impacts to water quality. EPA did not intend for its proposed language to establish the required degree of causality between the activity and the impact to water quality. The Agency finds it unnecessary to do so in this rulemaking. Consistent with the statutory text and purpose of section 401, final rule § 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. *See* section IV.E.2.b of this preamble for further discussion.

Fifth, § 121.3(b) provides that the scope of conditions in a grant of certification is the same as the scope of review when acting on a request for certification; certifying authorities are to impose conditions ''necessary to assure that the activity will comply with applicable water quality requirements.'' This is not a change in substance from proposal. Proposed rule § 121.7(d)(2) included the same concept by requiring a grant with conditions to include ''[a]ny conditions necessary to assure that the activity as a whole will comply with water quality requirements,'' and EPA was clear at proposal that the scope for the purpose of including conditions in a certification and the scope of review for purposes of whether to grant certification are the same. 87 FR 35346. EPA continues to find this interpretation best aligns with the statutory text and purpose of section 401. *See* section IV.E.2.e of this preamble for further discussion.

Next, EPA's final regulatory text provides that the certifying authority's evaluation of the activity includes ''the activity's construction and operation.'' At proposal, EPA explained that it did not intend for its proposed scope to cover only those portions of the activity directly authorized by Federal license or permit in question. 87 FR 35346. EPA specifically requested comment on this interpretation. *Id.* After considering comments and the statutory text of section 401, EPA is finalizing its proposed interpretation and including regulatory text to reflect it. Specifically, final rule § 121.3(a) states that the certifying authority's evaluation includes ''the activity's construction and operation'' without reference to whether the Federal license or permit at issue covers both aspects of the activity.

The Agency focused on construction and operation because those are the two aspects of an activity that Congress referenced throughout section 401. *See* section IV.E.2.b of this preamble for further discussion.

The Agency is also finalizing the definition of ''water quality requirements'' at § 121.1(j) as proposed (''*Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law''). The 2020 Rule narrowed the ability of certifying authorities to include conditions in their certifications pursuant to section 401(d) to protect the quality of their waters. Before the 2020 Rule, a certifying authority could add conditions to its certification as necessary to assure compliance with the specifically enumerated sections of the CWA and ''any other appropriate requirement of State [or Tribal] law.'' 33 U.S.C. 1341(d). In the 2020 Rule, however, EPA promulgated a narrow regulatory interpretation of the section 401(d) term ''other appropriate requirements of State law,'' limiting it to ''state or tribal regulatory requirements for point source discharges into waters of the United States.'' 40 CFR 121.1(n), 121.3 (2020); *see also* 85 FR 42250. In this rulemaking, EPA is returning to an interpretation of ''any other appropriate requirement of State law'' that is more closely aligned with the statutory text and more environmentally protective. *See* further discussion at section IV.E.2.c of this preamble.

The Agency also is finalizing an interpretation regarding which waters a certifying authority can consider when determining whether to grant certification. After considering public comment, the Agency concludes that a certifying authority is limited to considering ''navigable waters'' as defined in the CWA, except where a state or authorized Tribe has state or Tribal laws that apply to waters of the state or Tribe. This interpretation is supported by the text of section 401 and reflected in prior Agency guidance. *See* section IV.E.2.d of this preamble for further discussion.

As discussed below, the interpretations in this final rule of section 401's scope of review and conditions reflect the best reading of the statute. Even if some commenters may disagree that these interpretations reflect the best reading, there can be no doubt that they are imminently reasonable, for the same reasons articulated below for why EPA's interpretation represents the best reading. They also advance the water quality protection goals of section 401, are consistent with the principles of cooperative federalism that underlie the CWA and especially section 401, and restore the full measure of authority that Congress intended to grant states and authorized Tribes to protect their critical water resources.

2. Summary of Final Rule Rationale and Public Comment

The following subsections describe the Agency's finalization of the five key aspects of the scope of a certification: (a) return to activity scope of certification; (b) defining the ''activity'' subject to certification; (c) water quality requirements; (d) waters considered in acting on a request for certification, and (e) scope of conditions.

a. Return to ''Activity'' Scope of Certification Review and Conditions

Consistent with the proposal, EPA is returning the scope of certification review and conditions to the ''activity'' subject to the Federal license or permit. EPA is returning to the ''activity'' scope because it 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. After reviewing the considerable number of comments received on this aspect of the proposed rule, EPA concludes that the ''activity'' interpretation of scope affirmed by the Supreme Court in 1994 best reflects the statutory text, history, and purpose of CWA section 401. By allowing states and authorized Tribes to protect their water quality from the full activity made possible by a Federal license or permit, this interpretation also 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, e.g.,* 116 Cong. Rec. 8984 (1970) (explaining that the new certification provisions were meant to ensure that ''[n]o State water pollution control agency will be confronted [with] a fait accompli by an industry that has built a plant without consideration of water quality requirements''). Although this is a reversal of the approach taken by the Agency in 2020, any disruption to the certification process will be manageable in part because this final rule realigns scope with well-established practice for the nearly 50 years preceding the 2020 Rule, and all prior EPA interpretations, some dating from the 1980s.[56] Also, the 2020 Rule, departing from this longstanding regime, was in effect for only a few years. Further, the final rule addresses stakeholder concerns regarding the pre-2020 Rule landscape and provides regulatory certainty by clarifying important concepts such as how certifying authorities are limited to considering adverse impacts to water quality.

While disruption to the certification process will be modest, the additional protections to water quality, on the other hand, are significant. As commenters observed, the distinction between certifying the activity and certifying only its associated discharges is more than semantic and can in some cases have significant consequences. A point source discharge emanates from a ''discernible, confined and discrete conveyance.'' 33 U.S.C. 1362(14). Impacts to water quality from point source discharges are a small subset of the water quality impacts that may result from a federally licensed or permitted activity. For example, as commenters observed, there are many situations where reductions in stream flows or increases in thermal loading caused by aspects of the federally licensed or permitted activity not directly related to point source discharges can have devastating impacts on a waterbody or watershed. This can be especially true in the dam context (at issue in *PUD No. 1*), where construction and operation unrelated to point source discharges can cause, among other adverse water quality effects, a change in the timing and flow of water, blockage of nutrients, and altered chemical makeup of water due to reservoirs. But even beyond the dam context, the additional water quality protections offered by an ''activity''-based scope may be significant for certain types of federally licensed or

[56] All EPA interpretations of scope prior to the 2020 Rule reflected the ''activity'' or ''project'' scope affirmed in *PUD No. 1* and reinstated in this final rule. *See e.g.,* Memorandum from Catherine A. Winer to David K. Sabock, Section 401 Certification of Marina (Nov. 12, 1985) (hereinafter, Winer Memorandum) (concluding that ''section 401 may reasonably be read as . . . allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a 'discharge' in the narrow sense''); 1989 Guidance at 22 (''[I]t is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.''); 2010 Handbook at 17 (rescinded in 2019, *see supra*) (''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.'').

permitted activities, such as the construction and operation of a pipeline project. *See supra* section IV.E.2.a.iv of this preamble. Moreover, as explained in the following sections, an ''activity''-based scope is consistent with the longstanding Supreme Court precedent of *PUD No. 1* and bolstered by additional textual support and the legislative history.

i. The Supreme Court in PUD No. 1 Affirmed the Proper Scope of Certification

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. *Id.* at 711–12. Before the Court was a section 401 certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. The principal dispute in *PUD No. 1* was whether a certifying authority could require a minimum stream flow as a condition in its section 401 certification. The project applicant identified two potential discharges from its proposed hydroelectric facility: ''the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.'' *Id.* at 711. The project applicant argued that because the minimum stream flow condition was unrelated to these discharges, it was beyond the scope of the state's authority under section 401. *Id.*

The Court examined sections 401(a)(1) and 401(d), specifically the use of different terms in those paragraphs, to inform its interpretation of the scope of a section 401 certification. The Supreme Court, recognizing the ambiguity created when in 1972 Congress amended the language in section 401(a)(1) and added section 401(d), held that section 401(d) ''is most reasonably read'' as authorizing the certifying authority to place conditions on the ''activity as a whole'' once the predicate existence of a discharge is satisfied. *Id.* at 711–12. EPA agrees that section 401 is ambiguous regarding the scope of certification and conditions, and EPA agrees with the Court's textual analysis of the statute. The Court reasoned:

> If § 401 consisted solely of subsection (a), which refers to a state certification that a ''discharge'' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth ''any effluent limitations and other limitations . . . necessary to assure that *any applicant*'' will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a ''discharge.'' The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose ''other limitations'' on the project in general to assure compliance with various provisions of the Clean Water Act and with ''any other appropriate requirement of State law.'' Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post,* at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 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 (emphasis in original).[57] 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). Because section 401(d) requires that a section 401(a)(1) certification include conditions necessary to assure the ''applicant . . . will comply'' with water quality requirements, section 401 is most reasonably read to require the certifying authority—when it reviews a request for certification under section 401(a)(1)—to review the applicant's activity subject to the Federal license or permit, and not merely the potential point source discharges. This is the best interpretation of the combined text of sections 401(a)(1) and 401(d) partly because it accounts for the fact that the activity is made possible by the applicant's Federal license or permit, and that activity might involve a wide range of actions beyond any potential discharge that could significantly affect compliance with water quality requirements. In order to assure—as it must under section 401(d)—that the ''applicant'' will comply with all applicable water quality requirements, the certifying authority must be able to evaluate water quality-related impacts from the activity made possibly by the applicant's license or permit beyond those related to its triggering discharge(s).

As suggested by the Court, it is significant that Congress chose to use the term ''applicant'' in section 401(d), which it added to section 401 at the same time that it changed ''activity'' to ''discharge'' in section 401(a)(1). Congress could easily have used the term ''discharge'' in section 401(d) as it did in section 401(a)(1) in place of ''applicant'' and chose not to. Congress used similar phrasing in other parts of the CWA. For example, CWA section 402 contemplates that an NPDES permit may issue only upon a showing that a ''discharge will meet'' various enumerated provisions. 33 U.S.C. 1342(a). Congress could have used the same term (discharge) in section 401(d) but it did not. EPA's interpretation of section 401 accounts for the distinct language Congress employed. *See 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)).

In conclusion, 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 below, has identified additional support for the Agency's interpretation in the statutory text of section 401, the legislative history of section 401, the water quality protection goals of section 401, and the principles of cooperative federalism that underlie the CWA.[58]

ii. Additional Textual Support for ''Activity'' Scope of Certification

In *PUD No. 1,* the Court focused its analysis on sections 401(a)(1) and (d). However, additional text in section 401(a)(1) and section 401(a)(3)–(5) adds

[57] Note that, as EPA felt the Supreme Court need not reach the question of the scope of certification in *PUD No. 1,* the Agency did not directly address this issue in its *amicus* brief. The amicus brief filed by the Solicitor General on behalf of the EPA in this case did not grapple directly with the language in sections 401(a) and (d), and argued that ''[e]ven if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the Section 40l(d) condition imposed by the State in this case satisfies that test.'' Brief for the United States as Amicus Curiae Supporting Affirmance, *PUD No. 1,* No. 92–1911 at 11, 12 fn. 2. (Dec. 1993).

[58] It is also instructive to note that a unanimous Supreme Court left *PUD No. 1* untouched in *S.D. Warren,* which found that ''[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . .'' 547 U.S. at 386.

further support for a scope of review encompassing the activity subject to the Federal license or permit, not just its discharges. Section 401(a)(1) provides that ''[i]n the case of any *such activity* for which there is not an applicable [water quality requirement,[59]] the State shall so certify . . .'' 33 U.S.C 1341(a)(1) (emphasis added).[60] This final rule interprets this language to mean that if the certifying authority determines that no water quality requirements are applicable to the activity, the certifying authority shall grant certification. 40 CFR 121.7(g). Important to interpreting scope, what matters for this provision is whether there are water quality requirements applicable to the ''activity,'' not the ''discharge.'' Congress added this provision in the same 1972 act that changed ''activity'' to ''discharge'' earlier in section 401(a)(1). Yet Congress used ''activity'' here. Congress's use of ''activity'' in this provision of section 401(a)(1) instead of ''discharge'' adds further support to the conclusion that Congress intended for the scope of certification to encompass the activity subject to the Federal license or permit, not just its discharges.

Section 401(a)(3)–(5) adds more support.[61] Section 401(a)(3) provides that a certification for the ''construction'' of a ''facility'' fulfills the section 401 obligations with respect to the facility's ''operation'' unless the certifying authority determines there is no longer reasonable assurance of compliance with water quality requirements. *See* 33 U.S.C. 1341(a)(3). ''Construction'' and ''operation'' of a ''facility'' are clearly broader concepts than ''discharge.'' In addition, section 401(a)(4) allows the certifying authority the opportunity to ''review the manner in which the [previously certified] facility or activity shall be operated or conducted'' prior to initial operation for the purpose of assuring this will not violate applicable water quality requirements. *See id.* at 1341(a)(4). Reviewing how the ''facility or activity'' is ''operated or conducted'' goes well beyond simply evaluating any related ''discharge.'' Continuing with this language, Congress provided that if this review results in suspension of the facility or activity's Federal license or permit, the license or permit remains suspended until notification from the certifying authority that there is reasonable assurance that ''such facility or activity''—not discharge—''will not violate'' water quality requirements. *Id.* Lastly, section 401(a)(5) provides that any certified Federal license or permit may be suspended or revoked by the Federal licensing or permitting agency upon an entry of judgment that ''such facility or activity,'' not discharge, has been operated in violation of applicable water quality requirements. *See id.* at 1341(a)(5). The scope of review employed in each of these subsections is whether there has been compliance by the ''facility or activity'' with the five CWA sections identified in section 401(a)(1) (*i.e.,* CWA sections 301, 302, 303, 306, and 307), and not merely compliance by the ''discharge.'' Congress's choice to use broad words such as ''facility'' and ''activity,'' rather than the narrower ''discharge,'' to describe what is subject to the substantive requirements in section 401(a)(3)–(5) should be given meaning and is in this final rule. For a discussion on the text of section 401(a)(2), *see* section IV.K of this preamble, *infra.*

iii. Legislative History Confirms Congress Intended an Activity-Based Scope

The legislative history of CWA section 401, and of its predecessor section 21(b) of the Water Quality Improvement Act of 1970 where the certification requirement was first enacted, provides persuasive evidence that Congress intended the scope of certification to include the activity subject to the Federal license or permit, not only its point source discharges. As discussed in section III of this preamble, Congress significantly revised 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 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 below the legislative history of the 1972 CWA amendments demonstrates that these changes were not intended to significantly narrow the scope of section 401, contrary to what some commenters argued and what EPA stated in its justification for the 2020 Rule.

The pre-1972 version of section 401 indisputably authorized certifying authorities to review the entire activity, not only its point source discharges. Congress originally enacted the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970. Public Law 91–224, 84 Stat. 91 (April 3, 1970). That section provided that any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction and operation of facilities, which may result in any discharge into the navigable waters of the United States, ''shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance . . . that *such activity will be conducted in a manner which will not violate applicable water quality standards.*'' Public Law 91–224, 21(b)(1), 84 Stat. 91 (April 3, 1970) (emphasis added). Had this language remained untouched, there would be no question regarding congressional intent; the 1970 language clearly envisioned a broad ''activity'' scope of certification.

However, in 1972, Congress changed the above italicized language to ''such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act.'' Public Law 92–500, 401(a)(1), 86 Stat. 816 (Oct. 18, 1972). While Congress changed the word ''activity'' to ''discharge'' in this one instance when overhauling the CWA in 1972, the rest of the legislative history of the 1972 amendments demonstrates that Congress did not intend this one edit to section 401(a)(1) to dramatically narrow the scope of certification.[62] First, as discussed above, Congress made other revisions in 1972 that demonstrate Congress's intent to

[59] Specifically, the provision lists ''an applicable effluent limitation or other limitation under sections 1311(b) and 1312 [301(b) and 302] of this title, and . . . an applicable standard under sections 1316 and 1317 [306 and 307] of this title.'' As discussed *infra* at section IV.E.2.c of this preamble, section 301(b), specifically section 301(b)(1)(C), incorporates by reference section 303, and section 303 is not limited to regulating point source discharges.

[60] The provision goes on to say that any such certification (of no applicable water quality requirements) ''shall not be deemed to satisfy section 1371(c),'' *i.e.,* CWA section 511(c) (pertaining to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA)).

[61] *See* 87 FR 35344–45 (discussing section 401(a)(3)–(5) in support of an ''activity'' based scope of certification).

[62] While Congress was otherwise engaged in a ''total restructuring'' of the CWA in 1972, *Milwaukee* v. *Illinois,* 451 U.S. 304, 317 (1981) (quoting legislative history of the 1972 amendments), Congress deemed the water quality certification scheme so important that Congress carried it over, largely unchanged. Much of the legislative history of the 1972 amendments focuses on the total restructuring of the act, not explaining the pre-existing certification requirement. The legislative history is accordingly relatively sparse regarding certification. Much of the discussion that does exist concerns the change from certifying compliance with ''applicable water quality standards'' (in the 1970 version) to ''the applicable provisions of sections 301, 302, 306, and 307'' of the 1972 CWA. Congress amended section 401 in this way to reflect its new strategy to more effectively advance water quality protection and improvement; it is difficult to see why it would, at the same time, significantly narrow the scope of certification so as to undermine its power and effectiveness.

retain a broader activity-based scope. Congress used the phrase ''such activity'' (instead of ''such discharge'') in the very next sentence of section 401(a)(1) and added section 401(d), which authorizes certification conditions that assure that ''any applicant'' (instead of ''any discharge) will comply with water quality requirements. The broad phrasing in section 401(a)(3)–(5) existed in section 21(b) and, tellingly, was not revised by Congress in 1972. Further, the legislative record shows that, in 1972, Congress understood it was making only ''minor,'' insubstantial changes to section 21(b) to harmonize with the substantial new provisions of the CWA pertaining to regulation of point source discharges.[63] The Senate Report stated that section 401 was ''substantially section 21(b) of the existing law.'' S. Rep. No. 92–414, at 69 (1971); *see also* remarks of Sen. Baker: ''Section 21(b), with minor changes, appears as section 401 of the pending bill S.2770.'' 117 Cong. Rec. 38857 (1971). Nowhere in the legislative history is there a statement to the effect that Congress intended to dramatically shrink section 401's scope of review and protection to only those water quality effects caused by a potential point source discharge. To the contrary, the House Report stated that ''[i]t should be clearly noted that the certifications required by section 401 are *for activities* which may result in any discharge into navigable waters.'' H.R. Rep. 92–911, at 124 (1972) (emphasis added). Indeed, in summarizing section 401, Senator Muskie stated that ''[a]ll we ask is that *activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and recommendation before the Federal license or permit be granted.'' 117 Cong. Rec. 38854 (1971) (emphasis added). *See also* H.R. Rep. 92–911, at 121 (1972) (stating that ''[t]he term 'applicable' as used in section 401 . . . means that the requirement which the term 'applicable' refers to must be pertinent and apply to *the activity* . . . .'') (emphasis added). In light of the lack of any compelling evidence in the legislative history that Congress intended to fundamentally constrain the certification power it granted just two years before, and the abundant evidence to the contrary, EPA adopts the full activity scope of review included in the proposed rule.[64]

iv. Response to Comments Regarding an Activity-Based Scope of Certification

The Agency received numerous comments on the proposed return to an activity-based scope of certification review, including comments about the statutory language, legislative history, *PUD No. 1,* and the water quality harms associated with the 2020 Rule. This subsection contains summaries of these comments and the Agency's response. Comment summaries and additional discussion of other aspects of scope of certification (*i.e.,* defining the ''activity'' subject to certification, water quality requirements, waters considered in acting on a request for certification, and scope of conditions) are included elsewhere in this section of the preamble.

A. Comments Regarding the Language in Section 401

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. While the statutory text lends itself to more than one conceivable interpretation, the interpretation adopted in this final rule is the best reading of the text and follows the Supreme Court's authoritative interpretation in *PUD No. 1.* Some commenters asserted that the text of section 401 dictates a single interpretation of scope, although those commenters disagreed on that interpretation. A few such 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. Conversely, other commenters argued that the statutory language of section 401 unambiguously provides for certification on all aspects of the applicant's activity subject to the Federal license or permit, not only its potential point source discharges. A few of these commenters argued that the Court's holding in *PUD No. 1* was based on the unambiguous language of the statute.

EPA disagrees with both sets of commenters. 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'' as pertaining to the activity, 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.''). Congress's 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.

B. Comments Regarding Statutory Interpretation

Some commenters asserted that EPA misconstrued section 401(d), often reasserting arguments made in the preamble to the 2020 Rule or the dissenting opinion in *PUD No 1.* Some commenters echoed arguments made by the dissenting opinion in *PUD No. 1* that section 401(a)(1) limits a certifying authority to ''ensuring that any discharge resulting from a project will comply'' with water quality requirements and therefore, ''while § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges.'' 511 U.S. at 726 (Thomas, J., dissenting). Other commenters similarly argued that the reference in section 401(d) to ''applicant'' merely indicates who must comply with certification conditions. These comments are similar to the position taken in the 2020 Rule that ''the term 'applicant' in section 401(d) [was] merely identifying the

[63] Indeed, the 1971 Senate Report provided that section 401 was ''amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.'' S. Rep. No. 92–414, at 69 (1971).

[64] Congress's revisions to section 401 in the 1977 CWA amendments also suggest continued support for a broader ''activity'' approach. As discussed more fully in section E.2.c below, in 1977, Congress made further minor changes to section 401, this time inserting section 303 into the list of CWA sections for which a state must certify compliance. In the legislative history, Congress explained this ''means that a federally licensed or permitted *activity,* including discharge permits under section 402, *must be certified* to comply with State water quality standards adopted under section 303.'' H.R. Rep. No. 95–830, at 96 (1977) (emphasis added).

person or entity responsible for obtaining and complying with the certification and any associated conditions and not as expanding the regulatory scope of that section.'' 85 FR 42232.

EPA disagrees with the arguments made by these commenters, the dissent in *PUD No. 1,* and the preamble to the 2020 Rule. First, Congress could easily have used the term ''discharge'' in section 401(d) in place of ''applicant'' and chose not to. Congress used similar phrasing in other parts of the CWA. For example, CWA section 402 contemplates that an NPDES permit may issue only upon a showing that a ''discharge will meet'' various enumerated provisions. 33 U.S.C. 1342(a). In fact, Congress used this very phrasing in section 401(a)(1)—requiring certification that ''any such *discharge* will comply.'' *Id.* at 1341(a)(1) (emphasis added). It is Congress's use of these different phrases in section 401(a)(1) and section 401(d) that led the Supreme Court to decide the issue in *PUD No. 1* and now requires the Agency to interpret the proper scope of certification. Congress added section 401(d) in the same legislation in which it revised section 401(a)(1) to refer to ''discharge.'' Congress could have used the same term in section 401(d) but it did not. EPA's interpretation of section 401(d) accounts for these considerations. *Transbrasil,* 791 F.2d at 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.'').

EPA disagrees with the commenters that suggested that section 401(d) is irrelevant to the scope of certification. Section 401(d) requires the certifying authority—when making a decision to certify under section 401(a)(1)—to include conditions necessary to assure that the license or permit *applicant* will comply with water quality requirements, including applicable requirements of state law listed only in section 401(d). As the Court in *PUD No. 1* recognized, section 401(d) is central to interpreting the scope of section 401. 511 U.S. at 711–712 (analyzing both section 401(a)(1) and section 401(d) to interpret scope). Following this approach, this final rule adopts the interpretation of section 401 that, when read as a whole, best aligns with the language Congress chose for section 401(a)(1) and section 401(d), not just the language of section 401(a)(1).

C. Comments on Legislative History

Some commenters asserted that Congress's 1972 revisions to section 401(a)(1) support a ''discharge-only'' approach. These commenters argued that, when Congress revised ''such activity'' to ''such discharge,'' Congress unambiguously limited the scope of certification to the ''discharge,'' rather than the ''activity.'' EPA disagrees that the better interpretation of the 1972 revisions is that Congress intended to narrow the scope of certification. That interpretation considers only a portion of the 1972 amendments. It does not grapple with how to reconcile the revisions to section 401(a)(1) with the addition of section 401(d), which broadly authorizes certifying authorities to condition certification decisions—made under section 401(a)(1)—to assure that the ''applicant'' complies with water quality requirements. It also does not grapple with the use by the 1972 amendments of ''such activity'' later in section 401(a)(1), regarding activities without applicable water quality requirements. When Congress added section 401(d) and added the new sentence to section 401(a)(1) regarding activities without applicable water quality requirements, Congress could have used the term ''discharge'' but chose not to do so. EPA's interpretation of section 401's scope must account for that choice. Moreover, the commenter's interpretation does not harmonize with the extensive legislative history suggesting that Congress had no intention of substantially narrowing the certification power it had previously granted to states. *See* section IV.E.2.a.iii of this preamble, *supra.*

A couple of commenters asserted that Congress's revised certification language reflected a new emphasis in the CWA on directly regulating point source discharges of pollutants, away from indirectly regulating activities through ambient water quality standards. The preamble to the 2020 Rule made a similar point, that the 1972 amendments to section 401 made it ''consistent with the overall framework of the amended statutory regime, which focuses on regulating discharges to attain water quality standards and adds new federal regulatory programs to achieve that purpose.'' 85 FR 42232. 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. As discussed directly above at section IV.E.2.a.iii of this 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.

D. Comments Regarding PUD No. 1

A few commenters asserted that the Court in *PUD No. 1* relied on, and deferred to, EPA's 1971 Rule and guidance derived from that rule. One commenter asserted that the *PUD No. 1* decision was based on judicial deference to EPA regulations that predated the 1972 CWA amendments and should be distinguished on this basis. Another commenter asserted that the Court's reliance on the 1971 Rule significantly undermines the validity and applicability of the *PUD No. 1* decision for this rulemaking. Similar to these commenters, the dissenting opinion in *PUD No. 1* also asserted that the majority relied ''at least in part'' on the 1971 Rule. 511 U.S. at 728–29 (Thomas, J., dissenting).

EPA first notes that the Court did not rely on EPA's 1971 Rule during the Court's own analysis of the statutory text. The Court first undertook its own examination of the statutory text, concluding that section 401(d) ''is most reasonably read'' as authorizing conditions on the entire activity at issue. *Id.* at 712. Only after reaching that conclusion did the Court note that ''[o]ur view of the statute is consistent with EPA's regulations implementing § 401.'' *Id.* Therefore, EPA disagrees with commenters that asserted that the Court's analysis of the statutory text relied on the 1971 Rule. EPA also disagrees with commenters that the Court's discussion of the 1971 Rule undermines the applicability of *PUD No. 1* for this rulemaking. As described above, EPA is not concluding that the proper scope of certification is the activity subject to the Federal license or permit solely because that was the Supreme Court's holding in *PUD No. 1,* although the Court's authoritative holding on the issue offers compelling support. Instead, EPA has independently reviewed the statutory text, and agrees with the Court's analysis of section 401(a)(1) and section 401(d). EPA finds 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—particularly section 401 itself.

E. Comments Regarding Water Quality Harms of 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. For example, one commenter argued that the 2020 Rule's narrower ''discharge-only'' approach to section 401 prohibited states and Tribes from considering activities 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. One commenter argued that activities directly adjacent to streams and wetlands have a direct relationship to the biological, physical, and chemical components and overall health of the water resource. Another commenter asserted that without the ability to consider the entire activity subject to certification, states and Tribes would underestimate the implications of projects on watershed scales and lose capacity to manage designated uses. Several commenters specifically discussed the importance of an activity-based scope for hydroelectric dam projects. One commenter asserted that review under the 2020 Rule left water quality impacts from a dam unmitigated, including a change in the timing and flow of water, blockage of nutrients, and altered chemical makeup of the water due to reservoirs. Similarly, another commenter provided additional examples of the water quality impacts from hydroelectric dams that are not tied to a specific discharge and therefore left out under the 2020 Rule, including increased water temperature from decreased water flows, vegetation loss and reduced shading from dam reservoirs, fish kills from turbines, and increased toxin mobility from elevated turbidity. A different commenter asserted that the discharge from the powerhouse or tailrace of FERC-licensed hydropower projects is not the only impact from those projects, but rather the entire project fundamentally alters the chemical, physical, and biological integrity of a river.

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. For example, when looking at a hydropower project, the ''activity'' scope allows a certifying authority to consider water quality-related impacts beyond the discharges from the tailrace or powerhouse. Depending on the activity specifics, such consideration could result in certification conditions that could include building or maintaining fish passage or habitat restoration related to water quality protection. As another example, when reviewing the construction of a pipeline project, the ''activity'' scope allows a certifying authority to consider water quality-related impacts beyond the discharge of dredge or fill material from the construction and placement of the pipeline and, depending on the activity specifics, can include water quality impacts from non-discharge related erosion or sedimentation from the pipeline construction, as well as later water quality impacts from erosion or sedimentation from the operation and maintenance of the pipeline. Certifying authorities can consider certification conditions that include monitoring, reporting, and adaptive management in response to the non-discharge-related water quality impacts of the activity, such as temperature, flow, riparian buffer conditions, and species impacts.[65] As another example, when reviewing the construction of a boat marina, the ''activity'' scope allows a certifying authority to consider not only the discharges associated with dredging and placement of fill for the marina, but also, depending on the activity specifics, erosion or sedimentation related to construction of the marina, as well as water quality impacts related to the subsequent operation of the marina (*e.g.,* increased vessel pollution in the water associated with increased vessel traffic due to the construction of the dock). *See* section IV.E.2.b of this preamble, directly *infra,* regarding what is included as part of the ''activity'' subject to certification. The inability of states and authorized Tribes to protect against such impacts under the 2020 Rule could seriously impair their ability to protect valuable water resources. This would be inconsistent with Congress's intention to provide states and authorized Tribes with a powerful tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits.

[65] *See also* Economic Analysis for the Final Rule at section 4.5 for further discussion on the environmental benefits and incremental costs associated with the final rule as compared to the 2020 Rule baseline.

b. Defining the ''Activity'' Subject to Certification

As discussed above, the Agency is revising § 121.3 regarding scope of certification to clarify that a certifying authority's evaluation is limited to the water quality related-impacts from the activity subject to the Federal license or permit. This is the best interpretation of the statutory language and is consistent with congressional intent, the Agency's longstanding interpretation prior to the 2020 Rule, and *PUD No. 1.* Although this reading had been the Agency's longstanding interpretation prior to the 2020 Rule and should be familiar to stakeholders, in response to comments and to aid in implementation of this final rule, the Agency is providing further clarification around the ''activity'' subject to certification.

The Agency proposed a definition of the term ''activity as a whole'' at § 121.1(a). In this final rule, the Agency is removing the phrase ''as a whole'' from the regulatory text throughout part 121. Although the Supreme Court used the phrase ''as a whole'' in *PUD No. 1,* 511 U.S. at 712, the phrase is not found in the statutory text. This modification does not represent a change in substance from proposal. The Agency does not interpret the terms ''activity'' and ''activity as a whole'' as having different meanings; rather, EPA included the phrase ''as a whole'' in the proposed rule simply to emphasize that a certifying authority's evaluation extends to the activity in its entirety, as opposed to just the point source discharges associated with the activity. EPA concludes that the final regulatory text at § 121.3 makes this clear without the need to add ''as a whole.'' The Agency has historically used the word ''activity'' to refer to the scope of certification. *See, e.g.,* 1989 Guidance at 8 (''If a State grants water quality certification to an applicant for a federal license or permit, it is in effect saying that the proposed activity will comply with State water quality standards (and the other CWA and State law provisions enumerated above).''), 23 (''all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and

operations—should be part of a State's certification review.''); 2010 Handbook at 10 (rescinded in 2019, *see supra*) (''The granting of § 401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law.''). The Court in *PUD No. 1* appeared to use the terms ''activity as a whole,'' ''activity,'' and even ''project in general'' interchangeably. *PUD No. 1,* 511 U.S. at 711–12. Accordingly, the Agency is removing the phrase ''as a whole'' to better reflect the statutory text and to reduce any confusion that this phrase caused commenters.

The Agency proposed at § 121.1(a) to define the term ''activity as a whole'' to capture ''any aspect of the project activity with the potential to affect water quality.'' EPA intended for this proposed definition to provide certifying authorities with the ability to consider any aspect of the federally licensed or permitted activity that may adversely impact water quality. The impacts of a federally licensed or permitted project on a certifying authority's water resources may be caused by aspects of the project's activity other than the potential discharge that triggered the need for a section 401 certification (*e.g.,* non-discharge impacts from the construction and operation of the project). The Agency's proposed definition for the term ''activity as a whole'' was meant to include all aspects of the proponent's ''project in general'' with the potential to affect water quality. *PUD No. 1,* 511 U.S. at 711. Many commenters asserted that the proposed definition was ambiguous, confusing, and circular. In light of commenter concerns and in the interest of greater clarity, the Agency is not finalizing the proposed definition for ''activity as a whole,'' and instead will rely on clarifying edits in final rule § 121.3 to articulate the activity subject to a certifying authority's review.

Consistent with its proposal, 87 FR 35345, the Agency finds that section 401 is not constrained to those activities directly authorized by the Federal license or permit in question. Section 401(a)(3) provides compelling textual support for this reading. Specifically, section 401(a)(3) makes clear that a certification for a Federal license or permit for construction may address potential water quality impacts from the subsequent operation even though the operation may be subject to a different Federal license or permit. 33 U.S.C. 1341(a)(3) (''The certification . . . with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility'' except in the circumstances described in section 401(a)(3)). By providing that a construction permit certification shall also serve as an operating permit certification (unless notice is given of changes which call into question whether the operation will in fact comply with water quality requirements), section 401(a)(3) necessarily contemplates that the certification of the construction permit will have considered whether the subsequent operation will comply with water quality requirements.

EPA finds additional support for this interpretation in section 401(a)(4). That provision authorizes a certifying authority, after it has granted certification for a facility or activity, to review, prior to its initial operation, the manner in which a facility or activity will be operated if the ''facility or activity is not subject to a Federal operating license or permit.'' 33 U.S.C. 1341(a)(4). If the certifying authority has already granted certification and the facility or activity is not subject to a Federal operating license or permit, by implication the certifying authority has certified a pre-operational Federal license or permit such as a construction permit. Yet section 401(a)(4) tasks a certifying authority that has certified a *construction* permit with reviewing the subsequent *operation* ''for the purposes of assuring'' that ''the manner in which the facility or activity shall be *operated or conducted*'' will not violate water quality requirements. *Id.* (emphasis added). For this reason, section 401(a)(4) adds further support to EPA's conclusion that section 401 is best read to authorize a certifying authority to consider all aspects of the activity, not only those directly authorized by the relevant Federal license or permit at hand.

This interpretation is consistent with EPA's longstanding position before the 2020 Rule. Previously issued EPA guidance provided that ''because the States' certification of a construction permit or license also operates as certification for an operating permit (except for in certain instances specified in Section 401(a)(3)), it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.'' 1989 Guidance at 22; 2010 Handbook at 17 (rescinded in 2019, *see supra*) (''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.'') (*citing PUD No. 1,* 511 U.S. at 712 (1994)). Additionally, the Agency issued a memorandum in 1985 discussing a question from a certifying authority about whether a certification for a section 404 permit for the construction of a marina could consider the subsequent operation of the marina. Winer Memorandum. The Agency concluded, based largely on its reading of section 401(a)(3), that when acting on a request for certification for a section 404 permit for the construction of a marina, the certifying authority will have considered water quality impacts resulting from the subsequent operation of the marina.

