

Economic Analysis for the Clean Water Act
Section 401 Certification Rule

U.S. Environmental Protection Agency

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Table of Contents

List of Tables	3
List of Figures	4
Abbreviations	5
1 Introduction.....	6
2 Overview of Baseline.....	8
2.1 Overview of Federal Licenses and Permits.....	9
2.1.1 Section 404 Permits	10
2.1.2 Section 402 NPDES Permits.....	11
2.1.3 Interstate Natural Gas Pipeline and Hydropower Project Licenses	11
2.1.4 Rivers and Harbors Act Sections 9 and 10 Permits	12
2.1.5 Nuclear Power Plant Licenses.....	12
2.1.6 Mining Licenses.....	12
2.2 Overview of Certifying Authority Actions	12
3 Section 401 Certification Example Cases Under Baseline	16
3.1 Examples Where a Certifying Authority Denied Certification.....	16
3.1.1 New York Natural Gas Pipelines	16
3.1.2 Millennium Bulk Terminals in Washington State	19
3.2 Examples Where a Certifying Authority Failed to Act.....	20
4 Potential Effects of the Final Section 401 Certification Regulations.....	21
4.1 Timeframe.....	24
4.1.1 Final Rule Provisions.....	24
4.1.2 Potential Effects - Timeframe	25
4.2 Scope.....	27
4.2.1 Final Rule Provision.....	27
4.2.2 Potential Effects of the Final Rule - Scope	28
4.3 Pre-Filing Meeting Request Requirement.....	29
4.3.1 Final Rule Provisions	29
4.3.2 Potential Effects of the Final Rule – Pre-Filing Meeting Request Requirement	29
4.4 Potential Effects on Federal Agencies, States, and Tribes.....	30
5 Possible Effects on Example Cases	32
5.1 New York Natural Gas Pipelines	32
5.2 Millennium Bulk Terminals in Washington State	33
5.3 West Virginia Hydropower Projects	34
6 Data Limitations and Uncertainty	34

7 References..... 35
Appendix A. Tables/Figures for Federal License/Permit Overview..... 38

List of Tables

Table 2-1: License and permit summary data by certifying authority	9
Table 3-1: Section 401 certification denial cases.....	17
Table 4-1: Summary of potential effects of final section 401 revisions	23
Table 5-1: Possible impacts of the final section 401 revisions on recent New York State pipeline denials	32
Table 6-1: Limitations and uncertainties in estimating effects of final rule	34
Table A-1: State websites with public documentation of licenses/permits and section 401 certification documents	38

List of Figures

Figure A-1. NPDES program authorizations as of July 2015..... 38

Abbreviations

ACWA	Association of Clean Water Administrators
ASWM	Association of State Wetland Managers
BLM	Bureau of Land Management
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EA	Economic Analysis
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FWPCA	Federal Water Pollution Control Act of 1948
FFP	Free Flow Power Corporation
ICR	Information Collection Request
JARPA	Joint Aquatic Resources Permit Application
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NRC	Nuclear Regulatory Commission
NWP	Nationwide Permit
NYSDEC	New York State Department of Environmental Conservation
POTW	Publicly Owned Treatment Works
RGL	Regulatory Guidance Letter
RGP	Regional General Permit
SPGP	State Programmatic General Permit
TAS	Treatment As a State
USACE	U.S. Army Corps of Engineers
USDA	U.S. Department of Agriculture
WQS	Water Quality Standards
WV DEP	West Virginia Department of Environmental Protection

1 Introduction

Under the Clean Water Act (CWA) section 401, a federal agency may not issue a license or permit to conduct an activity that may result in any discharge into waters of the United States unless the certifying authority where the discharge would originate certifies that the discharge will comply with applicable water quality requirements or waives certification. The certifying authority is determined based on the location where the discharge originates and can be a State, territory, authorized Tribe, and in some circumstances, the U.S. Environmental Protection Agency (EPA). All States and U.S. territories currently have section 401 certification authority. Certification authority under CWA section 401 can be assumed by Indian tribes under section 518 of the CWA, which authorizes the EPA to treat eligible Tribes with reservations in a similar manner to States (referred to as “treatment as States” or TAS).¹ The EPA is responsible for section 401 certification decisions in instances when a State lacks certification authority, on Tribal lands where Tribes do not have TAS, and on lands with exclusive federal jurisdiction.

As the Agency charged with administering the CWA,² as well as a certifying authority in certain instances, the EPA is responsible for developing a common regulatory framework for certifying authorities to follow when completing section 401 certifications.³ In 1971, the EPA promulgated regulations for implementing the certification provisions in section 21(b) of the Federal Water Pollution Control Act of 1948 (FWPCA), but the EPA never updated those regulations to reflect the 1972 amendments to the FWPCA (commonly known as the CWA), which created section 401, despite the fact that there were changes to the relevant statutory text.

In April 2019, the President issued Executive Order 13868, entitled *Promoting Energy Infrastructure and Energy Growth* (the Executive Order), to encourage greater investment in energy infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty. The Executive Order identified the EPA’s outdated section 401 federal guidance and regulations as one source of confusion and regulatory uncertainty hindering the development of energy infrastructure. Prior to this rulemaking, the EPA’s only written guidance to the public on section 401 implementation was an interim handbook produced in 2010 entitled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*. This 2010 handbook had not been updated since it was released and therefore did not reflect the current case law interpreting CWA section 401 (*see* section II.F.4 of the final rule preamble for a detailed discussion of the relevant court decisions on section 401). The Executive Order directed the EPA to review CWA section 401 and the EPA’s 1971 certification regulations and interim guidance; issue new guidance to States, Tribes, and federal agencies within 60 days of the Order; and propose new section 401 regulations within 120 days of the Order.

On June 7, 2019, the EPA released updated guidance for States, Tribes, and federal agencies to provide information and recommendations for implementing the substantive and procedural requirements of section 401 (U.S. EPA, 2019a), and rescinded the interim handbook. On August 8, 2019, the EPA signed the proposed rule “Updating Regulations on Water Quality Certifications,” which was published on August 22, 2019 (84 FR 44080), to replace and modernize the 1971 water quality certification regulations located at 40 CFR part 121 and to provide greater clarity and regulatory certainty for the water quality certification process, consistent with the Executive Order. The 60-day public comment period closed on

¹ 33 U.S.C. 1377(e).

² The EPA co-administers section 404 with the Army Corps of Engineers (the Corps).

³ 33 U.S.C. 1251(d), 1361(a).

October 21, 2019. After considering public comments on the proposed rule and the proposed economic analysis, the EPA is finalizing the *Clean Water Act Section 401 Certification Rule*. The Agency's response to comments document is available in the docket for the final rule at Docket ID No. EPA-HQ-OW-2019-0405.

Pursuant to Executive Orders 12866 and 13563, the Agency conducted this economic analysis (EA) to better understand the potential effects of this final rule on certifying authorities and project proponents. While this EA is informative in the rulemaking context, the EPA is not relying on the analysis as a basis for this final rule. *See, e.g., National Association of Home Builders, et al., v. EPA*, 682 F.3d 1032 1039-40 D.C. Circuit 2012. This information was not used to establish the new regulatory text for the final rule.

Section 2 of this EA presents an overview of current practice (baseline scenario), including an overview of federal licensing and permitting actions that may trigger the need for a section 401 certification. Section 3 of this EA presents four examples of certification denials and one example of a circumstance where a certifying authority failed to act. These example cases demonstrate that there is existing confusion about the timeline and scope of section 401 under the 1971 certification regulations, which has led to project delays and increased project costs. Section 4 of this EA includes a qualitative assessment of the potential impacts of the final rule on project proponents and certifying authorities compared with the baseline scenario. Section 5 of this EA includes an assessment of how the final rule provisions could have increased regulatory certainty and reduced project delays in the five example cases from section 3.

The Agency prepared a proposed EA along with the proposed rule and has made enhancements to this final EA in response to feedback received from public commenters and federal agencies (*see* the Agency's response to comments document in the docket for the final rule, Docket ID No. EPA-HQ-OW-2019-0405), as well as updates to example cases to represent the most current information. For instance, the Agency provided clarifications to the descriptions of federal agency licensing and permitting programs in section 2 of this EA. Additionally, the Agency provided clarifications to the example cases in section 3.1 of this EA and added an example case from the hydropower sector in section 3.2 of this EA. The Agency updated section 4 of this EA to reflect the policies in the final rule, including new discussions on the pre-filing meeting request requirement (*see* section 4.3).

The Agency anticipates the final rule will result in more predictable, efficient decision-making by certifying authorities which will result in a net cost decrease and reduction in burden overall. The final rule has the potential to reduce costs and minimize delays for project proponents. The final rule's timeframe provisions will increase clarity regarding when the reasonable period of time begins and ends, leading to predictable certifying authority decision-making timelines and preventing unintentional waivers from occurring. The Agency also anticipates that the more clear and unambiguous scope of certification under this final rule will reduce the burden placed on certifying authorities who were previously considering information and factors beyond the scope of section 401. Under the final rule, the scope of certification applies to all actions taken on a certification request, including adding conditions to a certification and denying certification. Additionally, the final rule requires specific information to be included in a certification with conditions or a denial, but the Agency expects certifying authorities are already generating similar information to develop a complete and legally defensible administrative record to support certification actions.

Section 401 envisions a robust State and Tribal role in the federal licensing or permitting process, including those in which local authority may otherwise be preempted by federal law. Section 401 also places important limitations on how that role may be implemented to maintain an efficient federal licensing and permitting process. Because EPA failed to update its certification regulations when the 1972 CWA amendments were enacted, some State and Tribal processes and considerations that emerged over

time may have exceeded the bounds intended by Congress. In the final rule, the EPA is establishing the scope of section 401 as protecting the quality of waters of the United States from point source discharges associated with federally licensed or permitted activities by requiring compliance with water quality requirements, as defined in the final rule. This final rule may prevent some States and Tribes from imposing more onerous requirements than those intended by Congress and is therefore considered deregulatory at a national level, pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017).

2 Overview of Baseline

For the purposes of the EA, the baseline scenario means practices that exist under the 1971 certification regulations. This section presents an overview of the baseline scenario, including an overview of federal licensing and permitting actions that may trigger the need for a section 401 certification. As noted throughout the proposal preamble and the EA, the EPA acknowledges that many certifications under the baseline scenario reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy. Although a few high profile certification denials are part of the factual and administrative record for this rulemaking, and EPA has considered these facts during the rulemaking process, the EPA has not relied on these facts as the sole or primary basis for this rulemaking. The Agency's longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of those controversial section 401 certification actions and the resulting litigation.

Recent court cases illustrate the type of uncertainty this rule is attempting to resolve, highlighting that some project proponents, certifying authorities, and federal agencies have different ideas about when the time for review of a certification begins and—once begun—whether the review period can be tolled or extended beyond one year. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019); *New York State Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018); *Constitution Pipeline Co., LLC v. New York State Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d Cir. 2017). Questions have also arisen regarding the role of the federal agency in determining whether a waiver has occurred, and whether a certifying authority may deny certification for reasons that are unrelated to water quality. *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017); *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-5005 (W.D. Wash. filed Jan. 8, 2018). The example cases in section 3 present in greater detail the potential for regulatory uncertainty to occur under the baseline scenario.

