ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA–HQ–OW–2025–2929; FRL–6976.2–01–OW]

RIN 2040–AG47

Updating the Water Quality Certification Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is publishing this proposed rule to update and clarify several substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to States (and Tribes that have been approved for ''treatment as a State'' status) to review for compliance with appropriate Federal, State, and Tribal water quality requirements any discharge into waters of the United States that may result from a proposed activity that requires a Federal license or permit. This proposed rule is intended to clarify several aspects of the certification process consistent with the statutory framework.

DATES: Comments must be received on or before February 17, 2026. Comments on the information collection provisions of the proposed rule under the Paperwork Reduction Act (PRA) must be received by the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB–OIRA) on or before February 17, 2026. Please refer to the PRA section under ''Statutory and Executive Order Reviews'' in this preamble for specific instructions. *Public meeting:* EPA will hold a virtual public meeting following publication of this proposed action. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public meeting.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2025–2929, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2025–2929 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OW–2025–2929 for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

The virtual meeting will be held after publication of the proposed action; the date and time will be available at *https://www.epa.gov/cwa-401.* Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

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

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

A. Purpose of the Proposed Regulatory Action

The U.S. Environmental Protection Agency is seeking public comment on a proposed rule that would revise several procedural and substantive aspects of the *Clean Water Act Section 401 Water Quality Certification Improvement Rule* (hereinafter, the 2023 Rule) to address areas of regulatory uncertainty and implementation challenges.

In July 2025, the Agency published a **Federal Register** notice seeking input on regulatory uncertainty and implementation challenges associated with the 2023 Rule after stakeholders [1] raised questions about application of the 2023 Rule's scope of certification. 90 FR 29828, 29829 (July 7, 2025). In response, industry stakeholders and States supported revisions to the 2023 Rule to increase clarity and transparency around the certification process, in particular the scope of certification. Conversely, some States, Tribes, and individuals opposed revisions to the 2023 Rule. With this action, the Agency is proposing to revise the 2023 Rule to align the regulations with the scope of the Clean Water Act, increase transparency, efficiency, and predictability for certifying authorities

[1] *See, e.g.,* America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025) (statement of Robert D. Singletary, Executive Director, Oklahoma Department of Environmental Quality; statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Association of Manufacturers).

and the regulated community, and to ensure that States and authorized Tribes understand and adhere to their section 401 role. The proposed rule, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by the Agency's expertise developed in implementing the Clean Water Act for over 50 years and policy considerations where appropriate. A plain language summary of this proposed rule is available on *regulations.gov.*

B. Summary of the Major Provisions of the Proposed Regulatory Action

The Agency is proposing to revise the following provisions in 40 CFR part 121: the contents of a request for certification at 40 CFR 121.5; the scope of certification at 40 CFR 121.3; the contents of a certification decision at 40 CFR 121.7; the modification process at 40 CFR 121.10; and the section 401(a)(2) process at subpart B. The Agency is also proposing to add regulatory text at 40 CFR 121.6 regarding withdrawal and resubmittal of requests for certification and proposing to remove regulatory text at 40 CFR 121.11 regarding treatment in a similar manner as a State for Tribes. The Agency is also proposing several clarifying and conforming revisions throughout part 121.

C. Costs and Benefits

Potential costs and benefits would be incurred as a result of actions taken by applicants,[2] certifying authorities, and Federal agencies acting pursuant to or implementing the proposed rule. The Agency prepared the economic analysis for the proposed rule (''Economic Analysis''), available in the rulemaking docket, for informational purposes to analyze the potential cost savings and benefits associated with this proposed action. The Agency analyzed the potential cost savings and benefits against the baseline of the 2023 Rule. This analysis is summarized in section VI of this preamble.

II. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2025–2929, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

B. Participation in Virtual Public Meeting

The Agency will hold one virtual public meeting after publication of the proposed action. The meeting date and time will be available on *https://www.epa.gov/cwa-401.* The Agency will begin pre-registering speakers for the meeting upon publication of this document in the **Federal Register**. To register to speak at the public meeting, please use the online registration forms available at *https://www.epa.gov/cwa-401* or contact EPA staff at *cwa401@epa.gov* to register to speak at the meeting. The last day to pre-register to speak at the meeting will be the day before the meeting. On the last working day before the meeting, EPA will post a general agenda for the meeting that will list pre-registered speakers in approximate order at: *https://www.epa.gov/cwa-401.*

The Agency will make every effort to follow the schedule as closely as possible on the day of the meeting; however, please plan for the hearing to run either ahead of schedule or behind schedule. EPA will make every effort to accommodate all speakers who register and joining the meeting, although preferences on speaking times may not be able to be fulfilled. Additionally, as time allows, EPA will accept requests to speak the day of the meeting.

Each commenter will have three minutes to provide oral testimony. EPA encourages commenters to provide the Agency with a copy of their oral testimony electronically by emailing it to *cwa401@epa.gov.* EPA also recommends submitting the text of your oral comments as written comments to the rulemaking docket.

The Agency may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public meeting.

Please note that any updates made to any aspect of the meeting will be posted online at *https://www.epa.gov/cwa-401.* While EPA expects the meeting to go forward as set forth above, please monitor our website or contact *cwa401@epa.gov* to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of an interpreter or special accommodations such as audio description, please pre-register for the meeting with *cwa401@epa.gov* and describe your needs by one week before the meeting. The Agency may not be able to arrange accommodations without advance notice.

III. General Information

A. What action is the Agency proposing to take?

In this rulemaking, the Agency is publishing a proposed rule updating certain provisions in the water quality certification regulations in 40 CFR 121.

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

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

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

The Agency prepared the Economic Analysis for the proposed rule, available in the rulemaking docket, for informational purposes to analyze the potential costs and benefits associated with this proposed action. The analysis is summarized in section VI of this preamble.

IV. Background

Congress enacted section 401 of the Clean Water Act (CWA) to provide States and authorized Tribes with an important tool to help protect the water quality of federally regulated waters within their borders in collaboration with Federal agencies. Under section

[2] Throughout this document, the Agency will use the term ''applicant'' to refer to the individual responsible for obtaining certification. The current regulations refer to applicants as the ''project proponent.'' *See* 40 CFR 121.1(h). However, EPA is proposing to remove this term and instead rely on the term ''applicant'' consistent with the statutory text. *See* section V.A of this preamble for further discussion.

401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States,[3] unless the State or authorized Tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with applicable water quality requirements or certification is waived. Section 401 envisions a robust State and Tribal role in the Federal licensing or permitting proceedings, 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 process, consistent with the overall cooperative federalism construct established by the CWA.

Section 401 provides that a State or authorized Tribe must act on a section 401 request for certification ''within a reasonable period of time (which shall not exceed one year)''.[4] Section 401 does not guarantee a State or Tribe a full year to act on a request for certification, as the statute only grants as much time as is reasonable. 33 U.S.C. 1341(a)(1). The CWA provides that the timeline for action on a section 401 certification begins ''after receipt'' of a request for certification. *Id.* If a State or Tribe does not grant, grant with conditions, deny, or expressly waive the section 401 certification within a reasonable time period, section 401 states that the ''the certification requirements of this subsection shall be waived with respect to such Federal application.'' *Id.* If the certification requirement has been waived and the Federal license or permit is issued, any subsequent action by a State or Tribe to grant, grant with conditions, or deny section 401 certification has no legal force or effect.

Section 401 authorizes States and Tribes to certify that a discharge into waters of the United States that may result from a proposed activity will comply with certain enumerated sections of the CWA, including the effluent limitations and standards of performance for new and existing discharge sources (sections 301, 302, and 306 of the CWA), water quality standards and implementation plans (section 303), and toxic pretreatment effluent standards (section 307). When granting a section 401 certification, States and Tribes are directed by CWA section 401(d) to include conditions, including ''effluent limitations and other limitations, and monitoring requirements'' that are necessary to assure that the applicant for a Federal license or permit will comply with applicable provisions of CWA sections 301, 302, 306, and 307, and with ''any other appropriate requirement of State law.''

As the Agency charged with administering the CWA,[5] 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. *See* 33 U.S.C. 1251(d), 1361(a). In 1971, the EPA promulgated regulations for implementing the water quality certification provisions pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948 (FWPCA) (hereinafter, the 1971 Rule).[6] The 1971 Rule was promulgated prior to enactment of the 1972 amendments to the FWPCA (commonly known as the Clean Water Act or CWA),[7] which included amendments to the water quality certification provisions. In 1979, the Agency recognized the need to update the 1971 Rule, in part to be consistent with the 1972 amendments. *See* 44 FR 32854, 32856 (June 7, 1979) (noting the 40 CFR part 121 regulations predated the 1972 amendments). However, the Agency declined to update the 1971 Rule at the time because it had not consulted with other Federal agencies impacted by the water quality certification process and instead promulgated regulations applicable to water quality certifications on EPA-issued National Pollutant Discharge Elimination System (NPDES) permits. *Id.; see, e.g.,* 40 CFR 124.53 through 124.55. As a result, for many years, the 1971 Rule did not fully reflect the amended statutory language.

EPA revised the 1971 Rule in 2020.[8] The 2020 Rule was the Agency's first comprehensive effort to promulgate Federal rules governing the implementation of CWA section 401, informed by a holistic analysis of the statutory text, legislative history, and relevant case law. In 2023, the Agency revised the 2020 Rule and made several material revisions to procedural and substantive aspects of the certification process, including the scope of certification, the contents of a request for certification and certification decision, and modification to certification decisions.[9] In July 2025, the Agency published a **Federal Register** document seeking input on regulatory uncertainty and implementation challenges with the 2023 Rule after stakeholders raised questions about applications of the 2023 Rule's scope of certification. 90 FR 29828, 29829 (July 7, 2025).

The Agency is proposing revisions to several aspects of the 2023 Rule, including the contents of a request for certification, the scope of certification, the contents of a certification decision, and the modification process. The Agency is also adding regulatory text regarding withdrawal and resubmittal of requests for certification, removing regulatory text on the automatic extension process to the reasonable period of time, and removing regulatory text regarding ''treatment in a similar manner as a State'' (TAS) for Tribes and instead relying on the existing regulatory process for TAS for section 303(c). The proposed rule, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by the Agency's expertise developed in implementing the CWA for over 50 years and policy considerations where appropriate.

The following sections describe the regulatory framework and history of the 1972 CWA amendments, how section 401 fits within that framework, previous rulemaking efforts, and recent stakeholder outreach and engagement that provide the foundation for this proposed rule.

A. The Clean Water Act

In 1972, Congress amended the CWA to address longstanding concerns regarding the quality of the nation's waters and the Federal Government's ability to address those concerns under existing law. Prior to 1972, responsibility for controlling and redressing water pollution in the nation's waters largely fell to the Corps under the Rivers and Harbors Act of

[3] The CWA, including section 401, uses ''navigable waters,'' defined as ''waters of the United States, including territorial seas.'' 33 U.S.C. 1362(7). This proposed rulemaking uses ''waters of the United States'' throughout.

[4] In some circumstances, the EPA can act as the certifying authority. 33 U.S.C. 1341(a)(1) (''In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.'').

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

[6] 36 FR 8563 (May 8, 1971), redesignated at 36 FR 22369, 22487 (November 25, 1971), further redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979).

[7] The FWPCA has been commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, the Agency will generally refer to the FWPCA in this rulemaking as the CWA or the Act.

[8] Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (hereinafter, the 2020 Rule).

[9] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 FR 66558 (September 27, 2023) (hereinafter, the 2023 Rule).

1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse ''into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.'' [10] 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), in 1961, and in 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal Government to bring enforcement actions to abate water pollution.

These earlier statutory frameworks, however, proved challenging for regulators, who often worked backward from an overly polluted waterway to determine which dischargers and which sources of pollution may be responsible. *See EPA* v. *State Water Resources Control Bd.,* 426 U.S. 200, 204 (1976). In fact, Congress determined that the prior statutes were inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310 (1981), so Congress performed a ''total restructuring'' and ''complete rewriting'' of the existing statutory framework of the Act in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into waters of the United States specifically. *See, e.g., S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 385 (2006) (''[T]he Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally[.]'').

The objective of the new statutory scheme was ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985;'' and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . .'' *Id.* at 1251(a)(1)–(2).

Congress established several key policies that direct the work of the Agency to effectuate those goals. For example, Congress declared as a national policy ''that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.'' *Id.* at 1251(a)(3)–(7).

Congress gave States a major role in implementing the CWA. This balanced the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted ''the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources . . . .'' *Id.* at 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that ''[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.* at 1370.[11] Congress also pledged to provide technical support and financial aid to the States ''in connection with the prevention, reduction, and elimination of pollution.'' *Id.* at 1251(b).

To carry out these policies, Congress broadly defined ''pollution'' to mean ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,'' *id.* at 1362(19), to parallel the broad objective of the Act ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' *Id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation's waters generally. *See, e.g., id.* at 1256(a) (authorizing the EPA to issue ''grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution'').

In addition to the Act's non-regulatory measures to control pollution of the nation's waters, Congress created a Federal regulatory program designed to address the discharge of pollutants into a subset of those waters identified as ''the waters of the United States.'' *See* 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism: ''Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.'' *Id.* at 1311(a). A ''discharge of a pollutant'' is defined to include ''any addition of any pollutant to navigable waters from any point source,'' such as a pipe, ditch or other ''discernible, confined and discrete conveyance.'' *Id.* at 1362(12), (14). The term ''pollutant'' means ''dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into waters of the United States from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including by obtaining authorizations pursuant to the section 402 NPDES permit program or the section 404 dredged or fill material permit program. *See id.* at 1342, 1344. Congress therefore intended to achieve the Act's objective ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters'' by addressing pollution of all waters via non-regulatory means and federally regulating the discharge of

[10] The term ''navigable water of the United States'' is a term of art used to refer to a water subject to Federal jurisdiction under the RHA. *See, e.g.,* 33 CFR 329.1. The term is not synonymous with the phrase ''waters of the United States'' under the CWA, *see id.,* and the general term ''navigable waters'' has different meanings depending on the context of the statute in which it is used. *See, e.g., PPL Montana, LLC* v. *Montana,* 132 S. Ct. 1215, 1228 (2012).

[11] 33 U.S.C. 1370 also prohibits States with EPA-approved CWA programs from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

pollutants to the subset of waters identified as ''navigable waters.'' [12]

The regulatory programs established by the Act focus on the development of point source effluent limitations that directly restrict discharges, with compliance achieved through NPDES permits. *See EPA* v. *State Water Resources Control Bd.,* 426 U.S. at 204 (discussing the major changes to the methods to abate and control water pollution in the 1972 amendments). This provides a framework for the Agency to focus on reducing or eliminating discharges while creating accountability for each regulated entity that discharges into a waterbody, facilitating greater enforcement and overall achievement of the CWA water quality goals. *Id.; see Oregon Natural Desert Association* v. *Dombeck,* 172 F.3d 1092, 1096 (9th Cir. 1998) (observing that 1972 amendments ''largely supplanted'' earlier versions of CWA ''by replacing water quality standards with point source effluent limitations'').

Under this statutory scheme, the States [13] are authorized to assume program authority for issuing section 402 and 404 permits within their borders, subject to certain limitations. 33 U.S.C. 1342(b), 1344(g). States are also responsible for developing water quality standards for ''waters of the United States'' within their borders and reporting on the condition of those waters to the EPA every two years. *Id.* at 1313, 1315. States must develop total maximum daily loads (TMDLs) for waters that are not meeting established CWA water quality standards and must submit those TMDLs to the EPA for approval. *Id.* at 1313(d). And, central to this proposed rule, States under CWA section 401 have authority to grant, grant with conditions, deny, or waive water quality certifications for every Federal license or permit issued within their borders that may result in a discharge into waters of the United States. *Id.* at 1341. These same regulatory authorities 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) for a variety of purposes, including administering the principal CWA regulatory programs. *Id.* at 1377(e). In addition, States and Tribes retain authority to protect and manage the use of those waters that are not waters of the United States under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a).

B. Clean Water Act Section 401

Legislative history indicates that Congress created the water quality certification requirement to ''recognize[] the responsibility of Federal agencies to protect water quality wherever their activities affect public waterways.'' S. Rep. No. 91–351, at 3 (1969). ''In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered.'' *Id.* Instead of helping States cooperatively achieve Federal policy objectives related to water quality standards, Federal agencies were ''sometimes . . . a culprit with considerable responsibility for the pollution problem which is present.'' 115 Cong. Rec. 9011, 9030 (April 15, 1969). As an example, the legislative history discusses the Atomic Energy Commission's failure to consider the impact of thermal pollution on receiving waters when evaluating ''site selection, construction, and design or operation of nuclear powerplants.'' S. Rep. No. 91–351, at 3. As a result, States, industry groups, conservation groups, and the public alike ''questioned the justification for requiring compliance with water quality standards'' if Federal agencies themselves would not comply with those standards. S. Rep. No. 91–351, at 7 (August 7, 1969).

The water quality certification requirement first appeared in section 21(b) of the FWPCA, and it required States to certify that ''such *activity* will be conducted in a manner which will not violate applicable *water quality standards.*'' Public Law 91–224, 21(b)(1), 84 Stat. 91 (1970) (emphasis added). As described above, the 1972 amendments restructured the CWA and created a framework for compliance with effluent limitations that would be established in discharge permits issued pursuant to the new Federal permitting program. The pre-existing water quality certification requirement was retained in section 401 of the 1972 amendments but modified to be consistent with the overall restructuring of the CWA. The new section 401 required a water quality certification to assure that the ''*discharge will comply*'' with *effluent limitations* and other enumerated regulatory provisions of the Act. 33 U.S.C. 1341(a) (emphasis added). The 1972 amendments also established a new section 401(d), which provides that certifications ''shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure'' compliance with the same enumerated CWA provisions and with ''any other appropriate requirement'' of State or Tribal law. 33 U.S.C. 1341(d).

