Proposed CWA Section 401 Water Quality Certification Improvement Rule
Tribal 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 tribe provide specific elements that must be included in a request for certification in regulation? In guidance? In practice? How does your tribe 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 tribe 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 tribe’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: Neighboring jurisdictions**
Under proposed sections 121.12-121.15, EPA is proposing to provide more detail and explanation on the neighboring jurisdiction process under section 401(a)(2), including the roles of the actors involved, when the neighboring jurisdiction process begins and how it is conducted, and the minimal contents of a notification from the federal licensing or permitting agency to EPA.

**Question 1:** Under proposed section 121.14(b), EPA defines the contents of a neighboring jurisdiction’s objection. Should EPA require the neighboring jurisdiction to identify a license or permit condition that it thinks would resolve the objection?

**Question 2:** Should EPA establish a deadline by which the federal licensing or permitting agency must make a determination after a public hearing on a neighboring jurisdiction’s objection?

**Question 3:** Should a neighboring jurisdiction be allowed to withdraw its objection before a public hearing is held, thus eliminating the requirement to hold a public hearing?

**Topic: Treatment in a similar manner as a state**
Under proposed section 121.11, tribes may obtain treatment in a similar manner as a state (TAS) status for the section 401 certification program or may obtain TAS to act as a neighboring jurisdiction under section 401(a)(2), making it the first-time tribes will have this option, without also applying for TAS for water quality standards under section 303(c).

**Question 1:** Would your tribe be interested in participating in the section 401 certification process without obtaining TAS for water quality standards? Would your tribe be interested in participating in only the Section 401(a)(2) process? If applicable, please provide examples of your experience obtaining TAS for other CWA programs.

**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?