

# Summary Report on Consultation with State and Local Governments for the Clean Water Act Section 401 Certification Rule

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## Background

This consultation report was prepared to support the Environmental Protection Agency (EPA or “the Agency”) rulemaking to finalize the revisions to the “Clean Water Act Section 401 Certification Rule.”

Executive Order 13868: *Promoting Energy Infrastructure and Economic Growth* (the Executive Order, or the E.O.), dated April 10, 2019, directed the EPA to engage with States, Tribes, and federal agencies and evaluate whether the Agency’s guidance and regulations, including the existing certification framework, should be updated or clarified to facilitate efficient permitting processes and increase regulatory certainty. The EPA’s current certification regulations (codified at 40 CFR part 121) have not been updated since they were promulgated in 1971. After concluding its review of existing guidance and regulations, the Executive Order directed the EPA, as appropriate and consistent with law, to 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.

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 Concurrent with the release of the new guidance, EPA rescinded the 2010 document titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Interim Handbook).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

On August 22, 2019, the Agency published a proposed rule, “Updating Regulations on Water Quality Certifications,” which was intended to make the Agency’s regulations consistent with the current text of the CWA section 401, increase efficiencies, and clarify aspects of the CWA section 401 that have been unclear or subject to differing legal interpretations in the past. 84 FR 44080. After the proposed rule was published, the EPA continued to meet with State and local governments throughout the public comment period. The Agency has now published a final rule, “Clean Water Act Section 401 Certification Rule.”

Executive Order 13132, titled “Federalism” (64 FR 43255, August 10, 1999), requires federal agencies to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” The Executive Order defines “policies that have federalism implications” to include regulations that have “substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” The Agency consulted with State and local government officials, and certain representative national organizations, during the development of this action as required under the terms of Executive Order 13132 to permit them to have meaningful and timely input into the rule’s development.

Letter and webinar attendee feedback received by the Agency before and during Federalism consultation may be found in the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855). These webinars, meetings, and letters provided a wide and diverse range of interests, positions, and recommendations to the Agency. Following publication of the proposed rule and during the 60-day public comment period, the Agency held two additional in-person meetings with State representatives to answer clarifying questions about the proposal and to discuss implementation considerations. Letters from States and local governments received during the public comment period are available in the docket (Docket ID No. EPA-HQ-OW-2019-0405).

This rulemaking is the first time that the EPA has undertaken a holistic review of the text of section 401 in the larger context of the structure and legislative history of the 1972 Act and earlier federal water protection statutes, and the first time the Agency has subjected its analysis to public notice and comment. Where possible, the Agency adjusted the proposal to address issues identified by States during the consultation and outreach periods. The final rule is informed by this holistic review and presents a framework that the EPA considers to be most consistent with the text of the Act and Congressional intent. EPA acknowledges that States may update their programs and practices to be consistent with the final rule. EPA also observes that States may wish to work with neighboring jurisdictions to develop regulations that are consistent State to State. As a result, the Agency concludes that the final rule may have federalism implications because it may impact how States have traditionally exercised their authority under section 401 of the Act.

The following report summarizes EPA's outreach efforts throughout the rulemaking process and discusses key themes heard in pre-proposal consultation efforts and post-proposal outreach.

## Pre-Proposal Consultation Efforts

This section is intended to provide details of the pre-proposal outreach and federalism consultation, as well as a description of the wide range of comments received from State governments as part of this consultation process.

On August 6, 2018, the Agency sent a letter to the Environmental Council of the States, the Association of Clean Water Administrators, the Association of State Wetlands Managers, the National Tribal Water Council, and the National Tribal Caucus indicating the Agency's interest in engaging in potential clarifications to the section 401 process. The Agency discussed section 401 during several association meetings and calls in Fall 2018 and Spring 2019 and received correspondence from several stakeholders between Fall 2018 and Spring 2019. Early stakeholder feedback received prior to the issuance of the Executive Order, as well as presentations given between Fall 2018 and Spring 2019, may be found in the pre-proposal recommendations docket.

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

The Agency consulted with State and local government officials, and certain representative national organizations, during the development of this action as required under the terms of Executive Order 13132. On April 24, 2019, the Agency initiated a 30-day Federalism consultation period prior to proposing this rule to allow for meaningful input from State and local governments. The kickoff Federalism consultation meeting occurred on April 23, 2019; attendees included representatives of intergovernmental associations and other associations representing State and local governments. Organizations in attendance included: National Governors Association, U.S. Conference of Mayors, National Conference of State Legislatures, the Environmental Council of the States, National League of Cities, Council of State Governments, National Association of Counties, National Association of Towns and Townships, Association of Clean Water Administrators, Western States Water Council, Conference

of Western Attorneys General, Association of State Wetland Managers, and Western Governors' Association. Additionally, one in-person meeting was held with the National Governors Association on May 7, 2019.