In enacting section 401, Congress recognized that where States and Tribes do not have direct permitting authority (because they do not have section 402 or 404 program authorization or where Congress has preempted a regulatory field, *e.g.,* under the Federal Power Act), they may still play a valuable role in protecting the water quality of federally regulated waters within their borders in collaboration with Federal agencies. Under section 401, a Federal agency may not issue a license or permit for an activity that may result in a discharge into waters of the United States, unless the appropriate State or Tribal authority provides a section 401 certification or waives its ability to do so. The authority to certify a Federal license or permit lies with the agency (the certifying authority) that has jurisdiction over the location of the discharge (or potential discharge) to the receiving water of the United States. *Id.* at 1341(a)(1). Examples of Federal licenses or permits potentially subject to section 401 certification include, but are not limited to, CWA section 402 NPDES permits in States where the EPA administers the permitting program; CWA section 404 and RHA sections 9 and 10 permits issued by the Corps; bridge permits issued by the U.S. Coast Guard (USCG); and hydropower and pipeline licenses

[12] Fundamental principles of statutory interpretation support the Agency's recognition of a distinction between ''nation's waters'' and ''navigable waters.'' As the Supreme Court has observed, ''[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'' *Bailey* v. *United States,* 516 U.S. 137, 146 (1995) (recognizing the canon of statutory construction against superfluity). Further, ''the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'' *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Savings Ass'n* v. *Timbers of Inwood Forest Associates,* 484 U.S. 365, 371 (1988) (''Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]'') (citation omitted). The non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using Federal assistance to support State and local partnerships to control pollution in the nation's waters in addition to a Federal regulatory prohibition on the discharge of pollutants into the navigable waters. If Congress intended the terms to be synonymous, it would have used identical terminology. Instead, Congress chose to use separate terms, and the Agency is instructed by the Supreme Court to presume Congress did so intentionally.

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

issued by the Federal Energy Regulatory Commission (FERC).

Under section 401, a certifying authority may grant, grant with conditions, deny, or waive certification in response to a request from an applicant. The certifying authority determines whether the potential discharge or discharges from the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of State law. *Id.* at 1341(a)(1), (d). Certifying authorities also add to a certification ''any effluent limitations and other limitations, and monitoring requirements'' necessary to assure compliance. *Id.* at 1341(d). These limitations and requirements must become conditions of the Federal license or permit should it be issued. *Id.* A certifying authority may deny certification if it is unable to determine that the discharge from the proposed activity will comply with the applicable sections of the CWA and appropriate requirements of State or Tribal law. If a certifying authority denies certification, the Federal license or permit may not be issued. *Id.* at 1341(a)(1). A certifying authority may waive certification by ''fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.'' *Id.*

C. The EPA's Role in Implementing Section 401

The EPA, as the Federal agency charged with administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401.[14] In addition to administering the statute and promulgating implementing regulations, the Agency has several other roles under section 401.

The EPA is required to provide certification or waiver where no State, Tribe, or interstate agency has the authority to provide certification. 33 U.S.C. 1341(a)(1) (''In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.''). Currently, EPA acts as the certifying authority in two scenarios (1) on behalf of Tribes without ''treatment in a similar manner as a State'' (TAS) and (2) on lands of exclusive Federal jurisdiction in relevant respects.[15]

The EPA also notifies other States when the Administrator determines that a discharge may affect the quality of such State's waters. *Id.* at 1341(a)(2). Although section 401 certification authority lies with the jurisdiction where the discharge originates, another State whose water quality is potentially affected by the discharge may have an opportunity to raise objections to, and request a hearing on, the relevant Federal license or permit before issuance. Where the EPA determines that a discharge subject to section 401 ''may affect'' the water quality of another State, the EPA is required to notify that State. *Id.* If the notified other State determines that the discharge ''will affect'' the quality of its waters in violation of a water quality requirement of that State, it may notify the EPA and the Federal licensing or permitting agency of its objection to the license or permit. *Id.* It may also request a hearing on its objection with the Federal licensing or permitting agency. At such a hearing, section 401 requires the EPA to submit its evaluation and recommendations with respect to the objection. The Federal agency will consider the State's and the EPA's recommendations, and any additional evidence presented at the hearing, and ''shall condition such license or permit in such manner as may be necessary to ensure compliance with the applicable water quality requirements'' of the other State. *Id.* If the conditions cannot ensure compliance, the Federal agency shall not issue the license or permit.

The EPA must also provide technical assistance for section 401 certifications upon the request of any Federal or State agency or applicant. *Id.* at 1341(b). Technical assistance might include the provision of any relevant information or comment on methods to comply with applicable effluent limitations, standards, regulations, requirements, or water quality standards.

D. Prior Rulemaking Efforts Addressing Section 401

The EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. Because the EPA has been charged by Congress with administering the CWA, some courts have concluded that other Federal agencies are not entitled to deference on their interpretations of section 401. *See Ala. Rivers Alliance* v. *FERC,* 325 F.3d 290, 296–97 (D.C. Cir. 2002); *Am. Rivers, Inc.* v. *FERC,* 129 F.3d 99, 107 (2d. Cir. 1997). In the last 50-plus years, EPA has undertaken three rulemaking efforts focused solely on addressing water quality certification, one of which preceded the 1972 amendments to the CWA. The Agency has also developed several guidance documents on the section 401 certification process. This section of the preamble discusses EPA's major rulemaking efforts over the last 50-plus years, including most recently, the 2023 Rule.

1. 1971 Rule

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

The EPA's 1971 Rule required certifying authorities to act on a certification request within a ''reasonable period of time.'' 40 CFR 121.16(b) (2019). The regulations provided that the Federal licensing or permitting agency determines what constitutes a ''reasonable period,'' and that the period shall generally be six months but in any event shall not exceed one year. *Id.*

The 1971 Rule also provided that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on a request for certification; and second, when the Federal licensing or permitting agency sends written

[14] *See* 33 U.S.C. 1251(d) (''Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.''); *id.* at 1361(a); *Mayo Found. for Medical Educ. and Res.* v. *United States,* 562 U.S. 44, 45 (2011); *Hoopa Valley Tribe* v. *FERC,* 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Ala. Rivers Alliance* v. *FERC,* 325 F.3d 290, 296–97 (D.C. Cir. 2003); *Cal. Trout* v. *FERC,* 313 F.3d 1131, 1133 (9th Cir. 2002); *Am. Rivers, Inc.* v. *FERC,* 129 F. 3d 99, 107 (2d Cir. 1997).

[15] Exclusive Federal jurisdiction is established only under limited circumstances pursuant to the Enclave Clause of the U.S. Constitution, article 1, section 8, clause 17. These circumstances include (1) where the Federal Government purchases land with state consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; (2) where a State chooses to cede jurisdiction to the Federal Government, and (3) where the Federal Government reserved jurisdiction upon granting statehood. *See Paul* v. *United States,* 371 U.S. 245, 263–65 (1963); *Collins* v. *Yosemite Park Co.,* 304 U.S. 518, 529–30 (1938); *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 141–42 (1937); *Surplus Trading Co.* v. *Cook,* 281 U.S. 647, 650–52 (1930); *Fort Leavenworth Railroad Co.* v. *Lowe,* 114 U.S. 525, 527 (1895).

notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id.* at 121.16(a)–(b) (2019). Once waiver occurs, certification is not required, and the Federal license or permit may be issued. 33 U.S.C. 1341(a).

The 1971 Rule also established requirements that applied only when the EPA was the certifying authority, including specific information that must be included in a certification request and additional procedures. For example, the regulations required the applicant to submit to the EPA Regional Administrator the name and address of the applicant, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge would begin and end, and a description of the methods to be used to monitor the quality and characteristics of the discharge. 40 CFR 121.22 (2019). Once the request was submitted to the EPA, the regulations required the Regional Administrator to provide public notice of the request and an opportunity to comment, specifically stating that ''all interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determines that such a hearing is necessary or appropriate.'' *Id.* at 121.23 (2019). If, after consideration of relevant information, the Regional Administrator determined that there was ''reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,'' the Regional Administrator would grant certification.[16] *Id.* at 121.24 (2019).

The 1971 Rule identified a number of requirements that all certifying authorities must include in a section 401 certification. *Id.* at 121.2 (2019). For example, the regulations provided that a section 401 certification shall include the name and address of the applicant. *Id.* at 121.2(a)(2). They also provided that the certification shall include a statement that the certifying authority examined the application made by the applicant to the Federal licensing or permitting agency and bases its certification upon an evaluation of the application materials which are relevant to water quality considerations or that it examined other information sufficient to permit the certifying authority to make a statement that there is a ''reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.'' *Id.* at 121.2(a)(2)–(3) (2019). Finally, the regulations provided that the certification shall state ''any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity,'' and other information that the certifying authority deems appropriate.[17] *Id.* at 121.2(a)(4)–(5) (2019).

The 1971 Rule also established a process for the EPA to provide notification to other States in a manner that is similar to that provided in CWA section 401(a)(2). Under the 1971 certification regulations, the Regional Administrator was required to review the Federal license or permit application, the certification, and any supplemental information provided to the EPA by the Federal licensing or permitting agency, and if the Regional Administrator determined that there was ''reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,'' the Regional Administrator would notify each affected State within thirty days of receipt of the application materials and certification. *Id.* at 121.13 (2019). If the documents provided were insufficient to make the determination, the Regional Administrator could request any supplemental information ''as may be required to make the determination.'' *Id.* at 121.12 (2019). In cases where the Federal licensing or permitting agency held a public hearing on the objection raised by another State, notice of such objection was required to be forwarded to the Regional Administrator by the licensing or permitting agency no later than 30 days prior to the hearing. *Id.* at 121.15 (2019). At the hearing, the Regional Administrator was required to submit an evaluation and ''recommendations as to whether and under what conditions the license or permit should be issued.'' *Id.*

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

Finally, the 1971 Rule established an oversight role for the EPA when a certifying authority modified a prior certification. The regulation provided that a certifying authority could modify its certification ''in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and *the Regional Administrator.*'' *Id.* at 121.2(b) (2019) (emphasis added).

In November 1971, EPA reorganized and transferred several regulations, including the water quality certification regulations, into title 40 of the Code of Federal Regulations. EPA subsequently redesignated the water quality certification regulations twice in the 1970s.[18] The last redesignation effort was part of a rulemaking that extensively revised the Agency's NPDES regulations. In the revised NPDES regulations, EPA addressed water quality certifications on EPA-issued NPDES permits separately from the 1971 Rule. EPA acknowledged that the 1971 Rule was ''in need of revision'' because the ''substance of these regulations predates the 1972 amendments to the Clean Water Act.'' 44 FR 32880 (June 7, 1979). However, EPA declined to revise the 1971 Rule because it had not consulted the other Federal agencies impacted by the water quality certification process. *Id.* at 32856. Instead, the Agency finalized regulations applicable only to certification on EPA-issued NPDES permits. *Id.* at 32880. EPA developed these regulations, which included a default reasonable period of time of 60 days, limitations on certification modifications, and requirements for certification conditions, in response to practical challenges and issues arising from certification on EPA-issued permits. *Id.* Ultimately, despite the changes Congress made to the statutory text in 1972 and opportunities the Agency had to revisit the regulatory text during redesignation efforts in the 1970s, EPA did not substantively change the 1971 Rule until 2020.

2. Development of the 2020 Rule

Executive Order 13868, entitled Promoting Energy Infrastructure and Economic Growth, directed EPA to propose new regulations governing section 401 consistent with the policy set forth to encourage greater investment

[16] Use of the terms ''reasonable assurance,'' ''water quality standards,'' and ''activity'' in the EPA's 1971 certification regulations was consistent with section 21(b) of the pre-1972 statutory language. However, those terms are not used in the current text of CWA section 401, which replaced the pre-1972 language. *See* Public Law 91–224, 21(b)(1), 84 Stat. 91 (1970).

[17] The term ''desirable'' is also not used in CWA section 401.

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

in energy infrastructure in the United States by promoting efficient Federal licensing and permitting processes and reducing regulatory uncertainty. 84 FR 13495 (April 15, 2019). EPA issued the proposed rule on August 22, 2019.[19] EPA promulgated a final rule on July 13, 2020. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (''2020 Rule'').

The 2020 Rule rejected the ''activity as a whole'' scope of certification review in favor of the ''discharge-only'' approach and provided guidelines on the appropriate scope of conditions. *See* 85 FR 42258 (''The scope of certification extends to the scope of conditions that are appropriate for inclusion in a certification—specifically, that these conditions must be necessary to assure that the discharge from a federally licensed or permitted activity will comply with water quality requirements . . . .''). The 2020 Rule clarified that the certification requirement was triggered by a point source *discharge* from a Federally licensed or permitted activity into ''waters of the United States,'' and reaffirmed that certifying authorities may explicitly waive certification. The 2020 Rule also introduced several new features, including requiring applicants to request a pre-filing meeting with the certifying authority at least 30 days prior to requesting certification, and defining the contents of a request for certification and certification decisions for all certifying authorities. The 2020 Rule also prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request; and removed the certification modification provision from the 1971 Rule.

3. Development of the 2023 Rule

In Spring 2021, EPA reviewed the 2020 Rule in accordance with Executive Order 13990 and determined that it would propose revisions to the 2020 Rule through a new rulemaking effort.[20] The Agency issued a proposed rule on June 9, 2022.[21] EPA promulgated a final rule on September 27, 2023.[22]

The 2023 Rule retained several aspects of the 2020 Rule, including when the certification requirement was triggered, pre-filing meeting requests, and the ability to explicitly waive certification. However, the 2023 Rule differed from the 2020 Rule in several material respects, including adopting an ''activity as a whole'' approach to the scope of certification review, allowing certifying authorities to define additional components in a request for certification, removing the regulatory prohibition on certifying authorities requesting the withdrawal of requests for certification, declining to define required components for all certification decisions, and reintroducing a provision on modifications to certification decisions.

4. Review of the 2023 Rule

In early 2025, stakeholders raised questions about multiple features of the 2023 Rule, including applications of the 2023 Rule's scope of certification.[23] As a result, in May 2025, the Agency released a memorandum titled *Clarification regarding Application of Clean Water Act Section 401 Certification* [24] to reiterate the EPA's longstanding position that States and Tribes must utilize CWA section 401 only for its statutory purpose—to protect water quality. In the Memorandum, the Agency announced its intention to publish a **Federal Register** notice seeking stakeholder feedback regarding additional areas of implementation challenges and regulatory uncertainty related to the 2023 Rule to be later addressed through additional guidance or rulemaking. On July 7, 2025, the EPA published a **Federal Register** document [25] to initiate a series of stakeholder listening sessions and invite written feedback on multiple topics, including the scope of certification, the 2023 Rule definition of ''water quality requirements,'' the Agency's ''may affect'' analysis under CWA section 401(a)(2), and experiences with the 2023 Rule. *See* Section IV.E of this preamble for further discussion on pre-proposal stakeholder engagement and outreach.

The Agency reviewed input received on implementation challenges and regulatory uncertainty associated with the 2023 Rule and determined to propose revising specific aspects of the 2023 Rule, as discussed in this preamble. EPA is now proposing revisions to the 2023 Rule to reflect the best reading of the CWA's statutory text, the legislative history regarding section 401, to support an efficient and transparent certification process, and to address stakeholder feedback gathered in its preliminary engagement and outreach. A decision to revise a regulation need not be based upon a change of facts or circumstances. ''[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change,' 'display awareness that [they are] changing position,' and consider 'serious reliance interests.' '' *FDA* v. *Wages & White Lion Invs., L.L.C.,* 145 S. Ct. 898, 917 (2025) (''*Wages & White Lion*'') (*citing Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016) (''*Encino*'') (*quoting FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*'')).[26] A revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' before the agency is ''well within an agency's discretion.'' *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (*citing Fox,* 556 U.S. at 514–15). The Agency's proposal is based in part on additional facts and considerations raised in stakeholder feedback and will continue to be informed by additional facts or considerations raised during the public comment period.

In *Loper Bright* v. *Raimondo,* 603 U.S. 369 (2024), the Supreme Court overruled the longstanding *Chevron* deference doctrine. In *Loper Bright,* the Supreme Court emphasized that reviewing courts must ''exercise independent judgment in determining the meaning of statutory provisions.'' *Id.* at 394. To resolve the meaning of disputed statutory language, a court must adopt the interpretation that the court ''after applying all relevant interpretive tools concludes is best.'' *Id.* at 400. When a court reviews an agency's statutory interpretations, *Loper Bright* noted that ''courts may . . . seek aid from the interpretations of those responsible for implementing particular statutes.'' *Id.* at 394. The Court also recognized that Congress has often enacted statutes that delegate discretionary authority to agencies, such

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

[20] *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021).

[21] Clean Water Act Water Quality Certification Improvement Rule, 87 FR 35318 (June 9, 2022).

[22] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 FR 66558 (September 27, 2023).

[23] *See supra* footnote 1.

[24] Memorandum from Peggy S. Browne, Acting Assistant Administrator for Water, *Clarification regarding Application of Clean Water Act Section 401 Certification,* May 21, 2025.

[25] Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401, 90 FR 29828 (July 7, 2025).

[26] Although ''longstanding policies'' may engender ''serious reliance interests,'' *Wages & White Lion,* 145 S. Ct. at 918 (citations omitted), the 2023 Rule has been in effect for less than two years and subject to litigation for most of that time. *Louisiana, et al.,* v. *EPA,* No. 2:23–cv–01714 (W.D. La.). Supreme Court decisions ''have set a much higher bar, requiring, for example, 'decades of industry reliance on [an agency's] prior policy.' '' *Id.* at 927 (citing *Encino,* 579 U. S. at 222) (referring to another short-term agency policy). However, EPA will consider all asserted reliance interests raised by commenters.

as statutes that empower an agency to prescribe rules to ''fill up the details'' of a statutory scheme. *Id.* at 394–95. When the best reading of a statute is that it delegates discretionary authority to an agency, reviewing courts ''need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.'' *Id.* at 404.