The legislative history offers additional support for this interpretation. The legislative history reveals Congress's intent to ensure that federally licensed or permitted activities are not considered in a piecemeal fashion; rather, Congress recognized the importance of considering the effects of subsequent operations during site selection, *see* S. Rep. No. 91–351, at 8 (August 7, 1969) (''Site location is integral to effective implementation of the Nation's water quality program. There are sites where no facility should be constructed, because pollution control technology is not adequate to assure maintenance and enhancement of water quality. Those who make the decision on site location should be aware of this prior to making any investment in new facilities.''), and of early planning to avoid later adverse effects, *see* H.R. Rep. 91–127, at 6 (March 25, 1969) (''The purpose of subsection 11(b) is to provide reasonable assurance . . . that no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.''). After reviewing comments that the Agency requested on the issue, EPA concludes that section 401 is best read to authorize a certifying authority to consider all aspects of the activity, not only those directly authorized by the relevant Federal license or permit.

Accordingly, the revised text at final rule § 121.3 indicates that a certifying authority shall evaluate the water quality-related impacts of the entire activity subject to the Federal license or permit, including the construction and operation, and not solely the aspect of the activity directly authorized by a given Federal license or permit. For example, a section 401 certification on

a CWA section 404 permit authorizing the discharge of dredge or fill material in waters of the United States may consider both the construction associated with dredging (*e.g.,* removing sediment from the waterbody to place dock pilings) as well as the subsequent operation associated with the completion of the dredging (*e.g.,* increased vessel pollution in the water associated with increased vessel traffic due to the construction of the dock).

EPA requested comment on 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. One commenter asserted that the bounds of the permitting authority of the Federal permitting agency cannot dictate the scope of state or Tribal authority under section 401, observing that section 401(d) requires the Federal agency to incorporate into the Federal license or permit those certification conditions the state or authorized Tribe includes to ensure compliance with water quality requirements. EPA generally agrees with this commenter. 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.

A few commenters asserted that the definition for ''activity as a whole'' could be used by certifying authorities to impose conditions on activities that may only be speculatively or obscurely linked to the actual discharge. In addition, 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.

In response to comments, 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 § 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). Consistent with the intent of the proposed rule, § 121.3 in the final rule clearly limits a certifying authority's analysis of any given activity to adverse water quality-related impacts that may prevent compliance with water quality requirements. As discussed below, 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 water quality requirements; only if the activity will not comply with such requirements, does section 401 authorize certifying authorities to either condition the activity in such way to ensure compliance or deny the activity where compliance cannot be ensured with conditions. Accordingly, section 401 and this final rule do not authorize certifying authorities to deny or condition a certification due to impacts from the activity that do not adversely affect water quality. However, the Agency wishes to make clear that certifying authorities may address not only adverse water quality impacts caused exclusively by the federally licensed or permitted activity, but also adverse impacts contributed to by a federally licensed or permitted activity. For example, a certifying authority may deny or condition an activity that will contribute to ongoing noncompliance with water quality requirements. Relatedly, section 401 and this final rule do not authorize a certifying authority to condition an activity for the purpose of protecting waters that are not impacted by the activity or include conditions that do not otherwise affect compliance with the applicable water quality requirements in the waters impacted by the activity.

The 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. The Agency encourages certifying authorities to clearly state in a certification decision why a condition is necessary to assure that the activity will comply with water quality requirements or, in a denial, why it cannot certify that the activity will comply with water quality requirements. *See* 40 CFR 121.7; *see also* infra section IV.F of this preamble. If the project proponent believes the certification decision is premised on, in the words of one commenter, a ''statistically insignificant aspect of the project,'' it may challenge the sufficiency of the decision in a court of competent jurisdiction. 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).

One commenter argued that the Agency had not adequately explained how the ''activity as a whole'' scope would function in practice, and, as a result, the definition would introduce regulatory uncertainty, pose litigation risk regarding certification decisions, and threaten infrastructure projects. The Agency disagrees. 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 supra* for further discussion.

c. Water Quality Requirements

As proposed, EPA is finalizing the definition of water quality requirements as ''any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.'' 40 CFR 121.1(j). The final rule definition is consistent with congressional intent as well as long-standing Agency interpretation of the CWA. A fundamental factor in the scope of a section 401 certification is that the certifying authority is limited to considering whether the activity will comply with applicable water quality requirements. *See* 33 U.S.C. 1341(a), (d). This serves as a key limitation on the otherwise broad authority granted by Congress to certifying authorities. As discussed in more detail below, this approach was supported by the overwhelming majority of commenters on the proposed rule.

i. Water Quality-Related Impacts From Federally Licensed or Permitted Projects

EPA is finalizing that when a certifying authority reviews a request for certification, ''[t]he certifying authority's evaluation is limited to the *water quality-related impacts* from the activity subject to the Federal license or permit, including the activity's construction and operation.'' 40 CFR 121.3(a) (emphasis added). This limitation to evaluating water quality-related impacts was included in EPA's proposed definition of ''activity as a whole''—''any aspect of the project activity with the potential *to affect water quality*''—and EPA's proposal was clear that section 401 is limited to addressing only water quality-related impacts. 87 FR 35343.

The CWA's overall objective is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). Among the Act's policy declarations is ''the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution.'' *Id.* at 1251(b). 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. From its first inclusion of then-section 21(b) in the Water Quality Improvement Act of 1970, Congress intended to provide states and Tribes with a powerful tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits. *See* 116 Cong. Rep. 8805, 8984 (March 24, 1970) (''Mr. Muskie: No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard.''). Although Congress has changed the words and phrases that convey that limitation, legislative history shows consistent congressional intent over time. *See, e.g.,* S. Rep. 92–414, at 1487 (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.''). In short, Congress intended section 401 to provide certifying authorities with broad authority with respect to protecting water quality within their jurisdiction but specifically confined that authority to water quality.

Judicial and EPA interpretation on this point also have remained constant. The courts have consistently agreed that certifying authorities are limited to considering water quality effects. *See PUD No. 1,* 511 U.S. at 711–713 (holding that a state's authority to impose conditions under section 401(d) ''is not unbounded''); *see also Am. Rivers, Inc.* 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.''). The same is true for prior Agency interpretations, as articulated in the 2020 Rule and in prior Agency guidance. *See* 85 FR 42250; 1989 Guidance at 22 (''[I]t is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.'').[66]

The overwhelming majority of commenters agreed that the scope of section 401 certification is limited to water quality. Accordingly, 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. 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).

Several commenters asserted that certifying authorities considered non-water quality-related factors prior to the 2020 Rule and provided examples of such factors and the consequences, including project delays, ambiguity, and undue burdens on project proponents. A few commenters asserted that a handful of states have attempted to block or constrain projects based on non-water quality-related reasons and discussed specific certification actions as ''state abuse'' of section 401. 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* § 121.1(j), 121.3.

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. These commenters argued that the proposed rule would allow states to block projects for non-water quality reasons, which the commenters asserted include effects on designated uses of a water body that are not associated with water quality changes (*e.g.,* changes in water flow that might affect aquatic habitat). 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

[66] It is also consistent with EPA's interpretation in the 1971 Rule regarding section 21(b) in the Water Quality Improvement Act of 1970 (the precursor to current section 401). *See, e.g.,* 40 CFR 121.2(a)(3) (2019) (certification decisions concern whether ''the activity will be conducted in a manner which will not violate applicable water quality standards'').

chemical, physical, and biological integrity of waters, which could include, for example, changes in water flow that might affect aquatic habitat. EPA has consistently interpreted water quality impacts broadly. *See, e.g.,* 1989 Guidance at 22 (''all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's certification review''); 2010 Handbook at 17 (rescinded in 2019, *see supra*) (''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''). In 1991, EPA sent a letter to FERC in response to various FERC documents discussing ''inappropriate'' section 401 certification conditions, including conditions related to fish, wildlife, vegetation, and recreation. Letter from LaJuana S. Wilcher, Assistant Administrator of the Office of Water, to Lois D. Cashell, FERC Secretary (Jan. 18, 1991). In this letter, EPA expressly rejected the notion that water quality is a narrow concept; rather, the Agency asserted that the ''protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system.'' *Id.* The letter further noted that water quality issues can include toxic pollutants, pollutant bioaccumulation, aquatic species composition and diversity, habitat loss, stormwater impacts, nonpoint source impacts, and hydrological changes. *Id.* 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.

ii. Definition of Water Quality Requirements

To clarify which provisions of Federal, state, and Tribal law a certifying authority may consider when evaluating and ultimately deciding which action to take on a request for certification, the Agency is finalizing the definition of ''water quality requirements'' as proposed (''*Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.''). *See* 40 CFR 121.1(j).

The term ''water quality requirements'' is used throughout section 401, and the term ''any other appropriate requirement of State law'' is used in section 401(d), but neither term is defined in the CWA. The Agency did not interpret the terms ''water quality requirements'' and ''other appropriate requirement of State law'' in the 1971 Rule, as they were not introduced into the statute until the 1972 CWA amendments. Prior to 1972, what is now section 401(a) of the statute used the term ''water quality standards,'' and section 401(d) was not part of the statute. *See* Public Law 91–224, 21(b)(1), 85 Stat. 91 (1970); Public Law 92–500, 401, 85 Stat. 816 (1972).

The 2020 Rule defined the term ''water quality requirements'' and interpreted the statutory phrase ''any other appropriate requirement of State law.'' 40 CFR 121.1(n) (2020); *see* 85 FR 42253. Consistent with what EPA characterized as the ''discharge-only'' scope of section 401 certification, the 2020 Rule limited ''water quality requirements'' to only the enumerated provisions of the CWA listed in section 401(a)(1) and ''state or tribal regulatory requirements for point source discharges into waters of the United States.'' 40 CFR 121.1(n) (2020). Citing Justice Thomas's dissent in *PUD No. 1,* the Agency relied on the principle of *ejusdem generis* (''of the same kind'') to argue that the term ''appropriate requirement of State law'' was limited ''only to provisions that, like other provisions in the statutory list, impose discharge-related restrictions.'' 511 U.S. at 728 (Thomas, J., dissenting); 85 FR 42453. As a result, the 2020 Rule narrowed the scope of review and ability of certifying authorities to include conditions to protect their water quality. For example, a few commenters asserted that the 2020 Rule's approach to water quality requirements impeded certifying authorities' 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 other commenters stressed the importance of this authority for FERC licensed projects in particular because of the length of the license and preemption of state regulatory oversight on FERC licenses.

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 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); 87 FR 35347 (noting that the proposed definition applied to state or Tribal water quality requirements regardless of whether they apply to point or nonpoint source discharges).

Many commenters supported the proposed approach to ''water quality requirements,'' including its inclusion of state and Tribal laws applying to either point and nonpoint sources, noting it is more holistic, consistent with the Act and its purpose, consistent with case law, and that it restores and reinforces the authority Congress reserved for states and Tribes. However, several commenters did not support the proposed approach to defining ''water quality requirements,'' arguing that the term should be limited to point source discharges and/or limited to whether the discharge complies with water quality standards. A few commenters asserted that the term ''water quality-related requirements of state or Tribal law'' was too broad and would allow certifying authorities to include conditions unrelated or weakly related to water quality. Conversely, several other commenters believed the proposed definition of ''water quality requirements'' was overly restrictive, including a few commenters who recommended removing the term ''water quality-related'' in the definition for water quality requirements. As discussed below, 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.

First, 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).

Second, the text is not limited to certifying compliance with provisions addressing point source discharges. Section 401(d) includes the phrase ''*any* other appropriate requirement of State law.'' 33 U.S.C. 1341(d) (emphasis added). The phrase ''any other appropriate'' bears examination. The word ''any'' is capacious in its scope, literally meaning ''all'' such state law requirements and not just a limited subset such as point source-related requirements. *See Ali* v. *Federal Bureau of Prisons,* 552 U.S. 214 (2008); *Harrison* v. *PPG Industries,* 446 U.S. 578 (1980). The word ''other'' refers to requirements aside from the statutory provisions listed in the preceding list in section 401(d) (CWA section 301, etc.). While the word ''appropriate'' provides a limiting principle with respect to which requirements may be considered and applied, the word ''appropriate'' is to be interpreted broadly in light of the statute's text and purpose. *Michigan* v. *EPA,* 576 U.S. 743, 752 (2015) (stating that ''appropriate'' is a broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors). In this context, the phrase ''any other appropriate'' is best understood as allowing certifying authorities to consider state or Tribal laws regarding water quality that are not part of the enumerated list of CWA sections and that address water quality protections that are different from those covered by the enumerated list. *See also PUD No. 1,* 511 U.S. at 713 (declining to speculate on the scope of state laws that would be included in the phrase ''any other appropriate requirement of state law'' but finding that, ''at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law'').

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. The list of CWA provisions referenced in sections 401(a)(1) and 401(d) includes section 303,[67] which 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.[68] Considering the breadth of section 303, using *ejusdem generis* to interpret ''any other appropriate requirement of State law'' to only apply to point sources is not consistent with congressional intent as expressed through the statutory text.

The legislative history also supports a definition of ''water quality requirements'' not limited to requirements for point source discharges. As described earlier, even though in 1972 Congress modified the language of then-section 21(b), the legislative history shows that Congress intended new section 401 to be substantially the same as section 21(b), which did not limit certifying authorities to considering only point source discharges. In 1972, Congress understood it was making only ''minor,'' insubstantial changes to section 21(b). The Senate Report stated that section 401 was ''substantially section 21(b) of the existing law.'' S. Rep. No. 92–414, at 69 (1971). *See also* remarks of Sen. Baker: ''Section 21(b), with minor changes, appears as section 401 of the pending bill S.2770.'' 117 Cong. Rec. 38857 (1971). A comparison of section 21(b) and section 401 reveals that the two sections are, indeed, substantially the same. Congress's revisions to section 401(a) in the 1977 CWA amendments also suggests continued support for certifying authority consideration of water quality impacts not limited to point sources. In 1977, Congress added section 303 to the various lists of CWA sections in section 401. Legislative history from 1977 states that Congress intended for ''[t]he inserting of section 303 into the series of sections listed in section 401 [ ] to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303.'' H.R. Rep. No. 95–830, at 96 (1977). As discussed above, section 303 requires states to adopt water quality standards for its waters and applies to waters regardless of the presence of point or nonpoint sources of pollution or pollutants.

The legislative history also indicates that Congress intended the phrase ''any other appropriate requirement of state law'' to be read broadly. In earlier pre-adoption versions of section 401(d), Congress proposed to limit section 401(d) to the enumerated provisions from section 401(a)(1) and either ''any more stringent water quality requirements under State law provided in section 510 of [the Act],'' S. 2770, 92nd Cong. (1972), or ''any regulation under section 316 of this Act.'' H.R. 11896, 92nd Cong. (1972). Ultimately, Congress did not adopt either of those formulations. Instead, consistent with Congress's objective to empower states to protect their waters from pollution, Congress ''expanded'' beyond these earlier proposals the scope of section 401(d) ''to also require compliance with any other appropriate requirement of State law which is set forth in the certification.'' S. Rep. No. 92–1236, at 138 (1972) (Conf. Rep.).

---

[67] *See* H.R. Rep. No. 95–830, 96 (Dec. 6, 1977) (''The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306, and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402, and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed.''); *see also PUD No. 1,* 511 U.S. at 712–13 (''Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. 1311. Section 301 in turn incorporates § 303 by reference.'')

[68] A primary objective of section 303 is the establishment of water quality standards. Establishment of water quality standards is required for waters regardless of whether they receive point source discharges. 33 U.S.C. 1313(c). Non-attainment of standards may be due to point sources, nonpoint sources, or both. As explained in EPA's regulations, water quality standards ''serve the dual purposes'' of serving as the regulatory basis for establishing water quality based treatment controls for point source discharges and the broader purpose of establishing the water quality goals for a specific water body. 40 CFR 130.3. Section 303(d) specifically directs the identification of waters that do not meet water quality standards, considering both point sources and nonpoint sources of pollution. 33 U.S.C. 1313(d)(1)(A); *see also* 40 CFR 130.7(b)(1)(iii). Section 303(d) also addresses the establishment of a ''total maximum daily load'' for each water that does not meet standards, set at a level necessary to implement applicable water quality standards—again, considering both point sources and nonpoint sources. 33 U.S.C. 1313(d)(1)(C); *see also* 40 CFR 130.1(i) (defining total maximum daily load as the sum of loads from both point sources and nonpoint sources plus natural background).

A definition of ''water quality requirements'' that is not limited to point sources also is consistent with the underlying purposes of the CWA. Congress provided states and authorized Tribes with the primary role in protecting the nation's waters from pollution, including pollution from federally licensed or permitted projects, and the phrase ''water quality requirements'' should be interpreted broadly to preserve state and Tribal authority and further the water quality protective goal of section 401. *See S.D. Warren,* 547 U.S. at 386 (''State certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . .''); *see also* S. Rep. 91–414, at 1487 (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.'').

Finally, prior judicial interpretation also supports EPA's definition of ''water quality requirements'' as finalized here. EPA recognizes that, as noted by the Supreme Court in *PUD No. 1,* the authority granted to certifying authorities in section 401(d) ''is not unbounded.'' 511 U.S. at 712. Rather, the scope is limited to ''ensur[ing] that the project complies with 'any applicable effluent limitations or other limitations under [33 U.S.C. 1311, 1312] or other provisions of the Act,['] 'and with any other appropriate requirement of State law.' '' *Id.* Although the Court declined ''to speculate on what additional state laws, if any, might be incorporated by this language,'' the Court found that ''at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303 are 'appropriate' requirements of state law.'' *Id.* at 713. As described earlier in this section, EPA's longstanding position is that the scope of certification decisions and conditions are limited to water quality-related considerations. EPA's definition of the term ''water quality requirements'' in the final rule is not intended to alter this interpretation.

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.

d. Waters Considered in Acting on a Request for Certification

The Agency also is finalizing an interpretation regarding which waters a certifying authority considers when acting on a request for certification, with an important clarification in response to commenters. At proposal, EPA advanced an approach where a certifying authority would consider water quality-related impacts to waters within its jurisdiction beyond ''navigable waters'' as defined by the CWA (at 33 U.S.C. 1362). *See* 87 FR 35348 (''EPA does not believe that the scope of a state's or tribe's certification review is limited only to water quality effects in bodies of water meeting the definition of 'navigable waters' or 'waters of the United States' . . .''). Some commenters expressed concern with allowing certifying authorities to use the certification process to impose conditions relating to waters that are not ''waters of the United States'' and disagreed with the Agency's proposed position that section 401 could extend to non-''navigable waters'' once the threshold discharge into waters of the United States is met. A few commenters also noted that states could regulate state waters under their own laws.

The Agency concludes that while a certifying authority is limited to considering impacts to ''navigable waters'' 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 navigable waters. As discussed below, 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. An examination of the interpretation asserted in the 2020 Rule and the interpretation offered at proposal reveals that the interpretation as clarified in this final rule is the most consistent with the statute and best balances the cooperative federalism framework of section 401—by not applying provisions of the CWA to state waters that Congress otherwise limited to Federal waters, while still authorizing states and Tribes to protect those state or Tribal waters from federally licensed or permitted projects.[69] It also realigns with the Agency's position prior to the 2020 Rule. 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.'') (rescinded in 2019, *see supra*).

When a certifying authority considers whether an activity will comply with CWA sections 301, 302, 303, 306, and 307, the certifying authority is limited to considering impacts to ''navigable waters.'' 33 U.S.C. 1341(a)(1). These sections of the CWA apply only to navigable waters as defined by the CWA. *Id.* at 1362(7). EPA concludes that the best interpretation of section 401 is that it does not allow a certifying authority to apply these CWA provisions beyond the waters that Congress intended for them to apply. However, a certifying authority must also consider whether the activity will comply with ''any other appropriate requirement of State law.'' *Id.* at 1341(d). EPA concludes that other appropriate requirements of state or Tribal law include requirements that apply to state or Tribal waters beyond those waters covered by CWA section 402 and 404 permits. EPA further concludes that certifying authorities may consider the application of these laws to all waters impacted by the activity to which these laws otherwise apply.

In contrast to the section 402 and section 404 permit programs established in the 1972 version of the Act, the Act does not directly address what waters are considered for section 401. Section 402 and section 404 permits unambiguously cover impacts of discharges to navigable waters.[70]

[69] The Agency notes that this final interpretation is not reflected in the final regulatory text, including at § 121.3 regarding the scope of certification. The issue of what aspects of the activity are considered is distinct from the issue of what waters are considered.

[70] One way Congress expressly limited the application of section 402 permits to discharges to navigable waters is through the definition of ''discharge of a pollutant,'' a term that is not used in section 401. Section 402 authorizes EPA to issue permits ''for the discharge of any pollutant,'' 33 U.S.C. 1342(a)(1), which is defined as ''any addition of any pollutant *to navigable waters* from any point source.'' *Id.* at 1362(12) (emphasis added). EPA may issue such a permit upon the condition that the discharge will meet the requirements of sections 301, 302, 306, 307, and 308, *Id.* at 1342(a)(1), all sections of the CWA that do not apply beyond navigable waters. Section 402 also authorizes states to apply for their ''own permit program for discharges *into navigable waters* within its jurisdiction.'' *Id.* at 1342(b) (emphasis added). Section 404 authorizes the Corps to issue permits

Conversely, while the text of section 401 states that the need for a certification is triggered by a potential discharge into ''the navigable waters,'' it does not state that, once the need for certification is triggered, a certifying authority must confine its review to potential water quality impacts to such ''navigable waters'' even when considering requirements of state law that apply beyond navigable waters. 33 U.S.C. 1341(a)(1). Instead, in enacting section 401(d), Congress required a certifying authority to consider whether the ''applicant'' will comply with ''any other appropriate requirement of State law.'' *Id.* When Congress enacted section 401(d), it explained that this provision ''assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.'' S. Rep. No. 92–414, at 69 (1971).

State laws governing state water quality can of course apply to waters other than those directly regulated under the CWA. *See* 87 FR 35348 (recognizing at proposal that ''states may, under state law, protect state waters beyond those that are'' covered by CWA permitting). About half of the states have state laws covering at least some surface waters beyond CWA navigable waters. EPA and Department of Army, Economic Analysis for the Final ''Revised Definition of 'Waters of the United States' '' Rule, section II.A (December 2022). When Congress required states to consider state laws when acting on a request for certification, Congress declined to expressly limit this authorization to state laws that apply to waters regulated under the CWA. While Congress did include the limiting principle of ''appropriate,'' the text and legislative history of section 401 do not suggest that Congress considered state laws that apply to waters beyond those directly regulated under the CWA to be ''inappropriate'' state laws. Nor does the text and legislative history of section 401 suggest that Congress intended to limit the applicability of such laws to only a subset of waters to which they normally apply (namely, ''navigable waters''). Had Congress desired to prohibit states from considering water quality impacts to state waters, it could easily have done so. It did not.

This interpretation is reinforced by the fact that Congress intended section 401 to afford states and authorized Tribes broad power to protect their waters from harm caused by federally licensed or permitted projects. That intent is best realized by interpreting section 401 as allowing states and authorized Tribes to apply state law or Tribal law to *all* impacted state or Tribal waters when acting on a request for certification. While the section 401 certification requirement is triggered by a potential discharge into ''navigable waters,'' water quality impacts from the activity could occur in state or Tribal waters beyond those navigable waters. Allowing states or authorized Tribes to apply state or Tribal law to all potentially affected state or Tribal waters is supported by CWA section 510, which—''[e]xcept as expressly provided'' in the CWA—preserves a state's or authorized Tribe's authority and jurisdiction to protect its waters from pollution.

The best reading of section 401 is that it authorizes a state or Tribe to apply state law or Tribal law to *all* impacted state or Tribal waters, rather than limiting states and Tribes to considering only a subset of impacted waters. EPA acknowledges it articulated a different position on those issues in the 2020 Rule. 85 FR 42234–35. Upon reconsideration, EPA believes there are good reasons for changing its position now. EPA disagrees with and finds unpersuasive the 2020 Rule preamble's attempt to conflate section 401 with sections 402 and 404 by saying that ''similar to the section 402 and 404 permit programs, section 401 is a core regulatory provision of the CWA.'' *Id.* While section 401 is certainly a critical element of the Act—indeed, it pre-dated the 1972 CWA amendments and was deemed so important that Congress carried it over—section 401 is 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, and is significantly different in character from the Act's other Federal ''regulatory'' provisions. Section 401, although a neighbor to sections 402 and 404 in the CWA's organizational framework, is a fundamentally different provision and need not be interpreted according to those other provisions' strictures. The preamble to the 2020 Rule, with little supporting analysis, asserted incorrectly that any application of section 401 to non-Federal waters ''would effectively broaden the scope of the Federal regulatory programs enacted by the 1972 CWA amendments [*e.g.,* sections 402 and 404] beyond the limits that Congress intended.'' 85 FR 42234–35. However, the interpretation taken in this final rule in no way broadens the scope of sections 402 and 404. Finally, the reasons articulated above in support of a broad scope of certification (*e.g.,* Congress intended for section 401 to be a powerful tool for states to protect state waters from federally licensed or permitted projects) also support a state or authorized Tribe applying state or Tribal law to protect state or Tribal waters when acting on a request for certification.

e. Scope of Conditions

The Agency is adding text at § 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. This is consistent with the proposed rule, which would have required a grant of certification with conditions to include ''[a]ny conditions necessary to assure that the activity as a whole will comply with water quality requirements,'' 87 FR 35378—the same standard as the proposed scope of review for a certification decision. Moreover, the preamble to the proposed rule was clear that EPA ''interpret[ed] the scope of certification review under sections 401(a)(1) and (d) to be the same. . . .'' 87 FR 35346. To clearly convey the Agency's intent, EPA is adding regulatory text at § 121.3(b) stating that ''consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.''

Because the scope of review applies when the certifying authority is determining whether to grant certification, the same ''activity'' standard should apply to a grant of certification, a grant of certification with conditions, and a denial of certification. That is, the outcome of the certifying authority's analysis should not dictate the scope of review. Logically, the same scope applies to a certifying authority's evaluation of potential water quality effects under both sections 401(a)(1) and 401(d). This is because the two sections are inextricably linked. Section 401(d) requires a certifying authority to determine whether ''the applicant'' will—without additional conditions—comply with the same CWA provisions identified in section 401(a)(1) and ''any other appropriate'' requirement of state or Tribal 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

''for the discharge of dredged or fill material *into the navigable waters*'' and authorizes any state to apply for their own ''permit program for the discharge of dredged or fill material into *the navigable waters.*'' *Id.* at 1344 (emphasis added).

quality requirements will be met, may the certifying authority grant the certification contemplated by section 401(a)(1). In other words, when a certifying authority determines that it must add conditions under section 401(d) to the certification, that is equivalent to deciding that, without those conditions, it must deny certification. The certifying authority's evaluations and determinations under sections 401(a)(1) and 401(d) do not work together in a harmonious fashion if the statute is interpreted to apply a different scope of review to each section. EPA has never taken the opposite position. In the 2020 Rule, EPA also concluded that the scope of sections 401(a)(1) and (d) should be the same. 85 FR 42252.[71]

3. Implementation

At proposal, the Agency identified examples of certification conditions possibly falling inside and outside of the water quality-related scope of section 401 review. Some commenters provided input on these examples. Some of those commenters explicitly supported the listed examples, whereas other commenters disagreed that the examples listed 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, and argued that some examples in the proposal constituted the latter. 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 a certifying authority's review. 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. Some commenters provided their own examples of conditions they considered to be related or unrelated to water quality and asked for EPA to explicitly state which conditions would be within or outside the scope of section 401 certification.

[71] *See also* 2010 Handbook at 18 (rescinded in 2019, *see supra*) (''In order to obtain certification of any proposed activity that may result in a discharge to waters of the U.S., an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in [section] 401(a) and (d).'')

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.

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). Therefore, certifying authorities could include conditions to ensure a project will comply with, in addition to water quality criteria, a designated use of a water, s*ee PUD No. 1,* 511 U.S. at 714–15 (emphasis in original) (''We think the language of [section] 303 is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.''), or antidegradation requirements, *see id.* at 718–19 (recognizing the state appropriately justified its minimum flow rate as necessary to implement its antidegradation policy). This means conditions, such as those to ensure compliance with minimum flow rates to protect fisheries (*see, e.g., PUD No. 1,* 511 U.S. 700); and scheduled releases to accommodate existing recreational uses (*see, e.g., In re Morrisville Hydroelectric Project Water Quality,* 2019 VT 84, 224 A.3d 473 (2019)), may be appropriate certification conditions depending on the certifying authority's water quality standards or other aspects of state or Tribal law and the activity's impact on achieving compliance with such requirements.

The preamble to the final 2020 Rule identified examples of certification conditions possibly falling outside the water quality-related scope of section 401 review because they did not address water quality impacts, including conditions requiring one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project; conditions to address potential non-water quality-related environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity; and conditions related only to non-water quality-related impacts associated with air emissions and transportation effects. *See* 85 FR 42230. Subject to a case-by-case review of the particular facts presented by each certification, it is reasonable to assume that such non-water quality-related conditions would generally be beyond the scope of section 401.

Several commenters asserted that the proposed activity-based scope of certification was too ambiguous and would lead to various implementation challenges, such as regulatory uncertainty, increased litigation risk, increased project costs, and project delays. As discussed above, the Agency disagrees that its approach in the final rule will lead to implementation challenges. Rather, the final rule's approach to the scope of certification simply returns to the longstanding practice. Ultimately, the ''activity'' subject to the Federal license or permit will depend on the specific facts of a given situation. For example, the activity may be the construction and operation of a hydroelectric dam, *see, e.g., PUD No. 1,* 511 U.S. at 708–09, the construction and operation of a liquified natural gas marine import terminal and a pipeline connecting the terminal to an interstate natural gas pipeline, *see, e.g., AES Sparrows,* 589 F.3d at 723–24, or the construction and operation of a marina, *see, e.g.,* Winer Memorandum at 1.

While the specific ''activity'' subject to certification will be fact specific, the final rule clarifies certain limiting principles that apply to all certifications. A certifying authority's analysis is limited to evaluating the adverse water quality-related impacts from the activity when it evaluates whether the activity will comply with applicable water quality requirements. As discussed above, both the terms ''will comply'' and ''applicable water quality requirements'' limit what a certifying authority may consider and ultimately, the decisions that a certifying authority can make on a given request for certification.

F. Certification Decisions

1. What is the Agency finalizing?

In § 121.7(a), the Agency is finalizing that ''a certifying authority may act on a request for certification in one of four ways: grant certification, grant

certification with conditions, deny certification, or expressly waive certification.'' To provide further clarity on how a certifying authority may ''act on a request for certification,'' EPA is defining recommended minimum contents of a certification decision at § 121.7(c) through (f) and finalizing that certification decisions must be in writing. In a change from proposal and in support of the cooperative federalism balance central to section 401, the Agency is not requiring certifying authorities to include the components listed at § 121.7(c) through (f) in their certification decisions. Instead, the final rule defines recommended contents for a grant of certification (§ 121.7(c)), a grant of certification with conditions (§ 121.7(d)), a denial of certification (§ 121.7(e)), and an express waiver (§ 121.7(f)).

2. Summary of Final Rule Rationale and Public Comment

a. Decisions on a Request for Certification

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). This section briefly describes each of the four decisions a certifying authority may make, including what each decision means and its impact on the Federal licensing or permitting process. This final rule's interpretation of the four decisions a certifying authority may make is consistent with the 2020 Rule and longstanding interpretation of the 1971 Rule. *See* 40 CFR 121.7 (2020); 2010 Handbook at 1 (rescinded in 2019, *see supra*) (''The central feature of CWA § 401 is the state or tribe's ability to grant, grant with conditions, deny or waive certification.'').

First, a certifying authority may grant certification. A grant of certification means that the certifying authority has determined that the activity will comply with water quality requirements. *See* section IV.E in this preamble for further discussion of the scope of certification and the term ''water quality requirements.'' Granting certification means that the Federal license or permit may be issued. *See* 33 U.S.C. 1341(a)(1). Section 401(a)(1) provides that where there are no applicable water quality requirements for an activity, the certifying authority ''shall so certify.'' *Id.* EPA is finalizing minor revisions to the regulatory language located at § 121.7(f) of the 2020 Rule that describes this scenario, with minor edits to reflect the final rule scope of certification. *See* 40 CFR 121.7(g).

Second, a certifying authority may grant certification with conditions. A grant of certification with conditions means that the certifying authority has determined that the activity will comply with water quality requirements, but only if certain conditions are met. Pursuant to 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). As discussed later in section IV.G in this preamble, Federal circuit courts have routinely held that Federal agencies may not question or reject a state's certification conditions. *See, e.g., American Rivers,* 129 F.3d at 107 (''[Section 401(d)] is unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be ultra vires.''). Granting certification with conditions means the Federal license or permit may be issued, provided the conditions are incorporated into that Federal license or permit.

In this final rule, the Agency is not retaining any regulatory text on the incorporation of certification conditions as was included in the 2020 Rule. *See* 40 CFR 121.10 (2020). First, the 2020 Rule limited incorporation of certification conditions to only those that satisfy the content requirements at § 121.7(d) of the 2020 Rule.[72] 40 CFR 121.10 (2020). Section 401(d) requires all certification conditions to become conditions on a Federal license or permit and does not limit incorporation to only those conditions that include certain regulatorily defined components. As discussed in section IV.G of this preamble, EPA does not interpret the statute as allowing a Federal agency to review whether a certifying authority included certain regulatorily defined elements in its certification decisions, nor reject certifying authority conditions. Second, while the 2020 Rule required Federal agencies to clearly identify certification conditions in their Federal license or permit, section 401 does not require Federal agencies to distinguish among certification conditions in their licenses or permits. If the Federal agency finds it useful to distinguish certification conditions for implementation purposes, the Federal agency may structure its license or permit in such a manner, but EPA does not find it necessary to require such a distinction.

Third, a certifying authority may deny certification. A denial of certification means that the certifying authority is not able to certify that the activity will comply with water quality requirements. If a certifying authority denies certification, the Federal license or permit cannot be issued. 33 U.S.C. 1341(a)(1). The 2020 Rule included regulatory text that discussed the effects of a denial of certification. *See* 40 CFR 121.8 (2020). Section 121.8(a) of the 2020 Rule provided that a certification denial would not preclude a project proponent from submitting a new certification request. Section 121.8(b) provided that if the Federal agency determined that the certifying authority's denial satisfied the content requirements at § 121.7(e) of the 2020 Rule,[73] then the Federal agency would provide notice to the certifying authority and project proponent and the Federal license or permit would not be granted. As discussed below, the Agency is not retaining any regulatory text that speaks to the effects of a denial of certification because it is unnecessary.

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, the proposal did not include a similar provision. The commenter

[72] For example, the 2020 Rule required certifying authorities to include a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements and a citation to Federal, state, or Tribal law that authorizes the condition for each certification condition on an individual license or permit. 40 CFR 121.7(d)(1) (2020).

[73] For example, the 2020 Rule required certifying authorities to include three components on all denials of certification for individual Federal licenses or permits, including the specific water quality requirements with which the discharge will not comply, a statement explaining why the discharge will not comply with the identified water quality requirements, and description of the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements if the denial was due to insufficient information. 40 CFR 121.7(e)(1) (2020).

suggested that EPA is taking the position that a certification denial is always a permanent final action that is taken with prejudice and asserted that if this is EPA's position, it would be a significant change from its previous longstanding position affirmed by the 2020 Rule.

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.[74] 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.

EPA does not find it necessary to add any additional direction or process for certification denials, beyond providing recommended contents of a certification denial (as discussed below). If a project proponent disagrees with a certifying authority's denial, the project proponent may challenge the certifying authority's decision in the appropriate court. *See* S. Rep. 92–414 at 69 (1971) (''Should such an affirmative denial occur no license or permit could be issued by such Federal agencies . . . unless the State action was overturned in the appropriate courts of jurisdiction.''). The 2020 Rule also provided that a Federal license or permit may not be issued if a certifying authority denies certification in the manner prescribed by the 2020 Rule (*i.e.,* contains the contents defined at § 121.7(e) of the 2020 Rule). Under this final rule, Federal agencies may not review whether a certifying authority's certification denial contains the contents recommended at final rule § 121.7(e).