On May 8, 2019, the EPA held an informational webinar for both States and Tribes. Questions and recommendations from the webinar attendees are available in the preproposal docket (Docket ID No. EPA–HQ–OW–2018–0855).

During the consultation period, the EPA participated in phone calls and in-person meetings with intergovernmental associations including the National Governors Association. At the webinars and meetings, the EPA provided a presentation and sought input on areas of section 401 that may require updating or benefit from clarification, including timeframe, scope of certification review, and coordination among certifying authorities, federal licensing or permitting agencies, and project proponents. The EPA requested input on issues and process improvements that the EPA might consider for a future rule.

As required by Section 8(a) of Executive Order 13132, the EPA included a certification from its Federalism Official stating that the EPA had met the Executive Order's requirements in a meaningful and timely manner. A copy of this certification is included in the official record for this final action.

### Themes Emerging from the Pre-Proposal Meetings and Letters

Participant recommendations from webinars, meetings, and the pre-proposal docket represent a diverse range of interests, positions and suggestions. Among States, several themes emerged throughout this pre-proposal process, including support for ongoing State engagement, support for retention of State authority, and suggestions for process improvements for CWA section 401 water quality certifications.

The EPA received several specific recommendations regarding process improvements for section 401 certifications. First, States and cross-cutting State organizations expressed support for pre-application meetings and information-sharing among project proponents, certifying authorities, and federal licensing and permitting agencies. Additionally, State officials and cross-cutting State organizations cited deficient certification applications as a primary cause for delays in the certification decision-making process and recommended any timeline for review should be based on receiving a complete application. The Agency was also made aware of relatively low staffing availability in many State section 401 certification programs. Stakeholders suggested that preapplication meetings as well as explicit State processes and checklists could increase the quality of certification applications. Additionally, State officials as well as cross-cutting State organizations cautioned the Agency against mandating a specific reasonable period of time (e.g., 60 days) that would apply to all types of projects.

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

## Post-Proposal Outreach Efforts

The proposed rule updating the EPA's outdated regulations was published in the Federal Register on August 22, 2019. 84 FR 44080. The public comment period lasted for sixty days and closed on October 21, 2019. During the public comment period the EPA held two listening sessions specifically designated for States, on September 4, 2019 in Salt Lake City, UT and September 16, 2019 in Chicago, IL, along with a hearing that was open to the public on September 5-6, 2019 in Salt Lake City, UT. During these sessions, the EPA provided an overview of the proposed rule, responded to clarifying questions from participants, discussed implementation considerations, and received feedback from participants. The full summaries for the post-proposal in-person meetings with State representatives are included in the docket for the final rule.

The Agency also received comments from State and local government representatives through the public comment process. These comment letters represented diverse range of interests, positions, and suggestions. These comment letters along with the Agency's response to comments are in the docket for the final rule.

## Themes Raised in Post-Proposal Meetings and Letters

In State outreach following federalism consultation and in the written State and local government comments on the proposed rule, many States expressed concern that the proposed rule would adversely impact State authority and States' ability to protect waters within their borders. Commenters raised multiple concerns, including the federal agency review role in the certification process; constraints on the certification review process, including the scope, timeframe, and information required to start the statutory review clock; information requirements for decision documents; State's role in enforcement of certification conditions; and potential impacts on existing State regulations and law.

The EPA is committed to ensuring the comments and concerns of State and local governments are sufficiently addressed in the final rule. That said, State and local governments presented various views on many aspects of the proposed rule. Detailed points and themes from the various discussions during the meetings and in the written comments included the following:

### Certification Process

- Pre-application meetings
  - Commenters and State meeting participants generally supported the idea of pre-application meetings between certifying authorities and project proponents, also including federal agencies. However, most commenters did not believe the pre-application meetings should be mandatory. A few commenters suggested the pre-meeting process should be left up to State discretion.
- Elements of a Certification Request
  - Many commenters asserted that the proposed definition of "request" does not include sufficient information for a certifying authority to make an informed decision on a certification request. Commenters argued that without requiring more information to be submitted, project proponents would not be incentivized to provide more

information, which could result in an increase in processing time more certification denials.