E. Summary of Stakeholder Outreach

Following the publication of the July 2025 **Federal Register** notice, the Agency opened a 30-day recommendations docket beginning on July 7, 2025, and concluding on August 6, 2025. The Agency received over 170 written recommendations from members of the public, which can be found in the recommendations docket. *See* Docket ID No. EPA–HQ–OW–2025–0272. The **Federal Register** notice requested feedback related to implementation challenges and regulatory uncertainty related to the 2023 Rule and asked several questions related to the scope of certification, the definition of ''water quality requirements,'' the Agency's ''may affect'' analysis under CWA section 401(a)(2), and experiences with the 2023 Rule. *See* 90 FR 29828 for the list of questions for consideration.

EPA also hosted two webinar-based listening sessions open to States, Tribes, applicants, and the public on July 16 and July 30, 2025, to gain further input. A summary of the verbal input received at the listening sessions can be found in the docket for this proposed rulemaking. The Agency also met with stakeholders upon request during development of the proposed rule. The Agency initiated formal consultation efforts under Executive Order 13132 on Federalism with States and Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments regarding areas of regulatory uncertainty and implementation challenges associated with the 2023 Rule. The Agency held an initial federalism consultation meeting on July 22, 2025, and held an initial Tribal consultation meeting on July 23, 2025. Consultation ran from June 7, 2025, through September 7, 2025. A summary of the Tribal consultation and federalism efforts is available in the docket for this proposed rule. *See* section VII of this preamble for further details on the Agency's federalism and Tribal consultations.

During the consultation period, the Agency participated in virtual meetings with inter-governmental and Tribal associations, including the Region 9 Regional Tribal Operations Caucus, the National Tribal Water Council, the Environmental Council of States, the National Association of Wetland Managers, the Association of Clean Water Administrators, and the Western States Water Council. At the listening sessions and other meetings, EPA sought input on experiences with the 2023 Rule, including the scope of certification. Stakeholders addressed topics related to the 2023 Rule's interpretation of the scope of certification and definition of water quality requirements, the ''may affect'' process and categorical determinations, and experiences with the implementation of the 2023 Rule. While some stakeholders stated the 2023 Rule established clear and transparent processes, other stakeholders provided recommendations to help improve the overall implementation of the certification process. Additionally, several themes emerged throughout this process, including support for ongoing State and Tribal engagement and recognition of the importance of clarity, consistency, and effective protection of water resources within the regulatory framework. The Agency has incorporated relevant input into section V of this preamble. EPA considered all of this information and stakeholder input during the development of this proposed rulemaking, including all recommendations submitted to the docket and through the consultation process.

V. Proposed Rule

EPA is the primary agency responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including section 401. *See* 33 U.S.C. 1251(d), 1361(a). The Agency is proposing to revise several procedural and substantive aspects of the current water quality certification regulations at 40 CFR part 121 to better align its regulations with the text and legislative history of the CWA, increase transparency, efficiency, and predictability for certifying authorities and the regulated community, and to ensure States and authorized Tribes understand and adhere to their section 401 role. The following sections further explain the Agency's rationale for the proposed rule. EPA intends for this rulemaking to be informed by stakeholder input and welcomes comment on all facets of this proposal.

This section of the proposed rule preamble includes seven sub-sections that each discuss (1) the proposed rule provisions, and (2) a summary of the Agency's proposed rule rationale. Section V.A of this preamble discusses the contents of a request for certification. Section V.B of this preamble discusses two aspects of the timeframe for a certifying authority's analysis, including extensions to the reasonable period of time and withdrawal and resubmission of requests for certification. Section V.C of this preamble discusses the appropriate scope of certification, including the scope of any certification conditions. Section V.D of this preamble discusses the required contents of a certification decision. Section V.E of this preamble discusses modifications of a certification. Section V.F of this preamble discusses aspects of the section 401(a)(2) process, including the contents of a notification, factors the Agency considers in making a may affect determination, the contents of another State's objection to the issuance of a Federal license or permit, and the Federal agency process upon receipt of an objection. Lastly, section V.G of this preamble discusses the proposed repeal of the provisions for Tribes to obtain treatment in a similar manner as a State (TAS) for section 401 or section 401(a)(2).

The Agency is not proposing any revisions to the regulations at subpart C that specifically apply to EPA when it acts as a certifying authority. However, EPA is seeking comment on whether it should add regulatory text to limit the duration of the public comment period that accompanies EPA's public notice on a request for certification. Consistent with section 401(a)(1), EPA defines its public notice procedures at 40 CFR 121.17. *See* 33 U.S.C. 1341(a)(1) (''Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.''); 88 FR 66626. EPA declined to define the length of the public comment period and stated it would determine it on a case-by-case basis but acknowledged that it expected the comment period generally to be 30 days. 88 FR 66626. EPA is requesting comment on whether it should codify a comment period of no more than 30 days in its regulations currently located at 40 CFR 121.17(a).

The Agency is not proposing revisions to subpart E, which provides that the provisions of 40 CFR part 121 are separate and severable from one another, and if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect. EPA is proposing to retain this

regulatory text because EPA continues to view the provisions of 40 CFR part 121 as severable taking into account the revisions proposed here.

A. Request for Certification

1. What is the Agency proposing?

Under this proposed rulemaking, an applicant must submit a request for certification to a certifying authority to initiate an action under CWA section 401. Consistent with the text of the CWA, the proposed rule provides that the statutory timeline for certification review starts when the certifying authority receives a request for certification. In order for a request for certification to start the statutory timeline for review, it must meet the requirements as defined in this proposed rule, rather than as defined by the certifying authority. The proposed 40 CFR 121.5 includes a singular enumerated list of documents and information that must be included in a request for certification for all Federal licenses or permits, including a copy of the Federal license or permit application submitted to the Federal agency or a copy of the draft Federal license or permit; any readily available water quality-related materials on any potential discharges from a point source into waters of the United States from the Federally licensed or permitted activity that informed the development of the application or draft license or permit; and any additional project information as proposed in 40 CFR 121.5(c) not already included in the request for certification.

Under this proposed rulemaking, a request for certification must include all applicable components to start the statutory clock. In the interest of ensuring certifying authorities do not ''blur'' the ''bright-line rule regarding the beginning of [the certification] review'' process, which states that the timeline for a certifying authority's action regarding a request for certification ''shall not exceed one year'' after ''receipt of such request,'' the Agency is proposing to remove the text currently located at 40 CFR 121.5(c) which allows State and Tribal certifying authorities to define additional contents in a request for certification, consistent with the Agency's rulemaking authority. *N.Y. State Dep't of Envtl. Conservation* v. *FERC,* 884 F.3d 450, 455–56 (2d Cir. 2018) (''*NYSDEC*'').

EPA is proposing revisions throughout 40 CFR 121.5 to reflect the proposed scope of certification. *See* section V.C of this preamble. Consistent with this proposed revised scope, the Agency is also proposing to add a definition for ''discharge'' at 40 CFR 121.1(c) to clarify that usage of the term throughout 40 CFR part 121 refers to a discharge from a point source into waters of the United States.[27] Consistent with this revision, the Agency proposes to delete the text ''from a point source into waters of the United States'' from 40 CFR 121.2 and ''into waters of the United States'' from the definition of ''license or permit'' at 40 CFR 121.1(f) to reduce redundancy in these provisions. This proposed definition and revision to 40 CFR 121.2 are consistent with the Agency's longstanding position on the meaning of the term ''discharge'' for purposes of CWA section 401. *See* 88 FR 66568, 85 FR 42237.[28] The Agency welcomes comments on whether the proposed definition is necessary and addresses concerns related to clarity as drafted, or whether 40 CFR 121.2 clearly conveys the meaning of the term discharge for purposes of CWA section 401.

EPA is also proposing to remove the definition of ''project proponent'' currently located at 40 CFR 121.1(h) and instead leverage the statutory term ''applicant'' throughout 40 CFR part 121. The term ''project proponent'' does not appear in CWA section 401, and the Agency believes it is most appropriate to adhere to the statutory text where, as here, a term has a readily understandable ordinary meaning reinforced by the surrounding context. The term ''applicant'' as used in the EPA's proposed regulations, like the text of CWA section 401, would refer to the applicant for a Federal license or permit that is subject to CWA section 401 certification. Using the term ''applicant'' throughout 40 CFR part 121 carries this established usage throughout the regulatory scheme. To be clear, the term ''applicant'' may refer to the person or entity applying for a Federal license or permit themselves, contractors or other agents of that person or entity, or any other entity that may seek certification. The Agency is also proposing additional revisions to 40 CFR 121.5 to remove redundant provisions and further streamline the contents of a request for certification.

Ultimately, these proposed revisions would provide greater certainty for applicants, certifying authorities, and Federal agencies concerning when the reasonable period of time for review of a request for certification has started.

2. Summary of Proposed Rule Rationale

The Act places the burden on the applicant to obtain a CWA section 401 certification from a certifying authority in order to receive a Federal license or permit. The CWA section 401 certification process begins on the date when the certifying authority receives a request for certification. The statute limits the time for a certifying authority to act on a request as follows:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a *request for certification,* within a reasonable period of time (which shall not exceed one year) after *receipt* of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. 1341(a)(1) (emphasis added). The plain language of the Act requires that the reasonable period of time to act on certification not exceed one year after the ''receipt'' of the ''request for certification.'' The statute, however, does not define those terms. As the agency that Congress charged with administering the CWA,[29] Congress empowered EPA ''to prescribe rules to 'fill up the details' of a statutory scheme.'' *Loper Bright,* 603 U.S. 369, 395 (2024) (noting that in such circumstances, an ''agency is authorized to exercise a degree of discretion'') (citation omitted). In defining the terms ''receipt,'' at 40 CFR 121.6(a), and ''request for certification,'' at 40 CFR 121.5, EPA is ''filling up the details'' of the CWA section 401 certification process. *See* 33 U.S.C. 1361(a) (''The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.'').

In 2018, the Second Circuit addressed the question of when the statutory review clock begins. *NYSDEC,* 884 F.3d at 455–56. The certifying authority in the case, NY State Department of Environmental Conservation, ''contend[ed] that the review process under Section 401 begins only once it, a state agency, deems an application 'complete.' '' *Id.* at 455. The court disagreed and held that the statutory time limit is *not* triggered when a certifying authority determines that a request for certification is ''complete,''

[27] The Agency will use the term ''discharge'' throughout the preamble to refer to point source discharges into waters of the United States, *i.e.,* the proposed definition of ''discharge'' at 40 CFR 121.1(c), unless use of the full terminology is necessary for readability and clarity.

[28] The Agency continues to rely on the definition of ''point source'' in section 502(14) of the CWA. 33 U.S.C. 1362(14). For example, courts have concluded that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are ''point sources'' for purposes of the CWA. *See, e.g., Avoyelles Sportsmen's League* v. *Marsh,* 715 F.2d 897 (5th Cir. 1983); *United States* v. *Larkins,* 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd,* 852 F.2d 189 (6th Cir. 1988).

[29] *See* footnote 14.

but that the ''plain language of Section 401 outlines a bright-line rule regarding the beginning of review,'' and that the clock starts after ''receipt of such request'' by the certifying authority. *Id.* at 455–56. Otherwise, the court noted that State certifying authorities could ''blur this bright-line into a subjective standard, dictating that applications are complete only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.'' *Id.* at 456.

Under the current regulations, the Agency defined the minimum contents in all requests for certification and allowed State and Tribal certifying authorities to define additional contents of a request for certification. 40 CFR 121.5(a), (c). In the July 2025 **Federal Register** publication, the Agency asked stakeholders for any data or information on their experiences with the 2023 Rule, including certification procedures. 90 FR 29829. Several stakeholders, including some certifying authorities, supported the current regulation's approach to the request for certification, asserting that it provided certifying authorities with the necessary information to make a certification decision and reduced the time in the certification process. Conversely, several industry stakeholders expressed concern that the current regulation's authorization for State and Tribal certifying authorities to add additional contents could lead to uncertainty about when the reasonable period of time began.

Given the large number of requests for certification submitted each year,[30] the statutory requirement that those requests be acted on ''within a reasonable period of time (which shall not exceed one year) after receipt of such a request,'' and the potential for uncertainty or delays associated with the absence of a nationally consistent definition for request for certification, the EPA is proposing to standardize the contents of a ''request for certification'' to provide applicants, certifying authorities, and Federal agencies with clear regulatory text identifying when the statutory reasonable period of time begins.

The Agency is proposing to revise 40 CFR 121.5 to define one complete list of components for all requests for certification. Consistent with the existing regulatory requirements, all requests must be in writing, signed, and dated by the applicant. The proposed regulatory text retains the minimum components currently included in all requests for certification, *e.g.,* a copy of the Federal license or permit application, with structural revisions to consolidate these requirements into one list instead of bifurcating between individual and general licenses or permits, and additional revisions to ensure consistency across the proposed regulatory text. The proposed text also identifies additional project information for inclusion in a request for certification that is similar to the current default list of additional components, with revisions to further streamline and clarify the contents of a request.

As discussed in more detail below, the Agency believes these are the components that would be necessary to provide a certifying authority with clear notice that a request has been submitted and a sufficient baseline of information for the certifying authority to begin its review. It is important to distinguish between the amount of information appropriate to start the certifying authority's reasonable period of time and the amount of information that may be necessary for the certifying authority to take final action on a request for certification. The components of a request for certification identified in the proposed rule—including a copy of the Federal license or permit application or draft license or permit and any readily available water quality-related materials on any potential discharges from the Federally licensed or permitted activity that informed the development of the application or draft license or permit—are intended to be sufficient information to start the reasonable period of time but may not necessarily represent the totality of information a certifying authority may need to act on a request. Nothing in the proposed rule would preclude an applicant from submitting additional relevant information or preclude a certifying authority from requesting and evaluating additional information within the reasonable period of time. However, the Agency expects any additional information requested by the certifying authority to relate to the discharge, consistent with the proposed scope of certification at 40 CFR 121.3, because any decision must include a statement that the *discharge* will comply with water quality requirements. *See* Section V.D of this preamble for further discussion on the contents of a certification decision.

The Agency is proposing to retain the requirement that all requests for certification include either a copy of the Federal license or permit application submitted to the Federal agency (for an individual license or permit), or a copy of the draft Federal license or permit (for a general license or permit)[31]. This means that a request for certification could not precede submission of an application to the Federal agency (for individual licenses or permits), providing applicants and others with clear direction on when the certification process begins in relation to the Federal licensing or permitting process. Furthermore, this would be consistent with several Federal agency practices that allow applicants to submit requests for certification shortly after the license or permit application is received. *See, e.g.,* 18 CFR 5.23 (requiring a FERC hydropower license applicant to file a copy of a water quality certification, request for certification, or evidence of a waiver ''within 60 days from the date of issuance of the notice of ready for environmental analysis''); 33 CFR 325.2(b)(1) (requiring a Corps district engineer to notify the applicant if they determine that a water quality certification is necessary in processing an application).

The Agency is also proposing that all requests for certification include any readily available water quality-related materials on any potential discharges from the Federally licensed or permitted activity that informed the development of the application or the draft license or permit. This information is similar to the existing requirement currently located at 40 CFR 121.5(a)(1)(ii) and (a)(2)(ii), with revisions to ensure the information is appropriately limited and related to the potential discharges, consistent with proposed revisions to the scope of certification. *See* Section V.C of this preamble. The term ''readily available'' refers to existing materials that are in the applicant's possession or easily obtainable.[32] The phrase ''that informed development of the application or the draft license or permit'' refers to materials that were considered by the applicant during its development of the application or draft license or permit. These terms provide a predictable, objective endpoint for applicants because they are limited to data or information existing at the time of, and that was used in, the development of the Federal license or permit application or the draft Federal license or permit. This information may also reduce the need for duplicative

[30] *See* section 3 of the Economic Analysis.

[31] The Agency notes that the draft Federal license or permit required in a request for certification on the issuance of a general license or permit refers to the draft used at the time of the request for certification.

[32] For example, this could include maps, studies, or a reference to a website or literature that contain information that the applicant considered during the development of the application or draft license or permit.

studies and analyses during the certification process. Consistent with the scope of review under this proposed rule, the proposed rule would limit any such materials to ''water quality-related materials on any potential discharges.'' Accordingly, applicants may redact or exclude personally identifiable information (*e.g.,* personal addresses, personal finance information) and/or other sensitive information.

The components proposed at 40 CFR 121.5(a) and (b) should be familiar to stakeholders and provide a reasonable baseline of information to initiate the certification process, including information on the project and its discharge-related water quality impacts. However, in the event a Federal license or permit application or draft Federal license or permit does not include certain baseline information on discharge-related water quality impacts, the Agency is proposing five additional components for inclusion in a request for certification to ensure all requests for certification include the same predictable, baseline information. To ensure the additional information is not duplicative of the proposed components at 40 CFR 121.5(a) and (b), the proposed regulatory text specifies that such additional information is only required if not already included in the request for certification. For example, if the Federal license or permit application already includes a map or diagram of the proposed discharges from the Federally licensed or permitted activity, the applicant would not be required to submit a second copy of the map or diagram. To ensure the certifying authority understands where these components are located in a request for certification, the Agency observes that the applicant could simply indicate where the components identified in proposed 40 CFR 121.5(c) are already included in the materials proposed at 40 CFR 121.5(a) and (b). The proposed additional components are based on the current regulatory text that applies to EPA when it acts as a certifying authority or when a State or Tribe does not define additional components in a request for certification with revisions. 40 CFR 121.5(b), (d). Based on the Agency's experience, these proposed components are those that are necessary to initiate a certifying authority's analysis on a request for certification. The following paragraphs discuss these additional components.

The Agency is proposing to require additional components related to the location and type of discharges from a Federally licensed or permitted activity at 40 CFR 121.5(c)(1)–(4). These additional components, including a description of the proposed discharges, the specific location of any discharges, a map or diagram of the proposed discharges, and a description of current site conditions, are similar to those in the 2020 Rule, *see* 40 CFR 121.5(b)(4) (2020), and the current regulation, *see* 40 CFR 121.5(b)(1)–(4), with revisions to ensure the information is appropriately limited and related to the potential discharges, consistent with proposed revisions to the scope of certification. *See* section V.C of this preamble. The Agency recognizes that some of these components may not be appropriate for a Federal agency seeking CWA section 401 certification for the issuance of general license or permit. For example, at the time of certification, a Federal agency may not know the location of every potential discharge that may in the future be covered under a general license or permit. Accordingly, the Agency has proposed regulatory text at 40 CFR 121.5(c) to clarify that additional project information only needs to be included in a request for certification ''as applicable.''