In accordance with the Paperwork Reduction Act, the EPA has an OMB-approved Information Collection Request (ICR) for the 1971 certification regulations (EPA ICR Number 2603.03, OMB Control Number 2040-0295). That ICR estimates that respondents will submit approximately 100,000 certification requests per year and that annual paperwork burden is expected to be approximately 1 million hours. ICRs are developed based on available information about how a regulation may affect a respondent; however, the data used to support this ICR is not robust enough to rely on for the development of a quantitative economic analysis. To estimate the burden for this ICR, the EPA selected the midpoint of an estimated low and high burden. The low-end burden was taken from EPA ICR Number 0229.23, which was established for section 401 certifications for federally issued NPDES permits and does not capture the range of certification requests prepared by project proponents and reviewed by certifying authorities for other license and permit types. The high-end burden was established based on information provided by six respondents to an EPA questionnaire, which is not expected to be representative of the whole population of certifying authorities and is not representative of the population of project proponents. The limitations and uncertainties in this data set preclude its use for the development of a quantitative economic analysis. The ICR Number 2603.03 burden estimates are provided in this EA for informational

purposes only and are not intended for use as quantitative conclusions about potential economic costs or benefits of the baseline scenario or the final rule.

This section of the EA has been updated from the proposed EA to reflect current information and to incorporate clarifications provided during engagements with other federal agencies. The Agency has also combined sections 2 and 3 from the proposed EA to present a single, clear baseline scenario. The Agency also replaced two maps included as Figure 2 and Figure 3 in the proposal with citations to websites included in the references section of this EA that provide comparable information.

2.1 Overview of Federal Licenses and Permits

Section 401 certification is required for various federal licenses and permits including, but not limited to, dredge and fill activities that require CWA section 404 permits from the U.S. Army Corps of Engineers (Corps), CWA section 402 National Pollutant Discharge Elimination System (NPDES) permits for industrial and municipal point source discharges issued by the EPA, permits issued under sections 9 and 10 of the Rivers and Harbors Act (RHA) by the Corps (or the U.S. Coast Guard for bridges and causeways under section 9), mining plan of operations approvals issued by the Department of the Interior’s Bureau of Land Management (BLM) and the U.S. Department of Agriculture (USDA) Forest Service, and projects requiring licenses from the Federal Energy Regulatory Commission (FERC) or the Nuclear Regulatory Commission (NRC). Typically, certifying authorities conduct section 401 certification review during the federal agency’s license or permit process. Some certifying authorities have established joint application procedures with federal agencies to promote simultaneous review (*e.g.*, Alabama,⁴ New York,⁵ Oregon,⁶ South Carolina⁷).

The most common federal licenses and permits subject to section 401 certification are CWA section 404 permits issued by the Corps. Additional federal licenses and permits may be subject to section 401 under the final rule if they authorize an activity that may result in a discharge from a point source into a water of the United States. For a list of State websites with public documentation of licenses and permits and section 401 certification documents, see Table A-1 in Appendix A.

Table 2-1 presents summary information on the number of federal licenses and permits issued each year. The table provides separate values for general and individual licenses and permits, when applicable. General licenses and permits provide streamlined procedures for project proponents by authorizing categories of discharges or simplified review procedures when the proposed discharges comply with specified requirements, whereas individual licenses and permits are customized to a specific project and discharge. These values are intended to show the distribution of federal licenses and permits commonly requiring certification.

Table 2-1: License and permit summary data by certifying authority		
License/Permit Type	Annual Average # Licenses/Permits Issued^a	Timeframe for Section 401 Review
CWA Section 404	50,159 general; 2,511 individual ^b	60 days – 1 year ^b

⁴ <http://www.adem.state.al.us/DeptForms/Form166.pdf>.

⁵ <https://www.nan.usace.army.mil/portals/37/docs/regulatory/geninfo/genp/jointappinstruct.pdf>.

⁶ <https://www.nwp.usace.army.mil/Missions/Regulatory/Apply>.

⁷ <https://scdhec.gov/environment/water-quality/water-quality-certification-401-process-explained>.

Table 2-1: License and permit summary data by certifying authority		
License/Permit Type	Annual Average # Licenses/Permits Issued ^a	Timeframe for Section 401 Review
Rivers and Harbors Act Section 10	8,607 general; 1,670 individual ^c	60 days – 1 year ^h
CWA Section 402	16 general; 150 individual ^d	60 days ⁱ
Rivers and Harbors Act Section 9	30-35 ^e	1 year ^e
Federal Energy Regulatory Commission license	47 ^f	1 year ^j
Nuclear Regulatory Commission license	3-4 ^g	1 year

a. Includes all permits issued by the relevant federal agency (section 401 certification either granted, granted with conditions, or waived)

b. Estimate based on the annual average number of 404 permits from 2013-2018 based on counts provided by the Corps.

c. Estimate based on the annual average number of section 10 permits from 2013-2018 based on counts provided by the Corps.

d. Estimate based on the annual average of EPA-issued 402 permits from 2012-2017.

e. Estimate based on personal communication with Shelly Sugarman, Bridge Permits and Policy Division, Coast Guard Bridge Program.

f. Estimate based on annual average license issuance for hydropower facilities/major natural gas pipelines from 2013-2018 (FERC, 2019a, 2019b)

g. Estimate based on annual average number of licenses for operating nuclear power reactors from 2013 to 2018 (NRC, 2018). From 2013 to 2018, only one new operating license was issued, and 20 renewals were issued, or approximately 3.5 per year over the six-year period

h. Timeframe depends on Corps district. Corps regulations (33 CFR 325.2) specify that waiver could occur if the certifying authority does not issue a decision within 60 days. Historically, many Corps districts have allowed a longer timeframe.

i. 40 CFR 124.53(e)(3), unless unusual circumstances warrant a longer timeframe.

j. 18 CFR 4.34(b)(5)(iii)

2.1.1 Section 404 Permits

The Corps issues two types of CWA section 404 permits, general and individual. General permits are for activities that are similar in nature, cause only minimal adverse environmental impacts, and have only minimal cumulative environmental impacts (USACE, 2017). There are three types of general permits: Nationwide Permits (NWP), Regional General Permits (RGPs), and State Programmatic General Permits (SPGPs). The most common general permits are NWPs, which provide streamlined review and authorization for activity categories that are determined by the Corps to have minimal adverse impacts on the aquatic environment. NWPs automatically expire, unless renewed, every five years. The Corps has 52 NWPs as of March 2017, which are effective through March 18, 2022 (USACE, 2017). RGPs are issued on a regional basis by an individual Corps district (USACE, n.d.-a). There is no standard set of RGP activity categories that apply to all States, and there are varying numbers of RGPs issued by different Corps Districts. SPGPs authorize categories of activities that are also authorized by States with regulatory programs similar to the section 404 program, and the Corps' section 404 authorization may be provided with the state authorization with no activity-specific review by the Corps (USACE, n.d.-a).

Many States grant section 401 certification for activities covered under certain NWPs and RGPs. When a certifying authority grants certification for a NWP or RGP, all actions or activities that meet the requirements of the NWP or RGP are covered under the section 401 certification without additional review or action by the certifying authority. Certifying authorities can grant certifications for general permits with or without conditions. Some States grant certification of NWPs with conditions to address state specific water quality concerns. NWPs that are denied certification, and some that are granted with conditions that do not comply with the Corps' criteria for permit conditions at 33 CFR 325.4, require individual section 401 review, and the Corps handles these circumstances by asking the project proponent to submit a project specific request for section 401 certification to the State or Tribe in order to be authorized under the NWP. States vary on whether and which NWPs are denied certification. For

example, Colorado does not deny certification or require any additional review for NWP (Colorado Environmental Records, n.d.), whereas other States like California may deny certification and require additional review for certain NWPs (California Water Boards, 2018). This variability is due to multiple factors, including specific NWP conditions, differing project impacts, and applicable WQS. As for RGPs, States generally issue certifications with or without conditions. Additional review is usually not required for coverage under a RGP because the Corps Districts develop the RGPs regionally and often incorporate State conditions.

The Corps issues individual section 404 permits for projects that do not qualify for general permit authorization or have more than minimal individual or cumulative impacts (USACE n.d.-a). Individual permits are subject to project-specific certifications. Certifying authorities typically review each certification request for an individual section 404 permit.

Some States require additional review and an individual certification request for any project, whether it is being authorized under a general or individual permit, that would involve discharges to certain waters or is related to a certain activity. For example, Arizona requires individual certification requests for projects covered under a section 404 permit that would affect an “Outstanding Arizona Water,” an impaired or non-attaining water, or a lake (Arizona Department of Environmental Quality, 2018). North Carolina requires individual certification requests for all projects covered under a section 404 permit that are related to oil and gas structures on the outer continental shelf, coal mining, and stormwater management facilities (North Carolina Department of Environmental Quality, n.d.).

2.1.2 Section 402 NPDES Permits

The NPDES permit program addresses water pollution by regulating point sources that discharge pollutants to waters of the United States. Section 401 certification only applies when the NPDES permit is issued by the EPA. A State may receive authorization to administer one or more of the NPDES program components. The EPA retains administration for the program components for which a State is not authorized. For example, if the State has not received authorization to issue NPDES permits to federal facilities, the EPA would continue to issue permits to federal facilities (*e.g.*, military bases, national parks, federal lands, etc.), and the State would have input on the permit via section 401. The EPA is the sole NPDES permitting authority for three States (Massachusetts, New Hampshire, and New Mexico), the District of Columbia, all U.S. territories except the Virgin Islands, and generally on Tribal lands. All other States and the Virgin Islands have authorization to issue section 402 permits for either the entire NPDES program or certain components.⁸ Program components of NPDES include the authority to regulate federal facilities, pretreatment program, general permits program, and biosolids program (U.S. EPA, 2019b). Figure A-1 in Appendix A shows a map of States and territories and their NPDES program status.

The two basic types of NPDES permits are individual and general permits. Typically, dischargers seeking coverage under a general permit are required to submit a notice of intent (NOI) to be covered by the permit. The EPA’s general permits cover discharges meeting general permit requirements in areas where the EPA is the NPDES permitting authority (*see* U.S. EPA, 2017). The EPA works with certifying authorities during the development of section 402 general permits to ensure certification is issued.

2.1.3 Interstate Natural Gas Pipeline and Hydropower Project Licenses

Projects requiring interstate natural gas pipeline and hydropower project licenses, which are issued by FERC (FERC, 2018), are also subject to section 401 certification. Certifying authorities typically review and act on certification requests for these projects rather than expressly waiving review. There have been

⁸ Idaho is authorized to issue NPDES permits for individual industrial permits, individual municipal permits, and the State pretreatment program. Idaho is projected to be fully authorized by July 1, 2021.

instances where certifying authorities have waived certification for projects requiring a FERC license by failing or refusing to act within the maximum one-year timeframe (*see* section 3.2 of this EA). Although certification denials for projects requiring FERC licenses are rare, a few such denials have garnered attention. Section 3.1.1 of this EA discusses recent certification denials for natural gas pipelines.