Fourth, a certifying authority may expressly waive certification. The statute explicitly provides for a constructive waiver if the certifying authority fails or refuses to act on a request for certification within the reasonable period of time. The statute does not explicitly state that a certifying authority may expressly waive certification. A few 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. However, 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.''). This interpretation is also consistent with the Agency's longstanding interpretation of the waiver provision. *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). Additionally, continuing to allow express waivers may create efficiencies where the certifying authority knows early in the process that it will waive. An express waiver does not mean that the certifying authority has determined that the activity will comply with water quality requirements. Instead, an express waiver indicates only that the certifying authority has chosen not to act on a request for certification. Consistent with the statutory text, an express waiver enables the Federal agency to issue a Federal license or permit without a certification. 33 U.S.C. 1341(a)(1).

b. Defining What It Means ''To Act on a Request for Certification''

The Agency is finalizing the definition of what it means ''to act on a request for certification'' as proposed at § 121.7(a). Once a certifying authority receives a request, the certifying authority must ''act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.'' 33 U.S.C. 1341(a)(1). The phrase ''to act on a request for certification'' is not defined in the statute; nor did EPA define it in the 1971 or 2020 Rules. To provide greater clarity regarding how a certifying authority ''act[s] on a request for certification'' within the reasonable period of time, EPA is defining the phrase to mean that a certifying authority is making one of the four certification decisions discussed above: granting certification, granting certification with conditions, denying certification, or expressly waiving certification.

The Agency is providing clarification regarding what it means to ''act on a request for certification'' in light of commenter input on this topic and recent case law. For example, would other actions beyond the four just discussed qualify as ''acting'' on a request for certification? The Fourth Circuit recently held that it was permissible for a project proponent to withdraw its application to avoid a certification denial as long as the certifying authority and project proponent were not in a ''coordinated withdrawal and resubmission scheme.'' *NCDEQ* v. *FERC,* 3 F.4th 655, 672, 676 (4th Cir. 2021). However, the court, in dicta, also suggested that the section 401 phrase ''to act'' could be interpreted to mean something different than a final action on a request for certification. According to the court, a certifying authority that ''takes significant and meaningful action'' and ''in good faith takes timely action to review and process a certification request likely would not lose its authority to ensure that federally licensed projects comply with the State's water quality standards, even if it takes the State longer than a year to make its final certification decision.'' *Id.* at 670.

EPA proposed to interpret the phrase ''to act on a request for certification'' to mean that a certifying authority makes one of the four above-described certification decisions: grant, grant with conditions, deny, or expressly waive. However, the Agency requested comment on this interpretation, as well as any alternative interpretations, such as the *NCDEQ* approach. A few commenters did not support the proposed approach and 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 other 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. Conversely, some commenters supported the proposed approach noting it provided much needed clarity and correctly rejected the *NCDEQ* approach.

[74] *See e.g., New York State Dep't of Env't Conservation* v. *FERC,* 991 F.3d 439, 450 at n.11 (2d Cir. 2021) (noting that if a state finds that a ''particular application requires supplementation,'' the state ''can deny an application without prejudice within the one-year deadline, which will presumably prompt the applicant to resubmit the application with additional material'') (citing *New York State Dep't of Env't Conservation* v. *FERC,* 884 F.3d 450, 456 (2d Cir. 2018)); *Turlock Irrigation Dist.* v. *FERC,* 36 F.4th 1179, 1183–84 (D.C. Cir. 2022) (rejecting arguments that, if the court upheld the denials without prejudice at issue before it, ''State agencies could extend the time for decision indefinitely by denying one certification request after another without prejudice, thus nullifying section 401's one-year limit'').

The Agency finds that defining ''to act on a request for certification'' as making one of the four above-described certification decisions 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.''). 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, although the Agency has never explicitly defined ''to act on a request for certification,'' the interpretation taken in this final rule is consistent with prior Agency guidance and the 2020 Rule preamble. In the 2020 Rule, the Agency noted that ''[i]f a certifying authority fails or refuses to [grant certification, grant certification with conditions, deny certification, or expressly waive certification] within the reasonable period of time, the CWA provides that the certifying authority will be deemed to have waived the certification requirement.'' 85 FR 42262 (July 13, 2020). One implication of this language is that the Agency thought that ''to act on a request for certification'' means to make a final decision on the request (*i.e.,* grant, grant with conditions, deny, or expressly waive certification). Courts appear to agree. *See, e.g., Alcoa Power Generating, Inc.* v. *FERC,* 643 F.3d 963, 972 (D.C. Cir. 2011) (noting that ''[i]n imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request''); *NYSDEC,* 884 F.3d at 455–56 (noting that a state must act after receiving a certification request and that denial ''would constitute 'acting' on the request under the language of Section 401''); *New York State Dep't of Environmental Cons.* v. *FERC,* 991 F.3d 439, 443, 450 (2d Cir. 2021) (State agency could not ''extend[ ] the deadline . . . to issue or deny water quality certification'' beyond ''one year of the actual receipt of the application'' for certification); *Millennium Pipeline Co.* v. *Seggos,* 860 F.3d 696, (D.C. Cir. 2017) (''To prevent state agencies from indefinitely delaying issuance of a federal permit, ... a State [must] grant or deny the certificate'' within one year from the receipt of a request for certification).

Lastly, the Agency finds that the final rule's approach best supports a clear, consistent, and transparent certification process. As noted 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 (June 9, 2022). 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).

c. Failing or Refusing To Act on a Request for Certification

Similar to the proposed rule, the Agency is finalizing at § 121.9(a) 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.'' 40 CFR 121.9(a). EPA proposed at § 121.8 that ''the certification requirement shall be waived if a certifying authority fails or refuses to act on a request for certification in accordance with § 121.7(a) within the reasonable period of time, as defined at § 121.6.'' EPA has reorganized the regulatory text by moving the text proposed at § 121.8 (''Failure or refusal to act'') to § 121.9 and made several revisions. First, EPA made minor non-substantive revisions at § 121.9(a) to remove unnecessary and redundant internal references to §§ 121.6 (reasonable period of time) and 121.7(a) (possible actions on a request for certification). Second, the Agency has moved proposed § 121.9(c), which described the process that occurred once a certifying authority failed or refused to act, to § 121.9(b) to pair the process that occurs once a certifying authority fails or refuses to act with the final rule's express statement on constructive waiver. The Agency intends such restructuring to clearly convey that a constructive waiver of certification may only occur where a certifying authority fails or refuses to act, as defined in this final rule, within the reasonable period of time. *See* section IV.G in this preamble for further discussion on Federal agency review for failure or refusal to act within the reasonable period of time.

The plain language of section 401(a)(1) provides that the certification requirement is waived if a certifying authority ''fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year).'' *Id.* As discussed in section IV.D of this 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.

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. *See id.* (''No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.'').

The legislative history of this provision also suggests that constructive waivers were intended to prevent delays in the Federal licensing or permitting process due to the certifying authority's failure to grant or deny certification. *See* H. Rep. No 92–911, at 122 (1972) (''In order to insure that sheer inactivity by the State, interstate agency or Administrator as the case may be, will not frustrate the Federal application, a requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on the request for certification, then the certification requirement is waived.''). Similarly, the 1971 Rule and subsequent Agency guidance recognized that constructive waivers could occur due to certifying authority inaction. *See* 40 CFR 121.16(b) (2019) (providing that constructive waiver occurred upon the ''failure of the State . . . concerned to act on such a request for certification within a reasonable period of time after receipt of such request''); 2010 Handbook at 11 (rescinded in 2019, *see supra*) (''State and tribes are authorized to waive [section] 401 certification . . . by the certification agency not taking action.'').

The 2020 Rule's interpretation of what it means for a certifying authority to fail or refuse to act departed from the longstanding Agency position on constructive waivers. The 2020 Rule allowed a Federal agency to determine that a certifying authority had failed or refused to act, and thereby waived certification—even when the certifying authority *did* in fact act on a request for certification within the reasonable period of time—if the Federal agency found that the action was somehow procedurally deficient (*e.g.,* did not follow the 2020 Rule's procedural requirements for a denial of certification). 40 CFR 121.9(a)(2) (2020); 85 FR 42266. Similarly, a Federal agency could determine that a certification condition was waived if the condition did not comply with procedural requirements of the 2020 Rule. *Id.* at 42250. This aspect of the 2020 Rule drew considerable pre-proposal input and public comment to the effect that this interpretation could result in a Federal agency ''veto'' of a section 401 certification, and that it was contrary to the statute, the legislative history, and case law. EPA similarly expressed concern in its **Federal Register** document announcing its intent to revise the 2020 Rule, noting that ''a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency.'' 86 FR 29543 (June 2, 2021).

The 2020 Rule's interpretation of waiver of a certification decision is not consistent with the plain language of the statute and its legislative history. The mere failure of a certifying authority to include certain regulatorily defined elements in its certification decision or comply with other procedural requirements of section 401, such as following public notice procedures on a request for certification, do not qualify as the kind of ''sheer inactivity'' that Congress contemplated would result in a constructive waiver. This interpretation also resulted in Federal agencies rejecting certification decisions intended to prevent adverse water quality impacts because of fixable procedural concerns. For example, some 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.G.2 of this preamble, a constructive waiver is a severe consequence because 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. Accordingly, consistent with the statutory language, legislative history, and prior Agency interpretation, EPA is finalizing regulatory text to clarify that constructive waivers may occur only if a certifying authority fails or refuses to take one of the four actions described in this section within the reasonable period of time.

Consistent with this approach, EPA is also finalizing targeted conforming revisions to its part 124 and part 122 regulations, where these regulations previously allowed EPA to find that a certifying authority waived its right to certify or waived a certification condition for reasons other than those specified in final rule § 121.9 (failure to act on a request for certification within the reasonable period of time). EPA is deleting the majority of the language in 40 CFR 124.53(e)(2) and (3), which allowed EPA to waive certification conditions that did not meet certain requirements.[75] *See* discussion *infra* for further discussion on the revisions to § 124.53.

EPA is also finalizing revisions to 40 CFR 124.55(c), which allowed EPA to waive certification conditions or denials that were based on state law allowing a less stringent permit condition. Specifically, EPA is deleting the second sentence of § 124.55(c), which allowed EPA to waive a certification denial or condition. The first sentence of § 124.55(c) will remain because it is not affected by this final rule. Finally, EPA is finalizing revisions to 40 CFR 122.44(d)(3), which allowed EPA to waive certifications that were stayed by a court or state board under certain circumstances. EPA is deleting the second and third sentences, which concerned certification waiver. As a result of these deletions and revisions in EPA's part 124 and part 122 regulations, certification waivers for EPA-issued NPDES permits will be governed solely by the certification waiver requirements in § 121.9 of the final rule.

d. Contents of a Certification Decision

To further clarify how a certifying authority may ''act on a request for certification,'' EPA is finalizing recommended contents of a certification decision at § 121.7(c) through (f) and finalizing a requirement that all certification decisions be in writing. In a change from proposal 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 (§ 121.7(c)), a grant of certification with conditions (§ 121.7(d)), a denial of certification (§ 121.7(e)), and an express waiver of certification (§ 121.7(f)). As discussed in more detail below, these recommended contents are similar to those proposed (as requirements) with modifications in light of commenter input. The Agency is also finalizing revisions to the regulatory text located at § 121.7(a) of the 2020 Rule with minor, non-substantive revisions to clarify that all certification decisions should be within the scope of certification and taken within the reasonable period of time. 40 CFR 121.7(b).

[75] EPA is also deleting provisions in § 124.53(e) because its approach to the contents of a certification decision differed from final rule § 121.7, as explained in preamble section IV.F.2.d of this preamble.

EPA is finalizing removal of the regulatory text located at § 121.7(b) of the 2020 Rule, which characterized what actions a certifying authority may take based on its evaluation of the request for certification. EPA believes it is redundant to retain separate regulatory text restating the same ideas as final rule § 121.7(a) and (c) through (f).

While the statute provides that certifying authorities may make one of four decisions when processing a request for certification, the CWA does not explicitly describe the contents or elements of a certification decision. EPA's 1971 Rule defined the contents of a certification and express waiver decision for all certifying authorities. The 1971 Rule's enumeration of the contents of a certification decision was simple but effective and included the name and address of the applicant, a statement that the certifying authority examined the application, a statement that ''there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,'' and other information deemed appropriate by the certifying authority. 40 CFR 121.2(a) (2019). In addition, the 1971 Rule provided that a certification could be waived upon either (1) written notification from the certifying authority that it expressly waived its authority to act on a request, or (2) written notification from the Federal licensing or permitting agency regarding the failure of the certifying authority to act on a request for certification within the reasonable period of time. 40 CFR 121.16 (2019). The 1971 Rule did not define the contents of a certification denial or provide specific requirements for how to articulate and incorporate a certification condition.

In the 2020 Rule, EPA updated those requirements for each type of certification decision and more fully addressed the effects of those decisions. First, it provided that, when a certifying authority granted certification under the 2020 Rule, the certification must be in writing and include a written statement that the discharge from the proposed project would comply with water quality requirements. 40 CFR 121.7(c) (2020); 85 FR 42286.

Second, when a certifying authority granted certification with conditions, the 2020 Rule required that the certifying authority explain the necessity of each condition and provide a citation to an applicable Federal, state, or Tribal law. 40 CFR 121.7(d) (2020); 85 FR 42286. This was a change from the 1971 Rule, which broadly provided for certifying authorities to include conditions as they ''deem[ed] necessary or desirable.'' 40 CFR 121.2(a)(4) (2019). The 2020 Rule preamble stated that the requirements were ''intended to increase transparency and ensure that any limitation or requirement added to a certification . . . is within the scope of certification.'' 85 FR 42256. EPA observes that this provision was similar to EPA's current NPDES program-specific section 401 regulations. *See* 40 CFR 124.53(e)(2) (2023) (requiring a citation for any conditions more stringent than those in the draft permit).[76]

Third, unlike the 1971 Rule, under which certification denials were undefined, the 2020 Rule defined the contents of a denial decision. Specifically, the 2020 Rule required certification denials to be made in writing and to identify any water quality requirements with which the discharge will not comply, include a statement explaining why the discharge would not comply with those requirements, and provide any specific water quality data or information that would help explain a denial based on insufficient information. 40 CFR 121.7(e) (2020); 85 FR 42286.

Fourth, the 2020 Rule included similar language to the 1971 Rule for express waivers and required written notification from the certifying authority indicating an express waiver of its authority to act on a request for certification. 40 CFR 121.9(a)(1) (2020); 85 FR 42286. Lastly, under the 2020 Rule, EPA defined constructive waiver as a certifying authority's ''failure or refusal to act on a certification request'' which included failing or refusing to (1) act within the reasonable period of time, (2) satisfy the procedural requirements for a grant or denial of certification imposed by the 2020 Rule, or (3) comply with other procedural requirements of section 401 (*e.g.,* provide public notice on a certification request). 40 CFR 121.9(a)(2) (2020); 85 FR 42286. The 2020 Rule also provided that condition-specific waivers could occur if the certifying authority failed to satisfy the procedural requirements imposed by the 2020 Rule for certification conditions. 40 CFR 121.9(b) (2020); 85 FR 42286. *See* section IV.G in this preamble for further discussion on constructive waivers and the role of Federal agencies.

The stated purpose of the 2020 Rule requirements was to promote transparency and consistency in certification decisions and to help streamline the Federal licensing and permitting processes. 85 FR 42220. However, in pre-proposal input, several certifying authorities said that the 2020 Rule's requirements for the contents of certification decisions delayed rather than streamlined the certification process. Conversely, in pre-proposal outreach, project proponents expressed interest in keeping the 2020 Rule requirements for the added transparency and argued that it is helpful when certifying authorities explain their final certification decisions (especially denials). In response to this mixed input, the Agency proposed to include some requirements for each of the four types of certification decisions. The Agency intended for this approach to address both the workload concerns expressed by certifying authorities, and the desire of project proponents for increased transparency and consistency in the certification process.

Some commenters supported the proposed rule's approach, including the removal of the 2020 Rule requirements to include specific statutory or regulatory citations for each certification condition and denial, and retaining the inclusion of 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. Commenters argued that the explanation requirement would provide transparency and regulatory certainty. However, some commenters asserted that any content requirements imposed by EPA would place an undue burden on the certifying authority and recommended that the Agency remove all content requirements. Conversely, some other commenters expressed interest in keeping the 2020 Rule requirements, including a few commenters who argued that citations are necessary for legally defensible certification decisions, to provide transparency, and to enable the project proponent and the public to understand the rationale for a condition.

After reviewing public comments, the Agency is not finalizing any requirements for certification decisions. 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

[76] The Agency is finalizing revisions to the part 124 regulations where such provisions are inconsistent with this final rule, including deleting 40 CFR 124.53(e)(2). *See* discussion *infra.*

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). 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 § 121.7(c) through (f). These contents are similar to the contents proposed (to be required) at § 121.7(c) through (f), with modifications based on stakeholder input. *See* discussion *infra.* 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. For its part, the Agency intends to include these contents in certification decisions when it acts as a certifying authority and encourages other certifying authorities to include similar contents in their certification decisions. However, the final rule approach provides certifying authorities with the flexibility to add different or additional elements or information requirements to any of these four certification decisions to provide stakeholders with additional clarity and transparency. For example, a certifying authority may choose to require a citation to applicable Federal or state or Tribal water quality requirements to support a certification condition.

As discussed above, the Agency is recommending, as opposed to requiring, additional contents for each type of certification decision. Before discussing the specific contents of each certification decision in more detail, the Agency would like to address the recommended contents that are the same or similar in all four certification decisions. First, consistent with the 2020 Rule, the Agency has opted to retain language in the recommended contents of a certification decision consistent with the 1972 statutory language. Unlike the 2020 Rule, the 1971 Rule included language that reflected the predecessor statute. As discussed in section III in this preamble, the 1972 CWA revised the predecessor version of section 401 that the 1971 Rule relied upon. To continue to account for this change to the statutory text, the Agency is retaining a similar provision as the 2020 Rule that certification decisions to grant, grant with conditions, or deny certification should indicate whether the certifying authority has determined that an activity will comply with the water quality requirements identified in the CWA, not just water quality standards.[77] Unlike the 2020 Rule, EPA is finalizing that certification decisions should indicate whether the activity, as opposed to the discharge, will comply with water quality requirements. *See* section IV.E of this preamble for further discussion on the scope of certification.

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. 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.

Nor does EPA expect that the use of ''will comply'' will impede or limit a certifying authority's ability to act on a request for certification or prevent a certifying authority from relying on modeling information, which provides an informed projection of potential impacts, to make a certification decision. When a certifying authority makes a certification decision, it would be certifying that the activity will comply with water quality requirements for the life of the Federal license or permit and not just at the moment the Federal license or permit is issued. The lifespan of FERC licenses can be decades, whereas CWA section 402 or 404 permits usually last five years. Given the possible lifespan of a Federal license or permit, and the possibility that water quality-related changes or impacts may occur, for example, due to climate change or other factors during that time, it is reasonable (and perhaps essential in some cases) for certifying authorities to rely on modeling to inform certification decisions. EPA 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.

Second, the Agency continues to require all certification decisions to be in writing. While the Agency is not aware of any certification decisions being provided in a different manner (*e.g.,* verbally), EPA is finalizing the requirement that all certification decisions be in writing to ensure the project proponent and Federal agency can clearly understand the certification decision and, for a certification with conditions, any conditions that must be included in the Federal license or permit.

Third, 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. A few commenters suggested that the final rule should remove any requirements to include the identification of the Federal license or permit. 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.

Fourth, the Agency is adding regulatory text that encourages certifying authorities to clearly identify the certification decision type (*i.e.,*

[77] The 1971 Rule required a certification issued by any certifying authority to include, ''A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable *water quality standards.*'' 40 CFR 121.2(a)(3) (2019) (emphasis added).

grant, grant with conditions, denial, or waiver) to ensure project proponents and Federal agencies can easily understand the nature of the certification decision. This is particularly important for Federal agencies who need to look at a certification decision to determine how it should act in response. For example, if a certifying authority denies certification, the Federal agency cannot issue the Federal license or permit. Similarly, if a certifying authority grants certification with conditions, the Federal agency must include those conditions in its Federal license or permit.

Lastly, the Agency is adding regulatory text that encourages a certifying authority to indicate that it complied with its public notice procedures established pursuant to CWA section 401(a)(1). As discussed in section IV.G in this preamble, Federal agency review is limited to verifying compliance with the requirements of CWA section 401, including whether the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA section 401(a)(1). *See* 40 CFR 121.8. The language added throughout § 121.7 is intended to aid this aspect of Federal agency review. EPA is not defining how exactly a certifying authority must indicate in its certification decision that it complied with public notice procedures. Instead, a certifying authority may choose to demonstrate that it complied with its public notice procedures as it sees fit, including but not limited to, by including a copy of the public notice in its certification decision, by including a description of the public notice process it undertook in the certification decision, or by simply including an attestation statement in the certification decision that the certifying authority complied with its public notice procedures.

While the above paragraphs address aspects of the recommended components that are the same for all certification decisions, the following paragraphs describe the individual requirements EPA is recommending for each of the four kinds of certification decisions.

First, any grant of certification should (1) identify the decision as a grant of certification, (2) identify the applicable Federal license or permit, (3) include a statement that the activity ''will comply'' with water quality requirements, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). While the 1971 Rule required a statement that there was ''reasonable assurance,'' 40 CFR 121.2(a) (2019), as explained above, 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).

Second, EPA is finalizing that any grant of certification with conditions should (1) identify the decision as a grant of certification with conditions, (2) identify the applicable Federal license or permit, (3) include a statement explaining why each condition is necessary to assure that the activity will comply with water quality requirements, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). The Agency proposed that a grant of certification must include any conditions necessary to assure that the activity as a whole will comply with applicable water quality requirements. Due to the change in approach to include recommended components, as opposed to required components, for certification decisions, the Agency is removing the proposed text at § 121.7(d)(2) and instead adding text at final rule § 121.3(b) that requires certifying authorities to include any conditions necessary to assure that the activity will comply with applicable water quality requirements. The text at final rule § 121.3(b) reflects the language used in section 401(d).

The Agency recommends that certifying authorities include a statement explaining why each of the included conditions is necessary in a certification with conditions, consistent with proposed § 121.7(d)(3).[78] A few commenters expressed concern over how such justifications should be included in a certification decision, including arguing that it would interfere with readability or suggesting grouping explanations instead of requiring an explanation for each condition. Although the Agency is not requiring the inclusion of a statement explaining why a condition is necessary, EPA finds that including such a statement will help project proponents and Federal agencies understand the reason for the condition and assist in its implementation. As discussed in the implementation section below, there are several ways a certifying authority can include this information in a certification decision to aid readability for ease of implementation, such as including justifications in an addendum to the certification. *See infra.* EPA anticipates that such information is readily available to the certifying authority as part of its decision-making process.

Consistent with the final rule's shift to recommended contents of a certification decision, the Agency is not requiring certifying authorities to include a specific statutory or regulatory citation in support of a certification condition. Rather, the Agency will let certifying authorities decide what relevant information to provide in support of any conditions. EPA encourages certifying authorities to work with project proponents and Federal agencies to determine what information would be most useful (*e.g.,* statutory or regulatory citations). Additionally, EPA 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 here 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.

Third, EPA is finalizing that any denial of certification should (1) identify the decision as a denial of certification, (2) identify the applicable Federal license or permit, (3) include a statement explaining why the certifying authority cannot certify that the proposed activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). Although the 1971 Rule did not define the elements of a decision to deny certification, this concept was introduced in the 2020 Rule. The recommended contents for a denial of certification are similar to the requirements in the 2020 Rule. The Agency did not propose to retain the regulatory text located at § 121.7(e)(2)(iii) of the 2020 Rule, which required a certifying authority to describe specific water quality data or

[78] The Agency recommends including at least a succinct explanation for the certification condition(s) to provide necessary transparency and clarity for project proponents and Federal agencies. As a practical matter, certifying authorities will likely already have developed and considered such information as part of their decision-making process and included it in the record to substantiate their decision. Aside from borrowing from their decision-making record, EPA expects that certifying authorities may be able to satisfy this requirement in a number of ways. For example, certifying authorities could identify specific water quality requirements with which the activity will not comply without the condition.

information that would be needed if the denial is due to insufficient information. As discussed in the preamble to the proposed rule, the Agency noted that certifying authorities could provide this sort of information to satisfy the regulatory requirement at § 121.7(e)(2) to include a statement explaining why the certifying authority cannot certify that the activity as whole will comply with water quality requirements. 87 FR 35353. However, some commenters argued that denials due to insufficient information should, as in the 2020 Rule, include an explanation of what information was missing. Although the Agency is not requiring any specific information for denials of certification, the Agency is adding language at final rule § 121.7(e)(3) to clarify that statements explaining why a certifying authority cannot certify that the activity will comply with water quality requirements may include, but are not limited to, a description of any missing water quality-related information if the denial is based on insufficient information.

The Agency recommends including at least a succinct explanation for the certification denial to provide necessary transparency and clarity for project proponents and Federal agencies. As a practical matter, certifying authorities will likely already have developed and considered such information as part of their decision-making process and included it in the record to substantiate their decision. Aside from borrowing from their decision-making record, EPA expects that certifying authorities may be able to satisfy this requirement in several ways. For example, certifying authorities could identify specific water quality requirements with which the activity will not comply, or identify what information about the project or potential water quality effects is missing or incomplete that led the certifying authority to not be able to determine whether the activity will comply with water quality requirements. EPA anticipates that certifying authorities will work with project proponents and Federal agencies to determine what information would be most useful. Additionally, EPA is not distinguishing between certification decisions based on an individual or a general Federal license or permit. Although EPA took this approach in the 2020 Rule, EPA is no longer defining required certification decision-specific contents and the recommended contents would apply to a denial of certification regardless of the nature of the Federal license or permit.

Lastly, EPA is finalizing that any express waiver made by a certifying authority should (1) identify the decision as an express waiver of certification, (2) identify the applicable Federal license or permit, (3) include a statement that the certifying authority expressly waives its authority to act on the request for certification, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). This approach is consistent with the 1971 Rule and 2020 Rule, except the final rule merely recommends inclusion of such a statement of express waiver instead of requiring it. As noted above, an express waiver indicates only that the certifying authority has chosen not to act on a request for section 401 certification. Accordingly, the certifying authority would only need to state that it is waiving certification and would not need to make any statement about why it has decided to waive or its assessment of the project's impact on its water quality.

In this final rule, EPA is also, in large part, finalizing removal of 40 CFR 124.53(e)(1) through (3), which address the contents of a certification for an EPA-issued NPDES permit. EPA proposed to delete of the entirety of § 124.53. *See* 87 FR 35357. Most of the contents identified at § 124.53(e) are not consistent with the contents identified at § 121.7(d) and (e). For example, § 124.53(e)(2) required a citation (but not an explanation) for each condition of certification, whereas final rule § 121.7(e) recommends including an explanation (but not a citation) for each condition. Further, § 124.53(e)(1) identified what conditions must be included in a certification but did not match the conditions identified at final rule § 121.3(b). Final rule § 121.3(b) incorporates the final rule's concepts of the entire ''activity'' scope of review and ''water quality requirements'' while § 124.53(e)(1) did not. To be clear, all certification decisions, including those on EPA-issued NPDES permits, must comply with this final rule § 121.3(b). As discussed above, certifying authorities may work with EPA and/or project proponents to determine what information would be most useful to include in a certification with conditions on an EPA-issued NPDES permit (*e.g.,* a citation to the CWA or state law for conditions more stringent than those in the draft permit).

EPA is finalizing revisions to § 124.53(e)(3), now § 124.53(e), which allows, but does not require, certifying authorities to include a statement in a grant of certification regarding the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards. EPA has concluded that this provision, as finalized, is not inconsistent with the Agency's approach to certification decisions in the final rule because it is a recommended and not required component of a certification decision. This provision will assist the NPDES program in its implementation by ensuring that permit conditions in final NPDES permits are consistent with state law. However, any statement included pursuant to § 124.53(e) would be informational, for the benefit of EPA permit writers, and would not be a condition of certification. Section 124.53(e) would not allow the Agency to reject or modify certification conditions; rather, this provision allows certifying authorities to provide EPA with input on draft permit conditions. This is not the only opportunity for a certifying authority to provide input on draft NPDES permit conditions. Certifying authorities could also provide input on draft NPDES permit conditions through the public notice process or upon review of a draft NPDES permit.

3. Implementation

A few commenters suggested that the definition of ''to act'' needed additional clarity to state the that the four actions proposed are the only ways in which a certifying authority may ''act'' on a request for certification. EPA finds that the regulatory text at final rule § 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.

As discussed above, EPA is not defining how exactly a certifying authority must indicate in its certification decision that it complied with public notice procedures. Instead, a certifying authority may choose how it wishes to demonstrate that it complied with its public notice procedures. Possible options include, but are not limited to, providing a copy of the public notice in its certification decision, describing in the certification decision the public notice process it undertook, checking a checkbox that indicates that the certifying authority complied with public notice procedures, or including an attestation statement that the certifying authority complied with its public notice procedures.

Although the Agency is no longer requiring certifying authorities to include decision-specific contents in each of the four certification decisions, the Agency strongly encourages certifying authorities to include the recommended contents located at final rule § 121.7(c) through (f). EPA finds these recommended contents best reflect the types of information project proponents and Federal agencies may need to clearly understand and easily implement a certification decision. Specifically, clearly identifying the nature of the certification decision (*i.e.,* a grant, grant with conditions, denial, or waiver) is an important way to promote transparency and to avoid misunderstandings. The Agency believes all recommended contents should be readily available to the certifying authority as part of its decision-making process, and therefore easily incorporated into a certification decision.

The Agency received comments expressing concern over providing a justification statement for each certification condition because of readability concerns. To be clear, the Agency is not requiring these contents to be included in certification decisions, nor prescribing how they should be incorporated into a certification decision. Nevertheless, EPA believes there are several options to address such readability concerns and still provide the recommended information. For example, a certifying authority may choose to include explanations (*e.g.,* statement, citations, etc.) immediately following the certification condition it supports. Alternatively, a certifying authority could organize those explanations in the form of a table and reference them in the document. Either of those methods is an acceptable way to provide the support for why the conditions are necessary.

The recommended contents for certification decisions found at final rule § 121.7(c) through (f) do not represent the totality of information that a certifying authority may find useful to share with project proponents and Federal agencies.[79] Certification decisions can act as important implementation tools for certifying authorities to convey best practices, rationales, and other pertinent information to both project proponents and Federal agencies. However, for certifications with conditions, it is important to clearly indicate what information is merely background or supplementary information as opposed to the actual conditions that must be incorporated into the Federal license or permit. For example, when EPA acts as the certifying authority it clearly denotes which aspects of the certification with conditions are general information versus the actual certification conditions. Clearly parsing out this information in the decision document ensures project proponents are best positioned to understand and comply with certification conditions.

Related to the importance of clearly communicating certification decisions to project proponents and Federal agencies is the importance of drafting clear certification conditions. EPA recognizes that certification conditions are an important tool that enable certifying authorities to ensure that projects needing Federal licenses or permits will be able to move forward without adverse impacts to water quality. 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 wishes to clarify the nature and effect of 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 change. Conversely, one commenter asserted that certifying authorities should not be able to add adaptive management conditions to certifications because such conditions are reopener conditions that could lead to new conditions being incorporated into the Federal permit long after the certification is issued. EPA agrees that adaptive management conditions are an important tool to enable a certification to assure that the project will comply with water quality activities over the life of the project. However, the Agency disagrees that these conditions are the same as ''reopener'' clauses.[80] 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 this 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

[79] As discussed above, the Agency intends to include the recommended contents in certification decisions when it acts as a certifying authority and encourages other certifying authorities to include similar contents in their certification decisions.

[80] *See* discussion in section IV.I of this preamble about ''reopener'' clauses or conditions and the Agency's position on a certifying authority's ability to unilaterally modify a certification after the reasonable period of time.

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, *see supra*).

Once a certifying authority acts on a request for certification, the certifying authority should send the certification decision to the project proponent requesting certification. Ultimately, section 401(a)(1) requires the project proponent 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 email correspondence).

G. Federal Agency Review

1. What is the Agency finalizing?

The Agency is finalizing regulatory text at § 121.8 to clarify that Federal agency review is limited to verifying compliance with the requirements of CWA section 401. Specifically, the final rule provides that to the extent a Federal agency verifies compliance with the requirements of CWA section 401, its review is limited to (1) whether the appropriate certifying authority issued the certification decision; (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1); and (3) whether the certifying authority acted on the request for certification within the reasonable period of time. 40 CFR 121.8. EPA proposed at § 121.9 that Federal agency review of a certification decision is limited to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority complied with its own public notice procedures for a request for certification, and that the decision was issued in the reasonable period of time. As discussed in more detail below, the Agency removed the first factor (the nature of the decision) and modified the third factor to clarify that Federal agency review is limited to verifying that the certifying authority confirmed compliance with its public notice procedures. Aside from the three elements listed at § 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).

As proposed, the Agency is declining to define how a certifying authority must demonstrate its compliance with the three CWA section 401 requirements listed above. *See* 87 FR 35356 (June 9, 2022). The Agency proposed at § 121.9(b) to define a process that a Federal agency must follow if it determined that a certification decision did not indicate the nature of the certification decision or the certifying authority did not provide public notice on the request for certification. As discussed below, the Agency is not finalizing Federal agency review for whether the certification decision indicates the nature of the decision, and therefore EPA need not finalize a subsequent process. Although the final rule allows Federal agencies to verify that a certifying authority confirmed compliance with its public notice procedures, the Agency is returning to its pre-2020 Rule posture and declining to define a process that Federal agencies must follow if they are unable to verify compliance. The Agency is finalizing as proposed a process for the Federal agency to follow if it determines that a certifying authority failed or refused to act within the reasonable period of time at final rule § 121.9(b). Specifically, § 121.9(b) requires the Federal agency to promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived and that such notice from the Federal agency shall satisfy the project proponent's obligation under CWA section 401.

The Agency has also reorganized the regulatory text to move the Federal agency review provision to § 121.8, before the provision in the final rule regarding what it means to fail or refuse to act. The Agency believes this reorganization will more clearly communicate 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. The text as finalized 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.

2. Summary of Final Rule Rationale and Public Comment

Section 401 does not explicitly provide a defined role for Federal licensing or permitting agencies to review certifications. However, the Agency has long recognized, both in regulation and guidance, that some degree of Federal agency review of certification decisions is appropriate. The 1971 Rule provided Federal agencies with the ability to determine whether a certifying authority acted within the reasonable period of time. *See* 40 CFR 121.16(b) (2019) (''The certification requirement with respect to an application for a license or permit shall be waived upon . . . Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request . . .''). Prior EPA guidance acknowledged that the Federal licensing or permitting agency may review the procedural requirements of a certification decision. 2010 Handbook at 32 (rescinded in 2019, *see supra*) (''For example, the federal permitting or licensing authority may review the procedural requirements of [section] 401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.'') (citing *American Rivers,* 129 F.3d at 110–111; *City of Tacoma* v. *FERC,* 460 F.3d 53, 68 (D.C. Cir. 2006)). However, this prior guidance also acknowledged the limitations of Federal agency review and stated that Federal agencies cannot pick and choose among a certifying authority's certification conditions. *Id.* at 10 (citing *American Rivers,* 129 F.3d at 110–11).