Consistent with prior regulations, the Agency is proposing that applicants must provide documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures (unless the pre-filing meeting request was waived) at 40 CFR 121.5(c)(5). This provision is intended to create additional accountability on the part of the applicant to ensure that the applicant has complied with the requirement to request a pre-filing meeting with the certifying authority. If the certifying authority waives the requirement for a pre-filing meeting request, then the applicant would not need to produce documentation of the pre-filing meeting request.

The Agency is proposing to remove the additional contents currently required at 40 CFR 121.5(b)(5) and (6). 40 CFR 121.5(b)(5) requires the applicant to include ''[t]he date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence,'' while 40 CFR 121.5(b)(6) requires the applicant to include ''[a] list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization.'' While this information may be helpful to certifying authorities as they develop certification decisions, this information may not be available at the time the applicant submits a request for certification, or at all in the case of the issuance of general permits. *See* 88 FR 66580 (discussing the lack of information on other authorizations at the time of a request for certification on the issuance of a general permit). Certifying authorities would be free to leverage the pre-filing meeting or other communications with the applicant to discuss related items, to the extent they are relevant to the certifying authority's analysis, including work windows and any expected authorizations. The Agency requests comment on the proposed contents of a request for certification, including whether the Agency should further revise the required components proposed at 40 CFR 121.5.

EPA proposes to remove the text currently located at 40 CFR 121.5(c) which allows State and Tribal certifying authorities to define additional contents in a request for certification. The court in *NYSDEC* held that the reasonable period of time begins after receipt of a request for certification and not when the certifying authority deems it ''complete.'' 88 FR 66574. The 2023 Rule asserted that *NYSDEC* did not address the separate question of whether EPA or certifying authorities have the authority to establish a list of required contents for a request in advance of the request and opted to allow State and Tribal certifying authorities the ability to add additional requirements to a request for certification. *Id.* at 66577. After considering stakeholder input, the Agency has determined that EPA, and not certifying authorities, has the authority to establish a list of contents for a request for certification. Accordingly, the Agency is proposing to define one list of contents for all requests for certification to reduce uncertainty and enable applicants and certifying authorities to objectively and transparently understand which submittals start the reasonable period of time clock.

As an initial matter, the approach taken in the current regulation is not compelled by either the statutory text or *NYSDEC.* The Agency does not find that defining an exclusive list would delay or hinder the certification process. Rather, the Agency finds the current regulatory approach could introduce uncertainty and delays where certifying authorities fail to transparently and objectively convey the additional required contents of a request, including requesting information unrelated to certification of project-related discharges, leading certifying authorities to ''blur this bright-line into a subjective standard,'' *NYSDEC,* 884 F.3d at 456, contrary to the holding in *NYSDEC* and the statutory text. As discussed above, nothing in the proposed rule would

preclude an applicant from submitting additional relevant information or preclude a certifying authority from requesting and evaluating additional information within the reasonable period of time. Indeed, in many cases it may be in the interest of the applicant and provide a more efficient certification process if relevant information about discharges and potential impacts to the receiving waters is provided to the certifying authority early in the certification process. The Agency also observes that the applicants and certifying authorities could use the pre-filing meeting process to discuss the proposed project and to determine what information (if any), in addition to that required to be submitted as part of the request, may be needed to enable the certifying authority to take final action on the request in the reasonable period of time.

The EPA acknowledges the desire of certifying authorities to have all necessary information as soon as possible in the certification process, but the Agency must balance that desire against the need for transparency related to when the reasonable period of time starts and the need for certainty regarding the required contents of a request for certification. The Agency finds that its proposed rule would strike the appropriate balance by identifying the kinds of information that provide a reasonable baseline about any project while recognizing the ability of certifying authorities and applicants to request and provide additional information both before and after the reasonable period of time clock starts.

It is important to reiterate that the burden is on the applicant to submit a request for certification to the certifying authority and work cooperatively to provide additional information as appropriate to facilitate the certification process. Likewise, the burden is on the certifying authority to evaluate the request for certification in good faith and to request information, documents, and materials that are within the scope of section 401 as provided in this proposed rule and that can be produced and evaluated within the reasonable period of time. If an applicant fails to supply the certifying authority with information necessary to assure that the discharge from the proposed project complies with the water quality requirements, the certifying authority may so specify in a denial of the certification. If the certifying authority requests information from the applicant that is beyond the scope of section 401, the applicant's remedy would lie with a court of competent jurisdiction. To avoid situations where the certifying authority requests information from applicants that cannot be developed and submitted within the reasonable period of time, the EPA recommends that both the applicant and the certifying authority work in good faith, consistent with CWA section 401, and have early and sustained coordination and communication to streamline the overall certification process. The Agency requests comment on the proposed approach to remove the text currently located at 40 CFR 121.5(c) which allows State and Tribal certifying authorities to define additional contents in a request for certification.

Consistent with proposed revisions to define one list of components for all requests for certification, the Agency is proposing to remove 40 CFR 121.5(d), which directed applicants to provide defined additional contents in a request for certification if the State or Tribal certifying authority had not established its own list of requirements for a request for certification. This provision is unnecessary and redundant in light of the proposed requirements at 40 CFR 121.5(a)–(c). As noted above, the proposed components provide familiar regulatory text with clear direction for stakeholders regarding what is required in a request for certification that begins the statutory reasonable period of time. The Agency sees value in proposing to define components that are objective and do not require subjective determinations by a certifying authority about whether the request submittal requirements have been satisfied. Pursuant to 40 CFR 121.6(a), which would remain unchanged from the current regulations, the reasonable period of time begins on the date that the certifying authority receives a request for certification as defined in 40 CFR 121.5 (and in accordance with the certifying authority's applicable submission procedures). Thus, a request for certification must include all components listed in 40 CFR 121.5 of the proposed rule to start the statutory reasonable period of time. If any of the components of proposed 40 CFR 121.5 are missing from the request, the statutory reasonable period of time would not start. The inclusion of the proposed information would provide the certifying authority with clear notice that the applicant has submitted a request for certification and a sufficient baseline of information to allow it to begin its evaluation in a timely manner. If there are additional information needs aside from the proposed components provided in a request for certification, the certifying authority and applicant could discuss those needs during the pre-filing meeting (*i.e.,* discuss anticipated additional information needs prior to the request for certification submittal) or during the reasonable period of time (*i.e.,* discuss additional information needs that emerged during the certifying authority's analysis of the request). The regulatory requirement that requests be received ''in accordance with applicable submission procedures'' should not be used by certifying authorities to introduce unreasonable delay between when a certifying authority receives a request and when ''receipt'' occurs, as this would contravene this proposed rule.

Finally, the Agency is proposing to remove the definition of ''project proponent'' at 40 CFR 121.1(h) and revise corresponding regulatory language throughout 40 CFR part 121 to use the statutory term ''applicant.'' CWA section 401 applies to any ''applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters.'' 33 U.S.C. 1341(a)(1). Such an ''applicant . . . shall provide the licensing or permitting agency a certification from'' the relevant certifying authority. *Id.* The remainder of the statute carries through this basic applicability language—the CWA section 401(a)(2) provision triggers ''[u]pon receipt of such application and certification,'' *id.* 1341(a)(2), and any certification must include conditions ''necessary to assure that any applicant for a Federal license or permit will comply'' with applicable water quality requirements. *Id.* 1341(d). The term ''project proponent'' does not appear in CWA section 401 or any related provisions. The term ''applicant'' is most consistent with the statutory text and would also improve the clarity and administrability of the regulatory provisions intended to implement the statute.

In light of this revision, and in light of the statutory text of CWA section 401 discussed above, which requires an ''applicant for a Federal license or permit'' to request certification and otherwise carries through this basic applicability language, the EPA also requests comment on whether the best reading of the statute supports extending the CWA section 401 certification requirement to general permits, even in the absence of an ''applicant.'' *See Loper Bright,* 603 U.S. at 400. EPA's position, as reflected in the current regulation (and the prior 2020 Rule), is that CWA section 401 certification ''is not limited to individual Federal licenses or permits, but also extends to general licenses and

permits such as CWA section 404 general permits . . . and CWA section 402 general permits[.]'' 88 FR 66570; *see also* 85 FR 42243 (noting the definition of ''project proponent'' ''extends all of the substantive and procedural requirements [of the 2020 Rule] to federal agencies seeking certification for a general license or permit.''). In taking this position, the Agency previously asserted that ''both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification.'' 88 FR 66571 (citing, *inter alia, United States* v. *Marathon Dev. Corp.,* 867 F.2d 96, 100 (1st Cir. 1989)); 85 FR 42285–86. By defining ''project proponent'' to include ''the applicant for a Federal license or permit, *or the entity seeking certification,*'' 40 CFR 121.1(h) (emphasis added), the EPA sought for the regulation to include, as a categorical matter, general permits and other instances of non-applicants requesting certification. However, general permits do not involve an ''applicant,'' such as the issuance of nationwide and regional general permits for dredged and fill material issued by the Corps pursuant to an express grant of statutory authority in CWA section 404(e), 33 U.S.C. 1344(e). There are also instances where individual projects do not involve an ''application,'' such as Corps' civil works projects, but the Federal agency still requires a certification. *See* 33 CFR 336.1(a)(1) (''The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.''); 33 CFR 335.2 (''[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.''). The Agency requests comment on whether the best reading of section 401 extends the certification requirement even to those situations where there are no ''applicants,'' but there nevertheless is a potential for a point source discharge from a Federally licensed or permitted activity into waters of the United States. The Agency also seeks comment on whether reliance interests exist for the Agency's prior statements regarding the applicability of CWA section 401 in the absence of applicants, and, if so, how the Agency should weigh them against returning to the plain language of the statute. The EPA notes that this alternative approach would not be intended to alter the scope of permits to which CWA section 401 applies of its own force.

B. Timeframe for Certification Analysis and Decision

1. What is the Agency proposing?

Section 401(a)(1) of the CWA provides that a certifying authority waives its ability to certify a Federal license or permit if it does not act on a request for certification within the reasonable period of time. 33 U.S.C. 1341(a)(1) (''If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.''). As discussed in further detail below, the Agency is proposing to repeal the provision allowing for automatic extensions to the reasonable period of time to accommodate a certifying authority's public notice procedures and force majeure events and instead rely on the joint extension process. Furthermore, the Agency is proposing regulatory text to bar certifying authorities from requesting applicants to withdraw a request for certification to avoid exceeding the reasonable period of time.

2. Summary of Proposed Rule Rationale

i. Extensions to the Reasonable Period of Time

Under this proposed rulemaking, the EPA is removing the provision at 40 CFR 121.6(d) that allows for automatic extensions to the reasonable period of time if a longer period of time was necessary to accommodate the certifying authority's public notice procedures or force majeure events. The current regulations identify two circumstances that would require an extension to the reasonable period of time: (1) where a certification decision cannot be rendered within the negotiated or default reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters); and (2) when State or Tribal public notice procedures necessitate a longer reasonable period of time. 40 CFR 121.6(d).

In response to EPA's July 2025 request for stakeholder feedback, several industry stakeholders were not supportive of the extension provisions under the 2023 Rule arguing that State processes (*i.e.,* public notice procedures) should not override the agreed upon reasonable period of time. Further, one industry stakeholder added that the certifying authority should not be allowed to extend the reasonable period of time and instead the Federal agency should do so only at the request of the applicant. On the other hand, several State, Tribal, and public stakeholders supported extensions of the six-month default period where necessary.

Upon reconsideration, the Agency finds that automatic extensions which accommodate the certifying authority's public notice procedures or force majeure events are unnecessary. As an initial matter, the certifying authority and Federal agency can discuss the certifying authority's public notice procedures when jointly setting and agreeing to the reasonable period of time. *See* 88 FR 66586 (discussing factors Federal agencies and certifying authorities may consider in setting the reasonable period of time, including the certifying authority's administrative procedures). Since administrative procedures, like public notice procedures, should be established and readily predictable, EPA encourages the creation of memorandums of agreement (MOAs) between Federal agencies and certifying authorities as appropriate to help reduce the need for determining the reasonable period of time on a case-by-case basis for every request. Likewise, certifying authorities and Federal agencies can agree to extend the reasonable period of time, not beyond one year, as necessary to address unforeseen events like extensions to the public notice process or force majeure events, and develop MOAs to standardize the process in such scenarios.

Aside from being able to jointly set and extend the reasonable period of time, the Agency also finds the automatic extensions unnecessary in light of the default reasonable period of time. The reasonable period of time defaults to six months if the certifying authority and Federal agency cannot jointly agree to a reasonable period of time. 40 CFR 121.6(c). The Agency is unaware of any implementation issues with the default reasonable period of time and meeting public notice requirements. In any case, the Agency expects Federal agencies and certifying authorities to negotiate and collaborate on setting the reasonable period of time and any extensions in good faith.

Considering these other aspects of the existing regulations for setting and extending the reasonable period of time, the Agency finds the automatic extension provision to be duplicative and anticipates that the proposed approach would provide clarity and added predictability to the certification

timeline. The Agency is requesting comment on the proposed approach.

ii. Withdrawal and Resubmittal

The EPA is proposing to add regulatory text in 40 CFR 121.6(e) providing that the certifying authority may not request the applicant to withdraw a request for certification or take any action to extend the reasonable period of time other than specified in proposed 40 CFR 121.6(d), which provides that any extension ''shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.'' As described in greater detail below, this proposed language is consistent with the plain statutory text of CWA section 401(a)(1) providing that the reasonable period of time shall not exceed one year and is further supported by the legislative history and body of case law addressing withdrawal and resubmission of certification requests. Moreover, as discussed below, this proposed approach addresses concerns raised by stakeholders in pre-proposal outreach seeking regulatory clarity regarding withdrawal and resubmission.

Although CWA section 401(a)(1) does not address withdrawal and resubmission expressly, the plain text provides that the reasonable period of time upon which a certifying authority may act on a request for certification ''shall not exceed one year.'' This language unequivocally sets the maximum limit of the reasonable period of time to act on a request for certification as one year and does not provide for exceptions to this restriction. As the Court of Appeals for the D.C. Circuit correctly observed, through this text, ''Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request.'' *Alcoa Power Generating Inc.* v. *FERC,* 643 F.3d 963, 972, (D.C. Cir. 2011). This purpose is clearly documented in the legislative history for CWA section 401. The Conference Report on Section 401 identifies that the purpose of the one-year maximum time limit is to ensure that ''sheer inactivity by the State . . . will not frustrate the Federal application.'' H.R. Rep. 91–940, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2741. Allowing a certifying authority to circumvent the set maximum period of time to act on a request for certification, either by requesting that an applicant withdraw and resubmit the request for certification or otherwise extending the reasonable period of time beyond a year, conflicts with the plain statutory language and statutory purpose of precluding a certifying authority from thwarting a project through continued inaction. Thus, the proposed text recognizes the one-year maximum and ensures that certifying authorities do not request withdrawal and resubmission to evade this restriction.

The proposed approach is consistent with the body of case law addressing withdrawal and resubmission of certification requests, which recognizes that certifying authorities may not use withdrawal and resubmission to extend the one-year maximum on the reasonable period of time to act on a request for certification in section 401. In *Hoopa Valley Tribe* v. *FERC,* 913 F.3d 1099, 1104 (D.C. Cir. 2019), the Court of Appeals for the D.C. Circuit held that State certifying authorities had improperly entered into an agreement with an applicant whereby the ''very same'' request for certification of its relicensing application was automatically withdrawn and resubmitted every year by operation of ''the same one-page letter,'' submitted to the certifying authorities before the statute's one-year waiver deadline. *Hoopa Valley Tribe* v. *FERC,* 913 F.3d 1099, 1104 (D.C. Cir. 2019). The court found that under the coordinated ''withdrawal-and-resubmission scheme,'' the certifying authorities had not rendered a certification decision for ''more than a decade'' after the initial request was submitted to them, and that such ''deliberate and contractual idleness'' defied the statute's one-year limitation. *Id.* In its analysis, the court found that ''[s]uch an arrangement does not exploit a statutory loophole,'' but rather impermissibly circumvents the congressionally granted authority of the Federal agency licensing the project. *Id.* Specifically, the court reasoned that such a scheme ''could be used to indefinitely delay federal licensing proceedings,'' thereby undermining the authority of the Federal licensing agency to regulate such matters. *Id.*

Case law surrounding withdrawal and resubmission has continued to develop since the limitation identified in *Hoopa Valley Tribe.* Subsequent to its decision in *Hoopa Valley Tribe,* the Court of Appeals for the D.C. Circuit distinguished unilateral withdrawals initiated by an applicant as distinct from the impermissible withdrawal-and-resubmission scheme at issue in *Hoopa Valley Tribe,* finding that ''where a party unilaterally withdraws and resubmits its certification application, those actions outside of the State's control do not waive its statutory authority.'' *Vill. of Morrisville* v. *FERC,* 136 F.4th 1117, 1127 (D.C. Cir. 2025). In drawing this distinction, the court noted that its decision in *Hoopa Valley Tribe* centered on a mutual agreement between a State certifying authorities and the applicant to circumvent the one-year maximum limit of the reasonable period of time and delay the certification process, and the court explained that the ''evidence of the State's decision to delay was central to [the court's] holding'' in that case. *Id.* Consistently, the Fourth and Ninth Circuit Courts of Appeals have declined to find that agency records support finding impermissible withdrawal-and-resubmission schemes where such records demonstrate unilateral withdrawal initiated by an applicant, even where there has been acquiescence to the withdrawal by a certifying authority. *See N.C. Dep't of Envtl. Quality* v. *FERC,* 3 F.4th 655, 675 (4th Cir. 2021); *Cal. State Water Res. Control Bd.* v. *FERC,* 43 F.4th 920, 931–32 (9th Cir. 2022).