2.1.4 Rivers and Harbors Act Sections 9 and 10 Permits

Rivers and Harbors Act sections 9 and 10 permits cover construction of structures in navigable waters, as well as work in those waters (*e.g.*, dredging). Section 9 permits authorize construction of bridges and causeways, which fall under U.S. Coast Guard jurisdiction, as well as dams and dikes, which fall under Corps jurisdiction.⁹ Section 10 permits authorize construction of wharfs, piers, dolphins, booms, weirs, breakwaters, bulkheads, and jetties, which all fall under Corps jurisdiction (USACE, n.d.-b). Section 10 permits may also authorize dredging for navigation.

2.1.5 Nuclear Power Plant Licenses

NRC issues licenses for nuclear power plants that are often subject to section 401 review because they are typically located adjacent to waters to support the power generation equipment, and they can discharge cooling water (Energy Information Administration, 2020a). According to the Energy Information Administration, “[a]s of the end of December 2018, the United States had 98 operating commercial nuclear reactors at 60 nuclear power plants in 30 states.” (2020b).

2.1.6 Mining Licenses

Based on engagements with other federal agencies, the EPA is adding additional description in this final EA regarding section 401 certifications that may be required for mining licenses. The USDA Forest Service and BLM are responsible for management of surface resources and government-owned minerals on National Forest Service lands. The Forest Service and BLM therefore must approve mine plans of operations before mining activity can take place. Under the final rule, a section 401 certification would be required if such approvals authorize an activity that may result in a discharge from a point source into a water of the United States. Other approvals such as section 404 permits may also be required for such activities. Between 2010 and 2014, the Forest Service and BLM approved 68 mine plans of operations (GAO, 2016). It is not clear how many of the 68 approvals also required section 401 certification.

2.2 Overview of Certifying Authority Actions

A certifying authority may take four potential actions pursuant to its section 401 authority: grant, grant with conditions, deny, or waive certification. The Agency does not maintain a national database of certifying authority actions and therefore does not have available data to quantify the number of actions that fall into each of these categories.

Section 401 certification decisions have varying effects or consequences on project proponents. When certifying authorities grant certification or grant with conditions, the effects on project proponents vary depending on the amount of time taken to review and act on the certification request, license or permit type, and certification conditions (if applicable).

Denials can be an important option for certifying authorities to protect the quality of waters within their jurisdiction. However, when certifying authorities deny certification, the effects on project proponents can be significant. Denials can increase costs to project proponents by delaying projects and causing project proponents to forgo a project after having invested funds and staff time. Denials for large infrastructure projects highlight the potential for denials to have broader economic impacts. For instance, public commenters noted that in the Millennium example case (described in section 3.1.2 of this EA), the project

⁹ 33 U.S.C. 401.

proponent sought a water quality certification for six years and as part of that process, spent \$15 million on an EIS. Another public commenter asserted that the Constitution pipeline (described in section 3.1.1 of this EA) was a \$683 million project that was denied certification three years after the initial request was submitted to the certifying authority. While data to quantify the economic effects of denials are limited, one study noted that recurring denials of FERC-approved natural gas pipelines may affect transportation of natural gas and could have an effect on the reliability of gas-fired electric generators (Weiler and Stanford, 2018). The regulatory uncertainty involving water quality certifications could make it harder for natural gas pipeline developers to access capital markets, which could hinder needed development and increase costs for all (Weiler and Stanford, 2018). Additionally, denials can result in litigation costs to certifying authorities and project proponents when certification decisions are challenged.

When certifying authorities explicitly waive certification, project proponents face no additional effects or processing times related to the certification process. Under the baseline, certifying authorities can also waive certification by failing or refusing to act on certification request within the reasonable period of time, which is established by the federal licensing or permitting agency and can be up to one year.

In the baseline scenario, certifying authorities have generally taken an expansive view of the scope of review for certifications and evaluated the entire proposed project or activity for compliance with the listed CWA provisions¹⁰ and other requirements of State and Tribal law. Under the baseline, certifying authorities have also used a water quality certification to address potential non-water quality impacts and potential impacts from non-point sources of pollution that may be associated with the proposed project, as well as potential impacts to non-federal waters, including groundwater and isolated wetlands.

Under the baseline, certifying authorities make these determinations as follows:

- 1) **Grant certification.** Certifying authorities grant section 401 certification if they determine that the overall project or activity will comply with listed provisions of the CWA and other appropriate requirements of State or Tribal law. Some certifying authorities have taken an expansive view of “other appropriate requirements of State law” to include non-water quality provisions of law. When certification is granted by a certifying authority for a federal license or permit, the federal licensing or permitting agency (hereafter, the “federal agency”) may issue the license or permit.
- 2) **Grant certification with conditions.** Certifying authorities consider and impose limitations or conditions in their section 401 certifications as necessary to ensure the overall project or activity will comply with listed provisions of the CWA and any other appropriate requirement of State or Tribal law. Some certifying authorities have taken an expansive view of conditions that may be authorized under “other appropriate requirements of State law,” including conditions unrelated to water quality. Some courts have concluded that the federal agency must include all of the certification conditions in the resulting license or permit. In practice, some certifying authorities have included conditions on a section 401 certification that are not related to the discharge, the CWA, or water quality (*see* final rule preamble section II.G.1.a and III.E.2.c). When a certification is granted with conditions, the federal agency may issue the license or permit, and any certification conditions included in the section 401 certification become part of the federal license or permit.
- 3) **Deny certification.** Certifying authorities deny section 401 certification if they cannot certify that the overall project or activity will comply with listed provisions of the CWA and other appropriate requirements of State or Tribal law. Some certifying authorities have taken an

¹⁰ 33 U.S.C. 1361(a)(1).

expansive view of “other appropriate requirements of State law” and have denied certification based on non-water quality provisions of law. A certification denial prohibits the federal agency from issuing the license or permit. In practice, some certifying authorities have issued denials for reasons that not related to the discharge, the CWA, or water quality (*see* final rule preamble section II.G.1.a and III.E.2.c). When a certification is denied, the federal agency may not issue the license or permit.

- 4) **Waive.** Certifying authorities may waive section 401 certification, either explicitly through notification to the project proponent or implicitly by failing or refusing to act on a certification request within the reasonable period of time. The CWA establishes a timeframe of a reasonable period that is not to exceed one year for certifying authorities to complete their section 401 certification analysis and decision, and the EPA’s 1971 certification regulations¹¹ specify that the federal agency determines the reasonable period of time within that maximum one-year timeframe. Under the baseline, certifying authorities have often adopted the practice of relying on a complete application, as defined by the certifying authority, to start the clock and begin their review. In some cases, there has been confusion about what constitutes a complete application and what is required to start the clock for the reasonable period of time (*see* section 3.2 of this EA). A waiver does not necessarily indicate a certifying authority’s opinion regarding the potential water quality implications of an overall project or activity since a certifying authority may waive certification for a variety of reasons, including a lack of resources to evaluate the request. When certifying authorities waive certification, the federal agency may issue the license or permit without an affirmative certification from the certifying authority.

Some federal agencies have promulgated regulations establishing the reasonable period of time for certifying authorities to act on certification requests associated with their license or permit processes. For example, the Corps’ regulations provide a 60-day reasonable period of time for section 401 certification reviews associated with section 404 permits,¹² and the Corps released a 2019 Regulatory Guidance Letter (RGL) reinforcing this timeframe (USACE, 2019). FERC regulations provide a full year for certifying authorities to act on a certification request.¹³ The EPA regulations governing certification for federally-issued section 402 NPDES permits provide certifying authorities 60 days to act on a section 401 certification request associated with a draft permit.¹⁴ The EPA’s 1971 certification regulations established a default timeframe of six months.¹⁵

Under the baseline, certifying authorities have commonly used different approaches when they need more time for review than has been provided by the federal agency or authorized by section 401, including:

- 1) Determining that a request is incomplete until the certifying authority is prepared to review or issue the certification.

¹¹ 40 CFR 121.16(b).

¹² 33 CFR 325.2.

¹³ 18 CFR 4.34(b)(5)(iii).

¹⁴ 40 CFR 124.53(c)(3).

¹⁵ 40 CFR 121.16(b).

- 2) Restarting the clock by coordinating to have the project proponent withdraw and resubmit the certification request. The recent *Hoopa Valley Tribe v. FERC*¹⁶ decision concluded this practice is inconsistent with section 401 (*see* section II.F.4.b of the preamble for the final rule).
- 3) Denying certification without prejudice when they lack data or information they believe is necessary for their analysis and then encouraging the project proponent to resubmit the request once data gaps have been addressed.

Using these practices to extend the reasonable period of time, sometimes beyond the statutory one-year limit, may result in project delays that ultimately increase costs for project proponents. The EPA does not maintain a national database on certification decisions or timeframes, and therefore is unable to estimate how many projects are delayed by the practices described above. However, commenters on the proposed rule provided examples of substantial project delays in some cases. Other commenters asserted that most certification decisions are made within one year, but some of these commenters also stated that one year may not be enough time for certifying authorities to act on certification requests for complex projects.

These practices also lead to uncertainty about when the reasonable period of time begins and ends. Recent New York State natural gas pipeline certification denial cases (*see* section 3.1.1 of this EA) and West Virginia's failure to act within the reasonable period of time (*see* section 3.2 of this EA) demonstrate that the baseline practice of requiring a complete application to start the clock can cause confusion, delays, and unintentional waiver. While the EPA does not have data on how commonly unintentional waivers and project delays occur, the example cases demonstrate that the magnitude of the impacts can be high.

During the pre-proposal period and public comment period for the proposed rule, the Association of Clean Water Administrators (ACWA)¹⁷ submitted the summary of a survey it conducted of the 50 States about their section 401 certification processes, including the average annual number of certification requests and denials, certification timeliness, request completeness, and best practices (ACWA, 2019). Thirty-one States responded to the ACWA survey. According to these survey responses, the average length of time for States to issue a certification decision is 132 days after they receive a complete request. This is an average across certifications for all license and permit types. States responding to the ACWA survey cited incomplete certification requests as the most common reason for delays, but the survey did not provide data on the average amount of time it took from the original request to conclude that a request is "complete." Results from the ACWA survey also indicate that denials are uncommon in States that responded, with 17 States averaging zero denials per year and other States issuing denials rarely (ACWA, 2019). A 2011 review of Wisconsin's section 401 certification program found that Wisconsin denied approximately 2 percent of certification requests in 2009 and 2010 (ASWM, 2011a). During this timeframe, the most common cause cited by Wisconsin for the denials was the availability of a practical alternative that would better allow the project proponent to avoid or minimize impacts to wetlands (ASWM, 2011a). A similar review of Delaware's section 401 certification program in 2010 found that Delaware had not recently issued any denials (ASWM, 2011b). A summary of additional survey information was made available by the Western States Water Council (Western States Water Council, 2014). This survey suggests that in the following States denials are uncommon: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wyoming.

¹⁶ *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 650 (2019).

¹⁷ ACWA is a national organization representing the State, Interstate and Territorial officials who are responsible for the implementation of surface water protection programs throughout the nation.