- Commenters also suggested other elements that should be included in a certification request (e.g., “all requirements of State law,” fees, water quality information), with a few commenters asserting that State and other federal laws require a “complete” application or request for public notice. A few commenters requested the Agency allow States to determine the necessary components of a certification request or include the potential for States to include additional requirements. A few commenters also asserted that the limited list of information would not allow them to ensure compliance with antidegradation provisions. State meeting participants requested that federal agencies (e.g., the Corps and FERC) should be able to add elements of a request in their implementing regulations.
- A few commenters noted that it seemed unclear who would decide whether or not a certification request met the proposed requirements, and State meeting participants asserted there is still a “completeness” aspect to requests because sometimes information is inaccurate (e.g., the discharge location).
- One commenter noted that states should have an opportunity to determine if an application is technically or administratively complete before starting the clock to ensure State water resources are adequately protected, while another commenter noted that many States have specific requirements that must be met before a request is “administratively complete” to initiate public notice and comment. Several commenters expressed concern that the proposed rule, including the definition of certification request, conflicted with State regulations and laws, and indicated that States would have to change their rules or risk violating State law in the interim.
- Receipt of a request
  - A few commenters noted that the statute requires the clock to start “after receipt of such request,” not “upon receipt,” as EPA proposed.
  - State meeting participants and commenters asserted that the proposal provides project proponents with complete control of when to start the clock, arguing that this could be too early in the process before the project is formulated, or too late after all other approvals have already been obtained. One commenter suggested that the federal agency submit the certification request instead of the project proponent.
  - Some commenters noted that the project proponent does not always request certification from the certifying authority; instead, sometimes the certifying authority is made aware of a certification request by the federal licensing or permitting agency (e.g., via MOAs or other coordination agreements). A few commenters asserted that the proposal would disrupt strong partnerships between certifying authorities and federal agencies (e.g., State MOAs with Corps districts).

- One commenter requested that the EPA evaluate federal agency regulations that require submittal of a certification request before a federal application has the necessary information for making a certification decision.
- A few commenters also noted that it was unclear who determines when the clock starts. State meeting participants noted the federal agency may start the reasonable period while the certifying authority believes the request is incomplete or inaccurate. One commenter requested the Agency clarify whether the clock starts when the federal agency receives the certification request or when the State agency receives it.
- State meeting participants noted there has been confusion about when the clock starts for an action covered by a nationwide permit. Commenters explained that under current practice, when a State has not provided certification on a general permit, project proponents are required to obtain individual certification to be covered under that general permit. Participants asked for clarification on whether the clock starts when the Corps requests certification for the general permit or when the project proponent requests individual certification to be covered under the general permit.
- State meeting participants noted that when federal agencies are the project proponents, they may not be able to identify a permit or license to satisfy the definition of “receipt” (e.g., when the Corps voluntarily follows the section 401 process for its projects as if involving a Rivers and Harbors Act section 10 permit but does not obtain a “permit”).
- Reasonable period of time
  - Some commenters suggested section 401 provides certifying authorities, rather than federal agencies, the authority to set the reasonable period of time, while other commenters suggested it should be a collaborative effort between the certifying authority and the federal agency. Some commenters asserted that states should set the reasonable period of time because States are the water quality experts.
  - Commenters suggested various additional factors that should be considered when setting the time period, including existing State law and regulations prescribing timeframe and procedures, need for administrative review, license or permit type, staffing and workload, and individual project needs such as studies that require seasonal field work. A few commenters noted that the Agency should consider other timeframes (e.g., mandatory certifying authority public comment/notice periods, timeframes for Coastal Zone Management Act review), asserting that otherwise it would lead to duplicative review efforts, counter to the proposal’s intent to streamline permitting processes.
  - Commenters suggested that some of the proposed rule processes could occur outside the reasonable period of time: such as, federal agencies communicating the time period, requests for additional information, and certifying authority appeals of federal decisions on certifications or conditions.