The proposed regulatory text in 40 CFR 121.6(e) is consistent with this body of case law regarding withdrawal and resubmission, as it recognizes the impermissibility of a certifying authority applying withdrawal and resubmission to evade the statutory one-year maximum reasonable period of time to act on a request for certification, as addressed in *Hoopa Valley Tribe,* without precluding unilateral withdrawal initiated by an applicant found to be permissible in subsequent cases. This regulatory provision also does not preclude a certifying authority from acting within the statutory one-year maximum reasonable period of time to deny a request for certification without prejudice, which the Court of Appeals for the D.C. Circuit has distinguished from the withdrawal-and-resubmittal scheme at issue in *Hoopa Valley Tribe* and has recognized involves action from the certifying authority within the meaning of section 401 on a certification request. *See Turlock Irrigation Dist.* v. *FERC,* 36 F.4th 1179, 1183 (D.C. Cir. 2022).

The Agency's proposed approach addresses concerns raised by multiple stakeholders in response to the EPA's July 2025 request for stakeholder feedback regarding the lack of clarity under the current regulations regarding circumstances under which withdrawal and resubmission is impermissible. Rather than proposing an intent-based standard to evaluate the objectives of a certifying authority regarding withdraw and resubmission, which would likely prove difficult to apply and would not provide regulatory certainty for certifying authorities or industry, EPA's proposed approach provides a clear, bright-line limitation on certifying

authorities requesting an applicant withdraw a request for certification or otherwise taking action to extend the reasonable period of time beyond the one-year statutory maximum.

EPA seeks comment on its proposed text in 40 CFR 121.6(e), including but not limited to whether the proposed approach sufficiently addresses the regulatory uncertainty surrounding withdrawal and resubmission identified by stakeholders in feedback received in response to the Agency's July 2025 request.

C. Appropriate Scope for Section 401 Certification Review

1. What is the agency proposing?

The proposed rule would narrow the current regulation's broad ''activity''-based scope of certifying authority review to what Congress clearly intended: an assessment of whether a facility's point source *discharges* [33] into waters of the United States will comply with specified water quality requirements. To explain this fundamental change in overall scope of review, this section will explain the history of EPA's interpretations, why the Agency chose to address the issue again in this rulemaking, and most importantly, the basis for the proposed new interpretation. Lastly, the preamble turns to other changes the Agency proposes to correct, related to the definition of ''water quality requirements'' and the scope of waters subject to certification.

i. The History of EPA's Interpretation of Scope

The proposed rule is the Agency's fourth interpretation regarding the scope of water quality certification since 1971. EPA first issued regulations addressing water quality certification in 1971, implementing a version that predated the modern CWA enacted in 1972 including the current CWA section 401. The 1971 Rule included language that was consistent with the statute at that time, indicating that the scope of certification prior to the modern CWA extended to the entire ''activity'' at issue in the Federal license or permit. In 1972, Congress amended the CWA and required certifying authorities to certify that ''any such discharge shall comply'' with certain provisions of the CWA. EPA did not revise its 1971 Rule following those amendments. In 1994, the Supreme Court reviewed EPA's 1971 Rule under the *Chevron* framework, whereby courts deferred to agency interpretations of ambiguous provisions of statutes the agency implements so long as they were reasonable. *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology,* 511 U.S. 700 (1994) (''*PUD No. 1*''). The Court upheld EPA's 1971 interpretation as reasonable. *Id.* at 712.

As for the more recent interpretations in 2020 and 2023, they were made under an evolving and progressively unclear landscape for judicial interpretation wherein courts, including the Supreme Court, were reducing reliance on, or calling into question, *Chevron* deference. Against this backdrop, the 2020 Rule analyzed the statute under *Chevron* (which was applicable at the time) and adopted an interpretation largely consistent with this proposal. The 2023 Rule subsequently reversed the 2020 interpretation to largely return to the interpretation upheld by the Supreme Court in *PUD No 1.* The Agency did not cite *Chevron,* but in the absence of any other applicable framework, instead relied heavily on the *PUD No. 1* precedent and interpretive tools.

ii. Reevaluation of the 2023 Rule Interpretation

In June 2024, the Supreme Court issued its decision in *Loper Bright,* 603 U.S. 369, overruling *Chevron* and announcing a new framework for judicial review that largely eliminates judicial deference to administrative agencies regarding statutory interpretation, demanding instead that statutory interpretations be based on the ''best reading'' of the statute, starting with the language of the statute and using other traditional tools of statutory construction where appropriate. With the benefit of this direction from the Supreme Court, the Agency has reevaluated CWA section 401's language, structure, and history and concluded that CWA section 401 clearly limits the certification analysis to ensuring that any point source discharge into waters of the United States from a federally licensed or permitted activity will comply with appropriate and applicable water quality requirements. The 2023 Rule interpretation underpinning the current regulation does not reflect this best reading of the statute. This presents the Agency with a compelling reason to update its interpretation and, consequently, its regulations. EPA's proposal also reflects public feedback regarding uncertainty associated with the 2023 Rule provisions regarding the scope of certification.

2. Summary of Proposed Rule Rationale

EPA is proposing the following regulatory text at 40 CFR 121.3 regarding the scope of certification:

> The 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 applicable and appropriate water quality requirements.

Under the new definition of ''discharge,'' the discharge in this section is further limited by the fact that the discharge must be a discharge from a point source into ''waters of the United States.'' This section first explains why EPA's proposal is supported by the statutory text of CWA section 401, the history of the CWA and, in particular, the 1972 amendments to the Act, and related legislative history. After reviewing the statutory text and 1972 amendments, this section then discusses the Supreme Court's decision in *PUD No. 1* regarding the scope of certification including the Court's discussion of CWA section 401(d). The section then turns to EPA's proposed definition of ''water quality requirements'' and EPA's related proposed interpretation of the statutory phrase ''other appropriate requirement of State law;'' and finally to EPA's proposed approach to which waters a certifying authority considers when acting on a request for certification (referred to as ''scope of waters'' below).

i. The CWA Limits the Scope of Section 401 Certifications to ''Discharges''

The best reading of the text of CWA section 401 limits scope of certification to ''discharges'' and not to the ''activity.'' The first sentence in CWA section 401(a)(1) provides that ''[a]ny applicant for a Federal license or permit to conduct any *activity* including, but not limited to, the construction or operation of facilities, which may result in any *discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which *the discharge* originates or will originate . . . that any *such discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act'' (emphasis added). The plain language of CWA section 401(a) directs States to certify that any discharge resulting from the proposed Federally licensed or permitted activity will comply with the enumerated provisions of the CWA. The use of the phrase ''such discharge'' in the very sentence that identifies what a State must certify is strong textual support for EPA's proposed interpretation. *See Park 'N Fly, Inc.* v.

[33] *See* footnote 27.

Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) (''Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.''); *PG&E* v. *FERC,* 113 F.4th 943, 948 (D.C. Cir. 2024) (explaining that, ''when 'addressing a question of statutory interpretation, we begin with the text' '') (quoting *City of Clarksville* v. *FERC,* 888 F.3d 477, 482 (D.C. Cir. 2018)).

Section 401(a)(1) of the CWA uses the term ''activity,'' but not in reference to the scope of certification. The term ''activity'' describes the type of Federal license or permit that triggers CWA section 401 certification—namely, a ''Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters.'' Whereas ''such discharge'' identifies the scope of certification. Or, in the phrasing of the statutory text, if a Federal license or permit to conduct an activity may result in a discharge, then the certifying authority would certify that ''any such discharge'' will comply with the enumerated provisions of the CWA.

The language of the rest of CWA section 401 supports this reading. Section 401(a)(2) of the CWA, regarding the neighboring jurisdiction process discussed at section V.F of this preamble, is clearly limited to discharges.[34] Section 401(a)(2) of the CWA requires EPA to determine whether ''*such a discharge* may affect'' the quality of the waters of any other State beyond the State in which the discharge originates (emphasis added), and subsequently notify that affected other State. Section 401(a)(2) of the CWA also requires a notified State that objects to a Federal license or permit to determine whether ''*such discharge* will affect the quality of its waters so as to violate any water quality requirements'' (emphasis added). These references to ''discharge'' are clear indications that the subject of the entire CWA section 401 process—from certification pursuant to CWA section 401(a)(1) to the neighboring jurisdiction process pursuant to CWA section 401(a)(2)—is focused on discharges, not the broader activity. The scope of the CWA section 401(a)(2) process is clearly limited to discharges, and this provides strong support that the scope of certification in CWA section 401(a) is also clearly limited to discharges.[35]

ii. The 1972 Amendments to the CWA Support EPA's Proposed Interpretation

The 1972 amendments to the CWA and related legislative history provide additional support to interpret scope as limited to discharges. As discussed in detail in Section IV.A, before it was amended in 1972, the CWA ''employed ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution.'' *EPA* v. *Cal. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 202 (1976). In 1972, Congress determined that this program had ''been inadequate in every vital aspect,'' *id.* at 203 (quoting legislative history of the 1972 amendments), and performed a ''total restructuring'' and ''complete rewriting'' of the existing regulatory framework. *City of Milwaukee* v. *Illinois, 451 U.S.* 304, 317 (quoting legislative history of the 1972 amendments). The new regulatory framework involved imposing effluent limitations on point source discharges through NPDES permits. *State Water Resources Control Bd.,* 426 U.S. at 204–05 (describing the new framework).

CWA section 401 was updated as part of the 1972 CWA amendments to reflect the restructuring of the Act. The 1970 version provided that a certifying authority must certify ''that such *activity* . . . will not violate water quality standards.'' Public Law 91–224, 21(b)(1), 84 Stat. 91, 108 (1970) (emphasis added). Significantly, Congress modified this language in 1972, requiring a certifying authority to certify ''that any such *discharge* shall comply with the applicable provisions of [the CWA].'' Public Law 92–500, 401(a)(1), 86 Stat. 816, 877 (1972) (codified at 33 U.S.C. 1341(a)(1)) (emphasis added).

This change from ''activity'' to ''discharge'' is consistent with the broader amended regulatory regime and statutory construct of the CWA by focusing on regulating point source discharges into ''waters of the United States.'' It is also strong evidence that Congress intended the scope of certification to change from the entire ''activity'' subject to the Federal license or permit to the ''discharges'' of that activity. Had Congress intended the 1972 amendments to retain the original ''activity'' scope, Congress could have retained the phrase ''such activity'' instead of changing it to ''such discharge.'' However, Congress specifically did not carry forward the term ''activity'' in the operative phrase in CWA section 401(a). Under basic canons of statutory construction, EPA begins with the presumption that Congress chose its words intentionally. *See, e.g., Stone* v. *INS,* 514 U.S. 386, 397 (1995) (''When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'').

The legislative history also supports the conclusion that Congress intended its changed framing from ''activity'' to ''discharge'' to have real meaning, with the purpose of making the new CWA section 401 consistent with the new regulatory framework of the Act. The 1971 Senate Report reiterates that CWA section 401 involves ''certification from the State in which the *discharge* occurs that any such *discharge* will comply'' with water quality requirements. S. Rep. No. 92–414, at 69 (1971) (emphasis added). The report continues that CWA section 401 ''is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.'' *Id.; see also* H.R. Rep. No. 92–911 at 121 (1972) (''Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the [1972 Act].''). The legislative history indicates that Congress amended the existing water quality certification framework to ''assure consistency'' with the 1972 Act's ''changed emphasis'' of controlling ''discharges.'' The 2023 Rule makes much of the statements in the Congressional reports that CWA section 401 is ''substantially section 21(b) of existing law,'' suggesting that this demonstrates that Congress did not intend to change the scope of certification when it amended ''such activity'' to ''such discharge.'' 88 FR 66596. However, the better understanding of these statements, and the explicit amendment of the text of the Act, is that they reflect that Congress did in fact largely retain the water

[34] The 2023 Rule goes to great lengths to explain why it interprets ''such discharge'' in CWA section 401(a)(1) to effectively mean ''such activity'' while interpreting ''such discharge'' in CWA section 401(a)(2) to mean precisely what it says. 88 FR 66637–38 (discussing ''scope of the neighboring jurisdiction process''). EPA now proposes that the far simpler and more coherent reading, indeed the best reading, is that both provisions are limited to discharges.

[35] The text of section 401(a)(3) and (a)(4) also support a reading that the scope of certification is limited to discharges. Section 401(a)(3) refers to ''such discharge,'' another reference back up to the triggering discharge. Section 401(a)(4) also refers to discharges and applies to ''any federally licensed or permitted facility or activity which may result in any *discharge* into the navigable waters and with respect to which a certification has been obtained'' pursuant to section 401(a)(1) (emphasis added).

quality certification framework from section 21(b) and continued to allow States to ensure that Federally authorized projects would not violate applicable water quality requirements, even if Congress also made important revisions to assure the retained certification framework is consistent with the 1972 Act.

iii. The Supreme Court's Ruling Under Chevron on Scope of Certification

In 1994, the Supreme Court reviewed a CWA section 401 certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. *See PUD No. 1,* 511 U.S. 700, 703–04 (1994). This decision, though narrow in its holding, has been read by the EPA in the past (including in the 2023 Rule) and by some States and Tribes to significantly broaden the scope of CWA section 401 beyond what the statutory text allows. After considering the Court's holding and EPA's prior interpretations, EPA now appropriately interprets CWA section 401 using the ''best reading'' standard recently provided by the Supreme Court in *Loper Bright.*

The principal dispute adjudicated in *PUD No. 1* was whether the State of Washington could impose a minimum stream flow as a condition in a certification issued under CWA section 401. There were two potential discharges from the proposed hydroelectric facility: ''the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.'' *Id.* at 711. The applicant argued that the minimum stream flow condition was unrelated to these discharges and therefore beyond the scope of the State's authority under CWA section 401. *Id.*

The Court considered the text of sections 401(a) and 401(d) and, specifically, the use of ''discharge'' in CWA section 401(a) and ''applicant'' in CWA section 401(d). *Id.* at 711–13. Section 401(a) of the CWA requires the certifying authority to certify that the *discharge* from a proposed Federally licensed or permitted project will comply with enumerated CWA provisions, and CWA section 401(d) allows the certifying authority to include conditions to assure that the *applicant* will comply with enumerated CWA provisions and ''any other appropriate State law requirements.'' Emphasizing that the text of CWA section 401(d) ''refers to the compliance of the applicant, not the discharge,'' the Court explained that CWA section 401(d) ''is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.'' *Id.* at 712.

The Court then ultimately deferred to EPA's 1971 Rule, affording it *Chevron* deference. The Court found that ''[o]ur view of the statute is consistent with EPA's regulations implementing § 401.'' *Id.* The Court favorably quoted EPA's 1971 Rule, which indicated that certifying authorities certify the ''activity'' (and an EPA guidance document from 1989). *Id.* The Court then held that ''EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401 and is entitled to deference.'' *Id.* at 712 (citing, *inter alia, Chevron*) (emphasis in the original). The Court therefore reached its holding at *Chevron* ''step two,'' finding the statutory text to be ambiguous and EPA's interpretation embodied in the 1971 Rule to be a ''reasonable'' interpretation.

While the Court in *PUD No. 1* upheld one interpretation of CWA section 401 as reasonable, that does not preclude the Agency from adopting a different interpretation. When a court, even the Supreme Court, has upheld an agency interpretation of a statute as reasonable under *Chevron,* the agency is not precluded from revising its regulation to ensure it reflects the best reading of the statute. *See Loper Bright,* 603 U.S. at 400 (reviewing courts determine whether an agency interpretation is the ''best'' reading of the statute). Nothing in *Loper Bright* changed the proposition that agencies may update their interpretations of the statutes that they implement, even interpretations previously upheld by a court as reasonable under *Chevron,* particularly to align the agency's interpretation with the best reading of the statute. *Lopez* v. *Garland,* 116 F.4th 1032, 1038–41 (9th Cir. 2024) (upholding post-*Loper Bright* an agency's updated interpretation of a statute after that circuit court of appeals had ''historically endorsed [the] prior [agency] interpretation under *Chevron*''). *See White Lion,* 604 U.S. 542, 568 (2025) (affirming, post-*Loper Bright,* that agencies remain ''free to change their existing policies as long as they provide a reasoned explanation for the change''); *Ozurumba* v. *Bondi,* 2025 U.S. App. LEXIS 22523, *22 (4th Cir. 2025) (noting that it ''strikes us as arbitrary'' if ''we would be stuck—forever—with the most recent agency interpretation that we upheld [under *Chevron*] before *Loper Bright*'').[36]

It is significant that, not only did the majority in *PUD No. 1* employ *Chevron* deference to EPA regulations, those regulations were not based on the statutory text before the Court. The Court relied on EPA regulations that predated the 1972 CWA amendments and therefore contained outdated statutory terminology, most importantly ''activity'' rather than ''discharge'' in CWA section 401(a)(1). This is yet another important reason not to treat *PUD No. 1* as the final word on the proper scope of certification.

The *PUD No. 1* majority's short discussion of the statutory text focused on the use of the term ''applicant'' in CWA section 401(d), noting that the ''text refers to the compliance of the applicant, not the discharge.'' 511 U.S. at 711. While CWA section 401(d) does not expressly refer back to ''such discharge,'' it also does not use the phrase ''activity.'' Ultimately, CWA section 401(d) applies to ''[a]ny certification provided under this section,'' which is most naturally read as operating within the bounds set by CWA section 401(a)(1): discharges into waters of the United States.[37] Furthermore, CWA section 401(d) requires certifications to set forth conditions necessary to assure compliance with enumerated provisions of the CWA which all regulate point source discharges into waters of the United States.[38] The ordinary meaning of the word ''applicant'' is ''[o]ne who applies, as for a job or admission.'' *See Webster's II, New Riverside University Dictionary* (1994). The use of the term

[36] Granted, if the court upholding the prior agency interpretation offered a reasoned analysis explaining its support for the prior agency interpretation, it would behoove an agency to engage with that analysis to ensure the agency's new interpretation is the best interpretation. EPA does that here, for example, by analyzing the discussion in *PUD No. 1* regarding the text of section 401(d).