A number of courts have acknowledged a limited role for Federal agencies to ensure that a certifying authority meets certain statutory requirements of section 401. The D.C. Circuit has held that section 401(a)(1) authorized FERC, as the relevant Federal licensing agency, ''to determine that the specific certification 'required by [section 401 has] been obtained,' '' because otherwise, ''without that certification, FERC lack[ed] authority to issue a license.'' *City of Tacoma,* 460 F.3d at 67–68 (''If the question [raised to FERC] regarding the state's section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then FERC must address it.''). The court did not define what a ''certification required by this section'' included, but suggested it included at a minimum, ''explicit requirement[s] of section 401,'' including that the certifying authority provide public notice, which was the section 401 requirement at issue in the case before

the court. *Id.* at 68. It is important to note that, while the court found that FERC had an obligation under the facts of that case to confirm the public notice requirement was satisfied, the court did not frame this requirement as a prerequisite in every instance where the agency is presented with a certification decision. Rather, the court found that FERC had to confirm compliance in the case before it because public notice had been ''called into question.'' *See id.*

In an earlier case, the Second Circuit ruled that FERC did not have authority to substantively review certification conditions to ''decide which conditions are within the confines of [section] 401(d) and which are not.'' *American Rivers,* 129 F.3d at 107. In reaching this conclusion, the court noted that FERC nonetheless did have authority to determine whether the appropriate certifying authority issued the certification decision and whether the certification decision was issued within the reasonable period of time. The court explained that ''[w]hile [FERC] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, [FERC] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401.'' *Id.* at 110–11.

In a more recent case, the D.C. Circuit upheld a FERC order declining to weigh in on the validity of a certifying authority's denials of certification. *Turlock Irrigation Dist.* v. *FERC,* 36 F.4th 1179 (D.C. Cir. 2022). At issue in the case was the re-licensing of two hydroelectric facilities. *Id.* at 1181. The hydroelectric facilities argued that the denials were invalid under the facts of the case.[81] FERC found that no party disputed that the certifying authority denied the requests (without prejudice). *Turlock Irrigation Dist. Modesto Irrigation Dist.,* 174 FERC ¶ 61,042, 61,175 (2021). ''FERC reasoned that the [certifying authority], 'by denying the applications without prejudice, indeed acted on [ ] them. . . .' '' *Turlock,* 36 F.4th at 1182. FERC declined the facilities' invitation to decide whether the denials where nonetheless somehow ''invalid'' under Federal law ''because they were 'on non-substantive grounds' and not 'on the technical merits of the certification requests.' '' *Id.* at 1182–83. FERC ''conclude[d] that it is not the [FERC] Commission's role to review the appropriateness of a state's decision to deny certification.'' 174 FERC at ¶ 61,176. The Court of Appeals upheld FERC's order.[82] *Turlock,* 36 F.4th at 1184.

The 2020 Rule went a step further than the Federal agency review recognized by courts. The 2020 Rule required Federal agencies to review, in every instance, a certification decision to confirm that several requirements are met, including non-statutory requirements imposed by the 2020 Rule, as a prerequisite to accepting the certification decision. 85 FR 42267 (July 13, 2020). The 2020 Rule required the Federal licensing agency to ensure (1) compliance with ''other procedural requirements of section 401'' (which included public notice requirements), (2) compliance with the reasonable period of time, and (3) compliance with the rule's requirements related to providing a legal and technical basis within the certification document for the action taken. The 2020 Rule preamble explained that ''[i]f a federal agency, in its review, determines that a certifying authority failed or refused to comply with the procedural requirements of the Act, including the procedural requirements of this final rule, the certification action, whether it is a grant, grant with conditions, or denial, will be waived.'' *Id.* at 42266. The 2020 Rule took the same approach with review of individual conditions, *i.e.,* if a condition does not meet procedural requirements, it is waived (even though the certification itself stands). *Id.* at 42263. The 2020 Rule did not extend Federal agency review to more substantive requirements of the Act (*e.g.,* whether a certification decision was within the scope of certification). *Id.* at 42267.

The 2020 Rule contained little direction to Federal agencies about how to conduct the required review (*e.g.,* how to confirm public notice took place), other than noting in the preamble that the Federal agency's review role does not require the agency to ''make a substantive inquiry into the sufficiency of the information provided in support of a certification, condition, or a denial.'' *Id.* at 42268. This lack of clarity in the 2020 Rule led to stakeholder confusion and misunderstanding about the nature of the Federal agency's review (*e.g.,* assertions from both Federal agencies and states and Tribes in implementation, pre-proposal input, and public comment that the review was to be ''substantive'' in nature). Additionally, although the 2020 Rule limited Federal agency review to certain procedural components, Federal agency stakeholders expressed concerns about being required by the 2020 Rule to undertake even this responsibility.

Certifying authorities have expressed concern over the potential consequences of Federal agency review required by the 2020 Rule. A few commenters discussed their experience with the 2020 Rule and Federal agency review, including specific examples where Federal agencies deemed certification decisions waived. Most commenters who discussed Federal agency review critiqued the 2020 Rule's approach and argued that allowing, even requiring, Federal agencies to deem non-compliant certification decisions waived was inconsistent with the CWA and relevant case law (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 asserted that the 2020 Rule provided Federal agencies with improper authority to ''veto'' or ''override'' certifying authorities' decisions under the 2020 Rule. As discussed below, EPA generally agrees with these commenters. EPA continues to agree with the concerns it expressed in its Notice of Intent to revise the 2020 Rule, stating that ''EPA is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency.'' 86 FR 29543 (June 2, 2021).

The following subsections discuss the extent of Federal agency review, how certifying authorities might demonstrate compliance with the facial requirements of section 401, and the Federal agency review process under this final rule.

a. Extent of Federal Agency Review

The final rule confirms that Federal agencies may review a certification decision only for the limited purpose of verifying compliance with the requirements of CWA section 401. EPA

---

[81] For the certification requests of both hydropower facilities, the certifying authority denied certification without prejudice to re-request certification within days of the expiration of the one year reasonable period of time. *Id.* The facilities re-requested certification and, about one year later, the certifying authority did so again. The certifying authority gave as the reason for denial that the project proponents had not completed the state environmental review process, which the certifying authority was required by law to consider in making its certification decision. *Id.* The Agency takes no position here regarding repeated denials without prejudice, generally for the same reasons as it is not taking a position regarding repeated withdrawal and resubmittals (*e.g.,* the inquiry is highly fact specific and the caselaw is in flux). *See* section IV.D.2.c of this preamble.

[82] The petitioners in the D.C. Circuit case petitioned the Supreme Court for certiorari but the Supreme Court denied the petition on April 17, 2023. *Turlock Irrigation District and Modesto Irrigation District* v. *FERC, et al.,* Docket No. 22–616.

proposed at § 121.9 that Federal agency review of a certification decision is limited to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority provided public notice on the request for certification, and that the decision was issued in the reasonable period of time. As discussed in more detail below, the Agency removed the first factor (the nature of the decision) and modified the third factor to clarify that Federal agency review is limited to verifying that the certifying authority confirmed compliance with its public notice procedures.

As a result, the final rule provides that Federal agencies may verify (1) whether the appropriate certifying authority issued the certification decision, (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and (3) whether the certifying authority acted on the request for certification within the reasonable period of time. 40 CFR 121.8. Federal agencies may find that a certifying authority waived its ability to act on a request for certification *only* for failures to act within the reasonable period of time. The Agency finds this Federal agency review role is reasonable and consistent with the text of section 401, prior Agency guidance, and case law.

A Federal agency's review of a certifying authority's action (to ensure that the certification decision meets certain statutory requirements) does not require a Federal agency to inquire as to whether the certification is consistent with the substantive elements of state or Tribal law concerning certification or whether the certification action is within the proper ''scope of certification.'' As recognized by prior Agency guidance and the 2020 Rule, section 401 does not authorize Federal agencies to review or change the substance of a certification (*e.g.,* determine whether the certification or its conditions are within section 401's scope). *See* 85 FR 42268; 2010 Handbook at 10 (rescinded in 2019, *see supra*). As discussed below, the Agency has revised the proposed regulatory text to better emphasize the limited extent of Federal agency review.

Several commenters noted that section 401 does not give Federal agencies the authority to nullify or reject a certifying authority's water quality certification or conditions. Some of these commenters asserted that courts have affirmed that Federal agencies do not have the authority to ignore conditions of certification. EPA agrees. Federal circuit courts have routinely held that Federal agencies may not question or criticize the substance of a state's water quality certification or conditions, *see, e.g., City of Tacoma,* 460 F.3d at 67 (''[The Federal agency's] role is limited to awaiting, and then deferring to, the initial decision of the state.''); *American Rivers,* 129 F.3d at 111 (''[The Federal agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401.''); *U.S. Dept. of Interior* v. *FERC,* 952 F.2d 538, 548 (D.C. Cir. 1992) (''FERC may not alter or reject conditions imposed by the states through section 401 certificates.''). Courts have also cautioned Federal agencies against imposing conditions in a Federal license or permit they believe are more stringent than the certifying authority's conditions. *See Sierra Club* v. *U.S. Army Corps of Eng'rs,* 909 F.3d 635, 648 (4th Cir. 2018) (''the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality''); *see also Lake Carriers' Ass'n.* v. *EPA,* 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that additional notice and comment on state certification conditions would have been futile because ''the petitioners have failed to establish that EPA can alter or reject state certification conditions . . .'').

Rather, 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 the decision was issued within the reasonable period of time, whether public notice procedures were followed, and whether the appropriate certifying authority issued the decision. The court in *City of Tacoma* found that if the facial public notice requirement of section 401 is ''called into question'' before the Federal agency, the Federal agency must determine if it was met. 460 F.3d at 68 (requiring the Federal agency ''to obtain some minimal confirmation of such compliance, at least in a case where compliance has been called into question.'').

EPA proposed to expressly limit Federal agency review at § 121.9 to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority provided public notice on the request for certification, and that the decision was issued in the reasonable period of time. Several commenters agreed with limiting the 2020 Rule's breadth of Federal agency review, with some of these commenters supporting all four of the proposed review provisions. A few commenters wrote in favor of the proposed rule's limited ''ministerial'' role for Federal agencies. EPA agrees that Federal agency review is limited in nature. As discussed below, the Agency is finalizing regulatory text at § 121.8 to affirmatively limit Federal agency review to verifying compliance with the facial requirements of CWA section 401. However, 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.

Conversely, a few commenters recommended prohibiting Federal agency review of any certification decisions in the final rule, with one commenter arguing that Federal agency review erodes cooperative federalism principles, and another 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. 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. 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 above, 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.

On the other hand, other commenters wrote in support of the 2020 Rule's approach to Federal agency review, arguing 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 information supporting their certification actions. A few commenters argued that the 2020 Rule's approach to Federal agency review was a less costly and more efficient mechanism than judicial review.

EPA declines to impose in this final rule a requirement that Federal agencies review every certification decision for compliance with the statutory requirements of section 401. EPA recognizes that the preamble to the 2020 Rule indicated that Federal agency review is mandatory in every instance. 85 FR 42267–69 (''the Agency has concluded that under the final rule, federal agencies have an affirmative obligation to review certifications to ensure that certifying authorities have complied with procedural requirements and have included the required information for certifications, conditions, and denials . . .''). However, most case law on this topic focuses on the extent of Federal agency review, not the issue of if or when section 401 imposes a duty on the Federal agency to confirm compliance. The exception to courts not addressing this issue is *City of Tacoma,* where the court found that if the public notice requirement of section 401 is ''called into question'' before the Federal agency, the agency must determine if it was met. 460 F.3d at 68.[83] This final rule does not address what circumstances might compel a Federal agency to review certification decisions, nor does it require Federal agencies to review every certification decision. Instead, this final rule allows Federal agencies to review specified aspects of a certification decision, recognizing that Federal agencies have an interest in ensuring certifications relating to their permits are facially compliant with CWA section 401.

The Agency also disagrees with commenter assertions that the Agency is removing Federal oversight. The Agency is still authorizing Federal agencies to review much of what they could under the 2020 Rule. In fact, the Agency is clarifying in regulatory text that Federal agency review includes verification that the certifying authority confirmed that it complied with its public notice procedures and that the correct certifying authority acted on the request for certification (aspects that were not directly addressed in the 2020 Rule). The one aspect of the 2020 Rule that the Agency is removing is Federal agency review of the procedural and informational requirements (*e.g.,* citation requirements) of the 2020 Rule (as opposed to the facial requirements of section 401). The Agency disagrees with commenters who argued that this will lead to a lack of supporting information in certification decisions or create a structure for misuse. EPA encourages certifying authorities to include supporting information with certification decisions and is finalizing this recommendation at § 121.7. Furthermore, it is in the certifying authority's interest to include such information to ensure project proponents and Federal agencies—not to mention any court reviewing the certification decision—understand why a condition is placed on a certification or why a certification is being denied. *See supra* section IV.F of this preamble for further discussion of the contents of a certification decision.

It is unclear why some commenters concluded that the 2020 Rule's Federal agency review process would reduce litigation or create any efficiencies when compared to direct judicial review. Those commenters did not provide any data or information to substantiate a time or cost differential between the 2020 Rule's Federal agency review process and any possible judicial review associated with certification decision. Nothing about the 2020 Rule's approach to Federal agency review removed or reduced the opportunity or potential for judicial review on a certification decision. In fact, the 2020 Rule's mandate that Federal agencies review for compliance with the rule's own procedural and informational requirements (*e.g.,* citation requirements) added another possible avenue for judicial review. Federal courts could be called upon to decide whether a Federal agency properly found that a certifying authority waived certification for its failure to fully comply with the 2020 Rule's informational requirements. In fact, one such case was recently filed in the D.C. Circuit Court of Appeals. *Brookfield White Pine Hydro LLC* v. *FERC,* No. 23–1075 (D.C. Cir.) (petition for review filed March 20, 2023, regarding FERC determination that a denial of certification satisfied the procedural requirements of the 2020 Rule).

Furthermore, Federal agency review of the substance of certification decisions in lieu of judicial review is inconsistent with the legislative history of section 401. Indeed, 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.'').

The Agency is finalizing regulatory text substantively similar to proposed § 121.9(a)(2) that allows a Federal agency to verify whether the appropriate certifying authority—meaning the entity responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate—issued the certification decision. 40 CFR 121.8. EPA made one non-substantive change to proposed text to verify whether the ''appropriate'', as opposed to ''proper'', certifying authority issued the certification decision. 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). If the project proponent provides the Federal agency with a certification from the wrong certifying authority, then the Federal agency cannot issue its license or permit. Allowing a Federal agency to confirm that the appropriate certifying authority has issued certification is consistent with case law, *American Rivers,* 129 F.3d at 110–11, and prior Agency regulations and guidance, 85 FR 42267; 2010 Handbook at 10 (rescinded in 2019, *see supra*).

The Agency is finalizing regulatory text that allows a Federal agency to verify that the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1). 40 CFR 121.8. EPA proposed that a Federal agency may review a certification decision to determine whether the certifying authority ''provided public notice'' on the request for certification at § 121.9(a)(3). Some commenters noted

[83] In *Keating* v. *FERC,* the court required FERC to consider the application of section 401(a)(3) to a certifying authority's purported revocation of a certification. 927 F.2d 616 (D.C. Cir. 1991) (''FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements—*i.e.,* whether it is timely and motivated by some change in circumstances after the certification was issued.'').

that public notice procedures vary amongst certifying authorities, including one commenter that noted that establishing generally applicable procedures for public notice is not necessarily the same as providing public notice on every application. EPA agrees with these commenters. 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 § 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.

One commenter 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. 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 authorized 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 its certification decision. *See* section IV.F of this preamble for further discussion on ways a certifying authority can indicate its compliance; *see also infra*.

The Agency is also finalizing regulatory text substantively similar to proposed § 121.9(a)(4) that allows a Federal agency to verify whether a certifying authority acted on a request for certification within the reasonable period of time. 40 CFR 121.8. Section 401 provides that certification ''shall be waived'' if the certifying authority fails or refuses to act within the reasonable period of time. A Federal agency cannot issue its license or permit until certification ''has been obtained or has been waived.'' 33 U.S.C. 1341(a)(1). It is thus reasonable for the Federal agency to determine whether a certifying authority acted within the reasonable period of time, and this has been the Agency's longstanding position in regulation and guidance. *See* 40 CFR 121.16(b) (2019); 85 FR 42267; 2010 Handbook at 10 (rescinded in 2019, *see supra*). Additionally, as discussed above, this is also consistent with case law on Federal agency review. *See American Rivers,* 129 F.3d at 110–11 (explaining that FERC ''may determine . . . whether a state has issued a certification within the prescribed period''); *see also Alcoa Power Generating,* 643 F.3d at 972–73 (holding that, like the public notice requirements at issue in *City of Tacoma,* the issue of whether a certifying authority acted upon a certification request within the statutory one-year period was an issue properly before FERC).

The Agency is not finalizing the regulatory text proposed at § 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 § 121.8. The other components all concern verifying compliance with the statutory requirements of section 401. EPA concludes that it is best to remove this provision to avoid confusion. Further, as one commenter noted, the decision should generally be apparent on its face. Certifying authorities and Federal agencies have over 50 years of experience with developing and receiving certification decisions, respectively. Additionally, the Agency is finalizing regulatory text at § 121.7(a) that clearly defines the four possible ways a certifying authority may act on a request for certification, as well as regulatory text at § 121.7(c) through (f) that clearly outlines recommended contents for a certification decision. These final rule provisions should provide certifying authorities with sufficient clarity regarding possible actions they may take and how to develop clear certification decisions.

b. Demonstrating Compliance With the Facial Requirements of Section 401

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.

At proposal, EPA did not define the specific information a certifying authority must include in its certification decision to demonstrate that it has met the facial requirements of section 401. However, EPA requested comment on whether the Agency should identify in regulation different elements of a certification decision that might be appropriate for Federal agency review, or whether EPA should defer to Federal agencies to define those elements.

In the final rule, the Agency is declining to define the specific information a certifying authority must include in a certification decision to demonstrate that it has met the facial requirements of section 401. 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 expects that it should only take minimal effort by a certifying authority to demonstrate compliance for Federal agency verification. However, as discussed below, the Agency is providing recommendations for how certifying authorities can demonstrate compliance with these requirements.

To support a streamlined review of whether a certifying authority complied with its public notice procedures, EPA is finalizing a recommendation for a

certifying authority to indicate such compliance in its certification decision.[84] By doing so, the Federal agency should be able to simply look at the certification decision and quickly and easily determine whether the certifying authority indicated that it followed its public notice procedures.

A few commenters discussed how certifying authorities currently, or could, demonstrate compliance with their public notice procedures, including 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. EPA finds that these and other approaches to demonstrating compliance with public notice procedures would be 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. This inquiry does not require the Federal agency to research or inquire about the particulars of a state or Tribal laws and regulations regarding public notice, but rather merely verify that the certifying authority confirmed it complied with its public notice procedures. EPA is not defining how a certifying authority must communicate such confirmation, but EPA does not anticipate that such demonstrations will be burdensome. As the court noted in *City of Tacoma,* Federal agencies only need ''to obtain some minimal confirmation of such compliance.'' 460 F.3d at 68.

The Agency is also not defining how a certifying authority must demonstrate that it provided a certification decision within the reasonable period of time. However, EPA finds that other provisions in this final rule should aid in making such a demonstration. For example, final rule § 121.6(a) requires a certifying authority to send the project proponent and the Federal agency a written confirmation of the date that the request for certification was received, while § 121.6(b) requires the Federal agency and certifying authority to jointly agree on the reasonable period of time in writing. Using this documentation, the Federal agency should be able to verify whether the certifying authority acted on the request for certification within the reasonable period of time. If the Federal agency needs further information to verify that the certification decision was issued within the reasonable period of time, the certifying authority could satisfy this inquiry by providing documentation of the date it furnished the project proponent with a decision.

The Agency is also not defining how to demonstrate that the certification is from the appropriate certifying authority, meaning the state or authorized Tribe responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate.[85] EPA finds that the project proponent bears the burden of demonstrating that it has obtained a certification from the appropriate certifying authority. *See* 33 U.S.C. 1341(a)(1) (''Any applicant . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . .''). Accordingly, if a Federal agency chooses to verify that the appropriate certifying authority issued the certification decision, it should work with the project proponent to obtain location information, such as a map, indicating where the discharge originates or will originate. The Federal agency and project proponent may also discuss any questions regarding jurisdiction with the certifying authority, or as needed, EPA in its technical assistance capacity under section 401(b).

c. Federal Agency Review Process

Consistent with the 1971 Rule and 2020 Rule, the Agency is finalizing regulatory text to reaffirm that a waiver of certification occurs only if the certifying authority fails to act within the reasonable period of time. *See* 40 CFR 121.9(a)(2)(i) (2020); 40 CFR 121.16(b) (2019). If the Federal agency reviews for timeliness and determines that the reasonable period of time has passed without the certifying authority acting on the request for certification, then the Federal agency may determine that a constructive waiver has occurred. 40 CFR 121.9(b). Similar to the approach in the 2020 Rule, the Agency is finalizing regulatory text describing how the Federal agency must communicate its waiver determination to the project proponent and certifying authority. *See id.* Specifically, 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. *Id.* Similar to the 2020 Rule, *see* § 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 § 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 § 121.12). However, as discussed in more detail below, 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.

Many commenters agreed with the proposal's characterization of constructive waiver as a ''severe consequence.'' Some commenters expressed support for the position in the proposal that constructive waiver may only occur 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. A few commenters stated that procedural technicalities should not be a basis for an involuntary or implicit waiver of certification.

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 this 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

[84] *See* section IV.F of this preamble regarding contents of certification decisions.

[85] *But see* section IV.H of this preamble for further discussion on instances where EPA acts as the certifying authority instead of a state or authorized Tribe.

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).[86]

A couple of commenters suggested that EPA require the Federal agency to extend the reasonable period of time in instances where the certifying authority failed to act and extending the reasonable period of time would not exceed the one-year statutory time period from receipt of the request for certification. These commenters asserted that allowing constructive waiver before one year would be inconsistent with cooperative federalism principles, and one of these commenters asserted that section 401(a)(1) prohibited a finding of a constructive waiver until after one year. Conversely, one commenter expressed concern over the proposal's preamble language encouraging Federal agencies to extend the reasonable period of time where a certifying authority inadvertently waives certification, asserting 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.

Aside from providing that a waiver occurs if the certifying authority does not act within the reasonable period of time, the statute does not provide direction on what should occur if a certifying authority fails to meet the other statutory requirements in section 401. As discussed earlier, the legislative history indicates that Congress added the waiver provision to prevent ''sheer inactivity'' by a certifying authority from holding up the licensing or permitting process. *See* H.R. Rep. No. 91–940, at 54–55 (March 24, 1970) (Conf. Report). Consistent with the statutory language and legislative history, EPA believes that Congress intended such an extreme outcome only in situations where certifying authorities fail or refuse to make a decision, and not where a certifying authority, otherwise attempting to make a timely decision, fails to comply with other requirements of section 401. Case law also provides support for the Federal agency allowing the certifying authority to either demonstrate that its decision meets section 401's requirements or remedy the situation, as opposed to the Federal agency having authority to deem any failure an automatic waiver of certification. *See City of Tacoma,* 460 F.3d at 68–69 (''FERC should seek an affirmation from Ecology that it complied with state law notice requirements when it issued its water quality certification or, if it did not, that it has done so in response to this decision.'').

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. Most commenters providing input on this topic expressed support for proposed § 121.9(b) that if the Federal licensing or permitting agency determines that certain statutory requirements (*e.g.,* public notice) have not been met, it must provide the certifying authority with an opportunity to remedy the situation. However, a few commenters expressed concern with the proposed automatic extensions for certifying authorities that failed to comply with public notice procedures, suggesting that it might incentivize certifying authorities to ignore procedures and improperly extend the time for certification. 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 further detail below, this restores the Agency's pre-2020 Rule approach to Federal agency review and avoids unnecessarily encumbering the certification process with more procedure.

The Agency proposed at § 121.9(b) that if a Federal agency determines that a section 401 certification decision does not clearly indicate whether it is a grant, grant with conditions, denial, or express waiver, the Federal agency must notify the certifying authority of the deficiency and provide the certifying authority with an opportunity to remedy it. As discussed above, the Agency is not finalizing regulatory text regarding Federal agency review of the nature of the certification decision, so the proposed text regarding next steps is no longer needed.

The Agency did not propose any regulatory text explicitly discussing the consequences or next steps where Federal agency review reveals that the wrong certifying authority provided the certification decision. However, the proposed rule preamble provided that if Federal agency discovers that the wrong certifying authority issued the certification, then the Federal agency should notify the project proponent that it must seek certification from the appropriate certifying authority before the Federal license or permit may be issued. The Agency is not including regulatory text regarding next steps for this aspect of Federal agency review, but continues to encourage the Federal agency to promptly notify the project proponent where the Federal agency determines that the certification decision was not issued by the appropriate certifying authority. As noted above, section 401 requires a project proponent to seek certification from the jurisdiction in which the discharge originates or will originate. 33 U.S.C. 1341(a)(1). Therefore, it is incumbent on the project proponent to identify and obtain certification (or waiver) from the proper certifying authority—the entity responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate—before it can obtain a Federal license or permit. *See* 40 CFR 121.1(b).

The Agency is not finalizing the process proposed at § 121.9(b) for the Federal agency to follow if it is unable to obtain confirmation from the certifying authority that the certifying authority complied with its public notice procedures. The Agency proposed that the Federal agency must notify the certifying authority if it determined that the certifying authority did not provide public notice on the request for certification and provide the certifying authority with an opportunity to remedy the noted deficiency. 87 FR 35357. The proposal further provided that, if necessary, the Federal agency must extend the reasonable period of time to provide the certifying authority with an opportunity to remedy the deficiency, but the reasonable period of time may not exceed one year from the receipt of the certification request. *Id.*

Most commenters providing input on this aspect of the proposed rule expressed support for Federal agencies extending the reasonable period of time to allow for correction of deficiencies up to the statutory one-year limit. A few commenters suggested that the final rule should allow certifying authorities to

[86] Nothing in section 401 precludes a Federal licensing or permitting agency from considering input provided by a state or authorized Tribe in a late certification decision. But that consideration would occur outside the context of section 401 and would be akin to consideration of input provided by the state or Tribe in any other context (*e.g.,* a public comment period). For example, if a certifying authority included conditions in a late certification, nothing in section 401 precludes the Federal licensing or permitting agency from considering including similar conditions in its Federal license or permit, even though section 401 would not compel the Federal agency to do so.

correct errors even after the reasonable period of time has ended, including one commenter who suggested it should extend beyond the one-year timeframe. Conversely, 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. 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.

The Agency is declining to define any specific process to remedy any deficiencies identified through Federal agency review. As an initial matter, the Agency did not provide a regulatory process for Federal agency review prior to the 2020 Rule (aside from failure or refusal to act within the reasonable period of time). Rather, prior EPA guidance merely acknowledged that the Federal licensing or permitting agency may review the procedural requirements of a certification decision. *See* 2010 Handbook at 32 (rescinded in 2019, *see supra*) (''For example, the federal permitting or licensing authority may review the procedural requirements of [section] 401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.'') (citing *American Rivers,* 129 F.3d at 110–111; *City of Tacoma* v. *FERC,* 460 F.3d 53, 68 (D.C. Cir. 2006)). The Agency is not aware of any issues, procedural or otherwise, with Federal agencies and certifying authorities managing this process pre-2020 Rule. Because this final rule returns the Agency to its pre-2020 Rule posture on Federal agency review, the Agency is accordingly declining to define a process to address deficiencies identified through Federal agency review. The Agency expects this will provide certifying authorities and Federal agencies with the flexibility to address such procedural deficiencies in accordance with pre-2020 Rule practices.

The Agency emphasizes that other aspects of this final rule should prevent the need for specific EPA-mandated process to remedy deficiencies identified through Federal agency review. First, as discussed in section IV.D of this preamble, certifying authorities have an active role in setting the reasonable period of time with the Federal agency. *See* 40 CFR 121.6(b). This approach provides certifying authorities with an opportunity to ensure the length of the reasonable period of time considers their specific timing needs and concerns. Second, the final rule provides certifying authorities and Federal agencies with the ability to extend the reasonable period of time as needed, or automatically in limited cases. *See* 40 CFR 121.6(d) and (e). Together, these components of the final rule should provide certifying authorities with ample opportunities to ensure they have the appropriate amount of time to act on a request for certification and comply with the facial components of section 401. EPA notes that its proposed automatic extensions for curing deficiencies (at proposed § 121.9(b)) would have applied only for failure to indicate the nature of the decision and failure to provide public notice. In this final rule, EPA has removed Federal agency review of the nature of the decision and expressly limited review of public notice to simply verifying that the certifying authority confirmed that it complied with its public notice procedures. Additionally, as discussed in section IV.F of this preamble, the Agency encourages certifying authorities to include an indication that they complied with their public notice procedures established in all certification decisions. This serves two purposes. First, it ensures the certifying authority remains cognizant of satisfying all statutory requirements in section 401, including the need to establish and comply with public notice procedures. Second, it clearly communicates the certifying authority's compliance with this requirement of section 401 so that in the event the Federal agency chooses to review for such compliance it may easily determine that the certifying authority confirmed compliance with its public notice procedures.

3. Implementation

As discussed throughout this preamble, EPA emphasizes the importance of communication between certifying authorities, Federal agencies, and project proponents early and often through the certification process. Consistent communication can ensure that stakeholders develop a common understanding around timing and information needs to complete the certification process and comply with the facial requirements of section 401. Ideally, such communication minimizes the need for Federal agency review. However, in the event a Federal agency reviews a certifying authority's action, it is limited to reviewing whether the action complies with the requirements of section 401 as explicitly defined at final rule § 121.8. Federal agency review does not require, nor allow, a Federal agency to review the substance of a certification decision or specific certification condition (*e.g.,* determine whether the certification or its conditions is within the scope of section 401).

In the proposal, EPA requested comment on whether the Agency should develop procedures regarding how a certifying authority should respond to a Federal agency's notice regarding deficiencies in its certification decision. Several commenters provided various recommendations on the procedural aspects of the Federal agency review process, including recommending that the final rule should require the Federal agency to immediately notify the certifying authority after a deficiency was identified, recommending that Federal agencies develop procedures providing how a certifying authority should respond to a Federal agency's notice regarding deficiencies, and suggesting that the final rule include 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 Federal license or permit.

Under this final rule, if the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, then the final rule requires the Federal agency to promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived. 40 CFR 121.9(b). This final rule does not require a Federal agency to notify the certifying authority an impending deadline to act on a certification request prior to finding

waiver for failing or refusing to act. Certifying authorities are ultimately responsible for managing resources and ensuring that they act on a request for certification within the reasonable period of time. However, the Agency encourages Federal agencies to reach out to certifying authorities to remind them of impending deadlines to act prior to finding constructive waiver, or setting up MOAs or other agreements to establish notification protocols prior to finding a waiver of certification.

EPA encourages Federal agencies to promptly notify certifying authorities if they are seeking confirmation of certifying authority compliance with public notice procedures, and to promptly notify project proponents if they determine the certification decision was not issued by the appropriate certifying authority. In either event, the final rule does not define the contents of such notification, but EPA encourages Federal agencies to provide notification in writing so the certifying authority and/or project proponent can respond accordingly.

EPA does not find it necessary to impose a regulatory requirement for the Federal agency to notify the certifying authority that the certification has been received within the reasonable period of time, and that the certification conditions have been incorporated into the relevant Federal license or permit. As discussed above, Federal agency review is not a mandatory requirement under this final rule. The certifying authority should know whether it has issued its decision in the reasonable period of time due to its involvement in setting the reasonable period of time. As long as the certifying authority provides its certification decision within the reasonable period of time, the Federal licensing or permitting agency is required to incorporate any certification conditions into its license or permit. *See* 33 U.S.C 1341(d).

H. EPA's Roles Under Section 401

1. What is the Agency finalizing?

Under section 401, EPA serves three different roles. First, 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). Second, EPA is also responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id.* at 1341(b). Lastly, EPA is responsible for notifying other states or authorized Tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such notified state or authorized Tribe's objections. *Id.* at 1341(a)(2). This section focuses on EPA's role as a certifying authority and in providing technical assistance. The Agency's third role under section 401(a)(2), or the neighboring jurisdictions process, is discussed in section IV.K in this preamble.

Consistent with the proposal, the Agency is finalizing revisions to the regulatory text at §§ 121.16 and 121.17 to clarify EPA's process when it acts as the certifying authority, such as updating its public notice and hearing provisions. More specifically, the Agency is finalizing that when EPA is the certifying authority, it must provide public notice within 20 days of the date the request for certification is received. 40 CFR 121.17(a). The final rule also states that when EPA acts as the certifying authority, it is subject to the same requirements as other certifying authorities. EPA is also finalizing the regulatory text on EPA's technical assistance role at § 121.18 which reflects the statutory text at section 401(b) more directly.

2. Summary of Final Rule Rationale and Public Comment

a. EPA's Role as a Certifying Authority

EPA is finalizing revisions to the part 121 regulations to provide greater clarity about EPA's process when it acts as the certifying authority. 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). The 1971 Rule required EPA to provide certification in two scenarios: first, where EPA promulgated standards pursuant to section 10(c)(2) of the 1970 Water Quality Improvement Act; and second, where water quality standards had been established, but no state or interstate agency had authority to provide certification. 40 CFR 121.21 (2019). As discussed in section III in this preamble, the 1971 Rule was promulgated prior to the enactment of the 1972 CWA amendments; as a result, the language in the 1971 Rule regarding EPA as a certifying authority did not reflect the amended text of section 401. In the 2020 Rule, EPA updated this provision with new regulatory text that indicated that EPA provides certification consistent with the 1972 statutory text and noted that EPA was required to comply with part 121 when it acted as a certifying authority. 40 CFR 121.13 (2020).

EPA is finalizing minor, conforming modifications to § 121.13(a) and (b) of the 2020 Rule. Specifically, consistent with the language in section 401(a)(1), the Agency is reaffirming that EPA is required to provide certification or waiver where no state, Tribe, or interstate agency has the authority to provide certification. 40 CFR 121.16(a). The Agency is also reaffirming that, when it acts as a certifying authority, EPA must comply with both section 401 and the requirements in part 121. *See* 40 CFR 121.16(b).

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. In the first scenario, if a Tribe does not obtain TAS for section 401, EPA acts as the certifying authority for any federally licensed or permitted activity that may result in any discharge that originates in Indian country lands. As discussed in section IV.L in this preamble, a Tribe may obtain TAS for section 401 for the purpose of issuing water quality certifications. 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.

In the second scenario, EPA acts as the certifying authority in situations where any discharge from any activity subject to section 401 certification originates where the Federal Government has exclusive jurisdiction in relevant respects. Some commenters said they had concerns with EPA acting as the certifying authority for all national parks. One 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.

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. 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.

Under this final rule, consistent with the 2020 Rule, when EPA acts as the certifying authority, it is subject to the same requirements as other certifying authorities (*e.g.,* reasonable period of time to act on a request for certification) under section 401 and 40 CFR part 121. In contrast to the 2020 Rule, this final rule does not retain the request for additional information provisions included in § 121.14 of the 2020 Rule when EPA is the certifying authority. EPA proposed to remove § 121.14 of the 2020 Rule which introduced limits on EPA's ability, as a certifying authority, to request additional information from a project proponent once the reasonable period of time began. *See* 87 FR 35359 (June 9, 2022). These provisions included a requirement that EPA must initially request additional information within 30 days of receiving a request for certification and limitations on the type and scope of additional information EPA may request. 40 CFR 121.14(a) through (c) (2020). Additionally, the 2020 Rule required EPA to provide the project proponent with a deadline to respond to requests for additional information and acknowledged that a project proponent's failure to provide additional information would neither extend the reasonable period of time, nor prevent EPA from acting on the request for certification. *Id.* at § 121.14(d) and (e).