These summary survey data do not adhere to the EPA's requirements regarding data and information quality (U.S. EPA, 2001) (*e.g.*, requirements guiding data generation and acquisition, data validation and usability, etc.) and therefore are not relied upon to support the EPA's rulemaking. However, due to a lack of existing national data on section 401 processes that is discussed in greater detail in section 6 below, these results are, nonetheless, useful for considering baseline practices and estimating potential impacts of this final rule.

3 Section 401 Certification Example Cases Under Baseline

This section describes examples of section 401 certification denials (section 3.1) and circumstances where a certifying authority failed to act (section 3.2). Each of these cases occurred under EPA's 1971 regulations and all but one was described in the proposed EA.

A few commenters suggested that a few, unique, non-representative cases were listed in the proposal as examples of a problem with the section 401 process, but they stated that thousands of section 401 certifications are issued annually without raising any concerns. One commenter said that the EPA should have analyzed all federal license and permit types subject to section 401. Another commenter said that the EPA should analyze a representative sample of section 401 decisions that would be altered under the proposed rule and noted that the current analysis did not include any non-fossil fuel projects.

In response to commenters requesting additional example cases beyond the fossil fuel energy project denials discussed in section 4 of the proposed EA, the Agency has added an example case of a certifying authority failing to act on a certification request for two hydropower projects in West Virginia (*see* section 3.2 of this EA). As noted in the preamble to the final rule, the EPA acknowledges that many certifications reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy. However, these example cases demonstrate that there is existing confusion about the timeline and scope of section 401 under the 1971 certification regulations, which has led to project delays and increased project costs. Section 5 of this EA discusses how the clarity and regulatory certainty provided by the final rule provisions could have changed the outcomes in these example cases.

See the Agency's Response to Comments document in the docket for the final rule (Docket ID No. EPA-HQ-OW-2019-0405) for a full public comment summary and Agency responses.

3.1 Examples Where a Certifying Authority Denied Certification

This section describes four recent examples of energy-related section 401 certification denials. The four denials presented in this section include three natural gas pipelines in New York State (section 3.1.1) and a coal export terminal in Washington State (section 3.1.2).

3.1.1 New York Natural Gas Pipelines

FERC regulates natural gas pipeline market entry under the Natural Gas Act (NGA) by issuing a section 7(c) certificate of public convenience and necessity authorizing the construction of new facilities (Weiler and Stanford, 2018). Under the Energy Policy Act of 2005,¹⁸ FERC has the authority to set a schedule for federal and State agencies to reach a final decision on requests for authorizations necessary for proposed natural gas pipeline projects. The Energy Policy Act of 2005 also specified that in cases in which another agency delays issuing a required permit, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction to address the matter.

¹⁸ 119 Stat. 594; P.L. 109-58; 42 U.S.C. 15801.

FERC more recently granted NGA section 7(c) certificate authorization for the construction of three different interstate natural gas pipeline projects in New York State. FERC conducted environmental reviews, including analyses of each project’s potential impact on water resources, and found that construction and operation of each project would result in no significant environmental impacts (Weiler and Stanford, 2018). The New York State Department of Environmental Conservation (NYSDEC) took a contrary position and denied issuance of section 401 certification for all three projects (Weiler and Stanford, 2018). Table 3-1 summarizes the three natural gas pipeline cases.

Table 3-1: Section 401 certification denial cases			
Project Description	Request Timeframe	Reasons for Denial	Current Status
Constitution Pipeline: 124-mile pipeline from Susquehanna County, PA, to Schoharie County, NY, that would provide 650,000 dekatherms/day of firm transportation service.	Project proponent filed a section 401 certification request on August 22, 2013. NYSDEC requested additional information until it considered the request complete in December 2014. In April 2015, NYSDEC requested the project proponent to withdraw and resubmit the request to restart the maximum one-year reasonable period of time.	NYSDEC issued a denial in April 2016, stating that the certification request failed to address significant water resource impacts that could occur from the project and failed to demonstrate compliance with NY’s WQS.	Project proponent appealed NYSDEC’s decision to the U.S. Court of Appeals for the Second Circuit, but the court upheld the denial. The <i>Hoopa Valley</i> ruling (see section II.F.4.b of preamble for the final rule) opened the possibility that NYSDEC waived certification by exceeding the maximum one-year timeframe. In February 2019, U.S. Court of Appeals for the D.C. Circuit granted FERC’s request to remand the certification waiver question to FERC for a new review. In August 2019, FERC found that NYSDEC had, in fact, waived its authority to issue a certification. On December 30, 2019, NYSDEC appealed the FERC waiver decision to the Second Circuit. On April 8, 2020, the Second Circuit ordered that the case be held in abeyance until the earlier of (1) December 2, 2020, when the FERC certificate of public convenience expires, or (2) the court’s receipt of written notification from the petitioners of another change of circumstances warranting reinstatement of the cases.
Valley Lateral Pipeline: 7.8-mile extension of an existing pipeline in Orange County, NY to serve a new gas-powered	Project proponent filed section 401 certification request on November 13, 2015. NYSDEC initially deemed the request incomplete and requested additional information through August 2016. Project	In August 2017, NYSDEC denied the project proponent’s request on the grounds that FERC’s environmental review of the project was inadequate because it failed to consider downstream greenhouse	Project proponent waited until July 2017 before submitting a request to FERC to proceed with construction, arguing that NYSDEC had waived certification. In September 2017, FERC issued an order stating that NYSDEC had waived certification by exceeding the maximum one-year

Table 3-1: Section 401 certification denial cases

Project Description	Request Timeframe	Reasons for Denial	Current Status
power plant in Wawayanda, NY.	proponent urged NYSDEC to complete its review after receiving FERC authorization in November 2016, but NYSDEC said it had until August 2017 to make a determination. In June 2017 the U.S. Court of Appeals for the D.C. Circuit held that, in light of NYSDEC’s alleged waiver of certification due to failure to act within one year, the project proponent lacked standing to seek an order to compel NY State to act on its request for certification.	gas emissions from the electric generator shipper.	reasonable period of time and issued a Notice to Proceed with Construction. Despite the prior ruling by the U.S. Court of Appeals for the D.C. Circuit, NYSDEC appealed FERC’s decision to the U.S. Court of Appeals for the Second Circuit, but in March 2018 the court ruled in FERC’s favor. 884 F.3d 450 (2nd Cir. 2018). In July 2018, FERC authorized the project proponent to place the new pipeline into service.
Northern Access Pipeline: Project includes 99 miles of pipeline from Sergeant Township, PA to Elma, NY and ancillary facilities to expand firm service by 847,000 dekatherms/day.	Project proponent filed section 401 certification request in February 2016. After NYSDEC did not notify the project proponent about whether the request was complete, the project proponent agreed to a March 2, 2016 date of receipt if NYSDEC issued a decision within the next year. In January 2017, NYSDEC asked the project proponent to amend the prior agreement so that April 8, 2016 would be the date of receipt instead of March 2, and the project proponent complied. After receiving the amendment, NYSDEC deemed the request complete.	In April 2017, NYSDEC denied the project proponent’s request for failing to demonstrate compliance with State WQS, asserting that the project did not adequately mitigate impacts to water quality, jeopardized biological integrity, and impeded best uses of affected waterbodies. Following an appeal to the Second Circuit and a February 5, 2019 remand of the FERC certification denial, NYSDEC issued a revised denial in August 2019. Based on “a thorough evaluation of the Application as well as supplemental submissions,” NYSDEC concluded that “the Application fails to demonstrate compliance with New York State water quality standards.”	The project proponent has appealed FERC’s revised certification denial to the Second Circuit. That appeal is currently being held in abeyance, pending resolution of NYSDEC’s separate appeal to the Second Circuit of FERC’s August 2018 and April 2019 decisions that NYSDEC waived certification by not acting within one year. That waiver appeal is pending; all final form briefs are due to the Second Circuit by June 9, 2020.

3.1.2 Millennium Bulk Terminals in Washington State

Millennium Bulk Terminals—Longview, LLC (Millennium) proposed to construct and operate an export terminal in Cowlitz County, Washington, along the Columbia River (USACE, 2016). The proposed export terminal would receive rail shipments of coal from the Powder River Basin in Montana and Wyoming, and the Uinta Basin in Utah and Colorado. Export terminal employees would receive, blend, and load coal onto vessels in the Columbia River for export. The proposed export terminal would have a maximum throughput of 44 million metric tons of coal per year. The purpose of the proposed project was to transfer western U.S. coal from rail to ocean-going vessels for export to Asia. Millennium identified demand within the Asian market for western U.S. low-sulfur subbituminous coal and determined that existing West Coast terminals were unavailable to serve this need (USACE, 2016).

3.1.2.1 Water Quality Certification Denial

Millennium first submitted a section 404 permit request to the Corps and a section 401 certification request to the Washington Department of Ecology in February 2012 via a Joint Aquatic Resources Permit Application (JARPA), which serves as a joint application for federal, State, and local aquatic resource permits.¹⁹ Millennium withdrew its JARPA in February 2013 at the Corps' request to allow the federal agency more time to complete its regulatory process. *Id.* Millennium intended to resubmit after the environmental review process (Washington Department of Ecology, 2019), and resubmitted its JARPA in July 2016. In September 2016, the Corps issued a draft Environmental Impact Statement (EIS) for the proposed project under the National Environmental Policy Act (NEPA). Cowlitz County and the Washington Department of Ecology also issued an EIS under the State Environmental Policy Act in April 2017 (Washington Department of Ecology, 2019). As noted by a public commenter on the proposed rule, the State's EIS concluded in section 4.1.5.8 that compliance with laws and implementation of the measures and design features described throughout section 4 of the EIS would reduce impacts on water quality, and there would be no unavoidable and significant adverse environmental impacts on water quality (Cowlitz County and Washington Department of Ecology, 2017). In September 2017, the Washington Department of Ecology denied section 401 certification for the project and asserted that the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and Tribal resources as a result of not meeting State WQS (Washington Department of Ecology, 2019).

3.1.2.2 Current Status

To date, all court challenges to the section 401 certification denial have resulted in rulings favorable to the Department of Ecology. Millennium appealed the denial to Cowlitz County Superior Court and the Washington State Pollution Control Hearings Board. The Cowlitz County Superior Court dismissed Millennium's appeal in March 2018, stating that the appeal must first be heard by the Pollution Control Hearings Board (Washington Department of Ecology, 2019). The Pollution Control Hearings Board ruled in Washington Department of Ecology's favor in August 2018.²⁰ Millennium submitted a second appeal to the Cowlitz County Superior Court following the Pollution Control Hearings Board's ruling. Millennium also filed a challenge in Federal District Court against the Department of Ecology director, the Department of Natural Resources commissioner, and Washington's Governor Inslee, arguing that the denial interfered with foreign and interstate commerce²¹. The federal court dismissed the case against the

¹⁹ *Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology*. Docket 18-2-00994-08. Petition for Review.

²⁰ *Millennium Bulk Terminals—Longview, LLC v. State of Washington, Department of Ecology*, PCHB No. 17-090 (2019).