[37] This interpretation mirrors some of the reasoning discussed in the dissenting opinion in *PUD No. 1,* which the Agency examined in its efforts to discern ''the best'' interpretation of section 401. *Loper Bright,* 603 U.S. at 400. As the dissent reasoned, ''subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem.'' *PUD No. 1,* 511 U.S. at 726 (Thomas, J., dissenting). As described above, the Agency also is persuaded that reading section 401 ''as a whole'' indicates that ''while § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges.'' *Id.* at 726–27. As the dissent concluded, ''this interpretation best harmonizes the subsections of § 401.'' *Id.* at 727.

[38] Sections 301, 302, and 306 address the applicable effluent limitations for new and existing sources, while Section 307 addresses the effluent limitations for toxic pollutants and pretreatment standards for industrial pollutants discharged into publicly owned treatment works.

''applicant for a Federal license or permit'' is best read to simply describe the person or entity that applied for the Federal license or permit that requires a certification, not to greatly expand the scope of CWA section 401 beyond what the rest of the text clearly indicates.

This view of CWA section 401(d) is supported by the Supreme Court's ''clear statement'' rule regarding federalism. The Supreme Court ''require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power . . .'' *Sackett* v. *EPA,* 598 U.S. 651, 679 (2023) (citations omitted). In the 1972 amendments to the Clean Water Act, Congress maintained traditional State sovereignty principles while also adopting a new approach to federal regulation of waters of the United States by choosing to regulate discharges into waters of the United States instead of the prior water quality goal-based approach. It is improbable and highly unlikely that, despite Congress' actions to narrow the scope of State certifications in line with the discharge approach in regulation, Congress attempted to create a work-around to expand the scope of allowable certification conditions authorized under CWA section 401(d). Such a theory necessarily fails to satisfy the clear statement rule to alter the traditional Federal-State balance enshrined throughout the 1972 Act. As States continue to maintain their traditional land and water management authority, so too does the Federal government continue to maintain its traditional authority, as provided through the Commerce Clause, to determine how waters of the United States are to be regulated according to the Act's discharge-based approach. There is no ''exceedingly clear language'' in CWA section 401 indicating that Congress intended the scope of certification to go beyond discharges.

The Court has recently cautioned agencies against assertions of authority with vast ''economic and political significance'' without ''clear congressional authorization.'' *West Virginia* v. *EPA,* 597 U.S. 697, 723–30 (2022) (articulating the ''major questions doctrine''); *see also Biden* v. *Nebraska,* 600 U.S. 477, 511 (Barrett, J., concurring) (describing the doctrine as ''an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.' '') (citations omitted). The assertion in the 2023 Rule that the scope of certification encompassed the entire ''activity as a whole'' has vast economic and political significance, as it provides States with sweeping authority to decide the fate of nationally important infrastructure projects, such as natural gas pipelines and hydropower dams, based on potentially speculative water quality impacts not linked to a point source discharge into waters of the United States. And the 2023 Rule did so without ''clear congressional authorization,'' instead ignoring the statutory language of CWA section 401(a) limiting certification review to discharges likely resulting from the permitted activity and relying heavily on the ''vague term'' ''applicant'' in CWA section 401(d). 88 FR 66594; *West Virginia,* 597 U.S. at 723 (''Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' ''); *Nebraska,* 600 U.S. at 515 (Barrett, J. concurring) (''The expectation of clarity is rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.''). As the Supreme Court has recently reiterated, ''Congress does not 'hide elephants in mouseholes.' '' *Sackett,* 598 U.S. at 677. Applying that principle here, EPA should not assume that Congress intended to greatly expand the scope of certification simply by use of the term ''applicant'' in CWA section 401(d). Instead, for the reasons described above, the best interpretation of the text of CWA section 401, as informed by the statutory and legislative history of the CWA, is that the scope of certification is limited to discharges, not the entire activity subject to the Federal license or permit.

iv. Scope for Granting Certification Conditions

EPA is proposing to retain the position from both the current regulation and the 2020 Rule that the scope for purposes of conditioning a grant of certification is the same as the scope for purposes of deciding whether to grant or deny certification. As EPA explained in the 2020 Rule, interpreting CWA section 401 as establishing different standards for issuing a denial under CWA section 401(a) and for requiring conditions under CWA section 401(d) is likely to lead to implementation challenges, including confusion by applicants, certifying authorities, and Federal licensing and permitting agencies. 85 FR 42252. Moreover, if a certifying authority determines that it must add conditions under CWA section 401(d) to justify a grant of certification under CWA section 401(a), that is equivalent to deciding that—without those conditions—it must deny certification. The standard is therefore essentially the same. The outcome of the certifying authority's analysis does not dictate the scope of review.

EPA is proposing to remove current paragraph (b) in 40 CFR 121.3 regarding the scope of certification conditions as unnecessary. The proposed new text at 121.3, which applies to a ''section 401 certification,'' is sufficiently clear that it applies to all aspects of CWA section 401 certification, including conditions added to a grant of certification. The 2020 Rule included regulatory text similar to what EPA now proposes, and EPA is not aware of any confusion on this point stemming from the 2020 Rule.

v. ''Water Quality Requirements''

Under the proposed rule, a certifying authority certifies compliance with ''water quality requirements.'' EPA is proposing to define ''water quality requirements'' at 40 CFR 121.1(f) as ''applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality-related regulatory requirements for discharges.'' This would return the definition of ''water quality requirements'' to essentially what it was under the 2020 Rule. The first part of EPA's proposed definition simply repeats the CWA provisions identified in CWA section 401(a)(1) to which a certifying authority certifies compliance. The second part of EPA's proposed definition interprets the statutory phrase ''other appropriate requirement of State law'' in CWA section 401(d). Section 401(d) of the CWA directs certifying authorities to add conditions to a grant of certification necessary to assure compliance with enumerated provisions of the CWA and ''any other appropriate requirement of State law.'' EPA proposes to interpret ''other appropriate requirement of State law'' as ''applicable and appropriate state or tribal water quality-related regulatory requirements for discharges,'' consistent with the proposed scope of certification.[39] This would be a change from the current regulation, which interpreted ''other appropriate requirement of State law'' to broadly mean ''other water quality-related requirement of state or Tribal law.''

Congress delegated authority to EPA under CWA section 401(d) to identify what constitutes ''any other appropriate

[39] EPA is also proposing to define ''discharge'' for purposes of section 401 as ''a discharge from a point source into waters of the United States.''

requirement of State law.'' *Loper Bright,* 603 U.S. at 395–96 (reiterating that terms like ''appropriate'' ''empower an agency to . . . regulate subject to the limits imposed by'' that term and ''leaves agencies with flexibility'') (citations omitted). The phrase ''other appropriate requirement of State law'' indicates that Congress meant to empower EPA to regulate what State law requirements are ''appropriate'' for forming the basis of a certification decision.

In exercising this discretion, EPA proposes to interpret ''other appropriate requirement of State law'' to mean appropriate and applicable State or Tribal water quality-related regulatory requirements for point source discharges into waters of the United States. This interpretation is consistent with the approach the Agency took in 2020 and would appropriately limit ''other appropriate requirement of State law'' to such laws that address impacts that are within the scope of the certification and applicable to the discharges and receiving waters subject to the certification. However, consistent with the cooperative federalism central to CWA section 401, the proposed interpretation does not otherwise restrict which State or Tribal laws may form the basis of a certification decision within the universe of those laws establishing requirements for point source discharges into waters of the United States.[40]

EPA's interpretation of ''other appropriate requirement of State law'' is informed by the principle *ejusdem generis.* Under this principle, where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. *See Wash. State Dept. of Soc. & Health Servs.* v. *Keffeler,* 537 U.S. 371, 383–85 (2003). The use of the word ''appropriate'' in CWA section 401(d) indicates that Congress intended to limit the phrase ''requirement of State law'' in some meaningful manner. The best reading is that Congress intended that limitation to be informed by the enumerated provisions of the CWA that appear in section 401(d) directly before ''other appropriate requirement of State law''—which all regulate point source discharges into waters of the United States—as well as other key statutory touchstones in CWA section 401 like the terms ''discharge'' and ''navigable waters,'' *i.e.,* ''waters of the United States.'' The phrase ''any other appropriate requirement of State law'' in CWA section 401(d) is not unlimited or expansive, but rather it contains limiting language (''appropriate'') that must not be read out of the statute. *See PUD No. 1,* 511 U.S. at 712 (holding that a State's authority to add conditions pursuant to CWA section 401(d) ''is not unbounded'').

The phrase ''state or tribal water quality-related regulatory requirements for discharges'' in the proposed rule's definition includes those water quality-related provisions of State or Tribal law that are more stringent than federal law, as authorized in CWA section 510. *See* 33 U.S.C. 1370 (establishing the authority of States to set more stringent standards and limitations for discharges of pollutants under the CWA). The legislative history supports the EPA's proposed interpretation. *See* S. Rep. No. 92–414, at 69 (1971) (''In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit.''). It is important to note, however, that these more stringent provisions may not alter the scope of certification as provided in this proposed rule. *See, e.g.,* 40 CFR 123.1(i) (contrasting ''more stringent'' requirements of a State NPDES program with requirements ''with a greater scope of coverage'' and therefore not part of the EPA-approved NPDES program). For example, if a State law addresses nonpoint source discharges or discharges to non-Federal waters, both of which are not within the proposed scope of certification, they are still not factors the State may consider when acting on certification requests.

The proposed definition does not require State and Tribal provisions to be EPA-approved. EPA recognizes that there may be State or Tribal regulatory provisions that address point source discharges into waters of the United States that only partially implement certain CWA programs or that were not submitted to the EPA for approval, including water quality protective ordinances or water quality standards adopted by Tribes under Tribal law. For this reason, EPA is not proposing to limit State or Tribal regulatory provisions to EPA-approved provisions.

EPA notes that the proposed definition of ''water quality requirements'' would not limit States to evaluating only numeric water quality criteria in a certification review. While numeric water quality criteria are a central element of a water quality certification, the proposed definition allows States and Tribes to evaluate narrative water quality standards and other regulatory requirements that apply to point source discharges into waters of the United States. EPA is requesting comment on whether it should limit ''water quality requirements'' to only numeric water quality criteria.

EPA is requesting comment on an alternative interpretation of ''other appropriate requirement of State law'' as limited to those State and Tribal regulatory requirements that implement the enumerated provisions of the CWA that appear in section 401(d). As discussed above, the Agency finds the best reading of the statutory text is that Congress intended the phrase to be informed by the enumerated provisions of the CWA. The Agency seeks comment on whether to interpret ''other appropriate requirement of State law'' to be the subset of State or Tribal regulatory requirements for point source discharges that implement the CWA provisions enumerated in section 401(d). EPA also seeks comment on the potential delta between these two interpretations. EPA is also seeking comment on whether State or Tribal regulatory provisions should be limited to EPA-approved provisions if the Agency were to finalize the above alternative interpretation.

Additionally, EPA seeks comment on whether to interpret ''other appropriate requirement of State law'' as referring solely to the text in CWA section 401(d) regarding ''monitoring requirements'' for specific enumerated provisions of the CWA. EPA takes comment on whether to finalize a requirement that certifying authorities may only include certification conditions based on State or Tribal law if such conditions relate to a monitoring requirement necessary to demonstrate compliance with the specified provisions of the CWA (sections 301, 302, 306, and 307). This interpretation would rely principally on the placement of a comma after the phrase ''effluent limitations and other limitations'' and before the phrase ''and monitoring requirements'' in CWA section 401(d). Given the placement of the comma, EPA seeks comment on whether to limit certification conditions based on State or Tribal law to monitoring requirements necessary to implement the enumerated CWA provisions in section 401(d) and how this proposed approach could be implemented.

[40] Section 401 certification is required for Federal licenses or permits that authorize any activity which may result in any discharge from a point source into waters of the United States. EPA and the Corps recently published a proposed rule that would define the scope of ''waters of the United States.'' *See* ''Updated Definition of 'Waters of the United States' '' 90 FR 52498 (November 20, 2025). Any changes in which waters qualify as waters of the United States will impact the waters in which federally licensed or permitted activities must seek section 401 certification.

vi. Scope of Waters

EPA is proposing to define ''discharge'' for purposes of CWA section 401, at 40 CFR 121.1(c), as ''a discharge from a point source into waters of the United States.'' Accordingly, under the Agency's proposal, certifying authorities cannot consider water quality impacts to waters beyond waters of the United States, or impacts from outside the discharge itself. This would be a departure from the current regulations, which allow for consideration of State waters that are not waters of the United States in certain circumstances. Specifically, under the current regulations, certifying authorities may consider waters beyond waters of the United States when certifying compliance with requirements of State or Tribal law that otherwise apply to waters of the State or Tribe beyond waters of the United States. 88 FR 66604. EPA proposes that this approach was misguided and exceeded the Agency's authority under the CWA.

The text of CWA section 401 provides that an applicant must seek CWA section 401 certification for any activity requiring a Federal license or permit ''which may result in any discharge into the *navigable waters*'' (emphasis added). Thus, the text is clear that the trigger for CWA section 401 certification is a potential discharge into ''navigable waters,'' also known as waters of the United States. 33 U.S.C. 1362(7). EPA has always recognized that the trigger for certification involves a discharge into waters of the United States, including in both the 2020 and 2023 Rules.

EPA proposes that it is equally clear that the scope of certification is likewise limited to waters of the United States. Pursuant to CWA section 401(a)(1), a certifying authority certifies that any ''such discharge'' will comply with water quality requirements, and ''such discharge'' is a clear reference back to the triggering discharge.

This conclusion is supported by much of the same analysis as discussed above in support of a scope interpretation limited to discharges, as well as the regulatory framework of the CWA. As described Section IV.A, the CWA is structured such that the Federal government provides assistance, technical support, and grant money to assist States in managing *all* of the nation's waters. By contrast, the Federal regulatory provisions, including CWA sections 402 and 404, apply only to point source discharges to a subset of those waters—waters of the United States. CWA section 401 certification is another Federal regulatory provision and should be interpreted consistent with the other provisions as addressing point source discharges into waters of the United States.

Moreover, EPA's proposed interpretation is supported by Supreme Court precedent that ''require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'' *Sackett* v. *EPA,* 598 U.S. at 679 (citations omitted). The Court in *Sackett* continued that ''[r]egulation of land and water use lies at the core of traditional state authority'' and that ''[a]n overly broad interpretation of the CWA's reach would impinge on this authority.'' *Id.* at 679–80 (citations omitted). Congress has offered nothing approaching a clear statement that CWA section 401 extends beyond the waters of the United States, the point at which all other CWA regulatory provisions end. Accordingly, the scope of waters under CWA section 401 is limited to impacts from point source discharges into waters of the United States.

D. Contents of a Certification Decision

1. What is the Agency proposing?

Under the proposed rule, any action by the certifying authority to grant, grant with conditions, deny, or explicitly waive a request for certification must be in writing and must include certain supporting information as proposed in 40 CFR 121.7(c)–(f), including stating whether the certifying authority has chosen to grant, grant with conditions, deny, or expressly waive certification, and identifying the applicable Federal license or permit. The Agency is also proposing to require that each certification decision must include a statement indicating whether the discharge[41] will comply with water quality requirements, and if not, must include additional supporting information. In circumstances where a certifying authority grants certification with conditions, EPA proposes that each condition must include a statement explaining why the condition is necessary to assure that the discharge(s) from the proposed project will comply with water quality requirements, and a citation to the applicable water quality requirement upon which the condition is based. In circumstances where certification is denied, the EPA is proposing that the written notification of denial state the reasons for denial, including the specific water quality requirements with which the discharge(s) will not comply; a statement explaining why the discharge will not comply with the identified water quality requirements; or if the denial is due to insufficient information, a description of any missing water quality-related information.

The Agency is also making revisions throughout 40 CFR 121.7 to align with proposed revisions to the scope of certification. *See* section V.C of this preamble for further discussion on the scope of certification. The Agency is proposing to delete the text at 40 CFR 121.7(c)(4), (d)(4), (e)(4), and (f)(4), which suggested that certification decisions indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1), to ensure the decision documents focus on providing information about the nature and rationale of the certification decision. Ultimately, the Agency finds these revisions would support a transparent and consistent certification process that allows applicants, Federal agencies, and the public at large to understand the rationale behind certification decisions.

2. Summary of Proposed Rule Rationale

The CWA allows certifying authorities to make one of four decisions on a request for certification pursuant to their CWA section 401 authority. A certifying authority may grant certification, grant certification with conditions, deny certification, or it may expressly waive certification. A certifying authority may also waive certification by failing or refusing to act in the reasonable period of time. The CWA does not define the term ''certification,'' identify what it means to ''act'' on a request for certification, or offer a definitive list of its contents or elements. As the agency that Congress charged with administering the CWA,[42] Congress empowered EPA ''to prescribe rules to 'fill up the details' of a statutory scheme.'' *Loper Bright,* 603 U.S. at 395 (citation omitted). In identifying the contents of those decisions, EPA is ''filling up the details'' of the CWA section 401 certification process.[43]

Prior to the current regulations, the Agency defined the required contents for certification decisions. *See* 40 CFR 121.2(a), 121.16 (2019) (defining the contents of a grant of certification with or without conditions and a waiver for all certifying authorities); 40 CFR 121.7

[41] *See* footnote 27.

[42] *See* footnote 14.

[43] Section 304(h) of the CWA requires the EPA to promulgate factors which must be provided in any section 401 certification. 33 U.S.C. 1314(h). EPA is also acting pursuant to this authority when identifying the contents of certification decisions.

(2020) (defining the contents of all certification decisions). In a change from past practice, in 2023 the Agency defined recommended contents for all certification decisions in the current regulations, but did not require certifying authorities to include these contents in their decisions. 40 CFR 121.7(c)–(f).

In the July 2025 **Federal Register** publication, the Agency asked stakeholders ''whether justification is necessary to demonstrate that certification conditions included in a certification decision are within the appropriate scope.'' 90 FR 29829. Several industry stakeholders and one State recommended that the Agency require certifying authorities to justify certification conditions to ensure conditions are within the appropriate scope of certification. Another State discussed how providing justifications for certification conditions allowed them to ensure conditions were within the appropriate scope of certification and communicate their necessity to a Federal agency. Conversely, a few States and several non-governmental advocacy organizations opposed requiring justifications for certification conditions and asserted that it was time consuming and unnecessary.