Consistent with the proposal, EPA is removing § 121.14 of the 2020 Rule in its entirety because it finds these provisions not conducive to an efficient certification process for several reasons. The preamble to the 2020 Rule stated that it was ''reasonable to assume that Congress intended some appropriate limits be placed on the timing and nature of such requests [for additional information]'' because of the overarching statutory timeline. 85 FR 42271 (July 13, 2020). Yet, neither the 2020 Rule preamble nor its regulatory text articulated how a 30-day limitation on EPA's initial request for additional information is compelled or even consistent with the statutory limitation that a certifying authority must act within a reasonable period of time. Although it is ideal for EPA to have relevant information to inform its analysis early in the reasonable period of time, various questions or needs may arise later in the review process that are critical to EPA acting on a request for certification. There is nothing in the statutory language that compels or even suggests that EPA should have a limited ability to use the reasonable period of time to request additional information to evaluate a request for certification and make a fully informed decision. If the Agency is limited in its ability to request additional information to inform its decision, it may need to deny a request for certification instead of utilizing the additional information to possibly grant certification. Such an outcome would unnecessarily impede the Federal license or permitting process.

The 2020 Rule also unnecessarily injected ambiguity into the certification process. Section 121.14(b) of the 2020 Rule limited requests for additional information to that which is ''directly related to the discharge,'' while § 121.14(c) of the 2020 Rule limited requests only to information than can be ''collected or generated within the reasonable period of time.'' Yet neither the phrase ''directly related to the discharge'' nor ''collected or generated within the reasonable period of time'' was defined nor explained in the preamble or regulatory text to the 2020 Rule which introduced uncertainty into what kind of information EPA could actually request. For example, how would the Agency determine if the information was directly related to the discharge or that the information could

be collected or generated within the reasonable period of time? Furthermore, the statutory language and this final rule already place a number of limitations on all certifying authority decisions. As finalized in § 121.7(b), all certifying authorities, including EPA, must act within the reasonable period of time and within the scope of certification. EPA finds that these regulatory requirements are sufficient to ensure the Agency will act on requests for certification in a timely and appropriate manner. Consistent with the Agency's removal of the limitations on EPA's ability to request additional information, EPA is also finalizing the removal of the provisions at § 121.14(d) and (e) of the 2020 Rule, which discussed how EPA and project proponents must respond to requests for additional information or lack thereof.

Consistent with the proposal, § 121.17 provides that when EPA acts as the certifying authority, it ''shall provide public notice of the request for certification.'' 40 CFR 121.17(a). The Agency revised proposed § 121.17 to clarify that EPA will provide public notice on the request for certification itself, as opposed to merely providing public notice on the receipt of the request for certification. As proposed, this final rule does not limit or specify the particular manner(s) in which the public notice will occur to support broader public participation. The Agency is also finalizing as proposed that if a public hearing is determined appropriate when EPA acts as the certifying authority, the hearing should be scheduled ''at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means.'' 40 CFR 121.17(b).

The statutory language of section 401(a)(1) requires states and interstate agencies to establish procedures for public notice and hearings. The 1971 Rule stated that EPA could provide public notice either by mailing notice to state and local authorities, state agencies responsible for water quality improvement, and ''other parties known to be interested in the matter'' (including adjacent property owners and conservation organizations), or, if mailed notice is deemed ''impracticable,'' by publishing notice in a newspaper of general circulation in the area where the activity is proposed. 40 CFR 121.23 (2019). With regard to hearings, the 1971 Rule provided that the Regional Administrator with oversight for the area of the proposed project has discretion to determine that a hearing is ''necessary or appropriate,'' and that ''[a]ll interested and affected parties'' would have reasonable opportunity to present evidence and testimony at such hearings. *Id.* EPA updated this provision in the 2020 Rule to expand the scope of possible parties that may receive notice to avoid unintentionally narrowing the list of potentially interested parties. 85 FR 42271. Additionally, under the 2020 Rule, EPA placed a timeframe on when the Agency had to provide public notice following receipt of a certification request and retained discretion to provide for a public hearing as necessary or appropriate. *Id; see* 40 CFR 121.15 (2020).

EPA is finalizing § 121.17 as proposed, with minor, non-substantive revisions, to facilitate participation by the broadest number of potentially interested stakeholders and clarify that following such public notice, the Administrator shall provide an opportunity for public comment. 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 final rule allows for outreach designed to reach all potentially interested stakeholders, including communities with environmental justice concerns. The Agency encourages doing so by using all appropriate communication and outreach means and methods (*e.g.,* through local newspapers, online or electronic media, or other appropriate media). This approach will allow EPA greater flexibility to address on a case-by-case basis specific issues regarding notice, such as broadband access issues and requirements for regional publications, to provide notice in the most appropriate way to allow for broad participation. Additionally, EPA is not providing an exhaustive list or examples of potentially interested parties to avoid unintentionally excluding some interested stakeholders on that list. EPA generally believes those stakeholders to whom it is appropriate to provide public notice may include state, Tribal, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations.

EPA is also finalizing as proposed to provide public notice within 20 days following the date the request for certification is received. The 1971 Rule did not set a time frame for EPA's public notice after receiving a request for certification. In contrast, the 2020 Rule stated that EPA would provide public notice 20 days from receipt of a certification request. In EPA's view, continuing to provide a timeframe for EPA's issuance of public notice after receiving a request for certification will contribute to better accountability, transparency, and certainty with respect to EPA's handling of requests for certification. Generally, EPA finds it will be able to provide public notice within the final rule's timeframe. EPA finalized an identical timeframe under the 2020 Rule, which it has been able to meet without difficulty in most instances.

EPA is also finalizing as proposed that once the Administrator provides public notice on a request for certification, the Administrator must provide an opportunity for public comment. EPA is not defining the length of the public comment period. Rather, EPA's view is that the appropriate timeframe for comment is more appropriately determined on a case-by-case basis, considering project-specific characteristics. In general, EPA anticipates a 30-day comment period; however, comment periods as short as 15 days or as long as 60 days may be warranted in some cases, based on the nature of the project.

EPA may also hold a public hearing after it provides public notice on a request for certification. EPA is finalizing the public hearing provision at § 121.17(b) as proposed, with minor revisions to remove superfluous language. For context, the 1971 Rule provided that the Regional Administrator may hold a public hearing at their discretion. 40 CFR 121.23 (2019). Although ''[a]ll interested and affected parties'' have the opportunity to present evidence and testimony at a public hearing, the scope of the hearing is limited to the question of ''whether to grant or deny certification.'' *Id.* The 2020 Rule carried forward the position that the Agency has discretion to determine whether a public hearing is necessary or appropriate; however, the 2020 Rule removed the limitation on the subject matter of the public hearing. Consistent with the 2020 Rule, under § 121.17(b) of this final rule, stakeholder input at public hearings may cover any relevant subject matter on the proposed project to best inform EPA as it makes its certification decision.

Commenters generally supported EPA's clarifications around the process when it acts as the certifying authority, including the public notice and hearing provision updates and procedural revisions. These commenters said the revisions will help EPA act on requests in a timely manner. EPA agrees that clarifications in the final rule regarding

the process when EPA acts as the certifying authority should support timely actions and streamline the process. EPA finds that the provisions at §§ 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.

b. EPA's Role as a Technical Advisor

Section 401(b) provides certifying authorities, project proponents, and Federal agencies with the ability to ask EPA for technical advice on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and any methods to comply with such limitations, standards, regulations, requirements, or criteria. *See also* H.R. Rep. No. 92–911, at 124 (1972) (''The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements, or criteria, but only upon the request of a State, interstate agency, or Federal agency.''). The 1971 Rule acknowledged this role but limited it to provision of technical advice on water quality standards. 40 CFR 121.30 (2019). In the 2020 Rule, the Agency modified this provision to expand the scope of technical advice and assistance EPA might provide to better align with the statutory text. 85 FR 42274–75.

Consistent with the scope of section 401(b), EPA is finalizing the proposed revisions to the regulatory text at § 121.18 to reflect the statutory text more directly. Under this final rule, EPA shall provide technical advice, upon request 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.

3. Implementation

The Agency has made revisions throughout this final rule to clarify and help in the implementation of EPA's roles under section 401. With respect to EPA's technical advisor role, EPA does not intend this final rule to give EPA the authority to make certification decisions for states and authorized Tribes, or to independently review state or Tribal certifications or certification requests. *See* H.R. Rep. 92–911, at 124 (1972) (''The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency.''). Nor does the Agency consider its role under section 401(b) to include providing monetary or financial support to certifying authorities in implementing their section 401 programs. The Agency observes that there are other means for certifying authorities to seek financial assistance for their water quality certification programs (*e.g.,* CWA section 106 grants).

Regarding 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. While supporting the approach of not providing an exclusive list, the commenter 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. While 16 U.S.C. Chapter 1 identifies multiple national parks as having lands of exclusive Federal jurisdiction,[87] EPA does not maintain a map or list delineating all lands of exclusive Federal jurisdiction. In the preamble to the 2020 Rule, EPA noted that the number and extent of lands under exclusive Federal jurisdiction are subject to change and stated that it is the obligation of the project proponent to determine the identity of the appropriate certifying authority when seeking section 401 certification. 85 FR 42270. EPA is maintaining this position in the final rule. 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.

The Agency is also providing further insight on its plans to incorporate environmental justice into its role as a certifying authority. As discussed in section III in this preamble, the Agency intends for this final rule to address essential water quality protection policies identified in Executive Order 13990, including environmental justice. In addition to the policy directive from Executive Order 13990, other executive orders emphasize the importance of advancing environmental justice in Federal agency actions. *See* E.O. 12898, 59 FR 7629 (February 11, 1994) (directing agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations in the United States), E.O. 14008, 85 FR 7619 (January 27, 2021) (expanding on the policy objectives established in E.O. 12898 and directing Federal agencies to develop programs, policies, and activities to address the disproportionately high and adverse human health environmental, climate-related and other cumulative impacts on vulnerable, historically marginalized, and overburdened communities, as well as the accompanying economic challenges of such impacts); E.O. 14096, 88 FR 25251 (Apr. 21, 2023) (expanding on the policy objectives of E.O. 12898 and E.O. 14008 by further embedding environmental justice for all through a whole-of-government approach to environmental justice and directing Federal agencies to consider measures to address and prevent disproportionate and adverse environmental and health impacts on communities, to actively facilitate meaningful public participation and just treatment for all people in agency decision-making, to identify and address gaps in science, data, and research related to environmental justice, and to increase accountability and transparency in Federal environmental justice policy).[88]

Consistent with these directives and EPA technical guidance, when EPA acts as a certifying authority, the Agency should consider impacts on communities with environmental justice concerns who disproportionately bear the burdens of environmental pollution

[87] These include lands within Denali National Park, Mount Rainier National Park, Olympic National Park, Hot Springs National Park, Hawai'i Volcanoes National Park, Yellowstone National Park, Yosemite National Park, Sequoia National Park, Crater Lake National Park, Glacier National Park, Rocky Mountain National Park, Mesa Verde National Park, Lassen Volcanic National Park, Great Smoky Mountains National Park, Mammoth Cave National Park, and Isle Royale National Park.

[88] The Agency also finalized and published the FY 2022–2026 EPA Strategic Plan in March 2022, which includes new environmental justice strategic goals and emphasis to be embedded in all EPA work. *See https://www.epa.gov/planandbudget/strategicplan.*

and hazards, including Tribal Nations. In considering impacts from a federally licensed 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. Specifically, the Agency intends to consider the extent to which the ''activity'' or any discharge associated with the activity may cause water quality-related effects with the potential to impact communities with environmental justice concerns. Additionally, as discussed above, the Agency finds that broadening the public notice provision will provide communities seeking to advance environmental justice with greater opportunities to inform the certification process.

I. Modifications

1. What is the Agency finalizing?

The Agency is finalizing the proposed modification provision at § 121.10 with revisions to further clarify the process based on public comments. Consistent with the proposed approach, EPA is finalizing a modification provision that only concerns modifications to a grant of certification (with or without conditions) and does not apply to a denial of certification or a waiver of certification. The Agency has revised the regulatory text of the proposed rule to explicitly provide in the final rule that the certifying authority is not required to obtain the Federal agency's agreement on the actual language of the modification after reaching an agreement to modify the certification. Based on commenter feedback and recommendations, 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.

2. Summary of Final Rule Rationale and Public Comment

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). 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.

To introduce more clarity and balance the appropriate amount of flexibility and certainty for all stakeholders, EPA proposed that a certifying authority may modify a previously granted certification (with or without conditions) after reaching an agreement to do so with the Federal licensing or permitting agency. This final rule is consistent with the Agency's proposed intent, with minor changes to the regulatory text to better support implementation. Specifically, the final rule provides additional clarity regarding the agreement between the Federal agency and the certifying authority. The Agency also removed proposed references to revoking or modifying a denial or waiver of certification and clarified the title of the provision to explicitly reflect the final provision's focus on modifications to grants of certification.

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.

This final rule remains consistent with the proposal and the position in the 2020 Rule that CWA section 401 does not provide the authority for unilateral modifications to a certification decision—either by the certifying authority or by the Federal licensing or permitting agency—after the statutory reasonable period of time in which a certifying authority has to act on a request for certification. To be clear, the Agency does not intend for modifications to be used to avoid or extend the reasonable period of time because § 121.10 in the final rule only applies to previously granted certifications.

a. Returning to a Modification Process

CWA section 401 does not expressly authorize or prohibit modifications of certifications. Some commenters recommended that the final rule not include a provision for certification modifications 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. EPA disagrees and 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).[89]

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) and (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

[89] *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).

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.

EPA requested comment on whether it should place a time limit on when a certifying authority can modify its grant of certification in relation to the issuance of the Federal license or permit. While a few commenters argued that a certification should not be modified after the Federal license or permit is issued, several commenters asserted that certification modifications may be necessary to account for unforeseen water quality impacts during the life of the Federal license or permit, particularly for projects that can last decades. To balance stakeholder interests, EPA is not imposing such a time limit on when modifications to a grant of certification can occur in relation to the issuance of the Federal license or permit. The final rule's modification provision 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.

EPA also requested comment on whether EPA should identify a list of scenarios that may warrant certification modification. The preamble to the proposed rule provided examples of minor changes that may not rise to the level of requiring a new request for certification, but may be significant enough to warrant a modification of the granted 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). 87 FR 35361 (June 9, 2022). However, EPA did not propose an exclusive list of scenarios that may warrant modification. EPA received a wide range of comments on whether to list such scenarios, with most commenters requesting flexibility to address new information or project changes without providing specific details about what they meant by ''new information'' or ''project changes.'' A couple of commenters recommended that EPA develop a list of scenarios where modifications are appropriate, whereas a few commenters expressed support for the modification process precisely because the proposal did not define all circumstances in which modification is appropriate.

After reviewing public comment, EPA is not finalizing such a list 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.

In contrast to identifying scenarios warranting certification modifications, a few commenters recommended that EPA develop guidance regarding scenarios where a new request for certification is necessary, instead of a certification modification, to provide clarity on the outer limits of modifications. As noted above, 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 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 after 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.'').

b. Limits to Modification of Certification Decisions

In § 121.10 of the final rule, EPA is finalizing limits to certification modifications. The Agency made small changes to the proposed regulatory text to clarify these limits, including an adjustment of the provision title from ''Modifications'' to ''Modification to a grant of certification'' to clarify that modifications are limited to grants of certification. 40 CFR 121.10. Another adjustment was to flip the substance of proposed § 121.10(a) and (b) in the final rule so that the text first identifies the modification process and then its limitations. Furthermore, the Agency removed references to modifying denials or waivers of certification from proposed § 121.10(a) and revised the term ''modify'' in proposed § 121.10(a)(4) to ''change'' in § 121.10(b)(2) of the final rule.

As noted above, 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. In addition, 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.

While the final rule text does not address modifications to denials or waivers for the reasons discussed above,

EPA nonetheless concludes for the reasons mentioned above 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. As discussed in the proposed rule preamble, if a certifying authority has previously waived certification, that waiver may not be modified because there would be no ''certification'' to modify. 87 FR 35361–62. Thus, a certifying authority may not ''modify'' a waiver by changing it into a grant, a grant with conditions, or a denial. And finally, a denial of certification cannot be modified into a grant (with or without conditions) of certification or a waiver of certification.[90]

In contrast to this position, 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 or regulations. One commenter suggested that EPA change the modification 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.

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. As discussed above, 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.[91] EPA reiterates that if the activity changes significantly after a certification decision has been issued (*e.g.,* material change in the breadth or location of the activity), this may warrant a new request for certification.

i. Timing of Modifications to a Grant of Certification

Under this final rule, a certification modification could occur only if the certifying authority had granted certification (with or without conditions) within the reasonable period of time. The Agency maintains this position from the proposal in the final rule because the reasonable period of time limitation in the statute concerns the certifying authority's action on a request for certification. Accordingly, the Agency is finalizing a modification provision where a modification to an element or a portion of a granted certification occurs after the reasonable period of time in which the certifying authority acted. *See* 87 FR 35361 (''Under this proposed rulemaking, a certification modification could occur after the reasonable period of time in which the original certification decision was made.'').

EPA requested comment on whether the certification modification process should account for (1) whether there is a Federal license or permit modification process already in place and (2) the point in time at which a modification may be made (*e.g.,* if new information supporting a modification arises either before or after issuance of the license or permit). The Agency is not including a time limit on when modifications can occur so that modifications can happen at any time after the reasonable period of time ends, including prior to and after the issuance of a Federal license or permit until the expiration of the license or permit.

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. 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. Conversely, 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 Federal license or permit is issued.

After considering public comment, the Agency is promulgating a final rule at § 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 with 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.

ii. Agreement for a Modification to a Grant of Certification

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. However, such agreement does not require the certifying authority and Federal agency to agree to the substance of such a modification. Although EPA recommends that the modification process be collaborative, EPA is not

[90] Of course, nothing in section 401 or this final rule would preclude a project proponent from requesting certification again after a denial without prejudice and then the certifying authority could act in a different manner upon the second request if circumstances have changed. *See* section IV.F in this preamble.

[91] This statement and more broadly § 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.

suggesting that Federal agencies and certifying authorities must collaborate on the specific language of the certification modification, as discussed more below. Additionally, the certifying authority may modify only those portions of the certification that the two parties agreed upon.

Similar to the 1971 Rule, EPA is finalizing that a modification may only occur where a Federal agency and certifying authority agree in writing that the certification may be modified. While the parties must agree that one or another part of the certification can be modified, the certifying authority is not required to obtain the Federal agency's agreement on the specific language of such modification. Simply put, EPA expects that the certifying authority and the Federal agency's agreement would identify those portions of the certification decision that the certifying authority could modify, and then the certifying authority would be responsible for drafting the modification language. 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 § 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.

Some of the commenters who supported the proposed process for Federal agency and certifying authority agreement to a modification 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 does not review certification content during the original certification issuance.

EPA agrees with these commenters. 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. Accordingly, EPA is finalizing a process where 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.

Additionally, EPA requested comment on whether the final rule should provide project proponents with an explicit role in the modification process. A few commenters recommended that the project proponent should have a role in the process, for various reasons: because section 401 is framed around the role of the applicant, because the Federal agency and certifying authority may lack the technical knowledge for the modification; because often the project proponent is the party initiating the project modification; and because 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.

Consistent with the 1971 Rule, § 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 § 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.

Unlike the 1971 Rule, the Agency is not finalizing a role for EPA in the certification modification process where the Agency is neither the certifying authority nor the Federal licensing or permitting 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.[92] *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.

The cooperative approach in the final rule does not allow for unilateral modifications by certifying authorities, which includes through any ''reopener'' clauses included in a grant of certification. Reopener clauses purport to authorize a certifying authority to ''reopen'' and modify a certification at a later date. The final rule's position on unilateral modification is consistent with the position taken in the 2020 Rule. *See* 85 FR 42279. The Agency continues to disagree 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.

Some commenters recommended that EPA allow reopener clauses and discussed their prevalence in certifications. For example, one commenter asserted that certifications often include ''reopener'' or 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 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. Another 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 failing to meet water quality standards.

Other commenters recommended that the final rule 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

[92] *See* section IV.H in this preamble discussing EPA's specific roles identified in section 401, including acting as a certifying authority on behalf of jurisdictions lacking authority, notifying other jurisdictions where their water may be affected by a discharge from another jurisdiction, and providing technical assistance upon request.

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'' are contrary to the express and prescriptive provisions for post-certification authority that Congress provided in CWA section 401(a)(3) and 401(a)(4).

As discussed above, EPA's final rule does not authorize certifying authorities to unilaterally (*i.e.,* without Federal agency agreement) ''reopen'' or modify a certification decision. This holds true regardless of whether a certifying authority has inserted language into its grant of certification asserting this extra power.[93] 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, and EPA's interpretation supersedes any contrary interpretation taken by a certifying authority. Certifying authorities cannot bootstrap themselves greater authority to modify a certification beyond what is authorized in this final rule at § 121.10. However, EPA wishes to emphasize the distinction between reopener clauses and adaptive management conditions, the latter of which are permissible under the final rule. *See* section IV.F of this preamble for further discussion of adaptive management conditions.

c. Changes to the NPDES Regulations for Certification Modifications

EPA is also finalizing deletion of 40 CFR 124.55(b), which described the circumstances under which a modification may be made to a certification on an EPA-issued NPDES permit. The approach to modifications in § 124.55(b) differed from the approach EPA is finalizing at § 121.10. First, it addressed a subset of situations in which a modification would be permissible (*i.e.,* a change in state law or a stay, vacatur, or remand of a certification), while staying silent regarding whether modifications would be appropriate in other situations. Second, it suggested that in the identified situations, such as a change in state law or regulation, a previously issued grant of certification could be converted to a waiver, while this final rule takes the general position that a certifying authority cannot change a grant of certification into a fundamentally different certification action through a modification pursuant to § 121.10. Third, it did not require EPA as the Federal permitting agency to agree to the modification. Forth, it arguably suggested that in the identified situations, a modification was more appropriate than a new request for certification, an issue that EPA intentionally does not address in this final rule. Finally, it expressly precluded EPA from incorporating modified conditions into the NPDES permit except in one narrow circumstance: to delete a NPDES permit condition based on a condition in a certification invalidated by a state court or board, and only upon the request of the permittee. However, as discussed *supra* at section IV.G of this preamble, section 401(d) requires a Federal permitting agency to incorporate certification conditions into the Federal permit as conditions of that permit. EPA sees no reason why this fundamental principal should not apply to conditions of a modified certification. For this reason, EPA expects Federal agencies will agree to allow a modification only when the agency is willing to modify its license or permit or otherwise incorporate the modified certification conditions into its license or permit. EPA is finalizing deletion of § 124.55(b) because of these differences in approach between this final rule and § 124.55(b). As a result of the deletion of § 124.55(b), all certification modifications, including those for EPA-issued NPDES permits, must follow the approach finalized at § 121.10. A corresponding technical edit was made to 40 CFR 122.62(a)(3)(iii) to remove the reference to § 124.55(b).

EPA requested comment on whether the final rule should allow a certifying authority to unilaterally modify a certification in the circumstances identified in former § 124.55(b) such as a change in state law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate state board or agency stays, remands, or vacates a certification after Federal license or permit issuance. A few commenters recommended retaining 40 CFR 124.55(b) instead of the proposed § 121.10. To support their recommendation to retain 40 CFR 124.55(b), one commenter stated that EPA failed to describe any confusion, regulatory uncertainty, or other problems attributed to the certification modification provisions in the NPDES program.

In response to these commenters, 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 § 121.10 to apply to all certification modifications, including those on certifications for EPA-issued NPDES permits. Finally, EPA was concerned that leaving § 124.55(b) in place could introduce stakeholder confusion when read with final rule § 121.10 because it may have wrongly indicated that the circumstances in § 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 above, § 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 § 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.

EPA does not expect to develop an exhaustive list of circumstances under which EPA (when acting as the Federal permitting agency) expects to agree to a modification to a grant of certification by a certifying authority; however, EPA will work with certifying authorities where unanticipated water quality impacts, shifting project design plans, and new information warrant a modification to a grant of certification (and subsequently a modification to an EPA-issued NPDES permit). The Agency may develop guidance in the future regarding Agency agreements to modifications of grants of certification for NPDES permits issued by EPA.

3. Implementation

As previously discussed, the Agency is finalizing a process for modifying a grant of certification that requires the certifying authority and Federal agency

[93] This statement 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.

to agree that a modification is appropriate but does not require agreement on the substance of the modification. The process is meant to support a cooperative approach to adapting to changing circumstances or new information in an efficient and transparent way. As with other parts of the final rule, EPA is updating the section 401 regulations regarding modifications to support some of the past practices that certifying authorities and Federal agencies became familiar with over 50 years prior to the 2020 Rule. This includes a collaborative modification process like the one in the 1971 Rule. EPA is not aware of issues with modifications pursued under the 1971 Rule and notes that many stakeholders requested implementation guidance after the 2020 Rule omitted a process for modifying certification decisions. Therefore, 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.

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. The provision at 40 CFR 121.10 also does not preclude Federal agencies from developing a process for coordinating on certification modifications within the framework provided in this final rule.

EPA recommends that certifying authorities maintain clear records surrounding the development of certification decisions and any modifications to previously granted certifications, including justifications for modifying any certification conditions.[94] 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).

J. Enforcement and Inspections

1. What is the Agency finalizing?

This section of the preamble discusses several issues that have arisen with respect to enforcement of the requirement to obtain CWA section 401 certifications and enforcement of certification conditions. EPA did not propose to retain any regulatory text regarding enforcement of the requirement to obtain section 401 certification or enforcement of certification conditions.[95] However, EPA requested comment on whether it should add regulatory text on its interpretations on the enforceability of certification conditions by Federal agencies and certifying authorities; the judicial holdings regarding the application of the CWA citizen suit provision to certifications and certification conditions; and the interpretation of the term ''review'' in CWA section 401(a)(4). EPA is not finalizing any regulatory text on enforcement, consistent with the proposal. *See* 87 FR 35363 (June 9, 2022). Nevertheless, in light of the pre-proposal input and public comments EPA received on this issue, as well as stakeholder concern and confusion over how the 2020 Rule addressed CWA section 401 enforcement, EPA will discuss some of the more common concerns that have been identified regarding enforcement of the requirement to obtain section 401 certification and enforcement of certification conditions. To be clear, EPA is not offering new interpretations or positions on the issues discussed below.

2. Summary of Final Rule Rationale and Public Comment

a. General Enforcement Issues

Section 401 contains three provisions directly relevant to enforcement. First, section 401(a)(4) provides certifying authorities with an opportunity, prior to operation, to inspect a certified federally licensed or permitted activity or facility that does not require a Federal operating license to assure its operation will not violate water quality requirement. 33 U.S.C. 1341(a)(4). If the certifying authority determines that the operation will violate applicable water quality requirements, the Federal agency may suspend the Federal license or permit after a public hearing. *Id.* Second, section 401(a)(5) provides that any certified Federal license or permit may be ''suspended or revoked'' by the Federal agency ''upon the entering of a judgment under [the CWA] that such facility or activity has been operated in violation'' of the enumerated sections of the CWA. *Id.* at 1341(a)(5). Third, section 401(d) provides that if a grant of certification includes conditions, those conditions ''shall become a condition on any Federal license or permit subject to the provisions of this section.'' *Id.* at 1341(d).

Of these three provisions, the 1971 Rule only included regulatory text on section 401(a)(4), as discussed below in the section on inspection authority. The 1971 Rule did not contain any regulatory provisions addressing section 401(a)(5) or section 401(d) (the latter of which was not added to the statute until the 1972 amendments). The 2020 Rule addressed section 401(d) and section 401(a)(4). Regarding section 401(d), the 2020 Rule stated that the Federal agency ''shall be responsible for enforcing certification conditions'' incorporated into its license or permit. 40 CFR 121.11(c) (2020). Regarding section 401(a)(4), the 2020 Rule allowed the pre-operation inspection under section 401(a)(4) of all certified projects, regardless of whether they had received a subsequent Federal operating license or permit. *Id.* at § 121.11(a) and (b) (2020). The 2020 Rule preamble also stated that the ''CWA does not provide an independent regulatory enforcement role for certifying authorities,'' 85 FR 42275 (July 13, 2020), and declined to finalize an interpretation regarding CWA section 505 citizen suits and section 401. *Id.* at 42277.

In both pre-proposal input and public comment, stakeholders generally agreed that Federal agencies could enforce certification conditions. However, stakeholders expressed concern that the 2020 Rule prevented states and Tribes from exercising their independent enforcement authority and relied solely on Federal agencies to enforce certification conditions. Many commenters raised concerns over 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 state and Tribal enforcement, otherwise the conditions may never be enforced. Conversely, some commenters asserted that certifying authorities did not have an enforcement role either under section 401 or any other provision of the CWA,

[94] *See* discussion in section IV.F.2.d of this preamble regarding EPA's recommendation that certifying authorities include in their certification conditions a statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements. *See* also 40 CFR 121.7(d)(3).

[95] EPA is finalizing regulatory text regarding Federal agency review of certification decisions. *See* section IV.G of this preamble for further discussion.

including section 505 (the CWA's citizen suit provision). Other commenters asserted that section 505 provided for citizen suit enforcement of both failures to obtain section 401 certification and failure to comply with certification conditions. Many commenters requested that EPA expressly state in the final rule that states and Tribes have independent authority under the CWA to enforce certifications and certification conditions.

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.

The Agency views section 401 certification conditions that are incorporated into the Federal license or permit as enforceable by Federal licensing or permitting agencies. 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, *see supra*). 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, as noted above, the 2020 Rule included regulatory text that explicitly stated that Federal agencies were responsible for enforcing certification conditions incorporated into its Federal license or permit. 40 CFR 121.11(c) (2020). EPA proposed to remove this regulatory provision because it 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. Most commenters supported EPA's proposal to remove the 2020 Rule's language at § 121.11(c). However, some commenters disagreed with EPA's proposed approach, arguing that the enforcement of certification conditions incorporated into Federal licenses or permits must lie exclusively with the Federal permitting and licensing agencies. EPA disagrees. 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, *see supra*) (''Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority.'').

Some commenters argued that Federal and certifying authority enforcement will lead to confusion, unnecessary litigation, and possibly duplicative or inconsistent enforcement actions and conditions. 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.

b. Certifying Authority Inspection Authority

As discussed above, section 401(a)(4) identifies one set of circumstances where the certifying authority may review the manner in which a facility or activity will operate once the facility or activity has received certification. 33 U.S.C. 1341(a)(4). The certifying authority's review is limited to determining if the post-construction operation of the facility or activity will ensure that applicable effluent limitations, other limitations, or other applicable water quality requirements will not be violated. Section 401(a)(4) further states that when the certifying authority notifies the Federal agency that the operation or activity will violate effluent limits, other limits or other water quality requirements, the Federal agency, after public hearing, may suspend the Federal license or permit.

Id. The Federal license or permit shall remain suspended until there is reasonable assurance that the facility or activity will not violate CWA section 301, 302, 303, 306, or 307. *Id.*

The 1971 Rule clarified that the ability to ''review the manner in which the facility or activity shall be operated or conducted'' meant the right to inspect a facility or activity, and that the inspection is limited to a situation where there was a Federal construction license or permit and a subsequent Federal operating license or permit was not required. The 1971 Rule set forth the procedure regarding inspection and subsequent inspection findings; however, these regulations only applied where EPA was the certifying authority. *See* 40 CFR 121.26 through 121.28 (2019). The 2020 Rule interpreted section 401(a)(4) to apply to all certifying authorities. It also expanded the ability to conduct inspections pursuant to section 401(a)(4) to any certified project where the Federal license or permit and certification were issued prior to operation, instead of only for projects where there was a Federal construction license or permit and a subsequent Federal operating license or permit was not required. 40 CFR 121.11(a) (2020); 85 FR 42277. In pre-proposal input, several stakeholders pressed the Agency to allow for inspections before, during, and post-operation.

EPA is removing § 121.11(a) and (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. A few commenters recommended that the Agency add regulatory text regarding section 401(a)(4). However, 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. EPA interprets the term ''review'' found in section 401(a)(4) as 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. EPA requested comment on whether it should articulate this interpretation of section 401(a)(4) in regulatory text. A few commenters recommended that EPA adopt regulatory text regarding its proposed interpretation of the term ''review'' found in section 401(a)(4). After considering public comments, however, EPA finds it unnecessary to add regulatory text defining the term ''review'' as used in section 401(a)(4).

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. 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.

K. Neighboring Jurisdictions

1. What is the Agency finalizing?

The Agency is finalizing its proposed approach to the section 401(a)(2) process, referred to as the neighboring jurisdictions process, with some modifications to the regulatory text for clarity. *See* 40 CFR part 121, subpart B.

The Agency is adding text to § 121.12 of the final rule, which provides the contents of a notification to the Regional Administrator, to clarify that Federal licensing and permitting agencies notify EPA upon receipt of a Federal license or permit application [96] and certification or waiver by providing written notification to the ''appropriate'' Regional Administrator. EPA is also modifying the proposed text of § 121.13, which provided that a Federal license or permit ''may not be issued pending the conclusion of the process described'' in §§ 121.14 and 121.15, to more clearly state that a Federal license or permit ''shall not be issued pending the conclusion of the process described'' in § 121.13 (EPA's determination of effects on neighboring jurisdictions) as well as §§ 121.14 and 121.15.[97]

For purposes of language consistency and clarity, the Agency removed ''certified or waived'' from the proposed language of § 121.13(a), which stated that ''[w]ithin 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the certified or waived project may affect water quality in a neighboring jurisdiction.'' The removal of ''certified or waived'' is intended to remove redundancy, as § 121.12(a) already states that the Federal agency shall provide written notification to the appropriate Regional Administrator ''[w]ithin five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit,'' and to ensure conformity of the use of ''discharge from the project'' across subpart B.

Additionally, EPA is finalizing most of § 121.13(c), which provides the contents of the Regional Administrator's may affect notification, as proposed, except the Agency is revising the proposed language in § 121.13(c)(3) to conform the statement that the Agency provides to notified neighboring jurisdictions more closely with the statutory text of section 401(a)(2) and provide greater clarity about notification needed for an objection. Rather than providing a statement that the notified neighboring jurisdiction ''has 60 days'' to provide written notification ''whether it has determined that the discharge will violate any of its water quality requirements,'' as proposed in § 121.13(c)(3), the final rule states that the Agency provides a statement that the notified neighboring jurisdiction ''has 60 days after such notification'' from the Agency to provide written notification ''if it has determined that the discharge will violate any of its water quality requirements.'' 40 CFR 121.13(c)(3). This revision more closely reflects the statutory text of section 401(a)(2) which provides that a notified neighboring jurisdiction may object to issuance of a Federal license or permit ''[i]f, within sixty days after receipt'' of notification from the Agency it ''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). As a result, the text of § 121.13(c)(3) of the final rule also more clearly conveys the statutory time

[96] *See* section IV.C.2 of the preamble regarding the expectation that the Federal license or permit application be complete. *See* section IV.K.2 of this preamble *infra* for further discussion about the contents of the Federal agency's notification to EPA.

[97] *See* section IV.K.2.d. of this preamble *infra* for further discussion of the requirement for the neighboring jurisdictions process to conclude before issuance of a license or permit by a Federal agency.

and content requirements of the notification needed for an objection than the proposed regulatory text.

EPA is also modifying the proposed text of §§ 121.13 and 121.14 to remove language requiring the Administrator and notified neighboring jurisdiction to provide notification to the certifying authority during the neighboring jurisdictions process, to more closely reflect the statutory language in section 401(a)(2), which does not require such notification to the certifying authority in this process.