- State meeting participants requested that federal agencies provide notice about impending certifications and provide copies of application materials, noting that this could speed up certification decisions.
- Some commenters provided suggestions on the proposed provision for modifications to the reasonable period of time, including suggesting that the reasonable period of time should only be extended (not shortened) and suggesting procedures for modification requests.
- A few commenters asserted that the Agency should retain a default six-month reasonable period of time.
- Pausing/Resetting the Clock
  - Several commenters recommended allowing for the clock to stop when the State requests additional information.
  - Commenters asserted that the Agency misinterpreted case law, including *Hoopa Valley* (which applied to a coordinated withdrawal-resubmittal scheme designed to extend the reasonable period of time by many years).
  - State meeting participants noted that large, collaborative projects may require more time, and that if project proponents submit a request after preparing a multi-year federal application, States are left out of the full decision-making process. State meeting participants and commenters also noted that most certifications are typically acted upon quickly but noted that fast decisions are not always possible and it would be difficult to produce collaborative solutions with the applicant if they cannot stop the clock.
  - State meeting participants also noted that multi-year environmental reviews may be required for certifications, which could change the scope of the entire project. A few commenters noted that the proposal does not account for circumstances in which there is a change in the project, including how different a certification request has to be to restart the clock.
  - Some commenters requested clarification on whether project proponents may choose to withdraw applications, and if a certifying authority must still “act” on a withdrawn application.

## Scope of Review

- Activity as a whole vs. only discharge
  - Many commenters disagreed with the proposal’s interpretation of *PUD No. 1*, and asserted the Court relied on the plain language of section 401 and secondarily supported it with EPA’s regulations, thereby conducting a *Chevron* step 1 analysis. Some commenters asserted that even if the Court performed a *Chevron* step 2 analysis, the Agency’s interpretation is unreasonable based on the language of Act and the legislative history. State meeting participants noted that section 21(b) did not change very substantively from the 1970 to 1972 version, rather it just expanded State authority.

- State meeting participants and commenters asked the Agency to clarify what “discharge” would include (e.g., how closely must the scope of certification relate to the discharge itself). A commenter asserted that section 404 and FERC permitting and licensing regulations require analyzing the activity.
- Several commenters expressed concern about the impact of only reviewing the “discharge” instead of the “activity.” One commenter stated that consideration of impacts that are tangential to the discharge but that have a significant effect on the water quality should be in the scope of review, for example, alterations of wetlands, stream hydrology downstream of a discharge, or introduction of pollution sources connected to land use changes that are associated with a discharge. Another commenter expressed concern that certifying authorities would be unable to address impacts that would not occur but for the federal license or permit.
- Point source versus nonpoint source discharge
  - Commenters asserted that case law and the CWA support a broader interpretation of discharge than from a “point source,” including one commenter who said the Agency's assertion that the 1972 Act's permitting requirements for point source discharges narrowed the scope of section 401 to point source discharges is not supported, quoting *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (“By introducing effluent limitations in the CWA scheme, Congress intended to improve enforcement, not to supplant the old system”). A commenter said that “discharge” under section 401 must be interpreted according to its plain meaning (“flowing or issuing out”) and not as narrow as “discharge of a pollutant”, which is qualified by the elements in its definition including “addition” “from any point source” (citing *S.D. Warren*, 547 U.S. at 375-84). Another commenter noted that if only point sources trigger section 401, then only discharges of a pollutant from a point source are included, contrary to *S.D. Warren*. A few commenters agreed that the definition of “discharge” should be limited to point source discharges.
  - Commenters asserted that limiting the scope of certification to point source discharges would have various impacts, and could exclude certain federal projects (e.g., construction of water dependent structures such as docks, piers, and wharves, shoreline stabilization such as jetties, groins, and revetments, and erosion control activities such as beach nourishment) and other important pollution sources (e.g., stormwater runoff, discharges from vessels).
- Defining “water quality requirements”
  - Commenters generally agreed that the scope of certification should be related to water quality. Commenters generally disagreed, however, with the proposed definition of “water quality requirements.” A few commenters argued that the scope of the proposed rule was appropriate because some States are looking to deny projects based on issues with no relationship to the CWA’s scope or legislative intent (e.g., climate change).