²¹ *Lighthouse Resources, Inc. v Inslee*, No. 3:18-cv-05005-RJB (W.D. Wash. Dec. 11, 2018)

Department of Natural Resources commissioner in October 2018. *Id.* In December 2018, the federal court granted summary judgment against a portion of Millennium’s claims by determining that the State of Washington’s denial did not violate two federal laws, the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act.²² Millennium has appealed those rulings to the Ninth Circuit Court of Appeals (Docket No. 19-35415). As of March 27, 2020, the district court case was stayed and the appeal was still pending.

Although Washington denied section 401 certification for the proposed export terminal, the Corps restarted the federal permitting and environmental review process in November 2018 (Washington Department of Ecology, 2019). This decision prompted the Washington State Attorney General to send a letter to the Corps Lieutenant General expressing concern that restarting the permitting process undercuts the federalism partnership in the CWA and section 401 (Ferguson, 2018). The Corps’ efforts to update the EIS and coordinate compliance with section 106 of NHPA are ongoing.²³

A commenter on the proposed EA maintained that the proposal misrepresented the facts surrounding the Millennium certification, and that the terminal project has been independently rejected by two other decision-makers on State law grounds. The commenter asserted that this means the coal terminal could not be built regardless of whether the company had received a section 401 certification. The final EA reflects more recent developments regarding the facts of the Millennium CWA certification. While it is true that a number of State permits for the project have been denied by State officials, it is also true that, regardless of the final disposition of those matters, unless overturned by a court of competent jurisdiction, the State’s denial with prejudice of Millennium’s CWA section 401 certification request prevents the project from going forward as a matter of federal law.

3.2 Examples Where a Certifying Authority Failed to Act

On February 27, 2014, the Free Flow Power Corporation (FFP) filed applications with FERC for the construction and operation of six hydropower projects to be located at the Corps’ dams on the Monongahela River.²⁴ Two of these hydropower projects would occur in West Virginia, while four would occur in Pennsylvania. The six Monongahela River Projects would provide hydroelectric generation to meet part of West Virginia’s and Pennsylvania’s power, resource diversity, and capacity needs. The projects would have a combined installed capacity of 53 MW, and over the term of the licenses would generate an average of about 213,300 MWh per year (FERC, 2016).

On February 12, 2016, the West Virginia Department of Environmental Protection (WV DEP) received water quality certification requests from FFP for the Morgantown and Opekiska projects.²⁵ On March 9, 2016, WV DEP deemed the applications complete and stated that, per West Virginia regulations, it had one year from that date to act on FFP’s requests. On March 8, 2017, WV DEP issued section 401 water quality certifications with 18 conditions for the projects. However, FERC staff determined that, by not acting on FFP’s requests within a year of receiving them, WV DEP waived certification. Despite WV DEP’s reliance on West Virginia regulations, FERC staff explained that the EPA’s 1971 certification regulations and FERC’s certification regulations clearly state that the triggering event for the maximum one-year timeframe is the day the certifying authority receives the request for water quality certification. WV DEP thus needed to issue a determination by February 12, 2017, to avoid waiving its authority. Since

²² Case No. 3:18-CV-05005-RJB, United States District Court, Western District of Washington at Tacoma (2019).

²³ Personal communication USACE.

²⁴ 162 FERC ¶ 61,237.

²⁵ *Id.*

WV DEP had not issued the water quality certifications until March 8, 2017 and FERC concluded that WV DEP had waived certification, the conditions included in the late-issued certifications had no effect. Ultimately, FERC did not include WV DEP's conditions in either license. On October 27, 2017, Morgantown, West Virginia and River Conservancy requested rehearing of the License Orders, arguing that FERC erred in its determination that WV DEP waived certification. On March 15, 2018, FERC denied the rehearing request, reaffirming the original reasoning that WV DEP waived certification by failing to act on the request within one year of receipt.²⁶

The certification waivers in these cases resulted from differing interpretations about the triggering event for the maximum one-year reasonable period of time. Section 401 of the CWA, the EPA's 1971 certification regulations, and FERC's certification regulations clearly state that receipt of the request starts the reasonable period of time. However, like many certifying authorities, WV's State regulations provide that the reasonable period of time does not start until it receives a complete request. These differing interpretations resulted in the certifying authority unintentionally waiving certification, which prevented the certifying authority from adding conditions to the water quality certifications. The project proponent was also affected by the differing interpretations because the water quality certification review was delayed beyond the maximum one-year reasonable period of time, leading to delay and additional uncertainty. This outcome also underscores the importance of early communication between the certifying authorities and the federal licensing or permitting agency to ensure that all parties understand the timeline within which action on a certification request must occur.

4 Potential Effects of the Final Section 401 Certification Regulations

The EPA is finalizing revisions to its 1971 certification regulations, presented here across the three categories of timeframe, scope, and pre-filing meeting requests. These sections do not discuss the provisions that only apply to the EPA as the certifying authority since these provisions affect a small number of section 401 certification requests.²⁷ Sections 4.1 through 4.3 of this EA provide additional details about the generally applicable final rule provisions, and section 4.4 focuses on potential effects of the final rule on federal agencies, States, and Tribes. This section of the EA has been updated to incorporate provisions from the final rule and to respond to public comments on the proposal.

The requirements for when certification is required are set out in section 401 and have not changed from the 1971 regulations. As a result, the Agency does not expect that these final rule provisions will change the number of certification requests when compared with the baseline scenario. The Agency does not have data to estimate the number of certification actions (grant, grant with conditions, deny, or waive) per year, nor does the Agency have data to suggest how these actions will change under the final rule. EPA has used the number of federal licenses and permits issued as an indicator of how many certifications may be granted or waived annually, but that number would not account for certification requests that may have been denied or certification requests that were withdrawn and resubmitted.

As described in section 2 of this EA, external surveys and commenters on the proposal have suggested that certification denials are rare. The Agency acknowledges commenter concerns that the clear timeframe provisions in the final rule may lead to more denials, but the Agency believes that any new

²⁶ *Id.*

²⁷ On average, the EPA estimates it performs 54 CWA section 401 water quality certification decisions per year for projects on Tribal lands where the Tribe does not have TAS.

pressure on a certifying authority to deny within the reasonable period of time will be offset by the benefits of the pre-filing meeting requirements described in section 4.3.2 of this EA. Additionally, the final rule may reduce the number of denials that are based on information that is beyond the scope of certification (*e.g.*, considerations unrelated to the discharge). As such, the EPA expects denials will continue to be rare under the final rule.

By clarifying the timeframe for certifying authorities to act on certification requests under the final rule, the Agency anticipates more predictability in the certification process, including certainty about when project proponents should expect a decision on a certification request. Additionally, including clear information requirements for denials in the final rule will allow the project proponent to understand the basis for denial and have an opportunity to modify the project or to provide new or additional information in a new certification request.

As discussed below, the Agency anticipates that the final rule will result in more predictable, efficient decision-making by certifying authorities as compared with the baseline scenario discussed in section 2 of this EA. The final rule may reduce some flexibility for certifying authorities, for instance by defining a “certification request” that starts the reasonable period of time and precluding certifying authorities from unilaterally extending the reasonable period of time. This final rule may impose some new burden if project proponents decide to resubmit applications that were rejected by certifying authorities within the newly clarified reasonable period of time. The final rule may also impose some new burden on project proponents by requiring a pre-filing meeting request be filed with certifying authorities at least 30 days before submitting a certification request. However, the Agency expects that the overall benefits of the final rule will result in reduced information and review burden for certifying authorities, reduced regulatory burden for project proponents, and a net decrease in overall costs for the certification process. The final rule reduces the burden placed on certifying authorities through the clearer scope of certification, affirming that the reasonable period of time does not exceed one year, and establishing the pre-filing meeting request requirement. Additionally, the final rule helps ensure that certification conditions are enforceable by the federal agency issuing the license or permit with those conditions, potentially relieving certifying authorities of the burden and cost of enforcement and oversight.

By clarifying ambiguities in CWA section 401, the final rule also serves to simplify and normalize the certification process for certifying authorities. The final rule is expected to increase regulatory certainty, reduce costs, and minimize delays for project proponents, including small entities. The EPA further determined that improved clarity on the scope of section 401 will likely make the certification process more efficient for project proponents and certifying authorities alike, resulting in a net reduction in regulatory burden and costs. Therefore, the Agency does not expect the cost of the rule to result in significant economic impact on a substantial number of small entities. Given these expected outcomes and pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), the EPA considers the final rule to be a deregulatory action.

Table 4-1 summarizes potential effects of the final rule on certifying authorities and project proponents as compared with the baseline scenario.

Table 4-1. Summary of potential effects of final section 401 revisions				
Final Rule Provision and Net Economic Effect	Certifying Authorities		Project Proponent	
	Potential Improvements	Potential Consequences	Potential Improvements	Potential Consequences
Timeframe: Net Reduction in Costs	Improved clarity of when the clock starts; less litigation about delays; fewer unintended waivers	Less time to collect and generate information to inform decisions; may lead to more denials or waivers	Certainty that the certification process will not exceed the maximum of one year; improved clarity of when the clock starts; less litigation about delays and if waiver occurred	More denials
Scope: Net Reduction in Costs	Less burden to request and evaluate out of scope information, including effects of the overall project or activity on non-point discharges to non-WOTUS; and on air quality, transportation and other non-water quality impacts; less litigation about what is the appropriate scope of a certification review; shorter section 401 certification review times; certification condition elements may increase enforceability of certification conditions; denial elements build a strong record of denial decision-making	Increased litigation if conditions or the reasons for denial extend beyond the scope of certification; waiver of conditions or denials may occur if certifying authorities do not provide the three elements to support a denial and two elements to support certification conditions	Less burden to generate and produce out of scope information, including effects of the overall project or activity; on non-point discharges to non-WOTUS; and on air quality, transportation and other non-water quality impacts; less litigation about what is the appropriate scope of a certification review; shorter section 401 certification review times; fewer non-water quality conditions on certification	No substantial consequences anticipated
Pre-Filing Meeting Request Requirement: Net Reduction in Costs	May result in fewer incomplete certification requests and provide advance notice of requests; promote early engagement to understand proposed projects before the reasonable period of time begins; facilitate relationship development and rapport between certifying authorities and project proponents	Not all certifying authorities may have the budget/capacity to support pre-filing meetings	Pre-filing meetings help establish data needs for a timely review; promote early engagement with certifying authority before the reasonable period of time begins; facilitate relationship development and rapport between certifying authorities and project proponents	Minimal increased labor burden to request meeting and attend if accepted; potential additional fee/burden if certifying authorities charge fees for pre-filing meetings

4.1 Timeframe

4.1.1 Final Rule Provisions

The CWA states that certifying authorities must act on a request for certification “within a reasonable period of time (which shall not exceed one year) after receipt of [a certification] request.”²⁸ The EPA’s 1971 certification regulations (section 121.16(b)) specify that the federal licensing or permitting agency determines the reasonable time period within that maximum one-year timeframe, and the final rule reaffirms this requirement. In addition, the final rule clarifies that the reasonable period of time to act on a section 401 certification begins after receipt by the certifying authority of a “certification request,” as defined in the final rule.