Further, the Agency is modifying the proposed text of §§ 121.14 and 121.15 to clarify that references to a ''neighboring jurisdiction'' in these provisions refer to a ''notified'' neighboring jurisdiction, meaning a neighboring jurisdiction that has received notification that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality. The proposed text of § 121.14(a) referenced notice being provided to a neighboring jurisdiction ''in accordance with § 121.13(c),'' and the language in §§ 121.14 and 121.15 referred to ''the neighboring jurisdiction'' or ''a neighboring jurisdiction'' without more explicitly stating that the provisions were addressing ''notified'' neighboring jurisdictions. In the final rule, EPA is revising the internal citation in § 121.14(a) to more appropriately reference § 121.13(b), the provision in the final rule requiring the Regional Administrator to provide notification upon determining that discharge from the project may affect water quality in a neighboring jurisdiction. Likewise, EPA is revising the ''neighboring jurisdiction'' references in §§ 121.14 and 121.15 to specify that these refer to a ''notified'' neighboring jurisdiction, to remove ambiguity and improve clarity in these sections.

The Agency is also adding language to the provision in § 121.15 to clarify the process for the Federal agency to provide notice of a hearing on a section 401(a)(2) objection, and provide greater transparency as to how Federal agencies provide such notification. The proposed text of § 121.15(b) required the Federal agency conducting a hearing on an objection from a neighboring jurisdiction to ''provide public notice at least 30 days in advance of the hearing.'' In the final rule, § 121.15(b) requires the Federal agency in such circumstances to ''provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.'' This addition clarifies that that such notice must go to interested parties to ensure that they can prepare for and provide their testimony or comments at the public hearing. It further provides a greater level of transparency regarding how all Federal licensing or permitting agencies will provide public notice of a hearing on an objection.

Additionally, for purposes of improving the efficiency and clarity of the neighboring jurisdictions process in circumstances where a notified neighboring jurisdiction seeks to withdraw a previously issued objection, EPA is adding text in §§ 121.14 and 121.15 of the final rule to allow for withdrawal of an objection in these circumstances. Specifically, § 121.14(c) of the final rule provides that ''[t]he notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.'' Consistently, EPA is adding text to § 121.15(a) of the final rule, providing that the Federal licensing or permitting agency shall hold a public hearing on the notified neighboring jurisdiction's objection ''unless the objection is withdrawn in accordance with § 121.14(c).'' As discussed further below, EPA finds 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, and conserves resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances. Additionally, the added text regarding withdrawal of an objection in §§ 121.14 and 121.15 of the final rule add clarity by establishing a uniform procedure for executing withdrawal of an objection.

As discussed in greater detail below, EPA is finalizing its proposed approach to the definition of neighboring jurisdiction, the scope of the neighboring jurisdictions process, the circumstances initiating the neighboring jurisdictions process, and the timing in which a Federal licensing or permitting agency must provide notification to EPA pursuant to section 401(a)(2). The Agency is also maintaining its previously stated positions regarding the roles of the Federal licensing or permitting agency, EPA, and a neighboring jurisdiction in the neighboring jurisdictions process, but is providing some further discussion regarding certain aspects of these roles below to provide added clarity.

2. Summary of Final Rule Rationale and Public Comment

a. Definition of Neighboring Jurisdiction

The Agency is finalizing the definition of neighboring jurisdiction at § 121.1(g) as proposed. This final rule revises the definition of this term used in the 2020 Rule to clarify that it includes ''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), other than the jurisdiction in which the discharge originates or will originate.'' *See* 40 CFR 121.1(g). In contrast, 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. 40 CFR 121.1(i) (2020). As EPA noted in the proposed rule, 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 current definition also reflects the TAS provisions for Indian Tribes to administer section 401 that are being finalized in § 121.11.

A few commenters addressing the definition of neighboring jurisdiction in the proposed rule advocated for EPA to adopt a narrower definition of this term. 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).

b. Scope of the Neighboring Jurisdictions Process

The Agency is also maintaining in the final rule the interpretation of the scope of section 401(a)(2) stated in the proposed rule. In the proposed rule, EPA interpreted the scope of section 401(a)(2) as limited by the statutory language to considering potential effects only from a ''discharge'' from an activity, explaining that this is based upon the statutory language in section 401(a)(2) which limits EPA to considering whether a ''discharge'' from an activity may affect the water quality of a neighboring jurisdiction, and likewise limits a neighboring jurisdiction to determining whether a ''discharge'' from the activity will affect its water quality so as to violate any water quality requirements. 87 FR 35365 (June 9, 2022). A few commenters observed that EPA's proposed interpretation of the scope of section 401(a)(2) differed from its proposed interpretation of the scope for certification, and one such commenter asserted that EPA's differing interpretations of scope for certification and the neighboring jurisdictions process in section 401(a)(2) is arbitrary. EPA disagrees.

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. One commenter asserted that the scope of section 401(a)(2), outlining the neighboring jurisdictions process, is the same as section 401(a)(1), relating to certification, because section 401(a)(2) is inextricably linked to section 401(a)(1) through the use of ''such'' referring to the scope of discharges addressed in section 401(a)(1).

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 above, 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. The text of the neighboring jurisdictions process in the Water Quality Improvement Act of 1970 (in section 21(b)(2)) used ''such a discharge'' and ''such discharge'' language later employed in section 401(a)(2), even though the 1970 act used the term ''activity'' in place of ''discharge'' in what is now section 401(a)(1). The ''discharge'' language for the neighboring jurisdictions process remained unchanged during the 1972 amendments that changed the language regarding certification 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. A more limited scope of review is consistent with the more limited nature of the neighboring jurisdictions process. 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.

c. Circumstances Initiating the Neighboring Jurisdictions Process

The Agency is finalizing its proposed approach to clarify that both grants of certification (with or without conditions) and waivers of certification initiate the neighboring jurisdictions process established by section 401(a)(2). Section 401(a)(2) provides that the Federal licensing or permitting agency must immediately notify the EPA Administrator upon receipt of a Federal license or permit application and certification. 33 U.S.C. 1341(a)(2). Under the 1971 Rule, EPA's section 401(a)(2) review was initiated upon receipt of either a certification or a waiver, which was treated as a substitute for certification. *See* 40 CFR 121.11, 121.16 (2019). In the 2020 Rule, EPA's section 401(a)(2) review was initiated only upon receipt of a certification. 40 CFR 121.12(a) (2020); *see* 85 FR 42287 (July 13, 2020). Additionally, the 2020 Rule further provided that a Federal agency may issue a license or permit upon issuance of a written notice of waiver. 40 CFR 121.9(e) (2020). As proposed, EPA is returning to the approach taken in the 1971 Rule that the neighboring jurisdictions process is initiated by either a certification or waiver.

Although the statutory text does not explicitly identify waiver of certification as an action that initiates the neighboring jurisdictions process in section 401(a)(2),[98] the Agency maintains that it is reasonable to interpret the waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2) review for several reasons. First, this treatment is consistent with the purpose of section 401(a)(2). Section 401(a)(2) provides a mechanism for a notified neighboring jurisdiction to object to the issuance of a Federal license or permit when it determines that discharge from a project originating in another jurisdiction will affect the quality of its waters thus violating its water quality requirements. A waiver does not indicate a certifying authority's substantive opinion regarding the water quality implications (for itself or another jurisdiction) of a project subject to Federal licensing or permitting. Rather, a certifying authority may affirmatively waive certification for a variety of reasons, including a lack of resources to evaluate the project. In addition, a certifying authority may be deemed to have waived certification if that certifying authority fails or refuses to act on a request for certification before the end of the reasonable period of time. *See* section IV.F of this preamble for further discussion on waivers of certification. Ultimately a waiver of certification allows the Federal licensing or permitting agency to issue its license or permit without receipt of a water quality certification. As a result, a waived certification could result in water quality impacts that might violate a neighboring jurisdiction's water quality requirements. It is reasonable to afford a mechanism for EPA and a neighboring jurisdiction to evaluate that possibility.

Second, the approach taken under the 2020 Rule to exclude waivers from the neighboring jurisdictions process created a method for certifying authorities to circumvent the neighboring jurisdictions process in circumstances where they are aware of water quality concerns from a neighboring jurisdiction regarding a project. As noted above, EPA finds that section 401(a)(2) was established as a mechanism to allow 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. EPA does not find that the statutory language of section 401(a)(2) supports such circumvention of the neighboring jurisdictions process, as this would thwart the very purpose of the process established by the statutory text.

Finally, including waivers as actions initiating the neighboring jurisdictions process was the Agency's position for over 50 years prior to the 2020 Rule. *See* 40 CFR 121.16 (2019). The final rule provides clarification on when waiver of certification has occurred, allowing Federal agencies to provide EPA notice of the Federal license or permit application and waiver as required by § 121.12 of the final rule. Therefore, consistent with the approach taken in the 1971 Rule, the Agency is restoring the interpretation that waivers, in addition to certifications, initiate the neighboring jurisdictions process established in section 401(a)(2).

Accordingly, in § 121.12(a) of the final rule, the Agency is clarifying that the neighboring jurisdictions process is initiated when the Federal agency "has received both the application and either a certification or waiver for a Federal license or permit," and must provide notice to EPA. Additionally, as proposed, the Agency is removing the regulatory provision located at § 121.9(e) of the 2020 Rule, which provided that a Federal agency may issue a license or permit upon issuance of a written notice of waiver. As discussed above, under this final rule waivers of certification also initiate the neighboring jurisdictions process and EPA may make a "may affect" determination based upon a waiver of certification. *See* 40 CFR 121.12(a). Consistent with the language at § 121.13(d) of the final rule, a Federal agency shall not issue a Federal license or permit pending the conclusion of the neighboring jurisdictions process.

Several commenters provided input on the proposed approach to have waiver initiate the neighboring jurisdictions process. A few commenters agreed that a waiver should initiate the neighboring jurisdictions process and asserted that this approach would improve the neighboring jurisdictions process. Conversely, a few other commenters argued that a waiver should not initiate the neighboring jurisdictions process and asserted that that there is no statutory basis for the inclusion of waivers in this process. One of these commenters added that expanding the notification process beyond what the statute provides would lead to needless process and delays.

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 above, 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.[99]

[98] *See* 33 U.S.C. 1341(a)(2) ("Upon receipt of such *application and certification* the licensing or permitting agency shall immediately notify the Administrator of such *application and certification.*") (emphasis added).

[99] In fact, the language in section 401(a)(1) describes waivers of certification as a substitute for

Employing a more restrictive interpretation would 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.

d. Neighboring Jurisdictions Process Must Conclude Before Federal License or Permit Issuance

The proposed text of § 121.13(d) included language intended to explain that the neighboring jurisdictions process must conclude before a Federal agency issues a license or permit, stating that ''[a] Federal license or permit may not be issued pending the conclusion of the process described in §§ 121.14 and 121.15.'' This proposed text retained language similar to § 121.12(c) of the 2020 Rule, which stated that ''[t]he federal license or permit may not be issued pending the conclusion of the processes.'' 40 CFR 121.12(c) (2020). The Agency is modifying the proposed text of § 121.13 to more clearly state that a Federal agency is prohibited from issuing a license or permit subject to section 401 certification pending conclusion of the neighboring jurisdictions processes addressed in §§ 121.13, 121.14, and 121.15. Specifically, EPA changed the proposed text of § 121.13(d) from providing that the Federal license or permit ''may not be'' issued pending the conclusion of the neighboring jurisdictions process to more directly stating that the Federal license or permit ''shall not be'' issued pending the conclusion of the neighboring jurisdictions process. Further, EPA modified the text of § 121.13 to make clear that the neighboring jurisdictions process includes the processes described in §§ 121.13, 121.14, and 121.15. These changes are consistent with the proposed regulatory text, but provide further clarity that pursuant to § 121.13, and the statutory text of section 401(a)(2), a Federal agency cannot proceed with issuing its license or permit until the neighboring jurisdictions process set forth in §§ 121.13, 121.14, and 121.15 has concluded.

In practical terms, this means that Federal agencies must wait to issue a Federal license or permit until the neighboring jurisdictions process has concluded. The neighboring jurisdictions process may conclude in several different ways, depending on factual and procedural circumstances. One way the neighboring jurisdictions process concludes occurs when the appropriate Regional Administrator has completed the ''may affect'' determination within 30 days after receiving notice from the Federal agency, pursuant to § 121.13(a), without making a ''may affect'' finding. In such circumstances, the neighboring jurisdictions process has concluded, and the Federal agency may proceed with issuing the Federal license or permit without waiting for further proceedings.

In contrast, when the appropriate Regional Administrator completes the ''may affect'' determination by making a ''may affect'' finding and provides notification of this finding pursuant to § 121.13(b), the Federal agency must wait to issue the Federal license or permit until the notified neighboring jurisdiction has made a ''will violate'' determination, pursuant to § 121.14, within 60 days of the notification from EPA pursuant to § 121.13, or this time period has passed. Where a notified neighboring jurisdiction has determined that a discharge will violate its water quality requirements and has provided notification of its objection and request for hearing pursuant to § 121.14(a) and (b), the Federal agency cannot issue the license or permit until either the public hearing process described in § 121.15 is completed, or the notified neighboring jurisdiction withdraws its objection pursuant to § 121.14(c).

A few commenters raised concerns regarding the neighboring jurisdictions process delaying the issuance of Federal licenses or permits. Additionally, a commenter asserted that EPA should consider only requiring the neighboring jurisdictions process for larger, complex individual permit projects because of wide-ranging implications of this 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.[100] 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 further below, 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. EPA also 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.

e. Federal Licensing or Permitting Agency's Role in Initiating the Neighboring Jurisdictions Process

Section 401(a)(2) requires the Federal licensing or permitting agency to notify EPA immediately upon receipt of a Federal license or permit application and the related section 401 water quality certification. 33 U.S.C. 1341(a)(2). This notification from the Federal agency commences the remaining steps of the neighboring jurisdictions process addressed in section 401(a)(2) and discussed in §§ 121.13, 121.14, and 121.15 of the final rule. The 1971 Rule established some procedural requirements for this notification process, which EPA updated in the 2020 Rule. The 2020 Rule included additional specificity on the timing of Federal agency notification but did not contain a standardized process for notification. 40 CFR 121.12(a) (2020). Instead, under the 2020 Rule, EPA relied on Federal agencies to develop notification processes and procedures that work within their licensing or permitting programs. 85 FR 42273.

In the proposed rule, the Agency likewise proposed regulatory text to

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 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.

[100] Several commenters suggested that the neighboring jurisdictions process resulted, in part, from the 1971 Rule. As discussed, the statutory text of section 401(a)(2) establishes this process.

provide clarity regarding the timing by which a Federal agency must provide notification to EPA pursuant to section 401(a)(2), and further proposed additional procedures for Federal agencies to follow when providing notification to EPA. In the final rule, EPA is maintaining its interpretation of the timing for Federal agencies to provide notification pursuant to the statutory text in section 401(a)(2), and otherwise finalizing the proposed procedures for Federal agencies to follow when providing notification to EPA with some minor changes to the text of § 121.12 and the deletion of the definition of ''application'' proposed at § 121.1(c).

i. Timing of Notice From a Federal Agency

As noted, to initiate the neighboring jurisdictions process, a Federal licensing or permitting agency must ''immediately'' notify EPA when it receives a Federal license or permit application and a section 401 certification. 33 U.S.C. 1341(a)(2). EPA 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. This approach retains the same interpretation of ''immediately'' used in the 2020 Rule. 40 CFR 121.12(a) (2020); *see* 85 FR 42273.

EPA is also finalizing the regulatory text in § 121.12(a) of the final rule providing that ''[w]ithin five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.'' EPA is finalizing this provision with only minor changes from the proposal for added clarity. Specifically, EPA added language to specify that the Federal agency shall provide the written notification to the ''appropriate'' Regional Administrator, but otherwise maintained the proposed text providing that the period for the Federal agency to provide such notification commences upon ''the date that it has received both the application and either a certification or waiver.'' *See* 87 FR 35380.

As previously discussed, this provision reflects EPA's interpretation that the neighboring jurisdictions process set forth in section 401(a)(2) is initiated by either certification or waiver. *See supra* for further discussion on actions initiating the neighboring jurisdictions process. It further makes clear that the Federal agency is only considered to be in receipt of an application for a Federal license or permit and certification within the meaning of section 401(a)(2) when such agency has received *both* an application for a Federal license or a permit, as discussed above, *and* has either received a corresponding certification or a waiver has occurred.[101]

EPA received several comments on its proposal to retain the five-day interpretation of ''immediately'' in the context of section 401(a)(2). A few commenters agreed with EPA maintaining the five-day interpretation of immediately, asserting that this period was adequate for such notice and consistent with the statutory language. However, one commenter argued that providing Federal agencies with five calendar days to notify EPA is an unrealistic timeframe, and asked EPA to consider interpreting ''immediately'' as five business days or ten calendar days. 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.

Several commenters discussed the proposed language, finalized in § 121.12(a) of the final rule, which establishes that a Federal agency's obligation to provide notification to EPA only commences upon the Federal agency's receipt of both the Federal license or permit application and either certification or waiver. One commenter agreed with this approach, noting that the Agency's clarification on this point will ensure that EPA and neighboring jurisdictions have necessary information to make determinations within the neighboring jurisdictions process, and that this otherwise addresses confusion and information gaps caused by prior inconsistent information sharing practices. A few commenters, however, suggested that the Federal agency should be able to provide notification to EPA prior to receipt of certification, such as upon a receipt of an application for a Federal license or permit and a request for certification. One such commenter argued that requiring the Federal agency to be in receipt of both the Federal license or permit application and certification before notifying EPA would increase delays in the Federal licensing or permitting 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).

A few commenters argued that requiring Federal agencies to provide notification to EPA after receipt of a certification precluded Federal agencies from providing notification to EPA earlier (*e.g.,* after receipt of an application for a Federal license or permit), therefore prohibiting Federal agencies from engaging in early coordination with EPA. However, this is not correct. Nothing in the proposed text, or final rule, prevents a Federal agency from providing notification to EPA of a Federal license or permit

[101] Although this statutory language is unambiguous, EPA is further discussing when receipt occurs due to questions and conflicting practices among Federal licensing and permitting agencies. For example, some Federal agencies provide notice to EPA concurrently with its public notice on the licensed or permitted application, *see, e.g.,* 33 CFR 325.2(b)(1)(i) (''The public notice for such activity . . . will serve as the notification to the Administrator . . . pursuant to section 401(a)(2) of the Clean Water Act.''). Such practices are not consistent with the statutory language or this final rule. It is necessary that certification or waiver occur for EPA to make a determination as to whether a discharge from the activity ''may affect'' the water quality of a neighboring jurisdiction under section 401(a)(2), as EPA only makes such a determination where certification or waiver has occurred, and considers any conditions included in a certification in making this determination.

application for purposes of early coordination. Rather, such notice for coordination purposes does not satisfy the requirement that the Federal agency provide notification to EPA upon receipt of the Federal license or permit application and certification or waiver, pursuant to § 121.12 of the final rule, and would not commence the 30-day period for EPA's ''may affect'' determination pursuant to section 401(a)(2). Thus, EPA is providing this clarification in the final rule.

With regard to the meaning of ''application'' for purposes of section 401(a)(2), the Agency is maintaining the position stated in the proposed rule that within this context the term ''application'' is used to refer to the ''application for such Federal license or permit.'' *See* 87 FR 35366. Section 401 uses the term ''application'' throughout section 401(a); however, when read in context, the term is used for both ''applications for certification'' and ''applications for such Federal license or permit.'' 33 U.S.C. 1341(a)(1)–(2). The Agency considers the ''request for certification'' to be an ''application for certification.'' *See* section IV.C in this preamble for further discussion on request for certification. The context of the relevant statutory language in section 401(a)(2), directing the Federal agency to provide notification to EPA ''[u]pon receipt of such application and certification,'' reflects that this use of the term ''application'' refers to ''application for such Federal license or permit,'' rather than ''application for certification.'' *Id.* at 1341(a)(2). Accordingly, the obligation for the Federal agency to provide notification to EPA pursuant to section 401(a)(2) is initiated upon receipt of both a Federal license or permit application and either a section 401 certification or a waiver of certification.

In the proposed rule, EPA noted that there are instances where a Federal license or permit application does not accompany a certification or waiver, and therefore proposed to define the term ''application'' to mean ''an application for a license or permit submitted to a Federal agency, or if available, the draft license or permit'' to account for differing Federal licensing or permitting practices. EPA received a few comments related to this definition in the context of the Federal agency providing notification to EPA pursuant to section 401(a)(2). One commenter argued that EPA should not require the Federal agency to have a draft Federal license or permit when it notifies EPA under the neighboring jurisdictions process. In contrast, another commenter supported draft Federal licenses or permits being included in notification to EPA where such drafts are provided before a certification decision. However, as previously discussed, in the context of requests for certification, many commenters opposed to EPA's proposed approach of requiring the project proponent to include the draft Federal license or permit in all requests for certification. As a result, EPA is finalizing a bifurcated approach. A project proponent seeking certification on the issuance of a general license or permit must submit a copy of the draft Federal license or permit in its request for certification. A project proponent seeking certification on an individual license or permit must submit a copy of the Federal license or permit application in its request for certification. *See* section IV.C in this preamble for discussion on bifurcated request for certification process; 40 CFR 121.5(a). As a result of the comments received related to the proposed definition of ''application'' and finalized approach regarding use of draft Federal licenses or permits in the request for certification context, EPA is not finalizing the proposed definition of the term ''application'' in the proposed rule. Although the Agency is not proposing a definition of the term ''application'' in the final rule, it 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).[102]

ii. Contents of Notification From a Federal Agency

Although the text of section 401(a)(2) requires a Federal agency to notify EPA upon receipt of a Federal license or permit application and certification,[103] it does not define the contents of such notification. 33 U.S.C. 1341(a)(2). The 1971 Rule and 2020 Rule provided some direction on information that could be submitted to EPA as part of the neighboring jurisdictions process, but neither regulation defined the contents of the section 401(a)(2) notification. *See* 40 CFR 121.12(b) (2020); 40 CFR 121.13 (2019).

The 1971 Rule provided that upon receipt of an application for a license or permit with an accompanying certification, the Federal agency shall forward copies of the application and certification to the Regional Administrator. 40 CFR 121.11 (2019). It further stated that only those portions of the application which relate to water quality shall be forwarded to the Regional Administrator and allowed for the Regional Administrator to ask for supplemental information if the documents forwarded did not contain sufficient information to make the determination provided for in § 121.13. *See* 40 CFR 121.12 and 121.13 (2019). In the preamble to the 2020 Rule, EPA stated its expectation that Federal agencies would develop notification processes and procedures, but noted that the Administrator could request copies of the certification and Federal license or permit application. 85 FR 42273. During implementation of the 2020 Rule, some but not all agencies developed their own procedures, and such procedures varied between Federal agencies and across the country.

EPA is finalizing its proposed approach to add regulatory text defining the minimum level of information that must be included in the notification to EPA to provide consistency in practices across Federal agencies and to streamline the notification process. In § 121.12(a), the Agency provides that the notification must be in writing and contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location information (*e.g.,* latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment on the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, the notification shall include a copy of those comments. 40 CFR 121.12(a)(2). Additionally, the notification shall include a copy of the certification or notice of waiver, and the Federal license or permit application. 40 CFR 121.12(a)(1).

EPA is also finalizing the proposed approach allowing the Regional Administrator to submit a written request to a Federal agency upon determining there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to section 401(a)(2). 40 CFR

[102] For this final rulemaking, EPA is not suggesting that Corps civil works projects are exempt from neighboring jurisdictions processes, even though there are no ''applications'' or draft Federal licenses or permits. Rather, EPA expects the Corps to determine how best to comply with all section 401 requirements. Compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification.

[103] As previously discussed, EPA interprets the waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2). *See* section IV.K.2.c. of this preamble for further discussion of this interpretation.

121.12(b). This provision allows the Regional Administrator to request that such information be provided in a timely manner for EPA's ''may affect'' determination and provides that the Federal agency ''shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe.'' Likewise, the Agency is finalizing the proposed language allowing the Regional Administrator to develop agreements with Federal agencies to refine the notification process and the provision of supplemental information, in § 121.12(c) of the final rule.

One commenter addressing these proposed provisions argued 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 requiring such information would exceed EPA's authority under section 401(a)(2) and could result in 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 such information should be limited to existing information that is readily available. EPA disagrees that the provision in § 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 § 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.

f. EPA's Role Under Section 401(a)(2)

Section 401(a)(2) provides that whenever a discharge ''may affect, as determined by the Administrator, the quality of the waters of any other State,'' the Administrator must notify the neighboring jurisdiction, Federal agency, and the project proponent of the determination within thirty days of the date of notice of the application. 33 U.S.C. 1341(a)(2). In § 121.13 of the final rule, EPA is finalizing its proposed approach to making a ''may affect'' determination and providing notification of a determination that a discharge from a project may affect the water quality of a neighboring jurisdiction, although it is doing so with changes to the proposed regulatory text to omit the requirement that EPA provide such notice to a certifying authority, and to provide further clarification that a Federal license or permit cannot be issued without the neighboring jurisdictions processes concluding, as discussed above. EPA is otherwise maintaining its positions regarding the requirement that EPA make a ''may affect'' determination, the timing of this determination and notification, the meaning of ''may affect'' and EPA's ''may affect'' analysis, and procedural and content requirements of ''may affect'' notification, as reflected in § 121.13 of the final rule and discussed further below.

i. Requirement for EPA To Make ''May Affect'' Determination

At proposal, EPA stated its interpretation that the statutory text of section 401(a)(2) requires the Agency to determine whether a discharge ''may affect'' a neighboring jurisdiction once it receives notification of the application and certification or waiver. 87 FR 35367. Therefore, EPA proposed regulatory text in § 121.13(a) providing that the Regional Administrator ''shall determine whether a discharge from the certified or waived project may affect water quality in a neighboring jurisdiction.'' EPA is finalizing the proposed language in § 121.13(a) of the final rule with revisions to remove the term ''certified or waived.'' The removal of ''certified or waived'' is intended to ensure language conformity across subpart B, and remove redundancy, as § 121.12(a) of the final rule already states that once the Federal agency ''has received both the application and either a *certification or waiver,*'' the Federal agency ''shall provide written notification to the appropriate Regional Administrator.'' 40 CFR 121.12(a) (emphasis added).

Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit application, the certification, and any supplemental information provided to EPA, and, if the Regional Administrator determined that there was ''reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,'' the Regional Administrator would notify the affected jurisdictions within thirty days of receipt of the Federal license or permit application materials and certification. *See* 40 CFR 121.13 (2019). Similarly, the 2020 Rule acknowledged EPA's responsibility to notify a neighboring jurisdiction whenever it determined that a discharge from the certified activity may affect the water quality of the neighboring jurisdiction. 40 CFR 121.12(b) (2020); 85 FR 42274. However, the 2020 Rule asserted that it was within the Agency's discretion whether to make a ''may affect'' determination in the first place, and that EPA was, therefore, not required to make such a determination. 85 FR 42273.

To date, EPA is only aware that one Federal district court has addressed EPA's obligation to make a determination pursuant to section 401(a)(2). In *Fond du Lac Band of Lake Superior Chippewa* v. *Wheeler,* 519 F. Supp. 3d 549 (D. Minn. 2021), the court addressed two issues concerning section 401(a)(2): (1) whether EPA is required to make a ''may affect'' determination and (2) whether EPA's ''may affect'' determination is judicially reviewable. The court concluded that EPA is required to determine whether the discharge may affect the quality of a neighboring jurisdiction's waters pursuant to section 401(a)(2). In coming to this conclusion, the court examined the statutory text and found that it requires EPA to make ''a discrete factual determination . . . within a specific timeframe . . . based on an application and certification. . . .'' *Id.* at 564. The court found that ''the existence of such a clear and limited timeframe supports the argument that the statute imposes a duty on EPA to make a 'may affect' determination.'' *Id.* Further, the court concluded that Federal courts have the jurisdiction to review EPA's ''may affect'' determination.[104]

The Agency agrees with the court in *Fond du Lac* that EPA, pursuant to section 401(a)(2), must determine whether a discharge ''may affect'' a

[104] Notably, the court in *Fond du Lac* did not opine on the specific meaning of ''may affect'' or factors that EPA should consider in making a ''may affect'' determination. *See* 519 F. Supp. 3d 549.

neighboring jurisdiction once it receives notification of the Federal license or permit application and certification or waiver from the Federal agency consistent with § 121.12(a) of the final rule. As discussed by the court in *Fond du Lac,* the statutory language in section 401(a)(2), which requires the Agency to provide notification within a set timeframe to a neighboring jurisdiction when it finds that discharge from the project may affect its water quality, supports finding that EPA is required to make a ''may affect'' determination. *See Fond du Lac,* 519 F.Supp.3d at 563–64. Accordingly, the Agency is finalizing language in § 121.13(a) of the final rule, with the modifications discussed above, to reflect this interpretation and clarify that the Regional Administrator shall make this determination, consistent with the Agency's interpretation of section 401(a)(2).

EPA received comments regarding its interpretation of section 401(a)(2) requiring the Agency to make a ''may affect'' determination, and commenters were divided on whether EPA is required to make a ''may affect'' determination. Some commenters agreed with EPA's interpretation and the language in the proposal stating that section 401(a)(2) requires EPA to make a ''may affect'' determination upon receiving notice from the Federal licensing or permitting agency. Reasons cited for supporting this position included the rationale provided by the court in *Fond du Lac,* cited by some commenters, and the assertion that this approach better allows neighboring jurisdictions to protect their water quality and provides transparency regarding the Agency's actions.

Some other 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 Federal licenses or permits subject to section 401. In addition to asserting the position, taken in the 2020 Rule, that the statutory language provides EPA discretion as to whether to make a ''may affect'' determination, some of these commenters otherwise argued that requiring EPA to make a ''may affect'' determination for all Federal licenses or permits subject to section 401 would be an inefficient use of EPA resources and would result in unnecessary delays in the Federal licensing or permitting process.

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 § 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).

ii. Timing of EPA's ''May Affect'' Determination and Notification

As previously discussed, section 401(a)(2) requires EPA to provide notification ''within thirty days of the date of notice of application for such Federal license or permit'' to the neighboring jurisdiction, the Federal Agency, and the project proponent whenever it determines that a discharge from a project may affect the water quality of a neighboring jurisdiction. 33 U.S.C. 1341(a)(2). EPA finds that the ''notice of application for such license or permit'' references the prior statutory text of section 401(a)(2) requiring the Federal agency to immediately notify the Administrator ''[u]pon receipt of such application and certification.'' *See* section IV.K.2.e in this preamble for discussion regarding timing of Federal agency notification to EPA pursuant to section 401(a)(2). Accordingly, EPA finds that section 401(a)(2) provides EPA with a 30-day period to make its ''may affect'' determination and provide any required notification after receiving notice from the Federal agency of the Federal license or permit application and certification or waiver. EPA has, therefore, incorporated this 30-day period into the provisions it is finalizing in § 121.13(a) and (b) regarding its ''may affect'' determination and ''may affect'' notification, as it proposed. This is consistent with the approach taken in the 2020 Rule, which also provided a 30-day period for the EPA to make a ''may affect'' determination and provide ''may affect'' notification following appropriate notice from the Federal agency. *See* 40 CFR 121.12 (2020).

A few commenters discussed the period EPA is provided to make a ''may affect'' determination or ''may affect'' notification. One commenter argued that 30 days is too long of a period for EPA to make ''may affect'' determinations, and suggested EPA limit the timeframe to complete these determinations to 15 days. Another commenter requested that EPA establish a reasonable period of time to provide notification to the Federal agency and certifying authority calculated from the date the individual certification is issued for purposes of avoiding unnecessary permitting delays. As discussed above, 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 timeframe 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 period reflected in statute for making a ''may affect'' determination and providing any required notification.

iii. EPA's ''May Affect'' Determination and ''May Affect'' Standard

Section 401(a)(2) provides that EPA makes the ''may affect'' determination in the neighboring jurisdictions process, as discussed above, but notably does not delineate specific factors for the Agency to consider in determining whether a discharge from a project may affect the water quality of a neighboring jurisdiction. *See* 33 U.S.C. 1341(a)(2). Likewise, the 2020 Rule did not address in either preamble or regulatory text whether there are specific factors that the EPA considers in making a ''may affect'' determination or whether any other interested party can be involved in making this determination. *See* 85 FR 42273. During the pre-proposal outreach, stakeholders raised concerns that EPA had not clearly identified what factors it intended to use in determining whether a discharge ''may affect'' the water quality of a neighboring jurisdiction. Stakeholders also objected

to EPA asserting sole discretion over this ''may affect'' determination without obtaining input from the neighboring jurisdiction or other stakeholders.

In the preamble to the proposed rule, EPA asserted that the Agency, in making a ''may affect'' determination, has discretion to look at a variety of factors depending on the type of Federal license or permit and discharge. 87 FR 35367. EPA further stated that factors it may consider in making a ''may affect'' determination include but are not limited to the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to other jurisdictions, certification conditions and other conditions already contained in the draft Federal license or permit, and the neighboring jurisdiction's water quality requirements. 87 FR 35367–68. The Agency clarified that it was not proposing to identify 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. The Agency noted 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. *Id.* However, the Agency solicited comment on whether such a list of specific factors that EPA must consider in making a ''may affect'' determination should be set forth in regulation and, if so, what factors should be included. *Id.*

Additionally, in the proposal, the Agency clarified its position that it has sole discretion under section 401(a)(2) to examine the facts and determine whether the discharge ''may affect'' the quality of a neighboring jurisdiction's waters once it receives notice from a Federal agency initiating its obligation to make a ''may affect'' determination. 87 FR 35368. As a result, EPA stated that the Agency is not required to engage with stakeholders or seek their input in making this determination, and otherwise noted interested parties may have recourse under the Administrative Procedure Act, as discussed in *Fond du Lac* case. *Id.; see also Fond du Lac,* 519 F.Supp.3d at 565–67. However, EPA stated that it intends to consider the views of neighboring jurisdictions in making its ''may affect'' determination if such views are provided in a timely manner. *Id.* Specifically, the Agency proposed regulatory language in § 121.12(a), as discussed above, to define 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.[105]

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, as previously discussed, 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 § 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.

Some commenters disagreed with EPA's position on the role of neighboring jurisdictions or other stakeholders during in its ''may affect'' process. A few commenters suggested that EPA consult with or involve neighboring jurisdictions in making ''may affect'' determinations. 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. 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.

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). Some commenters sought, or offered, further interpretations of the ''may affect'' standard in section 401(a)(2). Such commenters asserted differing interpretations of the meaning of the ''may affect'' standard, including recommending that EPA make an actual demonstration that there may be an effect and suggesting that it is a low threshold (*i.e.,* some reasonable possibility an effect may exist). As stated above, EPA is not defining the meaning of the ''may affect'' standard. 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

[105] The Agency notes, as it did at proposal, that there are other opportunities for stakeholders to provide input into the certification and Federal licensing or permitting process, including the public notice and comment processes on the certification and the Federal license or permit.

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.[106] 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.

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. Accordingly, EPA is identifying that such factors include, but are not limited to, the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to neighboring jurisdictions, certification conditions and, as applicable, other conditions already contained in the draft Federal license or permit, 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. Based on public comments, EPA is also identifying additional factors it may consider. Specifically, EPA may consider the current water quality and characteristics of the water receiving the discharge in making a ''may affect'' determination. However, EPA reiterates that it is neither limited to considering, nor required to consider, the factors identified here.

With regard to the Agency's proposed approach of identifying factors it may consider in making a ''may affect'' determination, most commenters addressing this approach 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 could 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 constrained by the statutory bounds of section 401.

However, commenters were notably divided on the approach the Agency should take to identifying these factors. 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. Commenters supporting this position collectively asserted that this approach would limit subjectivity in such determinations, increase predictability, and allow Federal agencies and project proponents to better plan for these determinations. 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. In contrast, some other commenters supported EPA's proposed approach to identify examples of factors the Agency may consider, but did not recommend requiring EPA to consider factors in recognition of the fact-dependent nature of ''may affect'' determinations.