- Many commenters indicated that they believed the language of section 401(d) meant Congress intended to include more than just federal water quality standards, and they asserted that to suggest otherwise is contrary to the statute. Many commenters noted that because the enumerated items in 401(d) are EPA-approved, the proposal renders the phrase “any other requirements of State law” either a nullity or duplicative. Several commenters noted the Court declined to narrowly define “any other appropriate requirement of State law” in *PUD No. 1* and cited to Justice Stevens’s concurrence.
- State meeting participants expressed concern at limiting the States to “EPA-approved CWA regulatory program provisions.” State meeting participants and commenters asserted that limiting certifying authorities to “EPA-approved CWA regulatory program provisions” removes their ability to include water quality-related conditions, including for drinking water, endangered species, other federal programs (e.g., CZMA), other CWA programs (total maximum daily loads, section 208, section 319), mitigation, stormwater runoff control, habitat restoration, and water quality trading. One commenter noted that smaller projects that affect waters of the State are the primary cause of degraded water quality in that State, so the proposal would limit the State’s ability to prevent potentially severe, localized impacts.
- Commenters noted that some State water quality requirements may not be “EPA-approved,” and a few noted that the EPA may decline or take years to approve water quality standards. A few commenters asserted that the proposed definition of water quality requirements would require States to develop separate or additional State permitting programs to address State laws excluded by the definition. Multiple commenters asserted that these limitations would require separate State permits to preserve State law authorities such as maintenance of buffer zones, compensatory mitigation, groundwater, soil erosion, riparian buffers, and unacceptable adverse impacts, including cumulative and secondary impacts.

### Decisions on Certification Requests

- Required factors for denials and conditions
  - Many commenters suggested that providing the three elements required when “granting certification with conditions” would be burdensome, especially the requirement that authorities identify “less stringent” conditions. Several commenters asserted that the third element was inconsistent with the Act, while State participants questioned whether federal agencies would be able to pick the “less stringent” condition during their review of the certification. State meeting participants asserted that requiring States to justify conditions, in combination with a limited timeframe, would increase denials. A commenter was concerned about the level of detail and documentation necessary to meet the requirements for conditions.
  - Commenters also suggested providing the elements of a “denial” would be burdensome. State meeting participants and commenters suggested certifying authorities should not carry the burden of “identifying additional information” that would be needed for a certification or that the project would not comply with water

quality requirements. State meeting participants also requested clarification that project proponents are responsible for developing analyses of water quality impacts. State meeting participants and commenters asked for clarification on the requirements for a denial, including whether lack of information is sufficient for denial.

- Waiver

- A few commenters asserted that the Agency’s interpretation of the statutory phrase “fail or refuse to act” was inconsistent with the Act. A commenter argued that it impermissibly added words to the statute and violates the congressional intent behind the waiver provision, which was to prevent sheer inactivity, and discussed the legislative history.
- Another commenter requested clarification on what would justify a finding of waiver.

- Federal review of denials and conditions

- Many commenters argued that allowing federal agencies to review and potentially veto certification conditions and denials is inconsistent with the plain language of the Act, several federal court decisions, and the legislative history, and argued that there was no authority in the Act to give federal agencies this role. One commenter asserted that the federal review process proposed disregards basic administrative law principles (e.g., if a court determines there is an error in an agency decision, the court's action is to set aside the decision and remand it). Several commenters argued that State court is the appropriate venue to review certifying authority decisions. One commenter questioned how a certifying authority can stand behind a certification decision that does not reflect what they actually certified; they noted that if a certification condition is deemed “invalid,” the result is not the same certification the certifying authority had provided.
- A few commenters supported the review role for federal agencies but argued that the role did not authorize them to review the merits of a decision, with one commenter suggesting it should be a discretionary role to avoid overstepping State sovereignty.
- A few commenters asserted that federal agencies do not have the expertise or staff to determine if conditions are necessary, and a commenter asked the Agency to clarify how the EPA would ensure federal agencies are completing consistent reviews.
- A few commenters observed that in some cases federal agencies are the applicant and the relevant federal agency, and they asserted that the federal agency should not be able to evaluate certification decisions and conditions on its own certifications.
- Some commenters requested a dispute resolution process for federal agency reviews of conditions and denials.

## Other Components of the Section 401 Process

- Neighboring Jurisdiction Process

- Some commenters disagreed that the EPA has only a discretionary duty to determine if a certification may have water quality impacts in a neighboring jurisdiction. A few

commenters asked the Agency to clarify its procedures for determining whether or not a federal license or permit “may affect” a neighboring jurisdiction. One commenter requested that the EPA provide guidance for certifying authorities to determine if a certification may affect a neighboring State or tribe, while another commenter requested the EPA articulate such criteria in the regulation (e.g., how the EPA would determine when there may be an impact, what constitutes such a “determination,” and the information that the EPA must provide to downstream entities).