The final rule contains specific information requirements that must be submitted in a written certification request to start the reasonable period of time. If any of the requirements are missing from the certification request, the statutory reasonable period of time does not start. The final rule contains different certification request requirements for individual licenses and permits and for the issuance of general licenses and permits.

For an individual license or permit, the project proponent must submit a written request for certification to the certifying authority that includes the following information (including seven components similar to those in the proposed rule and **two new components in bold**):

1. identify the project proponent(s) and a point of contact;
2. identify the proposed project;
3. identify the applicable federal license or permit;
4. identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
5. include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
6. include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
7. **include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;**
8. **contain the following statement: ‘The project proponent hereby certifies that all information contained herein is, true, accurate, and complete to the best of my knowledge and belief’;** and
9. contain the following statement: ‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’

For issuance of a general license or permit, the project proponent must submit a written request for certification to the certifying authority that includes the following information (including seven components similar to those in the proposed rule and **two new components in bold**):

- 1) identify the project proponent(s) and a point of contact;
- 2) identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;
- 3) include the draft or proposed general license or permit;

²⁸ 33 U.S.C. 1341(a)(1).

- 4) estimate the number of discharges expected to be authorized by the proposed general license or permit each year;
- 5) **include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;**
- 6) **contain the following statement: ‘*The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief*’; and**
- 7) contain the following statement: *‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’*

The final rule clarifies the procedures by which federal agencies communicate the reasonable period of time to certifying authorities. Under final rule section 121.6(b), within 15 days of receiving the notice of the certification request from the project proponent, the federal agency shall provide, in writing, the following information to the certifying authority: the date of receipt, the applicable reasonable period of time to act on the certification request, and the date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.

Additional final rule revisions reinforce that the maximum reasonable period of time is one year from receipt of the certification request. The final rule also prohibits a certifying authority from taking actions to extend the maximum timeframe beyond one year from receipt of the certification request, thereby precluding the coordinated withdrawal and resubmittal practices that occur under the baseline scenario, as described in section 2.2 of this EA.

4.1.2 Potential Effects - Timeframe

For both certifying authorities and project proponents, the final rule provides clarity regarding the start of the review clock and reduces uncertainty and potential litigation about whether the reasonable period time has begun and whether certifying authorities waived certification by failing or refusing to act within the reasonable period of time. Recent New York State natural gas pipeline certification denial cases (*see* section 3.1.1 of this EA) and West Virginia’s failure to act within the reasonable period of time (*see* section 3.2 of this EA) demonstrate that the baseline practice of requiring a complete application to start the clock can cause confusion, delays, and unintentional waivers. In these cases, the certifying authority requested additional information from the project proponent or spent time reviewing the request before deeming the request complete and starting the statutory clock. FERC ultimately ruled in these cases that the certifying authority had waived certification by failing to act within the one-year reasonable period of time.

The EPA anticipates that defining “certification request” and including specific elements of a certification request in section 121.5(b) and (c) of the final rule will reduce confusion about when the clock starts and ends, reduce delays, and reduce unintentional waivers by certifying authorities as compared with the baseline scenario. Additionally, the final rule includes specific procedures by which federal agencies communicate the reasonable period of time under the final rule, including the date upon which waiver will occur if the certifying authority fails or refuses to act. Increased clarity will also ensure that certifying authorities have the opportunity to protect water quality from the impacts of federally licensed or permitted projects, rather than unintentionally waiving certification.

The final rule provides additional clarity about the timeframe, including the maximum reasonable period of time and when the statutory clock begins. These provisions are expected to reduce delays and could yield additional cost savings. Extended delay while waiting for an action on a certification request is an opportunity cost to the project proponent, meaning that sidelined investment funds awaiting action could

have been invested elsewhere. The sooner the project proponent knows of a denial, the sooner alternative investments can be considered which could generate benefits. Similarly, timely certifications and issuance of a federal license or permit can allow proposed projects to begin generating benefits sooner. In addition, legal risk and associated costs could also be reduced by increased regulatory clarity and transparency as well as by better defining milestones and responsibilities. Project proponents and certifying authorities are likely to benefit from clear regulations and face less legal risk associated with poorly defined certification processes.

The EPA expects that the definition of “certification request” and including specific elements of a certification request in section 121.5(b) and (c) of the final rule could, in cases where State or Tribal law may have more broad or open-ended information requirements for a complete application, reduce the burden placed on project proponents and certifying authorities. More clear and transparent requirements allow all entities to make decisions with symmetrical information which should lead to reduced ambiguity, confusion, and delay. While States could still require additional information from project proponents, the section 401 water quality certification process and its unambiguous timeframe would not be unnecessarily burdened or impeded by any such additional information collection.

The final rule makes it clear that certifying authorities are not authorized to request the project proponent to withdraw a certification request or to take any other action (other than specified in final rule section 121.6(d)), formally or informally, to modify the reasonable period of time. By specifically addressing the withdrawal and resubmittal mechanism previously used to extend the reasonable period of time beyond the statutory maximum one year, the EPA expects that certification requests will be acted upon within the reasonable period of time, allowing for a more streamlined and transparent process. If a certifying authority approaches the end of the maximum one-year timeframe and is unable to certify a section 401 certification request, two options remain available: denial or waiver. The final rule reaffirms the ability of a project proponent to submit a new certification request if a previous request is denied. By clarifying the timeframe for certifying authorities to act on certification requests under the final rule, the Agency anticipates more predictability in the certification process, including certainty about when project proponents should expect a decision on a certification request. The final rule’s requirements that certain information be included in a certification denial will assist the project proponent in submitting a new request for certification that addresses the water quality issues identified in the denial. The process improvements included in the final rule will increase clarity and regulatory certainty as compared with the practices described in the baseline scenario (*see* section 2 of this EA).

The EPA received public comments that establishing that the reasonable period of time begins after receipt of a certification request and precluding the withdrawal and resubmittal approach for extending the reasonable period of time could lead to more denials. Some States submitted public comments asserting that they may choose to deny certification rather than make a certification determination without complete information or risk inadvertently waiving certification. The Agency understands the concerns raised by these commenters but, as described in the final rule preamble in section III.C, the list of information and materials required in a certification request is not an exhaustive list of materials that may be necessary to make a certification decision. Certifying authorities can request additional information from project proponents, so long as they act on the certification request within the reasonable period of time. The EPA also expects that pre-filing meetings will provide an important opportunity for certifying authorities and project proponents to discuss the proposed project and potential information needs prior to the start of the reasonable period of time.

4.2 Scope

4.2.1 Final Rule Provision

Under section 121.3 of the final rule, “[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” “Water quality requirements” is defined in the final rule to mean applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and State or Tribal regulatory requirements for point source discharges into waters of the United States. See final rule preamble section III.E for a full analysis of the final scope of certification.

To provide transparency to the project proponent and the public, and to provide a framework for certifying authorities to act within the scope of certification, final rule section 121.7(d) provides that for each condition, a certification must include the following supporting information:

- 1) For certification conditions on an individual license or permit,
 - a. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and
 - b. A citation to federal, state, or tribal law that authorizes the condition.
- 2) For certification conditions on issuance of a general license or permit,
 - a. A statement explaining why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements; and
 - b. A citation to federal, state, or tribal law that authorizes the condition.

To provide transparency to the project proponent and the public, and to provide a framework for certifying authorities to act within the scope of certification, final rule section 121.7(e) provides that a denial must include the following supporting information:

- 1) For denial of certification for an individual license or permit,
 - a. The specific water quality requirements with which the discharge will not comply;
 - b. A statement explaining why the discharge will not comply with the identified water quality requirements; and
 - c. If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.
- 2) For denial of certification for issuance of a general license or permit,
 - a. The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;
 - b. A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and
 - c. If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

Under the final rule, the federal agency responsible for issuing the license or permit will review certification conditions and denials to determine if they include the required supporting information. The federal agency may waive any certification condition for which the required documentation is not included, although waiving a certification condition does not invalidate the entire certification. The

federal agency may also treat a denial that does not include the required documentation as a waiver. While the requirements in the final rule to include supporting information for a certification condition or denial may create an additional administrative burden on certifying authorities, such a burden should be marginal because certifying authorities are likely already developing this information as part of the administrative record to support decisions to grant, grant with conditions, or deny certification. By including specific information requirements for certification conditions and denials, the final rule promotes decision-making that is transparent to the project proponent, federal agency, and the public.

4.2.2 Potential Effects of the Final Rule - Scope

The EPA expects that the scope of certification under the final rule will increase clarity and regulatory certainty for certifying authorities and project proponents, resulting in net cost savings due to reduced project delays, reduced litigation, and clear information requirements for certifications. For certifying authorities that, under the baseline scenario, currently review, condition, or deny certifications using information or criteria that are outside the final rule's scope of certification, the final rule will likely reduce the time spent requesting out of scope information from the project proponent, reviewing out of scope information or data, and ultimately reduce the time spent on each certification request and reduce labor costs. In these circumstances, reduced review times may also translate into reduced wait times for project proponents. For project proponents, the scope of certification in the final rule will likely reduce the burden of developing and producing out of scope information and data that may be requested by certifying authorities under baseline. The final definition of "water quality requirements" should also eliminate non-water quality related certification conditions that may be required by the certifying authority under baseline, potentially reducing implementation and enforcement costs to the federal licensing and permitting agencies and reducing compliance costs for project proponents.

The final rule's requirement in section 121.7(d) to provide supporting information for each certification condition may increase implementation and enforceability of the conditions which would lead to potential increases in water quality protection. As described in section III.G.2.b of the final rule preamble, if the project proponent and the federal licensing and permitting agencies understand why the condition is necessary and the legal basis for the condition, implementation and enforcement of the condition will be more effective and lead to greater water quality protections. Along the same lines, the final rule's requirement in section 121.7(e) to provide supporting information for a certification denial helps maintain transparency and provides a strong record of decision-making that may help certifying authorities defend their decision against legal challenges.

Under the final rule, federal agencies may waive certification conditions and denials if the certifying authority fails to include the supporting information required in sections 121.7(d) and (e) of the final rule. Unlike the proposed rule, federal agencies are not authorized to review certification conditions and denials to ensure they are within the scope of certification; rather this substantive review is reserved for courts of competent jurisdiction.

By specifying that the scope of section 401 review is limited to water quality requirements, as defined in the rule, the final rule provides additional clarity on the types of certification conditions that are appropriate and lawful under section 401. This additional clarity should reduce confusion as compared with the baseline scenario, and therefore reduce litigation between the project proponent and the certifying authority about whether a certification condition or denial is within the scope of certification. Defining the scope as limited to water quality requirements will eliminate the ability of certifying authorities to use the certification process to condition federal licenses or permits based on air pollution, land use, and other non-water quality impacts.