EPA agrees that its discretion regarding making a ''may affect'' determination is bounded by the statutory grant of authority in section 401. 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.

iv. ''May Affect'' Notification

If EPA determines that a discharge from a project may affect a neighboring jurisdiction's water quality, section 401(a)(2) requires EPA to notify the neighboring jurisdiction, Federal agency, and the project proponent. 33 U.S.C. 1341(a)(2). As previously discussed, EPA must provide such notification within 30 days from notice provided by the Federal agency in accordance with section 401(a)(2). *See id.;* section IV.K.2.f.ii in this preamble for discussion on timing of EPA's may affect finding and any resulting notice. Notably, a finding by EPA that a discharge from a project may affect a neighboring jurisdiction's water quality pursuant to section 401(a)(2) is often referred to as a ''may affect'' finding, and the resulting notification of this finding is referred to as a ''may affect'' notification. Section 401(a)(2) does not require EPA to provide notification in circumstances where it has completed its ''may affect'' determination but has not found that a discharge from the project may affect a neighboring jurisdiction's water quality (*i.e.,* has not made a ''may affect'' finding). *See* 33 U.S.C. 1341(a)(2). Accordingly, in its proposal, EPA stated that it is not required to provide notification of its ''may affect'' determination in such circumstances. Consistently, EPA further stated that if a Federal agency does not receive notification from EPA that a discharge may affect a neighboring jurisdiction's water quality within 30 days after the proper notice, then the Federal agency may proceed with processing the Federal license or permit. 87 FR 35368.

EPA received comments relating to its ''may affect'' notification in the neighboring jurisdictions process. A few commenters expressed concern that EPA is not required to provide a response when not finding that a

[106] *See* section IV.E of this preamble for further discussion on the breadth of water quality effects that may be considered under section 401.

discharge may affect the water quality of a neighboring jurisdiction and suggested that lack of a response could have meaning other than this finding. Some of these commenters proposed that EPA provide notification to neighboring jurisdictions in circumstances where the Agency's "may affect" determination does not result in "may affect" finding, or otherwise suggested that the Agency provide public notice regarding its "may affect" determination. Some commenters supporting these approaches to notification asserted that they would increase transparency regarding EPA's "may affect" determination and inform interested parties regarding this determination.

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.

In addition to incorporating the notification requirements on EPA in section 401(a)(2) pertaining to a "may affect" finding, the 2020 Rule established additional procedures for EPA in providing such notification. The 2020 Rule required EPA to provide such notification to the certifying authority, as well as the neighboring jurisdiction, Federal agency, and the project proponent. 40 CFR 121.12(c) (2020). Additionally, the 2020 Rule required the notification to be dated and in writing and established certain requirements on the content of such notification. 40 CFR 121.12(c)(1) (2020). Specifically, the 2020 Rule required that the notification identify the materials provided by the Federal agency and inform the neighboring jurisdiction that it had 60 days to notify the Administrator and the Federal agency, in writing, whether it had determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency. *Id.* In contrast, the 1971 Rule did not define the contents of a "may affect" notification from EPA to a neighboring jurisdiction, Federal agency, and project proponent. However, the 1971 Rule required EPA to send the neighboring jurisdiction a copy of the application and certification it received to initiate the neighboring jurisdictions process. 40 CFR 121.14 (2019).

EPA proposed retaining regulatory text similar to that in the 2020 Rule requiring EPA to provide the "may affect" notification to the neighboring jurisdiction, Federal agency, the project proponent, and the certifying authority. The Agency further proposed maintaining content requirements for the "may affect" notification, but proposed revising these requirements to establish that the notification shall be in writing and shall include a statement that the Agency has determined that the discharge may affect the neighboring jurisdiction's water quality, as well as a description of the next steps in the neighboring jurisdictions process, a copy of the certification or waiver, and a copy of the Federal license or permit application.

In § 121.13(b) and (c) of the final rule, EPA is finalizing the proposed approach for providing a "may affect" notification with minor changes to the content requirements for a "may affect" notification and the omission of the requirement that EPA provide such notice to a certifying authority. As noted above, EPA revised the proposed text of § 121.13(c), addressing the contents of the Regional Administrator's "may affect" notification, to conform the statement that the Agency provides to notified neighboring jurisdictions more closely with the statutory text of section 401(a)(2) and provide greater clarity about notification needed for an objection. Rather than providing a statement that the notified neighboring jurisdiction "has 60 days" to provide written notification "whether it has determined that the discharge will violate any of its water quality requirements," as proposed in § 121.13(c)(3), the final rule states that the Agency provides a statement that the notified neighboring jurisdiction "has 60 days after such notification" from the Agency to provide written notification "if it has determined that the discharge will violate any of its water quality requirements." 40 CFR 121.13(c)(3). This revision ensures that the "may affect" notification reflects the statutory text of section 401(a)(2) and more clearly conveys the statutory time and content requirements of the notification needed for an objection than the proposed regulatory text.

Likewise, as previously mentioned, § 121.13(b) and (c) of the final rule was revised to omit the requirement that EPA provide the "may affect" notification to the certifying authority. Although the 2020 Rule required EPA to provide the "may affect" notification to the certifying authority, and proposed retaining this provision, EPA is omitting such notification to the certifying authority in the final rule to more closely reflect the statutory language in section 401(a)(2), which does not require such notification to the certifying authority. This is consistent with the Agency's approach in the final rule to likewise remove language from the proposed regulatory text requiring a notified neighboring jurisdiction to provide notification to the certifying authority in § 121.14. Both changes reflect the structure of the neighboring jurisdictions process established in section 401(a)(2), which does not provide a specified role for the certifying authority.

In addition to EPA's role in the neighboring jurisdictions process to make a "may affect" determination and provide "may affect" notification, as addressed in § 121.13 of the final rule and described above, the Agency also has at role at a hearing on an objection of a notified neighboring jurisdiction, which is reflected in § 121.15(c) of the final rule and discussed further below. *See* section IV.K.2.h in this preamble for discussion of the Agency's role to provide its evaluation and recommendations concerning the objection at such hearing and § 121.15(c).

g. Neighboring Jurisdiction's Role Under Section 401(a)(2)

CWA section 401(a)(2) provides that if, within 60 days after receipt of EPA's "may affect" notification, a neighboring jurisdiction determines that such discharge will affect the quality of its waters so as to violate any water quality

requirements in its jurisdiction, and within such 60-day period notifies the Administrator and the Federal licensing or permitting agency in writing of its objection to the issuance of such Federal license or permit and requests a public hearing, the Federal licensing or permitting agency shall hold a public hearing on the objection. 33 U.S.C. 1341(a)(2). Therefore, only neighboring jurisdictions notified by EPA may object to issuance of a Federal license or permit and request a hearing on this objection pursuant to section 401(a)(2). Further, in order for a notified neighboring jurisdiction to make an objection, it must (1) determine that a discharge from the project for which it received such notification will affect the quality of its waters so as to violate any of its water quality requirements, and (2) provide written notification of its objection and request for hearing to EPA and the Federal licensing or permitting agency within sixty days after receipt of notification from EPA. Notably, the determination made by a notified neighboring jurisdiction as to whether a discharge from the project will affect the quality of its waters so as to violate any water quality requirements is often referred to as a ''will violate'' determination. The provisions in the final rule regarding a notified neighboring jurisdiction's ''will violate'' determination and notification of objection and request for hearing are discussed below.

i. ''Will Violate'' Determination and Standard

Under section 401(a)(2), a notified neighboring jurisdiction's ''will violate'' determination is based upon whether a discharge from the project ''will affect the quality of its waters so as to violate any water quality requirements'' in its jurisdiction. 33 U.S.C. 1341(a)(2). EPA incorporated this standard in the proposed text of § 121.14(a), which reflected that the neighboring jurisdiction ''determines that a discharge will violate any of its water quality requirements.'' However, EPA did not propose to further define the ''will violate'' standard applied by notified neighboring jurisdictions, or otherwise identify specific factors that neighboring jurisdictions may or must consider in making this determination.

EPA is revising the proposed text of § 121.14 to clarify that the ''will violate'' determination is made only by a notified neighboring jurisdiction, and is therefore adding text to § 121.14(a) providing that a ''will violate'' determination is made by ''a neighboring jurisdiction notified by the Regional Administrator pursuant to § 121.13(b),'' and is otherwise revising references to ''the neighboring jurisdiction'' in the proposed text to ''the notified neighboring jurisdiction'' in § 121.14 of the final rule. EPA is otherwise modifying the text of § 121.14(a) to further reflect that the notified neighboring jurisdiction is evaluating ''discharge from the project.'' 40 CFR 121.14. These changes were made to add clarity, as pursuant to section 401(a)(2), only notified neighboring jurisdictions make a ''will violate'' determination, and this determination evaluates discharge from the project for which the neighboring jurisdiction received such notification from EPA. *See* 33 U.S.C. 1341(a)(2). EPA is otherwise maintaining the proposed approach in the final rule to not further define the ''will violate'' standard in regulation or identify factors for consideration in making this determination.

EPA received comment related to the ''will violate'' standard applied by notified neighboring jurisdictions. One commenter requested that EPA modify proposed § 121.14 to ensure that the regulation reflects that the ''will affect'' standard includes a discharge's contributions to water quality violations and that the discharge itself does not have to be the sole cause of the water quality violation. EPA finds that the statutory text of section 401(a)(2), and the consistent text of § 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 § 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 § 121.15 of the final rule.

ii. Notification of Objection and Request for Hearing

As previously noted, section 401(a)(2) requires a notified neighboring jurisdiction to provide written notification of its objection and request for hearing to EPA and the Federal licensing or permitting agency within sixty days after receipt of notification from EPA in order to raise an objection. *See* 33 U.S.C. 1341(a)(2). The statutory text, however, does not further describe the contents of this written notification. The 1971 Rule did not describe the contents or form that such an objection notification must take. However, the 2020 Rule provided that ''[n]otification of objection and request for a hearing from the neighboring jurisdiction shall: be in writing; identify the receiving waters it determined will be affected by the discharge; and identify the specific water quality requirements it determines will be violated by the certified project. 40 CFR 121.12(c)(2) (2020); 85 FR 42274.

EPA proposed to revise the specific regulatory requirements for what a neighboring jurisdiction is required to include in an objection notification and request for hearing sent pursuant to section 401(a)(2) in proposed § 121.14(b). Consistent with the statutory text of section 401(a)(2), the Agency proposed to retain the requirement that the objection be in writing. Additionally, EPA proposed that the notification of objection and request for hearing from the notified neighboring jurisdiction include ''[a] statement that the neighboring jurisdiction objects to the issuance of the Federal license or permit'' (proposed § 121.14(b)(1)), and ''[a] request for a public hearing from the Federal agency on its objection'' (proposed § 121.14(b)(3)). However, rather than requiring the notified neighboring jurisdiction to identify the receiving waters affected by the discharge and the specific water quality requirements violated as required in the 2020 Rule, EPA proposed in § 121.14(b)(2) that the notification include ''[a]n explanation of the reasons supporting the neighboring jurisdiction's determination that the discharge will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated.'' EPA proposed in § 121.14(a), that the notification of objection and request for hearing from the notified neighboring jurisdiction be made ''within 60 days after receiving notice in accordance with § 121.13(c),'' and otherwise that such notification be made to the Regional Administrator, the

Federal agency, and the certifying authority.

In § 121.14, the Agency is finalizing the proposed contents of a notification of objection and request for hearing from a notified neighboring jurisdiction with modifications for purposes of adding clarity and more closely conforming this regulatory text with section 401(a)(2). Consistent with revisions throughout §§ 121.14 and 121.15 in the final rule, EPA revised references to ''the neighboring jurisdiction'' in the proposed text of § 121.14 to ''the notified neighboring jurisdiction'' in the final rule to clarify that pursuant to section 401(a)(2) only a neighboring jurisdiction notified by EPA makes a ''will violate'' determination and may provide notification of an objection and request a hearing. Likewise, consistent with revisions throughout Subpart B of the final rule, EPA revised § 121.14 of the final rule to clarify that the ''discharge'' that the notified neighboring jurisdiction considered in its ''will violate'' determination is ''discharge from the project'' in accordance with section 401(a)(2). Otherwise, EPA is maintaining the requirements that the notification of objection and request for hearing be in writing and include (1) a statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit, (2) an explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated, and (3) a request for public hearing from the Federal agency on the notified neighboring jurisdiction's objection.

EPA received comments regarding the contents of a notification of objection and request for hearing from a notified neighboring jurisdiction. Some commenters stated that EPA should eliminate any content requirements that go beyond the express language in section 401(a)(2), including an explanation of the reasons supporting the determination that the discharge will violate water quality requirements. More specifically, these commenters objected to the requirement that the neighboring jurisdiction identify the water quality requirements that will be violated on the basis that this requirement is too burdensome on the notified neighboring jurisdiction. Other commenters concurred that the objection should include identifiable and justifiable reasons supporting the determination that the discharge will violate water quality requirements. In addition, some commenters stated that the neighboring jurisdiction should be required to include a citation to the water quality requirements that it believes will be violated.

EPA does not find that § 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 § 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.

Some commenters recommended that EPA require the neighboring jurisdiction to identify a Federal license or permit condition(s) that it thinks would resolve the objection in its notification of objection and request for hearing. Conversely, one commenter stated that EPA should not require the neighboring jurisdiction to provide conditions that would resolve the objection. 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.

A few commenters asserted that the project proponent, as opposed to the neighboring jurisdiction, has the burden to show that a Federal license or permit should be issued. 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) 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.

Some commenters asserted that the neighboring jurisdiction should be required to identify the ''potentially affected'' receiving water in an objection notification and request for hearing. This request appears similar to language in the 2020 Rule that required a notified neighboring jurisdiction to ''identify the receiving waters it determined will be affected by the discharge.'' 40 CFR 121.12(c)(2) (2020). One of these commenters stated that failure to identify the receiving water makes it impossible to determine the validity of the concerns raised to resolve the neighboring jurisdiction's concerns and allows the neighboring jurisdiction to

raise arbitrary concerns to slow down the Federal licensing or permitting process.

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.

In addition to the requirements regarding the content of a notification of objection and request for hearing, EPA is also finalizing the procedural requirements in § 121.14(a) with some modifications for purposes of added clarity and consistency with section 401(a)(2). Consistent with the statutory language in section 401(a)(2), EPA is retaining the requirement that the notified neighboring jurisdiction provide notification of its objection and request for hearing within 60 days of a ''may affect'' notice from EPA but is updating the internal citation to reflect that this notification is provided by the Regional Administrator ''pursuant to § 121.13(b)'' of the final rule. Additionally, as mentioned above, EPA is removing the requirement in the proposed regulatory text that a notified neighboring jurisdiction provide notification to the certifying authority in order to more closely reflect the statutory language in section 401(a)(2), which does not require notification to the certifying authority.

EPA received comments regarding its proposal to require the notified neighboring jurisdiction to send the ''will affect'' notification to the certifying authority, as well as to the Federal licensing or permitting agency and Regional Administrator. Some commenters supported this proposed approach. Conversely, another commenter stated that the neighboring jurisdiction should not be required to send the notification to the certifying authority because there is no statutory basis for this requirement and CWA section 401(a)(2) provides no role for the certifying authority. As noted, in the final rule, 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.

iii. Withdrawal of Objection Prior to Hearing

CWA section 401(a)(2) states that if a notified neighboring jurisdiction notifies EPA and the Federal agency ''in writing of its objection to the issuance of [the] license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing.'' 33 U.S.C. 1341(a)(2). Therefore, for a hearing to be required under section 401(a)(2), there must be (1) a written objection from the notified neighboring jurisdiction and (2) a request for a public hearing on the objection. *Id.* EPA proposed that if one of these elements were not present, then the Federal agency would not be required to hold a hearing and requested comment on whether to develop regulatory text for a process where the neighboring jurisdiction could withdraw its objection and eliminate the requirement to hold a public hearing. 87 FR 35370.

EPA received numerous comments recommending that it include language allowing notified neighboring jurisdictions to withdraw their objections before the hearing, thus, eliminating the need to hold a public hearing. Some of these commenters stated that allowing the neighboring jurisdiction to withdraw its objection is in line with section 401's cooperative federalism scheme, while other commenters stated that allowing for withdrawal provides for efficiency in the Federal licensing or permitting process. 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 § 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 will not need to proceed with a public hearing and can move forward with issuing the Federal license or permit. EPA has also added language to this effect at § 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.

h. Objection and Public Hearing Process Under Section 401(a)(2)

CWA section 401(a)(2) requires the Federal licensing or permitting agency to hold a public hearing on the objection of a notified neighboring jurisdiction if such neighboring jurisdiction provides notification of its objection and request for hearing in the required 60-day timeframe. 33 U.S.C. 1341(a)(2). As explained above, EPA is adding language to § 121.15(a) which clarifies that if the neighboring jurisdiction withdraws its objection, then the Federal agency does not have to proceed with a public hearing. Otherwise, consistent with section 401(a)(2), the final rule provides that the Federal agency must hold the public hearing upon a request for hearing from a notified neighboring jurisdiction in accordance with the requirements for the notification and request for hearing

in § 121.14(b) of the final rule. 40 CFR 121.15(a).

Section 401(a)(2) does not provide for a specific process for the public hearing conducted by the Federal licensing or permitting agency. It merely states that the hearing is public and shall be held by the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2). The statute further provides that the EPA Administrator must submit an evaluation and recommendations regarding the objection at the hearing. *Id.* Further, section 401(a)(2) states that additional evidence may be presented at the hearing. After the public hearing, the Federal licensing or permitting 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. *Id.* Notably, the statute is silent as to whether public notice of the public hearing is required; the nature of, and specific procedures for, the public hearing; the need for a court reporter or transcript; whether the Federal licensing or permitting agency's decision is appealable; and other such matters.

The Agency proposed to add transparency to the neighboring jurisdictions process by requiring the Federal agency to provide for a minimum of a 30-day public notice of the hearing, but declined to define the type of public hearing that the Federal agency must hold. Commenters provided various recommendations regarding the Federal agency's public hearing, including those addressing the notice of hearing, hearing procedures, and the location of a hearing. One commenter, who supported EPA's approach to the public hearing process, suggested that EPA should develop hearing procedures that can act as a default for Federal agencies that do not have public hearing procedures. On the other hand, another commenter stated that EPA should not impose a minimum notice requirement for the public hearing.

EPA is finalizing the proposed requirement that the Federal agency must provide notice at least 30-days prior to the public hearing, but is adding text to clarify that only a notified neighboring jurisdiction can make a request for hearing, and specify that the Federal agency must provide such public notice to interested parties. Consistent with revisions to § 121.14 of the final rule, discussed above, EPA is adding language to § 121.15 of the final rule to make clear that pursuant to section 401(a)(2) only a notified neighboring jurisdiction may provide notification of an objection and request a hearing. Additionally, EPA is adding language in § 121.15(b) that requires the Federal agency to provide public notice ''to interested parties, including but not limited to the notified 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.

The Agency is otherwise 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. EPA also 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.

As previously mentioned, section 401(a)(2), also establishes a role for EPA at the public hearing, providing that the Agency ''shall . . . submit [its] evaluation and recommendations with respect to any such objection to the licensing or permitting agency'' at the public hearing. 33 U.S.C. 1341(a)(2). Consistently, EPA is finalizing § 121.15(c) as proposed which mirrors the statute by stating that ''[a]t the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.'' 40 CFR 121.15(c). 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.

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 EPA's evaluation and recommendations compared with the notified neighboring jurisdiction's input

or other evidence received at the hearing; rather, the section appears to contemplate that the Federal agency will consider all of the information presented in making its decision.

If the Federal licensing or permitting agency determines that additional conditions may be necessary to ensure compliance with the neighboring jurisdiction's water quality requirements, the Federal licensing or permitting agency must include those conditions in the Federal license or permit pursuant to section 401(a)(2). 33 U.S.C. 1341(a)(2). In addition, if the Federal licensing or permitting agency cannot include conditions that will ensure compliance with applicable water quality requirements, the Federal agency cannot issue the Federal license or permit. *Id.* EPA is finalizing regulatory text that specifically incorporates these statutory requirements. 40 CFR 121.15(d) and (e). If the Federal agency decides that conditions are necessary to ensure that a project will comply with a neighboring jurisdiction's water quality requirements, EPA notes that the Federal agency may also have to comply with its own public notice and comment requirements before finalizing the Federal license or permit.

A few commenters provided input on how the Federal agency should engage with stakeholders after the conclusion of the public hearing. 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).

EPA did not propose to establish a deadline by which the Federal licensing or permitting agency must make a determination after the public hearing on the notified neighboring jurisdiction's objection but requested comment on whether such a deadline should be established. A few commenters recommended that EPA create a timeline of the neighboring jurisdictions process and specifically include timelines for establishing a public hearing, making determinations, and finishing the post-public hearing process. Several commenters recommended that EPA establish a deadline for the Federal agency to make a decision after the public hearing on the objection. At least one commenter stated that establishing a deadline would be inappropriate and inconsistent with CWA section 401(a)(2), arguing 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. 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.

3. Implementation

As discussed in detail above, once a Federal agency receives a Federal license or permit application and a certification or waiver, it may proceed with the neighboring jurisdictions process (*i.e.,* notify EPA as required under this final rule). The Agency wishes to reiterate that *all* certifications or waivers will trigger the neighboring jurisdictions process, even those for minor or remote projects. The requirement to notify EPA under section 401(a)(2) depends on the Federal agency's receipt of a Federal license or permit application and certification or waiver; it does not depend on the location of the project or the nature of the Federal license or permit. 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 Corps civil works project, compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification. Ultimately, EPA is responsible for determining whether a discharge from a project may affect the water quality of a neighboring jurisdiction. As stated in § 121.13(d) of the final rule, and discussed above, a Federal agency cannot issue a license or permit pending the conclusion of the neighboring jurisdictions process, set forth in §§ 121.13, 121.14, and 121.15 of the final rule.

Several commenters discussed the need for collaboration between EPA and other stakeholders prior to the initiation of the neighboring jurisdictions process. 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. As discussed above, 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 or project proponents or take any action pursuant to section 401(a)(2) prior to receiving notice from the Federal agency of its receipt of the application and either a certification or waiver.

L. Treatment in a Similar Manner as a State Under Section 401

1. What is the Agency finalizing?

The Agency is finalizing the proposed provisions enabling Tribes to obtain TAS solely for section 401, as well as provisions on how Tribes can obtain TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2).[107] Section 121.11 of the final rule includes the criteria an applicant Tribe would be

[107] Prior to this final rule, in the absence of TAS provisions tailored specifically for section 401, Tribes had received TAS for section 401 when eligible for TAS to administer the section 303(c) program for water quality standards. 40 CFR 131.4(c) (''Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.'').

required to meet to be treated in a similar manner as states, the information the Tribe would be required to provide in its application to EPA, and the procedure EPA would use to review the Tribal application.

Consistent with the requirements provided in CWA section 518, the final rule requires that four criteria must be met for Tribes to obtain TAS for section 401, including section 401(a)(2). First, the Tribe must be federally recognized by the U.S. Department of the Interior and meet the definitions finalized in § 121.1(d) and (e). Second, the Tribe must have a governing body that carries out ''substantial governmental duties and powers'' over a defined area. Third, the Tribe must have appropriate authority to regulate and manage water resources within the borders of the Tribe's reservation. Lastly, the Tribe must be reasonably expected, in the Regional Administrator's judgment, to be capable of administering a section 401 water quality certification program.

The Tribe may satisfy the first criterion by stating that it is included on the list of federally recognized Tribes that is published periodically by the U.S. Department of the Interior. Alternatively, the Tribe may submit other appropriate documentation (*e.g.,* if the Tribe is not yet included on the U.S. Department of the Interior list but is federally recognized).

To meet the second criterion, the Tribe would show that it conducts ''substantial governmental duties and powers,'' which the Agency views as performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. *See* 54 FR 39101; 81 FR 65906. This requires a descriptive statement that (1) describes the form of Tribal government, (2) describes the types of essential governmental functions currently performed by the Tribal governing body, including but not limited to, the exercise of the power of eminent domain, taxation, and police power, and (3) identifies the sources of authorities to carry out these functions.

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. This is identical to the way Tribes have been demonstrating authority for eligibility to administer 401 certifications under existing TAS regulations, the only change being that under the final regulations, Tribes will be able to seek TAS eligibility for section 401 only. Similarly, as with Tribes already administering section 401 under prior TAS approvals, the authority to issue certifications exercised by a Tribe authorized under the new regulation will, by virtue of the congressional delegation, apply throughout the reservation area covered by the TAS approval, irrespective of land ownership or the Tribal membership status of the Federal license or permit applicant. *See, e.g.,* 81 FR 30190. Therefore, grants or waivers of certification by an authorized Tribe, as well as any conditions included in a certification or denials of certification by an authorized Tribe, would apply to any application for a Federal license or permit throughout the relevant reservation without any separate need to demonstrate inherent Tribal jurisdiction.

A Tribe may satisfy the fourth criterion regarding its capability by either (1) providing a description of the Tribe's technical and management skills to administer a water quality certification program or (2) providing a plan that proposes how the Tribe will acquire such skills. Additionally, when considering Tribal capability, EPA would also consider whether the Tribe can demonstrate the existence of institutions that exercise executive, legislative, and judicial functions, and whether the Tribe has a history of successful managerial performance of public health or environmental programs.

Section 121.11 of the final rule is intended to ensure that Tribes treated in a similar manner as states for the purposes of the section 401 water quality certification program are qualified, consistent with CWA requirements, to implement a water quality certification program. The procedures are meant to provide more opportunities for Tribes to engage fully in the program and are not intended to act as a barrier to Tribal administration of the section 401 program. The procedures are modeled after the TAS regulatory provisions for the CWA section 303(c) water quality standards (WQS) program, located at 40 CFR 131.8, and the TAS provisions for the CWA section 303(d) impaired water listing and total maximum daily load program, located at 40 CFR 130.16. The WQS TAS regulations, developed in the early 1990s, have acted as a model for other programs including the section 303(d) regulations. *See* 81 FR 65905. Additionally, EPA's TAS regulations allow Tribes to simultaneously obtain TAS for sections 303(c) and 401. As a result, the part 131 and part 130 TAS regulations provide an appropriate model for this final rule.

These provisions provide more opportunities and clarity for Tribes interested in participating in the section 401 certification process. Although the CWA clearly allows Tribes to obtain TAS for section 401, current regulations and practice treat TAS for section 401 as an adjunct to TAS for the CWA section 303(c) program for water quality standards. To date, 83 federally recognized Tribes (out of 574) have received TAS for section 401 concurrently with obtaining TAS for section 303(c).[108] The TAS provisions in this final rule do not eliminate or modify the section 401 procedures already found in part 131. Instead, they provide an alternate path for Tribes wishing to obtain TAS status only for section 401 and not also for section 303(c).

Upon receiving TAS for section 401, Tribes have two roles. First, Tribes that receive section 401 TAS are responsible for acting as a certifying authority for projects that may result in a discharge into waters of the United States on their Indian reservations. As certifying authorities, Tribes with TAS may grant, grant with conditions, deny, or waive certification based on whether a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of Tribal law. *See* 33 U.S.C. 1341(a)(1) and (d). Second, Tribes that receive section 401 TAS are accorded the status of ''neighboring jurisdiction'' for purposes of section 401(a)(2). If EPA makes a ''may affect'' finding during its determination with respect to that neighboring jurisdiction, the notified neighboring jurisdiction, including Tribes with TAS for section 401 and

[108] *See https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.* To date, one Tribe with TAS for section 303(c) (Havasupai Tribe in Arizona) has declined TAS for section 401.

Tribes with TAS for section 401(a)(2), may object to the issuance of the Federal license or permit if they determine that a discharge from the project ''will violate'' any of its water quality requirements and request a public hearing from the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2); 40 CFR part 121, subpart B.

2. Summary of Final Rule Rationale and Public Comment

The final rule's inclusion of TAS provisions solely for section 401 and 401(a)(2) provides alternate paths for Tribes to engage in the section 401 process without also needing to apply for section 303(c), promoting cooperative federalism and Tribal rights. Many of the commenters addressing the proposal to add provisions enabling Tribes to obtain TAS solely for section 401 and for section 401(a)(2) expressed support for finalizing the proposed TAS provisions. These commenters supported the inclusion of section 401 TAS provisions for various reasons 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 Tribal cultures, and affording Tribes more options regarding administration of CWA programs.

EPA appreciates these commenters' support. 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.[109]

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.

However, EPA recognizes that some Tribes may not desire or have the resources to apply for the section 401 certification program. Pre-proposal input suggested that Tribes may wish to be notified about and have the ability to object to and provide information regarding, potential Federal licenses and permits that may impact their waters. Several Tribal stakeholders have expressed concern that Tribes without TAS are not able to participate in the section 401(a)(2) neighboring jurisdictions process. In response to pre-proposal input, EPA proposed a separate TAS provision for the section 401(a)(2) neighboring jurisdictions process. Many commenters from the public comment period indicated support for the proposed TAS provisions, including specifically for section 401(a)(2). Commenters asserted that waters on reservations are susceptible to degradation from upstream discharges and that the TAS provisions for section 401(a)(2) provided a mechanism for objecting and requesting a hearing on the issuance of Federal licenses and permits for those discharges while limiting administrative burdens associated with obtaining TAS for section 401(a)(1). As a result of this input, EPA is finalizing as proposed to provide Tribes with an opportunity to seek TAS authorization for the limited purpose of being a neighboring jurisdiction pursuant to section 401(a)(2). 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 above. 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. See discussion *infra.*

Some commenters expressed concern about the addition of TAS provisions for section 401 and section 401(a)(2). Some of these commenters asserted that section 401 is limited to ensuring compliance with EPA-approved water quality standards, and they questioned how Tribes without EPA-approved water quality standards under section 303(c) of the Clean Water Act would implement section 401. 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.[110]

Other commenters who raised concerns about the TAS provisions requested that EPA provide explicit acknowledgement of the specific circumstances regarding Oklahoma's authority under the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA). Some of these commenters said that EPA should note that the TAS provisions for section 401 and section 401(a)(2) are subject to limitations consistent with this authority.

[109] 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).

[110] 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.

EPA holds that the provisions in this final rule for obtaining TAS for section 401 and section 401(a)(2) have no effect on the separate TAS requirement of section 10211(b) of SAFETEA. Additionally, 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 (June 9, 2022). 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 a neighboring 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 authority in the neighboring state or Indian reservation where the discharge originates that exercises authority to grant, grant with conditions, deny, or waive certification. 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.

3. Implementation

As this final rule includes TAS provisions solely for section 401 and section 401(a)(2) for the first time, the Agency is developing materials to aid the implementation of this aspect of the final rule. To implement the TAS provisions in this rule, EPA will need to communicate how Tribes can apply and process any incoming TAS applications from Tribes. This implementation section also includes discussion of how Tribes can implement a certification program or participate in the neighboring jurisdictions process if they obtain TAS for section 401 and/or section 401(a)(2).

Commenters requested that EPA provide transparency on TAS applications through establishing guidelines for applying and identifying necessary materials for applications, as well as keeping applicant Tribes updated on their application status. 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 this 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 [111] of the application, including 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.

However, if a Tribe previously qualified for TAS for another program that also required a Tribe to demonstrate authority to regulate reservation water quality (*i.e.,* CWA section 303(c) program, CWA section 303(d) program, CWA section 402 program, or CWA section 404 program) and EPA provided a notice and comment opportunity, the Agency would not require notice on the Tribe's assertion of authority to appropriate governmental entities in the section 401 TAS application unless there were different jurisdictional issues or significant new factual or legal information relevant to jurisdiction. EPA thinks this approach could help streamline the process and avoid a potentially duplicative notice process. This approach will apply prospectively only, *i.e.,* where the Tribe obtains TAS for the CWA section 303(c), 402, or 404 programs after the effective date of this rule. In other words, if a Tribe first gains TAS for another CWA regulatory program after this rule is effective, and subsequently seeks TAS under this rule, additional notice and comment would not be required as part of the section 401 TAS application unless different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are presented in the section 401 TAS application. If the Regional Administrator determines that a Tribe's application meets the requirements in § 121.11(b), the Regional Administrator will promptly notify the Tribe in writing. A decision by the Regional Administrator that a Tribe does not meet the requirements in § 121.11(b) would not preclude the Tribe from resubmitting the application at a future date. If the Regional Administrator

[111] 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).

determines that a Tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the Tribe can make changes as appropriate and necessary.

M. Implementation Considerations

EPA recognizes that both certifying authorities and Federal agencies have existing regulations addressing implementation of section 401. For example, as discussed in section IV.C in this preamble, the Agency is aware that some certifying authorities have regulations defining the contents of a request for certification. As a result of this rulemaking effort, certifying authorities may choose to modify their existing regulations (*e.g.,* they may choose to define the contents of a certification request instead of relying on EPA's definition). Similarly, EPA is aware that the Corps and FERC have separate section 401 implementation regulations addressing their respective Federal licensing or permitting programs.[112] 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.

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. 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 § 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.[113] A ''reasonable period of time'' determined under the 2020 Rule prior to the effective date of the final rule would 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 § 121.6(e) of the final rule, or avail itself to an automatic extension to the reasonable period of time pursuant to § 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 § 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 § 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.[114] 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 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.

N. Severability

The purpose of this section is to clarify the Agency's intent with respect to the severability of provisions of this rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the Agency's intent is to preserve the remaining portions of the rule to the fullest possible extent. To dispel any doubt regarding EPA's intent and to inform how the regulation would operate if severed, EPA has added the following regulatory text at § 121.19: ''The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.'' The Agency would have adopted each portion of this rule independent of the other portions. As explained below, the Agency carefully crafted this rule so that each provision or element of the rule is capable of operating independently. Moreover, the Agency has organized the rule so that if any provision or element of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid.

Section 121.3 regarding the scope of review for certification decisions is a good example of how the Agency structured the final rule so its various provision and elements operate independently. The provisions regarding scope operate entirely independently from the other provisions of this rule, as § 121.3, which concerns scope, is not cross-referenced or necessary for the operation of any other section of part 121 or any other EPA

[112] *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).

[113] 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 of this preamble and 85 FR 42245 (July 13, 2020) (''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'').

[114] 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.

regulation. The other provisions of this rule operate the same regardless of whether the scope of certification is water quality-related impacts from the full activity subject to the Federal license or permit or only its point source discharges. First, the rule's provisions regarding when certification is required (§ 121.2) would be the same regardless of the scope of certification. The Agency's rationale for when certification is required does not rely on and is independent of the Agency's rationale for the proper scope of certification. What triggers a requirement to apply for certification is a distinct issue, independent from what the certifying authority can consider in its subsequent certification decision. Second, this rule's definition of water quality requirements remains valid regardless of the scope of certification. The rule defines ''water quality requirements'' to mean ''any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.'' Section 121.1(j). The first two clauses (listing the sections of the CWA identified in section 401 and the state or Tribal laws implementing them) clearly hold true regardless of scope of certification. In addition, regardless of the scope of certification (*i.e.,* either the full activity subject to the Federal license or permit or only its point source discharges), in order to qualify as an ''appropriate'' requirement of state or Tribal law, the requirement must be ''water quality-related.'' Additionally, the issue of which waters to consider when acting on a request for certification is independent of the issue of the proper scope of certification. Under either a ''discharge-only'' or activity-based scope of certification, the question remains whether certifying authorities may consider impacts to state or Tribal waters beyond ''navigable waters.'' EPA's interpretation regarding which waters may be considered is also severable from all other aspects of this final rule. No provision of this final rule operates differently depending on which waters a certifying authority may consider when acting on a request for certification.[115] Further, the Agency's interpretation regarding scope of the neighboring jurisdictions process in section 401(a)(2) is independent and does not rely on the Agency's interpretation regarding the scope of certification. As explained in this preamble, the certification process and the neighboring jurisdictions process are two distinct processes with distinct statutory text and legislative history. EPA's interpretation of the scope of the neighboring jurisdictions process expressly accounts for these differences.