## Federal and State Authority under 401

- Cooperative federalism
  - Many commenters asserted that the proposal undermined the cooperative federalism principles in CWA section 101(b) and weakened State authority. One commenter argued that the proposal would disproportionately impact States and Tribes that do not have authority over CWA programs. One commenter, citing *SWANCC*, noted that the Court has found “administrative interpretation alter[ing] the federal-state framework by permitting federal encroachment upon a traditional state power” raises “heightened” concern, and that such interpretations must be founded on a “clear statement from Congress.”
- Enforcement authority
  - Many commenters disagreed that certifying authorities do not have enforcement authority for certification conditions, as their authority is derived from State and tribal law. One commenter noted that enforcement of certification conditions can be initiated through State administrative law remedies or citizen suits. Another commenter asserted that the broad savings clause in section 510 explicitly preserves State authority to “enforce” their standards and limitations on discharges, as well as any requirement respecting the abatement of pollution, subject only to established minimum federal standards.
  - Some commenters argued that certifying authorities and federal agencies should collaboratively enforce certifications because certifying authorities provide valuable expertise and personnel.
  - Commenters recommend that the Agency replace “will comply” with “reasonable assurance of compliance” from the existing rule, arguing that “will comply” is an unreasonable threshold of assurance.

## Rulemaking Process

- EPA’s rulemaking authority
  - State meeting participants and commenters questioned whether the EPA had rulemaking authority for many aspects of the proposal, because they noted that section 401 is a direct grant of authority to States and Tribes. One commenter noted that section 101(d) applies “[e]xcept as otherwise expressly provided in this chapter” and asserted that EPA’s rulemaking authority in section 501(a) is expressly limited to only

“such regulations as are necessary to carry out [the Administrator’s] functions under this chapter.”

- APA-related arguments
  - A few commenters argued that the proposal failed to analyze the rule’s impact on water quality and whether the rule will meet the goals of the CWA.
  - A few commenters stated the Agency did not adequately discuss or analyze the impacts to State and tribal programs and failed to provide a reasoned explanation for, or demonstrate the need to, update the regulations. A few commenters asserted that the Agency failed to acknowledge and analyze the States' interests affected by the rule, demonstrating that the Agency failed to provide a reasoned explanation for its change in position.
- Economic Analysis
  - A few commenters asserted that the case studies misrepresented the cases.
- Rule text clarifications
  - State meeting participants expressed confusion over the preamble and rule text using “navigable waters” and “WOTUS” interchangeably.
  - Commenters and State meeting participants noted that it is difficult to tell when the proposed rule text applies to certifying authorities generally versus the EPA as a certifying authority.
- Federalism-related issues
  - Some commenters asserted that the EPA’s federalism efforts during the rulemaking process were inadequate and failed to meet the intent of E.O. 13132. Most of these commenters asserted that there was a lack of meaningful engagement on the proposal with State and local government officials. A few commenters asserted that a lack of early engagement by the EPA hindered State and local officials from providing meaningful input on the substantive matters the Agency sought comment on in the proposal. A few commenters noted that the EPA failed to provide States or local governments with substantive information supporting the need for the proposed rule.
- Effective date
  - State meeting participants and some commenters requested a delayed effective date because certifying authorities will need to develop programmatic capacity to implement the revised regulation and to change their regulations and statutes.

### Agency Response

See the Agency’s Response to Comments document for complete Agency responses to issues raised by State and local governments throughout the rulemaking, available in the docket for the final rule. For convenience, the Agency has briefly highlighted the key changes and responses to State issues here.

The Agency acknowledges that the final rule may change how States administer the section 401 program, but has made adjustments in the final rule to account for many of the concerns raised by States. The Agency has made certain changes in response to comments, including comments from States and local governments. The final rule preserves the robust State role in the certification process in a manner consistent with the CWA. As discussed in section III.G of the final rule preamble, the final rule does not provide federal agencies with a role in substantively reviewing State certification decisions. Under the final rule, the federal agency review is limited to ensuring compliance with procedural requirements of section 401 and the final rule. Additionally, the final rule expands the pre-filing meeting requirement to all project proponents and allows States, in their discretion, to meet with project proponents to discuss the proposed project and potential information needs prior to the reasonable period of time beginning. The final rule notice also clarifies that certifying authorities may request additional information during the reasonable period of time, and preserves certifying authorities' ability to deny certification requests if they have inadequate information to determine whether a discharge complies with water quality requirements. Further, the final rule definition of "water quality requirements" is no longer limited to State law provisions that are EPA-approved; rather, the definition captures State or Tribal regulatory requirements for point source discharges into waters of the United States. The final rule also removes the requirement for certifying authorities to provide a statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.