Proposed CWA Section 401 Water Quality Certification Improvement Rule
State and Territory Session Discussion Questions

Topic: Request for certification
Under proposed section 121.5(a), a request for certification must include (1) a copy of the draft license or permit (unless legally precluded from obtaining a copy of the draft license or permit) and (2) any existing and readily available data or information related to potential water quality impacts from the proposed project. Certifying authorities may identify other contents for a request for certification in their own regulations. EPA is requesting comment on this proposed approach and an alternative approach where the request for certification must include the federal license or permit application, instead of a copy of the draft license or permit.

**Question 1:** In your experience, what types of “existing and readily available data or information related to potential water quality impacts from the proposed project” have informed your certification analysis? Have you experienced any challenges with obtaining this type of information? How long, on average, does it take to obtain this type of information?

**Question 2:** Does your state or territory provide specific elements that must be included in a request for certification in regulation? In guidance? In practice? How does your state or territory communicate this information to project proponents?

**Question 3:** Are there other elements EPA should define as minimum requirements for all requests for certification? Should EPA define minimum requirements for certifying authorities other than EPA?

**Question 4:** In your experience, would the alternative approach provide enough information to commence the reasonable period of time? Would this alternative approach work for some federal licenses or permits but not others?

Under proposed section 121.6(a), the reasonable period of time begins upon receipt of a request for certification. The term “receipt” is defined at proposed section 121.1(k) to mean “the date that a request for certification, as defined by the certifying authority, is documented as received by a certifying authority in accordance with the certifying authority’s applicable submission procedures.”

**Question 5:** Does your state or territory have a publicly defined process to determine whether a request for certification is complete or submitted? Should EPA define “applicable submission procedures?”

**Question 6:** Should there be a specified timeframe for when the certifying authority must send written confirmation to the project proponent and federal agency of the date of receipt of the request for certification?

Topic: Reasonable period of time (RPT)
Under proposed section 121.6(b), the federal agency and certifying authority may, within 30 days of receipt of a request for certification, jointly agree in writing to a RPT for the certifying authority to act on the request for certification, provided that the RPT does not exceed one year from receipt.
**Question 1:** Should the federal agency and certifying authority collaboratively set the RPT? Should the federal agency be solely responsible for setting the RPT?

**Question 2:** Should the Agency define factors that the federal agency and certifying authority must consider in setting the RPT?

Under proposed section 121.6(c), if the federal agency and certifying authority do not agree on the length of the RPT within 30 days of receipt of a request for certification, the RPT shall be 60 days. However, extensions are possible in two instances. First, the default RPT is automatically extended upon notice by the certifying authority (before the end of the RPT) that the certifying authority’s public notice requirements will take longer than 60 days or if there is a force majeure event. Second, a federal agency and certifying authority, after consulting with the project proponent, may agree to extend the RPT in writing for any other reason provided the RPT as extended does not exceed one year from receipt of the request for certification.

**Question 3:** Should there be a different default RPT? What factors should inform the length of the default? Please provide any information, data, or experiences that could illustrate these factors.

**Question 4:** If EPA required a federal license or permit application, instead of a draft license or permit, in the request for certification, should the default RPT be different?

In the proposal, EPA is not taking a position on the legality of withdrawing and resubmitting a certification request. As discussed in the preamble, the potential factual situations that might give rise to, and potentially justify, withdrawal and resubmission of a certification request are so varied that the Agency is not confident that it can create regulatory “bright lines” that adequately and fairly address each situation.

**Question 5:** Should EPA establish regulations specifically authorizing withdrawals and resubmissions in certain factual situations similar (or not) to the circumstances in Hoopa Valley Tribe?

**Topic: Scope of certification**

Under proposed section 121.3, when a certifying authority reviews a request for certification, it shall evaluate whether the activity as a whole will comply with all applicable water quality requirements. Under proposed section 121.1(m), water quality requirements are defined as “any limitation, standard, or other requirement under §§ 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or tribal law.”

**Question 1:** Should EPA readopt the “activity as a whole” definition of scope of review under section 401(a)(1) and scope of conditions under section 401(d), or should EPA adopt the “discharge-only” scope of review announced in the 2020 Rule? Can you provide any examples of your state or territory’s experience implementing either or both interpretations?

**Question 2:** Should the word “activity” in the term “activity as a whole” include all activities at the project proponent’s “project in general” with the potential to affect water quality, or should
EPA specifically define the term “activity” to mean only those activities at the project site that are specifically authorized by the federal license or permit in question?

**Question 3:** Can the federal licensing or permitting agency effectively implement a certification with conditions that addresses impacts from the “activity as a whole” if it has authority over only a small part of a larger project?

**Topic: Contents of a certification decision**
Under proposed section 121.7, a certifying authority can make one of four certification decisions on a request for certification: (1) grant certification; (2) grant certification with conditions; (3) deny certification; or (4) expressly waive certification. Each decision must be in writing and include minimum information defined in the proposed rule (see proposed section 121.7(c)-(f)).

**Question 1:** Should EPA define minimum information requirements for certification decisions for certifying authorities other than EPA? Are these proposed minimal information requirements sufficient? Should there be other information defined for any of the actions?

**Topic: Federal agency review**
Under proposed section 121.9, federal agency review of certification decisions is limited to whether: 1) the certifying authority has indicated the nature of the certification decision (i.e., grant, grant with conditions, deny, or waiver); 2) the proper certifying authority issued the decision; 3) the certifying authority provided public notice on the request for certification; and 4) the decision was issued within the reasonable period of time.

**Question 1:** What is the scope of federal agency review under section 401? Does section 401 authorize other aspects of a certification decision to be subject to federal agency review aside from the proposed limitations?

If federal agency review reveals that the certifying authority did not indicate its decision or did not provide public notice on the request for certification, the federal agency would be required to provide the certifying authority with an opportunity to remedy the deficiency and must extend the RPT to do so, provided the time period for review has not expired. The proposal does not define how a certifying authority should demonstrate compliance for purposes of federal agency review.

**Question 2:** Should EPA identify in regulation what elements must be used (or may be used) to demonstrate to a federal agency that it has met the section 401 facial requirements subject to federal agency review? Or should EPA defer to federal agencies to define those elements?

**Question 3:** Should EPA develop procedures regarding how a certifying authority should respond to a federal agency’s notice regarding deficiencies in its certification decision? For example, should EPA provide a timeframe for the certifying authority to affirmatively respond to the federal agency’s notice of deficiency and provide a justification for any extension to the reasonable period of time (e.g., length of the public notice period)?

**Topic: Modifications**
Under proposed section 121.10, certifying authorities and federal agencies may agree to modify a grant of certification (with or without conditions). However, only the agreed upon portions may be modified.
The proposed rule clarifies that the certifying authority may not unilaterally modify the certification decision, and that the nature of certification decision (i.e., grant, deny, waiver) cannot be changed.

**Question 1:** Should project proponents have a role in the modification process? If so, how?

**Question 2:** Should modification be allowed only if the actual language of the certification modification is agreed upon by the federal agency and certifying authority, as opposed to the more general agreement currently proposed?

**Question 3:** Should the certification modification process account for whether there is a federal license or permit modification process already in place? Should the certification modification process account for which point in time in the licensing or permitting cycle a modification is considered (e.g., if new information supporting a modification arises either before or after issuance of the final license or permit)?

**Topic: Implementation**

In pre-proposal outreach for this rulemaking, several stakeholders indicated a need for more implementation materials and guidance.

**Question 1:** What implementation materials, if any, would be most beneficial in implementing any final rule?