After evaluating stakeholder input, EPA is proposing to revise 40 CFR 121.7 to require certifying authorities to include specific contents in all certification decisions. As discussed in more detail below, the Agency is proposing to retain all components currently listed at 40 CFR 121.7, except the component on the certifying authority's compliance with public notice procedures, with minor revisions to ensure consistency with the proposed scope of certification. *See* section V.C of this preamble for additional discussion on the scope of certification. The Agency is also proposing to require that all certification conditions include a citation to the applicable water quality requirement upon which each condition is based. The proposed approach will promote transparency and efficiency and ensure applicants and Federal agencies understand the reasoning and rationale behind a certifying authority's action. The Agency does not anticipate that this proposed approach will increase workload burden on certifying authorities because certifying authorities should already be generating this type of information to build complete and legally defensible administrative records to support their certification actions. Furthermore, this approach should be familiar to certifying authorities that incorporated required components from the 2020 Rule and/or 2023 Rule into their certification decisions.

The Agency is proposing to retain the requirement that all certification decisions be in writing. While the Agency is not aware of any certification decisions being provided in a different manner (*e.g.,* verbally), EPA is maintaining the requirement that all certification decisions be in writing to ensure the applicant and Federal agency can clearly understand the certification decision and, for a certification with conditions, any conditions that must be included in the Federal license or permit. The Agency is unaware of any issues with certifying authorities complying with this requirement under either the 2020 Rule or the 2023 Rule.

EPA is proposing to require that certifying authorities include two components that are the same or similar in all four types of certification decisions: (1) identification of the applicable Federal license or permit, and (2) identification of the certification decision type (*i.e.,* grant, grant with conditions, denial, or waiver). These components are similar, if not identical in some cases, to components currently listed at 40 CFR 121.7(c)–(f). EPA is also proposing conforming revisions throughout 40 CFR 121.7 to clarify that certification decisions should indicate whether the discharge, as opposed to the activity, will comply with applicable water quality requirements. *See* section V.C of this preamble for further discussion on the scope of certification.

The Agency is proposing to remove the component that requires a certifying authority to indicate that it complied with its public notice procedures established pursuant to CWA section 401(a)(1). *See* 40 CFR 121.7(c)(4), (d)(4), (e)(4), (f)(4). Under CWA section 401(a)(1), certifying authorities are required to establish procedures for public notice and, to the extent a certifying authority deems appropriate, procedures for public hearings. 33 U.S.C. 1341(a)(1). At least one Circuit Court has concluded that Federal agencies must determine whether a certifying authority has complied with its public notice procedures at least where compliance has been ''called into question.'' *See City of Tacoma* v. *FERC,* 460 F.3d 53, 68 (D.C. Cir. 2006) (finding that FERC had an obligation to ''confirm, at least facially, that the state has complied with section 401(a)(1)'s public notice requirements.''). EPA's current regulations do not require Federal agencies to review for certifying authority compliance with public notice procedures but instead acknowledge that Federal agencies can verify compliance with certain requirements of the text of CWA section 401 identified in case law, including compliance with public notice procedures. *See* 40 CFR 121.8. While an indication of the certifying authority's compliance with public notice procedures could be helpful in the event a Federal agency chooses to review the decision for such purpose (*e.g.,* compliance is called into question), the primary purpose of the certification decision is to communicate the nature and rationale behind the decision so that applicants and Federal agencies can effectively comply with and implement the decision. The proposed components for a certification decision would further that objective (*i.e.,* identify the decision type, the applicable Federal license or permit, and a statement regarding the basis of the decision). The Agency finds it unnecessary to mandate that certifying authorities include for every certification decision an indication of compliance with the public notice procedures in the decision document itself, particularly in light of the discretionary nature of Federal agency review. However, nothing in this proposed rule would prevent Federal agencies from requesting confirmation from the certifying authority that it complied with its public notice procedures (*e.g.,* providing a copy of its public notice), nor alters the statutory obligation for certifying authorities to establish and comply with public notice procedures consistent with CWA section 401(a)(1).

To ensure applicants and Federal agencies clearly understand the rationale behind certification conditions and denials, the Agency is proposing that such decisions include additional information to explain the basis of the decision. The following paragraphs discuss the additional information required for certifications with conditions and denials.

The Agency proposes to require (as opposed to the recommendation in the 2023 Rule) that a certifying authority must include a statement explaining each certification condition. *See* 40 CFR 121.7(d)(3). To provide additional transparency for Federal agencies, applicants, and the public, the Agency proposes to also require that each condition include a citation to the water quality requirement (as defined in this proposed rulemaking) upon which the condition is based. In other words, for each condition, the certifying authority must cite to the applicable ''water quality requirement'' (as proposed at 40 CFR 121.1(f)) for which the condition is necessary to assure compliance. The EPA intends this provision to require

citation to the specific State or Tribal statute or regulation or the specific CWA provision, *e.g.,* CWA section 301(b)(1)(C), and that general citations to CWA section 401 or other general authorization or policy provisions in Federal, State, or Tribal law would be insufficient to satisfy the proposed requirement.

It is important for Federal agencies to have a clear understanding of the basis for certification conditions, because such conditions must be included in a Federal license or permit. Several appellate courts have analyzed the plain language of the CWA and concluded that the Act ''leaves no room for interpretation'' and that ''state conditions *must* be'' included in the Federal license or permit. *Sierra Club* v. *U.S. Army Corps of Eng'rs,* 909 F.3d 635, 645 (4th Cir. 2018) (emphasis in original); *see also U.S. Dep't of Interior* v. *FERC,* 952 F.2d 538, 548 (D.C. Cir. 1992) (''FERC may not alter or reject conditions imposed by the states through section 401 certificates.''); *Am. Rivers, Inc.* v. *FERC,* 129 F.3d 99, 107 (2d Cir. 1997) (recognizing the ''unequivocal'' and ''mandatory'' language of CWA section 401(d)); *Snoqualmie Indian Tribe* v. *FERC,* 545 F.3d 1207, 1218 (9th Cir. 2008) (collecting cases). Providing an explanation of the condition and a citation to the water quality requirement underpinning the condition is one way to make it easier for Federal agencies to understand how best to implement and, if needed, enforce conditions.

In addition, including a citation and explanation with each condition would provide transparency for the overall certification process and allow the applicant to understand the legal and/or technical basis for each condition, to assess whether a condition is within the statute's lawful scope, and to identify what recourse may be available to challenge it in an appropriate court of competent jurisdiction. Certifying authorities should already be generating this type of information to build complete and legally defensible administrative records to support their certification actions and thus this requirement should not unduly burden the certifying authority. As a general matter, if a certifying authority determines that one or more conditions are necessary for a CWA section 401 certification, the certifying authority should clearly understand and articulate why it is necessary and should identify the specific water quality requirements which necessitate the conditions. Including this information in the certification itself would provide transparency for the applicant, the Federal licensing and permitting agency, and the public at large. For these reasons, the EPA proposes that these are appropriate requirements, and that the benefits of providing this information would significantly outweigh any additional administrative burden that certifying authorities may incur because of these requirements.

The Agency is also proposing that a certifying authority must include (as opposed to the 2023 Rule's recommendation to include) a statement explaining why it is denying certification. *See* 40 CFR 121.7(e)(3). However, the Agency proposes additional revisions to the text currently at 40 CFR 121.7(e)(3) to require certifying authorities to identify the specific water quality requirements that may be violated, unless the denial is based on insufficient information, in which case the statement must include a description of any missing water quality-related information. The proposed required information would lead to more transparent decision-making and a more complete record of the administrative action. If a certifying authority denies certification, its denial should be issued with information sufficient to allow the applicant to understand the basis for denial and have an opportunity to modify the project or to provide new or additional information in a new request for certification. This information may also facilitate discussions between certifying authorities and applicants about what may be necessary to obtain a certification should the applicant submit a new certification request in the future. A certifying authority's explanation of why a discharge from a proposed project will not comply with relevant water quality requirements would also assist reviewing courts in understanding whether the denial is appropriately based on the scope of certification discussed in section V.C of this proposal. If the certifying authority determines that there is no specific data or information that would allow the certifying authority to determine that the discharge will comply with water quality requirements, it should indicate as such and provide the basis for the determination in its written decision to deny certification. This proposed requirement is intended to reaffirm and clarify that insufficient information about the proposed project can be a basis for a certification denial.

While the proposed text of 121.7(c)–(f) makes clear that certifying authorities are required to include the defined components, applicants may challenge a certification decision in court in the event the required components are missing. The ability of applicants to challenge certification decisions in court is supported by the legislative history, which indicates that certification decisions should be challenged in courts of competent jurisdiction. *See, e.g.,* 116 Cong. Rec. 8805, 8988 (1970) (Conf. Rep.) (''If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so.''); H.R. Rep. No. 92–911, at 122 (1972) (same); *Lake Carriers' Ass'n* v. *EPA, 652 F.3d 1,* 10 (D.C. Cir. 2011) (quoting *Roosevelt Campobello Int'l Park Comm'n* v. *EPA,* 684 F.2d 1041, 1056 (1st Cir. 1982) for the proposition that ''the courts have consistently agreed . . . that the proper forum to review the appropriateness of a state's certification is the state court''); 40 CFR 124.55(d) (''Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.'').

The Agency is requesting comment on the proposed approach to define the contents for a certification decision, including but not limited to the mandatory nature of the proposal and the proposed components.

E. Modifications

1. What is the Agency proposing?

The EPA is proposing to revise the regulatory text to require the Federal agency, the certifying authority, and the applicant to all agree before the certifying authority may modify a grant of certification. Under the current regulations, only the certifying authority and the Federal agency had to agree to modification; this proposal includes the applicant as part of the modification process. Further, the Agency is proposing that the certifying authority is required to obtain the applicant's agreement on the language of the modification.

The Agency is proposing to retain that a certifying authority may not unilaterally modify a grant of certification. EPA intends that a modification to a grant of certification means a change to an element or a portion of a certification or its conditions—it does not mean a wholesale change or unilateral modification in the type of certification decision or a reconsideration of the decision whether to certify (*e.g.,* changing a grant of certification to a denial of certification). The Agency therefore proposes to maintain regulatory text at 121.10(b) providing

that a certifying authority may not revoke a grant of certification or change it into a denial or waiver.

2. Summary of Proposed Rule Rationale

CWA section 401 does not expressly authorize or prohibit modifications of certifications. The current regulations reintroduced a modification provision with restrictions to protect applicant and Federal agency reliance interests (*i.e.,* modifications cannot be made unilaterally, the agreement must be in writing, a grant of certification cannot be changed into a denial, etc.).

In response to EPA's July 2025 request for stakeholder feedback on their experiences with the 2023 Rule, in general, most stakeholders supported retaining a modification process noting that modifications were particularly useful for addressing small changes to a project schedule or planned activities, enhanced efficiencies during the certification process, and helped ensure that waters were protected in light of project changes. Other stakeholder feedback warned that modifications beyond the reasonable period of time could undermine trust and certainty in the permitting process and should be limited to material changes to the project's Federal license or permit.

EPA is proposing to retain the ability for a certifying authority to modify a grant of certification (with or without conditions) provided that the Federal agency, certifying authority, and applicant agree in writing that the certifying authority may modify the certification. However, the EPA proposes to maintain its longstanding position that CWA section 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certifying authority to reopen the certification in the future or through any other mechanism. This proposal remains consistent with the position in the 2020 Rule and 2023 Rule that CWA section 401 does not provide the authority for unilateral modifications to a certification decision—either by the certifying authority or by the Federal licensing or permitting agency—after the statutory reasonable period of time has ended. *See* 88 FR 66631; 85 FR 42279. Additionally, the Agency does not intend for modifications to be used to avoid or extend the reasonable period of time because 40 CFR 121.10 in the proposed rule only applies to previously granted certifications.

The Agency also notes that the ability to unilaterally modify a certification after issuance is unnecessary. First, the certifying authority has the ability under the proposed rule to modify a certification with the agreement of the Federal agency and applicant. Even if agreement cannot be reached, circumstances that may necessitate modifications often will be linked to other actions that have established procedures. For example, if a Federal license or permit is modified or the underlying project is changed such that the Federal license or permit requires modification, it may trigger the requirement for a new certification, depending on the Federal agency's procedures.

The Agency is proposing to provide a direct role for the applicant in the modification process. Specifically, in 40 CFR 121.10(a) of this proposal, EPA is adding that the applicant agree in writing, along with the Federal agency and certifying authority, that the certifying authority may modify a grant of certification (with or without conditions). Some stakeholder feedback expressed support for a modification process that is collaborative and includes the applicants in the process to agree upon reasonable modifications after certifications have been issued. Stakeholder feedback also highlighted that applicants play a necessary role in making project changes (*i.e.,* changes in construction methods, re-routes avoiding newly identified resources, etc.) to accommodate potential modifications. One stakeholder suggested that at a minimum applicants should be given an opportunity to submit comments during the modification process. EPA agrees that the applicant has an important role in implementing any conditions of a grant of certification and should therefore be included in the agreement process of a modification. The Agency is requesting comment on whether the applicant be involved in agreeing to the modification, as proposed, or if some other variation should be considered.

While the Federal agency must agree to a modification of the certification, the current regulation does not require the certifying authority to obtain Federal agency agreement to the substance or language of such a modification. EPA proposes to retain this dynamic between the certifying authority and Federal agency while also proposing to require the certifying authority to obtain the applicant's agreement on the language of the modification. EPA is proposing this for the same reasons as discussed above for including the applicant in the modification process. The applicant would ultimately need to implement any modified certification conditions and therefore should have a role in determining what any modified conditions will look like. To be clear, the proposed rule would not give the applicant (or Federal agency) a direct role in determining the language of an initial certification decision (although the applicant presumably may participate in the certifying authority's public participation procedures like any other stakeholder). However, it is EPA's view that if the certifying authority desires to change certification conditions after the reasonable period of time has expired, particularly after the Federal license or permit has been issued or the applicant has already expended resources or initiated or finalized the project, the applicant should participate in crafting the language of any modified condition. EPA continues to recommend that the modification process be collaborative.

As mentioned above, with the revisions to 40 CFR 121.10 currently proposed, the Federal agency would not need to agree to the language of the modification. The Agency proposes to remove the text currently located at 40 CFR 121.10(a) that explicitly states this, since the proposed text now focuses on who can agree to the language of a modification (*i.e.,* the certifying authority and applicant). It should be clear that the absence of the Federal agency from the list of those involved with agreeing on the language of the modification means the Federal agency would not be involved in that specific step of the modification. The Agency requests comment on whether there should be explicit text stating that Federal agency agreement on the language of the modification is not required, or if the proposed text is clear enough to convey that approach. Some stakeholder feedback raised the fact that modified certification conditions would also require the Federal license or permit to be modified to include the modified conditions. The Agency is requesting comment on whether the Federal agency should also be involved in the agreement on the language of the modification, if just the certifying authority and applicant should be involved (as proposed), or if some other variation should be considered.

F. Section 401(a)(2) Process

1. What is the Agency proposing?

EPA is proposing several revisions to the regulations addressing the CWA section 401(a)(2) process. First, the Agency is proposing to remove the definition of ''neighboring jurisdiction'' located at 40 CFR 121.1(g) and make conforming revisions throughout subpart B of part 121 to use the statutory language ''other State'' when referring to

the jurisdiction engaged in the CWA section 401(a)(2) process. Second, the Agency is proposing to remove the definition of ''Regional Administrator'' located at 40 CFR 121.1(i), revise the definition of ''Administrator'' located at 40 CFR 121.1(a) to acknowledge the term may include any authorized representative, and make conforming revisions throughout subpart B of part 121 to use the statutory language ''Administrator'' when referring to EPA's role in the CWA section 401(a)(2) process. Third, the Agency is proposing minor revisions to the contents of a Federal agency's notification to EPA to clarify that the size or scope of the activity referred to in the project summary is only that which is relevant to the discharge. Fourth, EPA is proposing to remove the current text at 40 CFR 121.13(c) that allows an EPA Regional Administrator to request supplemental information from a Federal agency as needed to make a determination and to enter into agreements with Federal agencies. Fifth, EPA is proposing to add regulatory text that acknowledges that the Agency may conduct ''may affect'' determinations on a categorical or case-by-case basis. Sixth, the Agency proposes that any other State's objection must include a citation to the water quality requirements that will be violated to be valid. The Agency is also proposing several revisions to internal citations throughout subpart B to reflect the proposed regulatory provisions. Lastly, the proposed rule provides Federal agencies with 90 days to hold a public hearing on State's objection and make a determination on the objection. These proposed revisions are discussed in further detail below.

2. Summary of Proposed Rule Rationale

Section 401(a)(2) provides a mechanism for the EPA to notify other States and authorized Tribes where the EPA has determined the point source discharge into waters of the United States [44] from a proposed Federally licensed or permitted project subject to section 401 may affect the quality of their waters.[45] Although the statutory text refers to these States and authorized Tribes as ''other State[s],'' both the 2020 and 2023 Rule defined a new term, ''neighboring jurisdictions,'' to characterize these States and Tribes. *See* 40 CFR 121.1(g) (defining neighboring jurisdictions as ''any state, or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate''); 40 CFR 121.1(i) (2020) (defining neighboring jurisdictions as ''any other state or authorized tribe whose water quality the Administrator determines may be affected by a discharge for which a certification is granted pursuant to Clean Water Act section 401 and this part.''). Upon reconsideration, the Agency proposes to remove the definition of ''neighboring jurisdiction'' currently located at 40 CFR 121.1(g) and instead make conforming edits throughout subpart B to use the statutory language ''other States'' to refer to States or Tribes with TAS for section 401 that may be notified for purposes of Section 401(a)(2) review. The term ''other State'' is self-explanatory when read in the statutory and regulatory text, *i.e.,* a jurisdiction that is not otherwise the certifying authority and that EPA has determined has waters that may be affected by a discharge. This proposed revision reflects the statutory text, but the Agency acknowledges that since the term ''neighboring jurisdiction'' was introduced in 2020, it has been incorporated into stakeholder vernacular around this topic. As such, the Agency will continue to use the term ''neighboring jurisdiction'' interchangeably with ''other State'' and ''neighboring jurisdiction process'' interchangeably with the section 401(a)(2) process throughout this preamble and any subsequent materials. However, the Agency does not believe a definition of the term is necessary for reasons discussed above. The Agency requests comment on this proposed revision.