The other topics addressed in this rulemaking all function the same regardless of the scope of certification. Many are 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 function the same regardless of scope. All the topics addressed in this rulemaking beyond scope are important provisions that EPA would have promulgated absent promulgation of a rule changing the scope of certification. As explained throughout this preamble, these other aspects of the rule provide independent benefits to the certification process including regulatory certainty and transparency, efficient certification reviews, and enhanced cooperative federalism. Regardless of the scope of certification, for the reasons articulated in this preamble, EPA would adopt the same pre-filing meeting requirement (§ 121.4); the same minimum contents for a request for certification (§ 121.5); the same process for determining the reasonable period of time (§ 121.6); the same four ways a certifying authority may act on a request (grant, grant with conditions, deny, or expressly waive) (§ 121.7); the same limitations regarding Federal agency review (§ 121.8); the same standard for when inadvertent waiver occurs (§ 121.9); the same procedure and limitations for modifying a grant of certification (§ 121.10); the same requirements for Indian Tribes to administer a certification program (§ 121.11); the same procedures regarding the neighboring jurisdictions process (§§ 121.12 through 121.15); the same additional procedures for when EPA acts as a certifying authority (§§ 121.16 and 121.17); the same rules regarding EPA review and advice (§ 121.18), and would otherwise take the same approach as it did in this final rule. EPA's rationales for adopting these provisions apply equally regardless of the scope of certification and these provisions would function equally under any scope of certification.

Likewise, the other provisions of this rule operate independently from each other and are intended to be severable. For example, the contents of a request for certification (§ 121.5) function independently from the procedures for setting and extending the reasonable period of time (§ 121.6). The process and limitations for modifying a grant of certification (§ 121.10) have no bearing on a federally recognized Tribe's ability to apply for TAS for section 401 (§ 121.11). The limitations on Federal agency review (§ 121.8) have no bearing on when a request for certification is required (§ 121.2). Were any element of these provisions stayed or invalidated by a reviewing court, the elements that remained in effect would continue to provide vital improvements to the certification process including regulatory certainty and transparency, efficient certification reviews, enhanced cooperative federalism, and where appropriate, reasonable flexibility to adapt to changing circumstances. The examples provided throughout this section are illustrative, rather than exhaustive, and EPA intends each portion of the rule to be independent and severable. Further, if the application of any portion of this rule to a particular circumstance is determined to be invalid, the Agency intends that the rule remain applicable to all other circumstances.

V. Economic Analysis

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 14094 (Modernizing Regulatory Review), EPA has prepared an economic analysis (Economic Analysis for the Final Rule) to inform the public of potential effects associated with this rulemaking. This analysis is not required by the CWA.

To support the final rulemaking, EPA prepared an Economic Analysis for the Final Rule and other related rule analyses to assess potential impacts of the rule. These analyses seek to evaluate the benefits and costs of the rulemaking and the effects of the rule on vulnerable groups and small entities. The Economic Analysis for the Final Rule presents an overview of practice under the 1971 Rule and 2020 Rule (baselines),[116] a description of the final rule changes, and an assessment of the potential impacts of the final rulemaking on project proponents, certifying authorities, and Federal agencies as changes from each baseline of regulatory practice to the new requirements. Appendix A in the Economic Analysis for the Final Rule provides a plain-language comparison of the 1971 Rule, 2020 Rule, and final

[115] In fact, the Agency's interpretation of which waters may be considered in certification is not reflected in the regulatory text, including the text regarding scope of certification at § 121.3.

[116] Due to ongoing litigation on the 2020 Rule, EPA considers two baselines in the economic analysis.

rulemaking provisions in a table format. Within the Economic Analysis for the Final Rule, the Agency included discussion of the environmental benefits and process costs with examples relative to the final rulemaking provisions. EPA also assessed environmental justice impacts of the rulemaking on vulnerable communities and impacts on small entities. The Agency also prepared an Information Collection Request Supporting Statement which describes the overall burden of the section 401 regulations, thus including any new burdens resulting from this final rule. *See* section VI.B of this preamble.

Section 401 certification decisions have varying effects on certifying authorities and project proponents. However, the Agency has limited data regarding the number of requests for certification submitted and the certification decisions taken on requests for certification (*i.e.,* whether certifications were granted, granted with conditions, denied, or waived). The Agency does not maintain a national database of certifying authority decisions and therefore did not have enough data available to perform a fully quantitative economic analysis. Given the absence of data related to section 401 regulations, EPA performed a qualitative analysis of the section 401 certification process under the 1971 Rule, the 2020 Rule, and under the final rulemaking.

The Agency reviewed information from several sources to characterize section 401 baseline conditions and understand potential impacts of the regulatory changes. Specifically, the Agency investigated State and territory websites and assembled available information concerning section 401 fees and certification decisions. EPA also conducted a focused review of pre-proposal input letters [117] and public comments [118] to extract any information concerning economic impacts of section 401 and key issues identified during implementation of section 401.

Section 401 is a direct grant of authority to states and authorized Tribes. Accordingly, EPA does not provide program oversight to state or Tribal programs. Nevertheless, EPA reviewed state and territory websites to investigate data availability on certification decisions and found that seven certifying authorities have section 401 certification decision documents publicly available. The Agency reviewed a random sample of 200 certification decisions from seven different state websites [119] and used a machine reading approach to determine whether the Agency could derive any information on timing and certification decisions to inform this rulemaking.[120] Due to significant data limitations, EPA was unable to use the review of the certification decisions to make any conclusions to inform this rulemaking. More information about the analysis that EPA performed when reviewing these decision documents can be found in the Economic Analysis for the Final Rule.

Within the Economic Analysis, the Agency describes the various Federal licenses and permits that require section 401 certification and the potential actions that certifying authorities may take pursuant to their section 401 authority. Additionally, the Agency summarized the annual number of licenses and permits that require section 401 certification under different Federal authorities to determine the extent of licensing and permitting actions within the section 401 universe. These types of information are used in the Economic Analysis for the Final Rule to describe implementation practices and trends under the baselines and serve as the basis for assessing impacts of the final rulemaking.

In determining the potential effects of the final rulemaking, EPA described the impacts of rule revisions in several key areas including pre-filing meetings, contents of requests for certification, reasonable period of time, neighboring jurisdictions, and Tribal provisions for implementing section 401. The 1971 Rule baseline did not include a pre-filing meeting request requirement. However, because pre-filing meetings allow for early discussion of project details, such meetings would ultimately be expected to reduce burden elsewhere in the section 401 certification process. The 2020 Rule did not provide certifying authorities with the option to waive or shorten the pre-filing meeting request requirement. The Agency anticipates that the pre-filing meeting request provision will provide flexibility for certifying authorities to decide whether to require pre-filing meeting requests and whether to hold pre-filing meetings based on project complexity and other factors. Relative to both the 1971 Rule and 2020 Rule baselines, the Agency expects that the minimum content requirements for all requests for certifications will support a transparent and efficient certification process. Additionally, relative to each of the two baselines, the changes concerning the reasonable period of time for certification review will balance equities between certifying authorities and Federal agencies and provide flexibility for certifying authorities and Federal agencies to determine the optimal length for the reasonable period of time or any extensions, provided they do not exceed one year from the date the request for certification was received. For example, the final rule will allow certifying authorities to ensure that the reasonable period of time is informed by the size and complexity of the project, the certifying authority's available resources (*e.g.,* staff size), public notice and comment requirements, and 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). Allowing the certifying authority and Federal agency to negotiate a reasonable period of time at or before the beginning of the certification process (subject to a six-month default) is also likely to improve the efficiency of the review process. The final rule also provides greater clarity regarding the process to protect neighboring jurisdiction waters (*e.g.,* by specifying the contents of a notification from a Federal agency to EPA), which is expected to increase its efficiency. This clarity and efficiency are expected when using the 1971 Rule as the baseline, as well as for the 2020 Rule baseline (though potentially to a lesser extent due to some updated provisions in the 2020 Rule). Neither the 1971 Rule nor the 2020 Rule included TAS provisions. Final revisions permitting Tribes to obtain TAS solely for section 401 and, if desired, to only obtain TAS for the purpose of participating as neighboring jurisdictions under section 401(a)(2), will provide Tribes with a greater ability to protect their water resources from the adverse effects of pollution from federally licensed or permitted projects.

In some areas, the rulemaking would revive practices that had been widely implemented for 50 years before the 2020 Rule. Specifically, the rule would return the scope of a certifying authority's section 401 review as encompassing the ''activity'' which is consistent with longstanding Agency and certifying authority practice and

[117] Docket ID No. EPA–HQ–OW–2021–0302.

[118] Docket ID No. EPA–HQ–OW–2022–0128.

[119] Arkansas, California Water Board of San Diego, Idaho, Mississippi, New Hampshire, Oregon, and Washington.

[120] For more detailed information about the Agency's methodology for selecting random samples and conducting the machine reading analysis, please see *Clean Water Act Section 401 Water Quality Certification Improvement Rule—Final Rule, Memorandum to the File, Certification Decision PDF Extraction Effort,* available in Docket ID No. EPA–HQ–OW–2022–0128.

allows certifying authorities to protect their waters from the widest range of impacts. The Agency is finalizing a certification modification process, allowing certifying authorities and Federal agencies the flexibility to mutually agree on circumstances warranting modification. Provided that certification modification efforts are appropriately coordinated, the modification process under the final rule would allow certifying authorities to adapt to changes in environmental and regulatory conditions, and provide needed flexibility to accommodate changed circumstances after issuance of a grant of certification, with or without conditions.

EPA anticipates that the rulemaking will enhance the ability of states and Tribes to protect their water resources by clarifying key components of the water quality certification process and improving coordination between Federal agencies, certifying authorities, and project proponents.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a ''significant regulatory action'' as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866 review is available in the docket for this action. The Agency prepared an economic analysis of the potential impacts associated with this action, and concluded that the benefits of the rule justify the costs. This analysis, the Economic Analysis for the Final Rule, is available in the docket for this action (Docket ID No. EPA–HQ–OW–2022–0128) and is briefly summarized in section V in this preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rulemaking have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2603.08 (OMB Control No. 2040–0295). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The information collected under section 401 is used by certifying authorities and EPA to evaluate potential water quality impacts from federally licensed or permitted projects. When states or Tribes with TAS act as the certifying authority, the primary collection of this information is performed by the Federal agencies issuing the licenses or permits or the states and Tribes acting as certifying authorities. When EPA acts as the certifying authority or evaluates potential neighboring jurisdiction impacts, the information is collected by EPA. Information collected directly by EPA under section 401 in support of the section 402 NPDES program is already captured under existing ICR No. 0229.255 (OMB Control No. 2040–0004). The information collected under section 518(e) is used by EPA to determine whether a Tribe is eligible for TAS for section 401 or TAS for section 401(a)(2). Information collected directly by EPA under section 518(e) in support of the process for Tribes to obtain TAS for CWA section 303(c) and section 401 simultaneously is already captured under existing ICR No. 0988.14 (OMB Control No. 2040–0049). The information collection requirements are not enforceable until OMB approves them.

The revisions clarify the nature of the information project proponents must include in a request for section 401 certification. They also contain a pre-filing meeting request requirement for project proponents which may be waived or shortened by a certifying authority. The revisions also provide Tribes with the ability to obtain TAS solely for either section 401 or section 401(a)(2). Total annual burden for respondents (project proponents and certifying authorities and Tribes applying for TAS) are anticipated to be 861,274 hours with the associated annual labor costs being approximately $48 million. EPA expects these revisions to provide greater clarity regarding section 401 requirements, to reduce the overall preparation time spent by a project proponent on requests for certification, and to reduce the review time for certifying authorities.

In the interest of transparency, EPA is providing the following summary of the relevant portions of the burden assessment associated with EPA's existing certification regulations. EPA does not expect any measurable change in information collection burden associated with the rulemaking changes.

Respondents/affected entities: Project proponents, state and Tribal reviewers (certifying authorities), Tribes applying for TAS.

Respondent's obligation to respond: Required to obtain section 401 water quality certification; voluntary for Tribes to apply for TAS.

Estimated number of respondents: 154,006 responses from 77,146 respondents annually.

Frequency of response: Variable (one per Federal license or permit application, or only once) depending on type of information collected.

Total estimated burden: 861,274 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $48 million (per year).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this final rule will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are project proponents that are small businesses applying for Federal licenses or permits subject to section 401 certification, which includes construction, manufacturing, mining, and utility businesses. Section 401 requires project proponents to obtain a water quality certification from the certifying authority where the potential discharge originates or will originate before it may obtain such Federal license or permit.

EPA is not able to quantify the impacts of the rulemaking on small entities due to several data limitations and uncertainties, which are described within the Economic Analysis for the Final Rule, available in the docket for this rulemaking. However, EPA is including 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. *See* the Economic

Analysis for the Final Rule for details of the qualitative analysis.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates enforceable duties for the private sector, the cost does not exceed $100 million or more. This action does not create enforceable duties for state and Tribal governments. See the Economic Analysis for the Final Rule in the docket for further discussion on UMRA.

E. Executive Order 13132: Federalism

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.

EPA is finalizing updates to its CWA section 401 regulation to provide greater clarity and flexibility for certifying authorities in relation to acting on pre-filing meeting requests, contents of requests for certification, acting within the reasonable period of time, modifying a grant of certification, and participating in the neighboring jurisdictions process. EPA is also finalizing clarifications to the scope of Federal agency review; however, nothing in EPA's rulemaking would preempt state law. These regulatory clarifications and revisions will reinforce the authority granted to states by CWA section 401 to protect their water quality, which had been exercised by the states prior to implementation of the 2020 Rule.

Prior to proposing a rule in June 2022, EPA solicited recommendations and conducted pre-proposal outreach, such as virtual listening sessions, where many state and local governments, intergovernmental associations, and other associations representing state and local governments participated. Specifically, EPA hosted webinar-based listening sessions for pre-proposal input on June 14, June 15, June 23, and June 24, 2021, with over 400 participants from most states and a few territories. Furthermore, EPA accommodated requests for listening sessions with representatives from the Association of Clean Water Administrators, the Association of State Wetland Managers, the Environmental Council of the States, Western States Water Council, Indiana Department of Environmental Management, Maryland Department of the Environment, New Mexico Environmental Department, New York Department of Environmental Conservation, Oregon Department of Environmental Quality, Virginia Department of Environmental Quality, and Washington Department of Ecology. All pre-proposal input letters and summaries of the webinar-based listening sessions are available in Docket ID No. EPA–HQ–OW–2021–0302. These webinars, meetings, and input letters provided a wide and diverse range of interests, positions, and recommendations to the Agency.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period, and EPA held a public hearing on July 18, 2022 for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for state and territory government representatives on June 15, 22, and 28, 2022—there were over 175 attendees at these listening sessions. Summaries of the public hearing sessions and of the input received during the state/territory listening sessions can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from state, territory, and local governments in a Response to Comments document that can also be found in the docket for this rulemaking.

Comments on the proposed rule were submitted by various state and territory governmental agencies, predominately state environmental agencies or departments, with some comments from state departments of agriculture, wildlife (and fish and game), public health, and transportation. In addition, some comments were submitted by governors' offices and attorneys general, with a few joint comments from multiple state attorneys general. A few comments were submitted by state-specific, state-level water boards or departments. Comments were also submitted by several national and regional state associations. Many of these commenters were generally supportive of the rulemaking effort and elements of the proposed rule, but also offered suggestions and/or critiques of specific aspects of the proposed rule. Commenters in support of the proposed rule generally critiqued the 2020 Rule or offered support for the 1971 Rule approach to section 401. These commenters argued that the proposed rule was an improvement over the 2020 Rule in terms of cooperative federalism and/or the purported approach to the CWA and discussed the importance of state involvement under the CWA and section 401, with several commenters discussing specific approaches in their states. On the other hand, other state commenters, including a large group of state attorneys general that signed onto one letter, voiced support for the 2020 Rule, arguing that the narrowed scope of certification review introduced in the 2020 Rule was necessary to prevent the abuse or misuse of CWA section 401 by certifying authorities.

As discussed throughout this preamble, EPA acknowledges that the final rule may change how states and territories administer the section 401 program, but anticipates that the adjustments incorporated into the final rule will provide states and territories with additional flexibility (1) in waiving or shortening the pre-filing meeting request requirement, (2) in defining additional content requirements for requests for certification, (3) in negotiating the length of the reasonable period of time (including development of categorical agreements), (4) in reviewing the water quality-related impacts from the activity, (5) in development of their certification decision documents, (6) in the ability to modify a grant of certification, and (7) in the neighboring jurisdictions process if a potential discharge originating in another jurisdiction may affect their water quality. Finally, the final rule provides clarity for states acting as certifying authorities on several key aspects of the certification process, including (1) the minimum contents of a request for certification, (2) the start of the reasonable period of time (and the default length of the reasonable period of time), (3) the water quality-related scope of review, (4) the recommended contents of certification decisions, (5) the extent of Federal agency review, (6) the limits to modifications of certifications, and (7) the neighboring jurisdictions process.

As mentioned above, all state and local government comment letters and recommendations received during the comment period are included in the rulemaking docket (Docket ID No. EPA–HQ–OW–2022–0128).

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

This action may have implications for Tribal governments. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. This action may change how Tribes with TAS for section 401 administer the section 401 program, but it will not have an administrative impact on Tribes on whose behalf EPA issues certifications. As discussed in the preamble, EPA expects this final rule to expand and further clarify the opportunities for Tribal participation in the CWA section 401 water quality certification process.

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.

As previously mentioned, the Agency initiated a Tribal consultation and coordination process before proposing a rule by sending a ''Notification of Consultation and Coordination'' letter, dated June 7, 2021, to all 574 of the Tribes federally recognized at that time (*see* Docket ID No. EPA–HQ–OW–2021–0302). The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process for this rulemaking. In addition to two national Tribal webinars held on June 29 and July 7, 2021, the Agency convened other listening sessions, that Tribal members and representatives attended, for certifying authorities and the public. EPA continued outreach and engagement with Tribes and sought other opportunities to provide information and hear feedback from Tribes at national and regional Tribal meetings during and after the end of the consultation period. The Agency did not receive any consultation requests. All Tribal and Tribal organization letters and webinar feedback are included in the pre-proposal docket (Docket ID No. EPA–HQ–OW–2021–0302), and a summary of the Tribal consultation and coordination effort may be found in the docket for this action (Docket ID No. EPA–HQ–OW–2022–0128). Many Tribal feedback letters or meeting participants expressed an interest in receiving additional information and in continued engagement with the Agency during development of the proposed rulemaking; however, most of these Tribal representatives highlighted other ongoing rulemakings that also required their engagement.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period, and EPA held a public hearing on July 18, 2022 for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for Tribal representatives on June 15, 22, and 28, 2022—there were over 75 attendees at these listening sessions. Summaries of the public hearing sessions and of the input received during the Tribal listening sessions can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from Tribal representatives in a Response to Comments document that can also be found in the docket for this rulemaking.

Most Tribal commenters expressed support for the proposed rule's return to pre-2020 rule practices to restore Tribal sovereignty for the protection of their water resources. Many Tribal commenters supported inclusion of a section 401 TAS process independent of TAS for section 303(c), asserting that it would increase Tribal authority related to the neighboring jurisdictions process and increase Tribal regulatory capability as certifying authorities. Many Tribal commenters supported EPA's return to the Agency's longstanding ''activity as a whole'' scope of review. Many Tribal commenters also expressed support for the proposed rule's approach to extensions to the reasonable period of time, as well as the proposed removal of the regulatory prohibition on withdrawal and resubmission of requests for certification. Some Tribal commenters supported increased flexibility for modifications.

While many of the Tribal commenters supported the proposed rule, some Tribal commenters expressed disagreement or concern with portions of the proposed rule. A few Tribal commenters said that they were concerned with the inability to participate in the neighboring jurisdictions process if EPA does not commit in the regulation to consulting with Tribes during EPA's 30-day review period. Another issue some Tribal commenters raised was the need for more clarity regarding Tribal enforcement of section 401 certification conditions. Additionally, a few Tribal commenters expressed concern that the default 60-day reasonable period of time would not be enough time for their review of large, complex projects. As mentioned throughout this preamble, the Agency expects the adjustments made from the proposed rule to the final rule to address any Tribal representative concerns while continuing to provide the flexibility and clarity that many Tribal representatives requested. For more information about the Tribal consultation and coordination efforts, please see the final ''Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule'' in the docket (Docket ID No. EPA–HQ–OW–2022–0128).

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. *See* the Economic Analysis for the Final Rule in the docket for further discussion on Executive Order 13211.

I. National Technology Transfer and Advancement Act

This final rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. The Economic Analysis for the Final Rule includes information about the data limitations and uncertainties that exist regarding both baseline environmental conditions and how stakeholders, including certifying authorities, may respond to this final rule.

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.

One of the ways the Agency addresses environmental justice concerns through the final rule is through the pre-filing meeting request requirement, which provides a mechanism to ensure certifying authorities can request and receive information needed to protect their water resources and ensure the activity will comply with applicable water quality requirements, including through consideration of information and input from potentially affected communities with environmental justice concerns during early engagement. In addition to informing the certification process, this also advances the goals of Executive Order 14096, including ''meaningful involvement.''

Additionally, the final rule empowers certifying authorities to make a well-informed decision that may affect communities with environmental justice concerns because under the final rule, the certifying authority can determine the additional contents of requests for certification (as long as those contents are relevant to the water quality-related impacts from the activity and are identified prior to when a project proponent submits a request). Starting the certifying authority's review of a request for certification with the necessary information about water quality-related impacts from the activity promotes environmental justice and transparency in the certification process. This also enables certifying authorities to share a greater level of detail with the public (including any communities that may be impacted by a proposed project), so that participants in the public notice and comment process can provide better informed input.[121]

Under the final rule's collaborative approach for determining the reasonable period of time, certifying authorities can take the needs of potentially affected communities into account when determining the amount of time they need to review and evaluate the potential impacts of a proposed project on the communities' water resources (*e.g.,* a certifying authority may suggest a longer reasonable period of time to facilitate outreach to communities or to conduct studies on a proposed project's impact on local communities). Additionally, the ''activity'' approach for scope of review has the potential to benefit communities with environmental justice concerns by ensuring that the certifying authority can broadly review the potential water quality impacts on affected communities.

Furthermore, the TAS provisions for section 401 as a whole or only for section 401(a)(2) give Tribes additional options to obtain TAS, as well as more opportunities to provide input and voice any water quality concerns during the section 401 process. Lastly, when EPA is acting as the certifying authority, the Agency is finalizing the proposed updates to the public notice provision to facilitate participation by the broadest number of potentially interested stakeholders, including communities with environmental justice concerns.

The information supporting this Executive order review, including a description of data limitations and uncertainties, is contained in the Economic Analysis for the Final Rule, which can be found in the docket for this action and is briefly summarized in section V in this preamble.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 121

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

[121] Under CWA section 401(a)(1), certifying authorities are required to establish procedures for public notice and, to the extent it deems appropriate, procedures for public hearings. 33 U.S.C. 1341(a)(1).

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR parts 121, 122, and 124 as follows:

■ 1. Revise part 121 to read as follows:

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

Sec.

Subpart A—General

121.1 Definitions.
121.2 When certification is required.
121.3 Scope of certification.
121.4 Pre-filing meeting requests.
121.5 Request for certification.
121.6 Reasonable period of time.
121.7 Certification decisions.
121.8 Extent of Federal agency review.
121.9 Failure or refusal to act.
121.10 Modification to a grant of certification.
121.11 Requirements for Indian Tribes to administer a water quality certification program.

Subpart B—Neighboring Jurisdictions

121.12 Notification to the Regional Administrator.
121.13 Determination of effects on neighboring jurisdictions.
121.14 Objection from notified neighboring jurisdiction and request for a public hearing.
121.15 Public hearing and Federal agency evaluation of objection.

Subpart C—Certification by the Administrator

121.16 When the Administrator certifies.
121.17 Public notice and hearing.

Subpart D—Review and Advice

121.18 Review and advice.

Subpart E—Severability

121.19 Severability

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General

§ 121.1 Definitions.

As used in this part, the following terms shall have the meanings indicated:

(a) *Administrator* means the Administrator, Environmental Protection Agency (EPA).

(b) *Certifying authority* means the entity responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.

(c) *Federal agency* means any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401.

(d) *Federal Indian Reservation, Indian reservation,* or *reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(e) *Indian Tribe* or *Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation.

(f) *License* or *permit* means any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United States.

(g) *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), other than the jurisdiction in which the discharge originates or will originate.

(h) *Project proponent* means the applicant for a Federal license or permit, or the entity seeking certification.

(i) *Regional Administrator* means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(j) *Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.

§ 121.2 When certification is required.

Certification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.

§ 121.3 Scope of certification.

(a) When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation.

(b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.

§ 121.4 Pre-filing meeting requests.

The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request.

§ 121.5 Request for certification.

(a) Where a project proponent is seeking certification from any certifying authority, the request for certification shall include the following minimum contents:

(1) If the request for certification is for an individual Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the Federal license or permit application submitted to the Federal agency; and

(ii) Any readily available water quality-related materials that informed the development of the application.

(2) If the request for certification is for the issuance of a general Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the draft Federal license or permit; and

(ii) Any readily available water quality-related materials that informed the development of the draft Federal license or permit.

(b) Where a project proponent is seeking certification from the Regional Administrator, if not already included in the request for certification in accordance with paragraph (a) of this section, a request for certification shall also include the following, as applicable:

(1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

(2) The specific location of any discharge(s) that may result from the proposed activity;

(3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

(4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

(5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;

(6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

(7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

(c) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.

(d) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified in paragraph (b) of this section.

§ 121.6 Reasonable period of time.

(a) The reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5, in accordance with the certifying authority's applicable submission procedures. The certifying authority shall send written confirmation to the project proponent and Federal agency of the date that the request for certification was received.

(b) The Federal agency and the certifying authority may jointly agree in writing to the reasonable period of time for the certifying authority to act on the request for certification, provided the reasonable period of time does not exceed one year from the date that the request for certification was received. Such written agreements may establish categorical reasonable periods of time.

(c) If the Federal agency and the certifying authority do not agree in writing on the length of the reasonable period of time, the reasonable period of time shall be six months.

(d) If a longer period of time is necessary to accommodate the certifying authority's public notice procedures or force majeure events (including, but not limited to, government closure or natural disasters), upon written notification by the certifying authority to the Federal agency prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by public notice procedures or the force majeure event. In such written notification to the Federal agency, the certifying authority shall identify how much additional time is required and provide a justification for such extension. Such an extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

(e) The Federal agency and certifying authority may agree in writing to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

§ 121.7 Certification decisions.

(a) A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

(b) A certifying authority shall act on a request for certification within the scope of certification and within the reasonable period of time.

(c) A grant of certification shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the activity will comply with water quality requirements; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(d) A grant of certification with conditions shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification with conditions;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(e) A denial of certification shall be in writing and should include the following:

(1) Identification of the decision as a denial of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why the certifying authority cannot certify that the activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(f) An express waiver shall be in writing and should include the following:

(1) Identification of the decision as an express waiver of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the certifying authority expressly waives its authority to act on the request for certification; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(g) If the certifying authority determines that no water quality requirements are applicable to the activity, the certifying authority shall grant certification.

§ 121.8 Extent of Federal agency review.

To the extent a Federal agency verifies compliance with the requirements of Clean Water Act section 401, its review is limited to whether: the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.

§ 121.9 Failure or refusal to act.

(a) 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.

(b) If the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived in accordance with § 121.8. Such notice shall satisfy the project proponent's requirement to obtain certification.

§ 121.10 Modification to a grant of certification.

(a) Provided that the Federal agency and the certifying authority agree in writing that the certifying authority may modify a grant of certification (with or without conditions), the certifying authority may modify only the agreed-upon portions of the certification. The certifying authority is not required to obtain the Federal agency's agreement on the language of the modification.

(b) The certifying authority shall not, through a modification pursuant to paragraph (a) of this section:

(1) Revoke a grant of certification (with or without conditions); or

(2) Change a grant of certification (with or without conditions) into a denial or waiver of certification.

§ 121.11 Requirements for Indian Tribes to administer a water quality certification program.

(a) The Regional Administrator may accept and approve a Tribal application for purposes of administering a water quality certification program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 121.1(d) and (e);

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(3) The water quality certification program to be administered by the Indian Tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality certification program in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations in this chapter.

(b) Requests by an Indian Tribe for administration of a water quality certification program should be submitted to the appropriate EPA Regional Administrator. The application shall include the following information, provided that where the Tribe has previously qualified for eligibility or ''treatment as a state'' under another EPA-administered program, the Tribe need only provide the required information that has not been submitted in a previous application:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; and

(ii) A statement by the Tribe's legal counsel or equivalent official that describes the basis for the Tribe's assertion of authority and may include copies of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality certification program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience that may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and implementing a water quality certification program; and

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality certification program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(c) The procedure for processing a Tribe's application is as follows:

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to paragraph (b) of this section in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

(2) Except as provided in paragraph (c)(4) of this section, within 30 days after receipt of the Tribe's application, the Regional Administrator shall provide appropriate notice. The notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters;

(ii) Be provided to all appropriate governmental entities; and

(iii) Provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(3) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of paragraph (a)(3) of this section.

(4) Where, after November 27, 2023, EPA has determined that a Tribe qualifies for treatment in a similar manner as a state for the Clean Water Act section 303(c) Water Quality Standards Program, Clean Water Act section 303(d) Impaired Water Listing and Total Maximum Daily Loads Program, Clean Water Act section 402 National Pollutant Discharge Elimination System Program, or Clean Water Act section 404 Dredge and Fill Permit Program, and has provided notice and an opportunity to comment on the Tribe's assertion of authority to appropriate governmental entities as part of its review of the Tribe's prior application, no further notice to governmental entities, as described in paragraph (c)(2) of this section, shall be provided with regard to the same Tribe's application for the water quality certification program, unless the application presents to the EPA Regional Administrator different jurisdictional issues or significant new factual or legal information relevant to jurisdiction.

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, they shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the water quality certification program.

(d) An Indian Tribe may submit a Tribal application for purposes of administering only the Clean Water Act section 401(a)(2) portion of a water quality certification program.

Subpart B—Neighboring Jurisdictions

§ 121.12 Notification to the Regional Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.

(1) The notification shall include a copy of the certification or waiver and the application for the Federal license or permit.

(2) The notification shall also contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (*e.g.,* latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing

comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification.

(b) If the Regional Administrator determines there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to Clean Water Act section 401(a)(2), the Regional Administrator may make a written request to the Federal agency that such information be provided in a timely manner for EPA's determination, and the Federal agency shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe.

(c) The Regional Administrator may enter into an agreement with a Federal agency regarding the manner of this notification process and the provision of supplemental information.

§ 121.13 Determination of effects on neighboring jurisdictions.

(a) Within 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the project may affect water quality in a neighboring jurisdiction.

(b) If the Regional Administrator determines that the discharge from the project may affect water quality in a neighboring jurisdiction, within 30 days after receiving notice in accordance with § 121.12(a), the Regional Administrator shall notify the neighboring jurisdiction, the Federal agency, and the project proponent in accordance with paragraph (c) of this section.

(c) Notification from the Regional Administrator shall be in writing and shall include:

(1) A statement that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality;

(2) A copy of the Federal license or permit application and related certification or waiver; and

(3) A statement that the neighboring jurisdiction has 60 days after such notification to notify the Regional Administrator and the Federal agency, in writing, if it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency.

(d) A Federal license or permit shall not be issued pending the conclusion of the process described in this section, and §§ 121.14 and 121.15.

§ 121.14 Objection from notified neighboring jurisdiction and request for a public hearing.

(a) If a neighboring jurisdiction notified by the Regional Administrator pursuant to § 121.13(b) determines that a discharge from the project will violate any of its water quality requirements, it shall notify the Regional Administrator and the Federal agency in accordance with paragraph (b) of this section within 60 days after receiving such notice from the Regional Administrator.

(b) Notification from the notified neighboring jurisdiction shall be in writing and shall include:

(1) A statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on the notified neighboring jurisdiction's objection.

(c) The notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.

§ 121.15 Public hearing and Federal agency evaluation of objection.

(a) Upon a request for hearing from a notified neighboring jurisdiction in accordance with § 121.14(b), the Federal agency shall hold a public hearing on the notified neighboring jurisdiction's objection to the Federal license or permit, unless the objection is withdrawn in accordance with § 121.14(c).

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.

(c) At the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the notified neighboring jurisdiction and the Regional Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional Federal license or permit conditions may be necessary to ensure that any discharge from the project will comply with the neighboring jurisdiction's water quality requirements. If such conditions may be necessary, the Federal agency shall include them in the Federal license or permit.

(e) If additional Federal license or permit conditions cannot ensure that the discharge from the project will comply with the notified neighboring jurisdiction's water quality requirements, the Federal agency shall not issue the Federal license or permit.

Subpart C—Certification by the Administrator

§ 121.16 When the Administrator certifies.

(a) Certification or waiver by the Administrator is required where no state, Tribe, or interstate agency has authority to give such a certification.

(b) When acting pursuant to this section, the Administrator shall comply with the requirements of Clean Water Act section 401 and this part.

§ 121.17 Public notice and hearing.

(a) Within 20 days of the date that the request for certification was received, the Administrator shall provide public notice of the request for certification. Following such public notice, the Administrator shall provide an opportunity for public comment.

(b) If the Administrator determines that a public hearing on a request for certification is appropriate, the Administrator shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means.

Subpart D—Review and Advice

§ 121.18 Review and advice.

Upon the request of any Federal agency, certifying authority, or project proponent, the Administrator shall provide any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Subpart E—Severability

§ 121.19 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 2. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 3. Amend § 122.4 by revising paragraph (b) to read as follows:

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of the CWA and that certification has not been obtained or waived;

* * * * *

■ 4. Amend § 122.44 by revising paragraph (d)(3) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) * * *

(3) Conform to the conditions in a State certification under section 401 of the CWA when EPA is the permitting authority;

* * * * *

■ 5. Amend § 122.62 by revising paragraph (a)(3)(iii) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(3) * * *

(iii) For changes based upon modified State certifications of NPDES permits, see § 121.10 of this chapter.

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 6. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* Clean Air Act, 42 U.S.C. 7401 *et seq.*

■ 7. Amend § 124.53 by revising paragraphs (b) through (e) to read as follows:

§ 124.53 State certification.

* * * * *

(b) Consistent with the requirements set forth in §§ 121.4 and 121.5 of this chapter, applications for individual permits may be forwarded by the Regional Administrator to the certifying State agency with a request to act on the request for certification consistent with § 121.7 of this chapter.

(c) If State certification has not been requested by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency a request for certification consistent with § 121.5 of this chapter and include a copy of the draft permit.

(d) State certification shall be granted or denied within the reasonable period of time as required under CWA section 401(a)(1). The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards.

■ 8. Amend § 124.54 by revising paragraphs (a) and (b) to read as follows:

§ 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a copy of the certification required under CWA section 401(a)(1) to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section 301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision to the State. If the State fails to deny or grant certification and concurrence under paragraph (a) of this section within the reasonable period of time provided in CWA section 401(a)(1), certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

* * * * *

■ 9. Amend § 124.55 by:

■ a. Revising paragraph (a);

■ b. Removing paragraph (b);

■ c. Redesignating paragraphs (c) through (f) as paragraphs (b) through (e), respectively; and

■ d. Revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1), no final permit shall be issued:

(1) If certification is denied; or

(2) Unless the final permit incorporates the conditions specified in the certification.

(b) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

(c) A condition in a draft permit may be changed during agency review in any manner consistent with a corresponding certification. No such changes shall require EPA to submit the permit to the State for recertification.

* * * * *

[FR Doc. 2023–20219 Filed 9–26–23; 8:45 am]

BILLING CODE 6560–50–P