4.3 Pre-Filing Meeting Request Requirement

4.3.1 Final Rule Provisions

To further assist with efforts to promote more complete certification requests, the EPA is finalizing a requirement that all project proponents request a meeting with a certifying authority at least 30 days prior to submitting a certification request. The final rule expands the application of this requirement to all section 401 certification requests, not just those submitted when the EPA is the certifying authority as was proposed. Under the final rule, certifying authorities are not required to accept the pre-filing meeting request, but at a minimum, the meeting request will provide advanced notification to the certifying authority that a certification request may be forthcoming. The final rule does not prescribe any methodology for conducting the pre-filing meetings, but under the final rule, if the certifying authority grants the pre-filing meeting, the project proponent and the certifying authority are encouraged to discuss the nature of the proposed project and potential water quality effects. The final rule also encourages the project proponent to provide a list of applicable State, Tribal, and federal licenses and permits and describe the anticipated timeline for construction and operation. After receiving the pre-filing meeting request, the certifying authority is encouraged to contact the federal agency and identify points of contact at each agency to facilitate information sharing throughout the certification process.

4.3.2 Potential Effects of the Final Rule – Pre-Filing Meeting Request Requirement

Although pre-filing meetings can place additional burden on both project proponents and certifying authorities, the process is ultimately expected to reduce burden elsewhere in the section 401 certification process and will result in a net reduction in costs. The baseline withdrawal and resubmit process highlights informal engagement currently occurring for larger and more complex projects. The pre-filing meeting would provide more formal opportunity between the project proponent and the certifying authority and shift its occurrence to earlier in the certification process, which may help project proponents provide relevant information and certifying authorities to act within the reasonable period of time.

Some States already provide formal and informal pre-filing meetings, indicating these States believe such meetings are beneficial. Some States recommend or require project proponents to request pre-filing meetings (*see* section 4.4 of this EA). The requirement in the final rule for all project proponents to submit a pre-filing meeting request will provide all certifying authorities with the option to learn about and discuss proposed projects prior to receiving a certification request, which represents an improvement from the baseline scenario. Pre-filing meetings benefit certifying authorities and project proponents by helping everyone understand the proposed project and the type of information or data that may be necessary for a timely and substantively complete section 401 review.

Under baseline, certifying authorities seek out early engagement with project proponents on an inconsistent basis. The final rule requires project proponents to submit written pre-filing meeting requests to all certifying authorities, which may place a burden on project proponents when certifying authorities accept such meetings. In addition to the potential time burden, project proponents may be required to pay a fee for a pre-application meeting. For example, Michigan uses a joint State and Corps permit application, and project proponents currently have the option to request a pre-application meeting for a fee up to \$1,100 (Michigan Department of Environmental Quality, 2019). As pre-filing meetings become more common as a result of this rulemaking, certifying authorities may consider adding pre-filing meeting fees to help cover their administrative costs. However, the EPA does not have information on which States may impose these fees or the magnitude of potential future-imposed fees.

The burden of the pre-filing meeting provision on certifying authorities depends on multiple factors. First, the burden depends on how much the baseline scenario changes as a result of this final rule provision. Some certifying authorities are already engaging in pre-filing meetings with project proponents and may

thus experience limited to no changes as a result of this provision of the final rule. Second, the burden depends on each certifying authority's acceptance rate for pre-filing meeting requests. To minimize costs and burdens on staff, certifying authorities can decline all meeting requests or choose to decline meeting requests for routine or non-complex projects and only accept the meeting for larger or complex projects. Third, the burden depends on the methodology that certifying authorities use to conduct pre-filing meetings. Certifying authorities can use methodologies that would limit staff time and resources, such as conducting the meeting online or via phone call. Lastly, the burden also depends on whether a certifying authority implements a pre-filing meeting fee to help cover costs. The EPA recognizes there is considerable uncertainty in estimating how certifying authorities may change the baseline scenario in response to the final rule (*see* Table 6-1).

4.4 Potential Effects on Federal Agencies, States, and Tribes

Federal agencies can play an important role in facilitating information collection, sharing information amongst involved parties, and clearly communicating project milestones and deadlines during the federal license and permitting process. The changes in this final rule highlight how federal agencies are uniquely positioned to promote pre-filing coordination with certifying authorities and project proponents to harmonize project planning activities and promote timely action on certification requests. The final rule does not explicitly require federal agencies to change their existing regulations to reflect these updated requirements. For this reason, the EA does not attempt to quantify those potential costs. However, the Executive Order directs federal agencies to update their regulations to ensure consistency with the EPA's final updated regulations. The final rule highlights the need for clear communication between entities and outlines opportunities for certifying authorities and federal agencies to facilitate this communication.

Certifying authorities generally delineate their section 401 requirements in statutes, regulations, guidance documents, and forms. Some public commenters on the proposed rule noted that States that have section 401 regulations, statutes, guidance documents, and forms that are inconsistent with this final rule may face a range of risks. Some commenters asserted that the timeframe for certification reviews may conflict with current State laws, such as State laws requiring time to determine collection of all necessary information or development of environmental impact reports, public participation timeframes, and withdrawal and resubmittal processes. One commenter stated the proposed rule would require States to change their laws to comply with the EPA's new rule. Other commenters urged the EPA to include a process by which States can assess the compatibility of their respective section 401 certification rules with the EPA's final rule.

The final rule does not require States or Tribes to update their regulations, statutes, guidance documents, or forms. Section 401 is a direct grant of authority to States and authorized Tribes to review proposed federal licenses and permits and grant, deny or waive certification as appropriate. Unlike the section 402 and 404 permit programs, the CWA does not require EPA to approve State or Tribal administration of the 401 program. The CWA also does not require States or Tribes to establish regulations to implement section 401, but many States and some Tribes have voluntarily promulgated section 401 implementing regulations. Additionally, any changes made by a State or Tribe to their section 401 program do not require formal approval by the EPA to go into effect. In summary, by finalizing this rule, EPA is neither mandating that conforming changes be made to State or Tribal regulations, nor overseeing in any capacity such changes. The EPA is not aware to what extent States or Tribes may update their regulations so does not attempt to quantify potential costs associated with States or Tribes doing so. However, the Agency recognizes that in order to increase certainty and clarity and to avoid other negative outcomes, certifying authorities may update their section 401 requirements to conform with the final rule provisions. Subsequent rulemakings promulgated by other federal agencies (*e.g.*, Corps, FERC, etc.) could increase the likelihood that certifying authorities update their section 401 requirements. Inconsistencies between

State and federal law may lead to negative outcomes such as regulatory uncertainty, decreased project viability, and legal risks which could increase the burden on certifying authorities and project proponents. Because certifying authorities delineate their requirements in different ways, the EPA is unable to fully describe all potential revisions States may make or the associated costs. The following paragraphs discuss potential changes States may make in response to the final rule. The EPA reviewed select topics covered in State section 401 regulations that may differ from the final rule provisions.

Some State section 401 regulations include language stating that the reasonable period of time (a maximum one-year statutory timeframe determined by the federal agency) begins after the State receives a complete application or after the certifying authority determines that a certification request is complete. Some State regulations identify the components that must be included in a complete request, including open-ended requests for all information related to potential impacts from the proposed project. The request components required in the final rule do not cover the universe of all components from all State programs. This is particularly true for open-ended information requests that may exceed the scope of certification provided in the final rule. Although the final rule does not prevent States from requiring additional information beyond what is described in the final rule, States cannot use these additional information requirements to delay the start or the conclusion of the reasonable period of time. States with language indicating that the maximum one-year statutory timeframe starts after they receive a complete application or after they determine that a certification request is complete, based on components listed in the State regulation but that are not reflected in the final rule, may update their regulations to conform with the final rule.

Some State section 401 regulations recommend or encourage project proponents to request meetings with the State prior to the submittal of a certification request. However, under the final rule, project proponents (including federal agencies seeking to issue general license or permits) are required to request pre-filing meetings for every project. While the final rule mandates that the project proponent request a pre-filing meeting, it is essentially providing notice to the certifying authority as there is no requirement for the certifying authority to hold the pre-filing meeting. States may update their regulations to require a pre-filing meeting request for all projects.

States also have different fee structures for 401 certifications. Some State section 401 regulations mention the existence of a fee but do not include specific language about the response to nonpayment of the fees. Other States include language about nonpayment of applicable fees; for example, regulations may specify that fees must be paid to produce a complete application and start the review process, or that an application is considered withdrawn if the project proponent fails to pay the appropriate fee within a specified time period. The final rule does not include payment of fees as one of the required certification request components, nor is nonpayment of fees included as an element of a certification denial in section 121.7(e) of the final rule. The final rule does not prevent or preclude a certifying authority from requiring fees, and the EPA encourages the project proponent and the certifying authority to discuss during the pre-filing meeting the certifying authority's fee structure and the project proponent's obligation, if any, to pay a fee related to the water quality certification. Given the States' differing practices in this area, the final rule does not include proof of fee payment as a required component of a certification request to trigger the statutory timeframe for State or Tribal action.

In accordance with the Paperwork Reduction Act, the EPA has developed a proposed ICR for the final rule. As noted above, ICRs are developed based on available information about how a regulation may affect a respondent. That ICR estimates that under the final rule, respondents will submit approximately 1 million certification requests per year and that annual paperwork burden is expected to be approximately 931,000 hours. ICRs are developed based on available information about how a regulation may affect a respondent; however, the data used to support this ICR is not robust enough to rely on for the

development of a quantitative economic analysis. To estimate the burden for this ICR, the EPA selected the midpoint of an estimated low and high burden. The low-end burden was taken from EPA ICR Number 0229.23, which was established for section 401 certifications for federally issued NPDES permits and does not capture the range of certification requests prepared by project proponents and reviewed by certifying authorities. The high-end burden was established based on information provided by six respondents to an EPA questionnaire, which is not expected to be representative of the whole population of certifying authorities and is not representative of the population of project proponents. The limitations and uncertainties in this data set preclude its use for the development of a quantitative economic analysis. The EPA estimated a reduction in burden because there are fewer information requirements in the final rule, and because the scope of the final rule is limited to discharges rather than the activity as a whole. The ICR burden estimates are provided in this EA for informational purposes only and are not intended for use as quantitative conclusions about potential economic costs or benefits of the final rule.

5 Possible Effects on Example Cases

Example cases presented in section 3 demonstrate the potential for confusion and regulatory uncertainty under the baseline scenario. The final rule addresses this confusion and regulatory uncertainty by clarifying the timeframe for certifying authorities to act on a certification request and the scope of certification review, and by adding a pre-filing meeting request requirement to encourage early communication, collaboration, and information sharing among project proponents, certifying authorities, and, in some cases, federal licensing and permitting agencies. This section discusses how the final rule could have affected the example cases of certification denials (section 3.1) and failure to act (section 3.2).

5.1 New York Natural Gas Pipelines

Table 5-1 summarizes how the final rule could have impacted recent denial cases for natural gas pipelines in New York State.

Table 5-1: Possible impacts of the final section 401 revisions on recent New York State pipeline denials			
Final Revision	Constitution Pipeline	Valley Lateral Pipeline	Northern Access Pipeline
Timeframe	Project proponent filed section 401 certification request on August 22, 2013. The final rule unambiguously provides that a decision would have been required by August 2014 (actually issued April 2016).	Project proponent filed section 401 certification request on November 13, 2015. The final rule unambiguously provides that a decision would have been required by November 2016 (actually issued August 2017).	Project proponent filed section 401 certification request in February 2016. The final rule unambiguously provides that a decision would have been required by February 2017 (actually issued April 2017).
Scope	NYSDEC denied section 401 certification for failing to demonstrate compliance with NYS WQS, so the final rule scope of certification is	NYSDEC denied section 401 certification because FERC’s environmental review of the project failed to consider downstream greenhouse gas emissions from the electric generator shipper. This denial	NYSDEC denied section 401 certification for failing to demonstrate compliance with State WQS, so the final rule scope of certification is

Table 5-1: Possible impacts of the final section 401 revisions on recent New York State pipeline denials			
Final Revision	Constitution Pipeline	Valley Lateral Pipeline	Northern Access Pipeline
	unlikely to have impacted this case.	would be subject to challenge because it was based on greenhouse gas emissions, which is beyond the scope of certification in the final rule. However, if NYSDEC had provided the three elements to support a denial, the denial would have passed federal agency review. If NYSDEC had not provided the three elements of a denial, FERC may have treated the decision as a waiver.	unlikely to have impacted this case.

Overall, the final rule provisions that could have resulted in the biggest outcome changes for the New York pipeline cases are the timeframe changes. The review timeframe revision would have necessitated a section 401 certification decision within one year of receiving the request for certification. Instead, a decision took three years in the Constitution case, nearly two years in the Valley Lateral case, and 14 months in the Northern Access case. The pre-filing meeting request requirement of the final rule may also have helped NYSDEC and the project proponents meet the maximum one-year reasonable period of time by identifying potential data needs early in the process.

The Valley Lateral pipeline denial is the most likely of the three cases to have a different result under the final rule’s scope of certification. In this case, NYSDEC denied section 401 certification because of greenhouse gas effects, which does not fall within the final scope of certification. If NYSDEC had provided the three elements of a denial, the denial would have passed federal agency review, but the project proponent may have challenged the denial in court as beyond the scope of CWA section 401. If NYSDEC had not provided the three elements of a denial, FERC may have treated the decision as a waiver.

5.2 Millennium Bulk Terminals in Washington State

Millennium first submitted a section 404 permit application to the Corps and a section 401 certification request to the Washington Department of Ecology in February 2012 via a Joint Aquatic Resources Permit Application (JARPA), which serves as a joint application for federal, State, and local aquatic resource permits.²⁹ Millennium withdrew its JARPA in February 2013 at the Corps’ request to allow the federal agency more time to complete its regulatory process,³⁰ with the intention of resubmitting after the environmental review process (Washington Department of Ecology, 2019). Millennium resubmitted its

²⁹ *Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology*. Docket 18-2-00994-08. Petition for Review.

³⁰ *Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology*. Docket 18-2-00994-08. Petition for Review.

JARPA in July 2016. Assuming the project proponent still withdrew its JARPA and resubmitted near the conclusion of the environmental review process under the final revisions, the Washington Department of Ecology would have needed to issue a section 401 certification determination by July 2017 to comply with the timeframe revision and avoid waiving review. The Washington Department of Ecology actually issued its determination two months later in September 2017, one year after the Corps issued its EIS. If the project proponent had never agreed to withdraw its section 401 certification request and to resubmit it closer to the conclusion of the environmental review process, the Washington Department of Ecology would have been required to act on the request by February 2013, the same month that the project proponent withdrew their initial request. The pre-filing meeting request requirement of the final rule may have helped Washington Department of Ecology and Millennium meet the maximum one-year reasonable period of time by identifying potential data needs early in the process. Additionally, the pre-filing meeting request requirement is an opportunity for project proponents to obtain more information about the appropriate timing for submitting a certification request.

The Washington Department of Ecology’s certification denial, dated September 2017, identified several reasons, including that the section 401 certification request did not provide reasonable assurance that the project would meet State WQS; the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and Tribal resources; increased cancer risk from diesel pollution; more traffic congestion and delayed emergency response times; increased vessel traffic on the Columbia River; and limited Tribal fishing access. In this case, the State’s assertion that the certification request did not provide reasonable assurance that the project would meet WQS would be within the final scope of certification; the other reasons provided could have been subject to challenges as they may be beyond the scope of certification.

5.3 West Virginia Hydropower Projects

The WV DEP received the water quality certification request from FFP for the Morgantown and Opekiska projects on February 12, 2016. To comply with the maximum one-year reasonable period of time and avoid waiving review, the WV DEP would have needed to issue a section 401 certification determination by February 12, 2017. The WV DEP actually issued its determination approximately one month later on March 8, 2017, based on the understanding that they had one year after deeming the request complete. FERC ultimately determined that the WV DEP had waived certification. The final rule will provide clarification regarding when the maximum one-year statutory timeframe starts, making circumstances where a certifying authority unintentionally waives due to a failure to act less likely. The pre-filing meeting request requirement of the final rule may have helped WV DEP meet the maximum one-year reasonable period of time by identifying potential information needs early in the process.

6 Data Limitations and Uncertainty

Table 6-1 summarizes the limitations and uncertainties the EPA faced in assessing the potential impacts arising from the final rule. Whether these limitations and uncertainties, taken together, are likely to result in an understatement or overstatement of the potential impacts is not known.

Table 6-1: Limitations and uncertainties in estimating effects of final rule	
Uncertainty/Data Limitation	Notes
Lack of national-level dataset of section 401 certification reviews	The lack of a national-level dataset of section 401 water quality certification reviews limited the EPA’s ability to perform a quantitative analysis of the potential impacts of the final rule in the EA. The EPA has limited data

Table 6-1: Limitations and uncertainties in estimating effects of final rule	
Uncertainty/Data Limitation	Notes
	regarding the number of section 401 reviews that each certifying authority conducts annually, the number of certification actions (grant, grant with conditions, deny, or waive), average time spent per review, and other time requirements.
Lack of information to determine how certifying authorities will respond to the final rule (e.g., fee changes, acceptance rate of pre-filing meeting request requirement)	The impact of the final rule on both certifying authorities and project proponents can vary depending on certifying authority response. Certifying authorities may adjust their fee structure for section 401 reviews to account for changing costs or keep their fee structure (or lack thereof) the same. The impact of the pre-filing meeting request requirement depends on whether the certifying authority currently engages in pre-filing meetings, how frequently the certifying authority may accept the meeting request, the methodology used to conduct pre-filing meetings, and whether the certifying authority implements a pre-filing meeting fee to help cover costs.
Lack of information to determine how many requests are submitted without enough information to make a water quality certification determination	The final rule clarifies that the section 401 review timeframe starts after receipt of a certification request rather than after the certifying authority deems a request complete. Quantifying the impacts of this provision would require data about the proportion of requests that are incomplete under baseline, the proportion of requests that may be incomplete under the final rule, and would require communication with the project proponent and certifying authorities to receive additional information.
Lack of information to determine change in certification denials	With the review timeframe starting after receipt of a certification request, certifying authorities may deny certification if they do not receive additional information they assert is needed to make a determination, particularly for licenses/permits with shorter reasonable periods of time (e.g., section 402, section 404). The elimination of the withdraw-and-resubmit practice may also increase the number of certification denials, but the actual change is uncertain since pre-filing meetings will likely increase the initial availability of information that may be necessary to make a certification decision.

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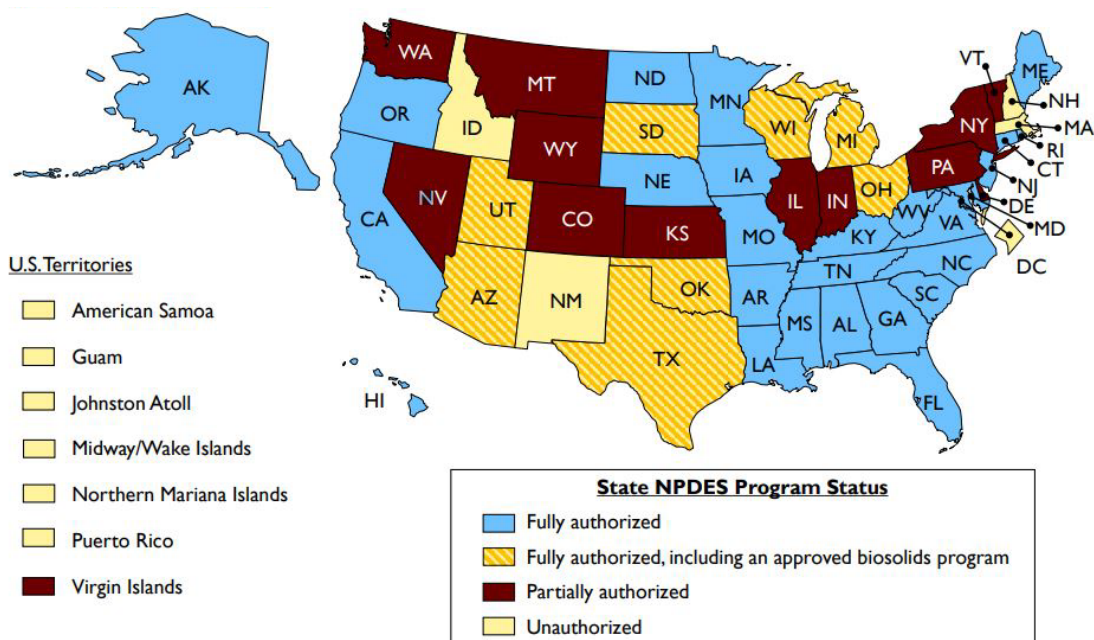
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Appendix A. Tables/Figures for Federal License/Permit Overview

Figure A-1. NPDES program authorizations as of July 2015.



Source: U.S. EPA, 2015

Note: The EPA is currently delegating NPDES authority to Idaho. Idaho is projected to be fully authorized by July 1, 2021.

Table A-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	Website title	Link
Arkansas	Instream 401 Certification and Short Term Activity Authorization	https://www.adeq.state.ar.us/water/planning/instream/
California (San Diego Region)	San Diego Region – Wetlands and Riparian Protection	https://www.waterboards.ca.gov/rwqcb9/water_issues/programs/401_certification/
California (San Francisco Bay)	Clean Water Act Section 401 Water Quality Certification	https://www.waterboards.ca.gov/sanfranciscobay/certs.html
Maine	Hydropower and Dams	https://www.maine.gov/dep/land/dams-hydro/index.html#state
Mississippi	Recently Issued Permits and Certifications	https://www.mdeq.ms.gov/ensearch/recently-issued-permits-certifications/
New Hampshire	Projects Requiring Individual 401 Certification for Federal Licenses or Permits (other than FERC)	https://www.des.nh.gov/organization/divisions/water/wmb/section401/coe_ind.htm

Table A-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	Website title	Link
North Carolina	Environmental Request Tracker	https://deq.nc.gov/permits-regulations/permit-guidance/environmental-request-tracker
Oregon	Section 401 Hydropower Certification	https://www.oregon.gov/deq/wq/wqpermits/Pages/Section-401-Hydropower.aspx
Texas	401 Certification Tracking System	https://www6.tceq.texas.gov/cmpts/index.cfm
Washington	401 Water Quality Certifications for non-hydropower permits	https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification/non-hydropower-401-certifications