Section 401(a)(2) requires Federal agencies to immediately notify the EPA upon receipt of a certification and Federal license or permit application. Although the statute refers to the Administrator throughout the section 401(a)(2) process, the current regulations refer to the Regional Administrator because section 401(a)(2) duties have been delegated from the Administrator to the Regional Administrators. To ensure the regulations reflect the statutory text, the Agency is proposing to remove the term ''Regional Administrator'' from 40 CFR 121.1(i), revise the definition of ''Administrator'' to acknowledge the term may refer to any authorized representative of the EPA Administrator, and replace references to the Regional Administrator throughout subpart B. The Agency does not intend for this revision to change current practice (*e.g.,* Federal agencies should continue to provide notification pursuant to section 401(a)(2) to the appropriate EPA representative) but instead it ensures the regulatory text remains durable in the event the delegation of authority changes to a different representative. The Agency requests comment on this proposed revision.

EPA has 30 days from the date it receives Federal agency notification to determine whether a discharge from the proposed activity may affect the water quality of another State and, if so, to notify that State, the Federal licensing or permitting agency, and the applicant. Although the text of section 401(a)(2) requires a Federal agency to notify EPA upon receipt of a Federal license or permit application and certification, it does not define the contents of such notification. *Id.* The current regulations define the minimum level of information that must be included in the notification to EPA to provide consistency in practices across Federal agencies and to streamline the notification process. 40 CFR 121.12(a). These components include a copy of the certification or notice of waiver, and the Federal license or permit application, a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location information, a project summary including the nature of any discharge into waters of the United States, and whether the Federal agency is aware of any neighboring jurisdiction providing comment on the project along with a copy of any such comments. 40 CFR 121.12(a)(2). The Agency is proposing a minor revision to the text at 40 CFR 121.12(a)(2) to clarify that the project summary must be relevant to the discharge. The Agency continues to find that as a practical matter, it is both reasonable and in the best interests of the Federal licensing or permitting agency and the applicant for the Agency to have adequate information to inform its ''may affect'' determination.

The regulations allow an EPA Regional Administrator to request supplemental information from a Federal agency as needed to make a determination and to enter into agreements with Federal agencies to refine the notification and supplemental information process. 40 CFR 121.12(b)–(c). In Summer 2025, EPA developed and launched a new online notification

[44] *See* footnote 27.

[45] Consistent with the Agency's longstanding position, the scope of the CWA section 401(a)(2) process is limited to point source discharges into waters of the United States. *See also* section V.C of this preamble for further discussion on the scope as it relates to CWA section 401(a)(2).

portal [46] to standardize and increase efficiencies in the Federal agency notification process. As a result, EPA no longer finds the text at 40 CFR 121.12(c) necessary because the portal standardizes the notification process for all Federal licenses and permits, which obviates the need for the Regional Administrator to enter into separate agreements regarding the manner of notification. The online notification portal also includes a field for additional information, which Federal agencies can leverage to provide additional information to the Agency as needed. Accordingly, EPA proposes to repeal the text at 40 CFR 121.12(c) and leverage its new online portal to standardize the notification process and procurement of any additional information. The Agency requests comment on this approach and whether there is any necessity in retaining this provision.

Section 401(a)(2) provides that whenever a discharge ''may affect, as determined by the Administrator, the quality of the waters of any other State,'' the Administrator must notify the neighboring jurisdiction, Federal agency, and the applicant of the determination within thirty days of the date of notice of the application. 33 U.S.C. 1341(a)(2). However, the statute does not delineate specific factors for the Agency to consider in determining whether a discharge may affect the water quality of a neighboring jurisdiction. EPA declined to define specific factors EPA must consider in making a ''may affect'' determination in its current regulations, noting that it was in the Agency's sole discretion to examine the facts and determine whether a discharge ''may affect'' the quality of another State's waters. 88 FR 66644. However, the preamble to the current regulations identified factors it may consider in making its determination, including the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to other States, certification conditions and, as applicable, other conditions already contained in the draft Federal license or permit, the other State's water quality requirements, the views of the other State on the effect of discharge from the project on its water quality, and current water quality and characteristics of the water receiving the discharge. *See id.* at 66645.

In the July 2025 **Federal Register** publication, the Agency asked stakeholders for data or information on parameters the Agency should consider in making a ''may affect'' determination. 90 FR 29829. Many stakeholders agreed with the existing parameters discussed above, with a few stakeholders focusing on the proximity of the project and discharge to the other State. A few stakeholders recommended that the Agency also consider other factors, including the chemical and physical parameters of the discharge. In addition to highlighting relevant parameters, several stakeholders emphasized the importance of the Agency having data and documentation that supports a may affect determination.

The Agency appreciates stakeholder input on this topic and agrees that it is important for Agency may affect determinations to be well-informed by relevant data and documentation. As a practical matter, the Agency's current practice generally involves consideration of more than just the parameters listed in the preamble to the current regulation when making a may affect determination,[47] considering other factors such as the chemical and physical characteristics of the discharge, whether a discharge into waters of the United States is occurring in a shared water, water features, stream miles between the discharge and any other State, and whether there are existing impairments in the receiving waterbody. Not all parameters may be relevant in every circumstance; for example, if a discharge is into a waterbody with no hydrologic connection to another State's waters, then it is unnecessary for the Agency to consider the other State's water quality requirements in its analysis. Conversely, if a discharge is into a waterbody one mile upstream of another State, the Agency may consider parameters such as the chemical and physical characteristics of the discharge, whether any conditions in the certification or aspects of the project design would attenuate or prevent discharge movement, the receiving waterbodies characteristics, and the other State's applicable water quality requirements. However, given the range of Federal licenses or permits that are covered by section 401(a)(2) and EPA's discretion to examine various factors, EPA is not proposing to identify specific factors EPA must analyze in making a ''may affect'' determination. The Agency acknowledges that some factors may carry greater weight than others in certain circumstances, but no single factor alone dictates EPA's determination. For example, on Corps general permits, the nature of the discharge, size and scope of activity relevant to the discharge, and any conditions would likely be the most relevant factors for EPA's analysis. This could support not making a may affect determination on Corps general permits because projects covered under these permits have no more than minimal individual and cumulative adverse environmental effects [48] that could be further mitigated by certification conditions or draft permit conditions, require compliance with other applicable environmental statutes prior to issuance (*e.g.,* the CWA 404(b)(1) guidelines and the National Environmental Policy Act), and are subject to public notice and comment procedures providing awareness and opportunity for input from stakeholders and other States. However, in the interest of transparency, EPA is asking for comment on whether some or all of the factors listed above should be set forth in regulation. In lieu of a regulatory requirement, the Agency requests comments on whether there are other components the Agency may consider in its may affect analysis, in addition to those identified above, and the relevant fact patterns that would necessitate consideration of those components. The Agency is also requesting comment on whether there are factors that would inform any threshold regarding the may affect analysis, consistent with the Agency's July 2025 **Federal Register** notice request for stakeholder input on data or information about how the Agency should conduct a may affect analysis.

Because the Agency receives section 401(a)(2) notifications on all certifications and waivers, *see* 40 CFR 121.12(a), on average, the Agency conducts hundreds of may affect determinations each month. As a result, the Agency has noticed emerging trends regarding certain circumstances where the Agency made, or did not make, a

[46] *https://cwa401a2notifications.epa.gov.*

[47] The standard applied by EPA in its ''may affect'' analysis requires determining whether a discharge into CWA jurisdictional waters *may* have water quality effects on a neighboring jurisdiction. 33 U.S.C. 1341(a)(2). In applying this standard, EPA does not consider whether a covered discharge ''will affect'' water quality by violating the water quality requirements of a neighboring jurisdiction. *Id.; see* 88 FR 66645. EPA's ''may affect'' determination does not imply or assert any particular likelihood of water quality effects or water quality violations in the neighboring jurisdiction and should not be understood to suggest such effects or violations. Rather, EPA's ''may affect'' determination triggers an opportunity for the neighboring jurisdiction to provide evidence to the licensing agency on the question whether such discharge will result in a violation of its water quality standards. EPA reserves the right to recommend, in response to any objection by a neighboring jurisdiction, that the discharge *does not* meet the ''will affect'' standard and will not violate the water quality requirements asserted by the neighboring jurisdiction.

[48] *See* 33 U.S.C. 1344(e).

may affect determination. For example, for projects on the U.S. Virgin Islands, the Agency reviewed the relevant certifications and applications and consistently determined, in light of the U.S. Virgin Island's location to other States and prevailing ocean currents, it would not make a may affect determination because any discharges would not reach any other States. Recognizing there may be other trends that emerge from this process, the July 2025 **Federal Register** notice requested stakeholder data or information on whether there are specific types of activities, geographic regions, types of waterbodies, or other circumstances that may support the development of categorical determinations. 90 FR 29829. Some stakeholders supported the development of categorical determinations and gave examples of circumstances that may lend themselves to such an approach, such as small, temporary discharges that do not travel downstream, projects in areas with no hydrological connection with other States, and discharges with no reasonable potential to affect water quality based on flow, pollutant characteristics, and site-specific attenuation. Conversely, other stakeholders opposed the development of categorical determinations, asserting that the analysis is inherently fact specific, and that section 401(a)(2) did not authorize the Agency to develop such determinations. Some of these stakeholders referred to the determinations as categorical exclusions or exceptions, which they asserted Congress allowed in other contexts but not in section 401.

As an initial matter, the idea of a categorical determination is not the same as a ''categorical exclusion,'' which would imply the Agency would not conduct the section 401(a)(2) process for certain categories of projects or discharges. A categorical determination refers to a standardized way of reviewing and acting upon notifications that meet a set of criteria for a ''category'' of discharge types, project types, and/or projects in specific locations. For example, in instances where a project discharges into waters of the United States that will not reach other States (*e.g.,* discharges into the ocean or bordering international jurisdictions), the Agency would confirm the project's location and lack of hydrological connectivity, before concluding that it does not have reason to believe a discharge may affect the water quality of another jurisdiction. Because the discharge cannot reach other States, the Agency would not need to consider other factors such as the discharge type, or conditions on the project. This approach allows the Agency to continue receiving notices on a case-by-case basis, while standardizing and expediting the Agency's review process when it has determined from the notification that the project meets certain criteria. The Agency only has 30 days to review a notification and make a may affect determination. By leveraging the Agency's experience with section 401(a)(2) notifications and creating a process to review notifications that categorically meet certain criteria, the Agency can efficiently review notifications while still ensuring the determination is well-informed by relevant data and documentation. The Agency appreciates stakeholder input on possible categories to explore for this purpose; for its part, the Agency plans to develop categories and supporting documentation to substantiate selected criteria for such categories, such as instances where there are no neighboring jurisdictions. The Agency is proposing to codify this approach at 40 CFR 121.12(a), which would acknowledge that may affect determinations may be made on a categorical or case-by-case basis. To be clear, the Agency is not proposing to codify specific categorical determinations but rather merely proposing to acknowledge the development of categorical determinations in regulatory text. The Agency emphasizes that projects may not always be subject to the categorical review process, even in instances where they meet the criteria for that category. In keeping with the Agency's sole discretion to determine factors for a may affect analysis, the Agency may determine that other factors or considerations require closer analysis. The Agency welcomes additional comments on possible categories and any relevant water quality data or other information that would substantiate such a category, and what scenarios or types of information would necessitate a closer analysis even if it meets the criteria for a category.

If EPA determines that the discharge may affect another State's water quality, EPA must notify the other State, the Federal licensing or permitting agency, and the applicant. The other State has sixty days after receipt of the notification from EPA to determine whether such discharge will affect the quality of its waters so as to violate any water quality requirements in its jurisdiction, object to the issuance of the license or permit, and provide a request for hearing to EPA and the Federal licensing or permitting agency. *See* 33 U.S.C. 1341(a)(2). The statutory text, however, does not further describe the contents of this objection. The current regulations require that the notification of objection and request for hearing be in writing and include (1) a statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit; (2) an explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated; and (3) a request for public hearing from the Federal agency on the notified neighboring jurisdiction's objection. 40 CFR 121.14(b).

The Agency is proposing minor revisions to the current text at 40 CFR 121.14(b)(2) to require a citation to the water quality requirements that will be violated. The EPA intends this provision to require citation to the specific State or Tribal statute or regulation or the specific CWA provision, *e.g.,* CWA section 301(b)(1)(C), and finds that general citations to CWA section 401 or other general authorization or policy provisions in Federal, State, or Tribal law would be insufficient to satisfy the proposed requirement. The Agency does not expect that it would be burdensome for notified neighboring jurisdictions to include an explanation of the reasons supporting the ''will violate'' determination, including a citation to the water quality requirements that will be violated. Section 401(a)(2) of the CWA states that a notified neighboring jurisdiction may make an objection and request a hearing ''[i]f . . . such other State *determines* that such discharge will affect the quality of its waters so as to violate any water quality requirements . . . .'' 33 U.S.C. 1341(a)(2) (emphasis added). To accomplish this, the neighboring jurisdiction necessarily must consider its water quality requirements and complete an analysis or evaluation to determine that a discharge from the project will violate such water quality requirements. The EPA is simply proposing that the other State provide an explanation of that analysis or evaluation in its notification of objection and request for hearing, including the identification of and citation to the water quality requirements that will be violated. This would inform the Federal licensing or permitting agency, EPA, and the

applicant of the reasoning for the objection; allow the Federal agency and EPA to prepare for a hearing on the objection; and may assist in determining whether there is a way to resolve the objection before the public hearing through the potential inclusion of a condition to address the subject of the objection. EPA is requesting comment on this revision, and whether any additional information would be helpful to include in the neighboring jurisdiction's objection.

CWA section 401(a)(2) requires the Federal licensing or permitting agency to hold a public hearing on the objection of another State if such other State provides notification of its objection and request for hearing in the required 60-day timeframe. 33 U.S.C. 1341(a)(2). The current regulations provide a process for neighboring jurisdictions to withdraw an objection, which would relieve the Federal agency from proceeding with a public hearing. *See* 40 CFR 121.15(a). Otherwise, consistent with section 401(a)(2), current regulations require the Federal agency to hold a public hearing upon a request for hearing from the notified other State. Section 401(a)(2) does not provide for a specific process for the public hearing conducted by the Federal licensing or permitting agency. It merely states that the hearing is public and shall be held by the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2). The statute further provides that the EPA Administrator must submit an evaluation and recommendations regarding the objection at the hearing. *Id.* Further, section 401(a)(2) states that additional evidence may be presented at the hearing. After the public hearing, the Federal licensing or permitting agency must consider the recommendations of the other State and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the Federal license or permit as the Federal licensing or permitting agency determines may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall not issue the license or permit. *Id.* Notably, the statute is silent as to the nature of, and specific procedures for, the public hearing, and the timing of the public hearing process and Federal agency's final determination. Aside from requiring the Federal agency to provide notice at least 30 days prior to a public hearing, *see* 40 CFR 121.15(b), the Agency previously declined to establish a deadline by which the Federal licensing or permitting agency must make a determination after the public hearing on the other State's objection.

In response to the July 2025 **Federal Register** notice, multiple stakeholders expressed concern over delays associated with the lack of deadline for the Federal agency, including one stakeholder who discussed one example where the Federal agency took nearly two years to conclude the process following receipt of an objection. The Agency shares these concerns and is proposing to give Federal agencies 90 days from the receipt of the other State's objection to hold a public hearing and make a determination on the objection. The Agency finds it reasonable to provide a timeline for the public hearing process. Section 401(a)(2) provides discrete timeframes for every aspect of the process, *i.e.,* the Federal agency must immediately notify EPA, EPA has 30 days to make a may affect determination, and a notified other State has 60 days to make a will violate determination. Considering the focus on ensuring projects are not unreasonably delayed elsewhere in Section 401, *see, e.g.,* 33 U.S.C. 1341(a)(1), it is reasonable to infer Congress did not intend for Federal agencies to otherwise unreasonably delay projects through the public hearing process. The proposed timeline would provide Federal agencies with enough time to provide the prerequisite 30-day notice of the public hearing, conduct the hearing, and resolve the process. The proposed timeline would also provide stakeholders with greater certainty and transparency around the timing for the conclusion of the section 401(a)(2) process and potentially allow for the process to conclude within one year of the receipt of the request for certification.[49] The Agency requests comment on its proposed approach, including the proposed timeline. Consistent with the Agency's interest in ensuring a timely resolution to the section 401(a)(2) process, the Agency also requests comment on an alternative approach whereby the section 401(a)(2) process would start at the six-month mark, coinciding with the conclusion of the default reasonable period of time, for any project certifications that have not been completed within that interval. For example, if a certifying authority takes the full year to review a proposed FERC licensed project, under this approach, FERC would provide the notification to EPA required by section 401(a)(2) at the six-month mark. This approach could allow for the section 401(a)(2) process to conclude within one year of the request for certification. This approach would require further amendments to the regulations at proposed 40 CFR 121.11(a) in the final regulation to specify when the notification is triggered (*i.e.,* either when the certification decision is completed if it occurs before the conclusion of the six month default, or at the conclusion of the six month default if the certification decision is not completed) and the contents of such notification. At least one stakeholder suggested the Agency consider a concurrent process in its input on the July 2025 **Federal Register** publication; the Agency welcomes additional input on this approach including any supporting legal rationale for such a concurrent process and potential regulatory text changes that may be required.

G. Treatment in a Similar Manner as a State

1. What is the Agency proposing?

EPA is proposing to repeal the regulations currently located at 40 CFR 121.11(a)–(c) that provide for Tribes to obtain treatment in a similar manner as a State (TAS) solely for CWA section 401 and instead, appropriately direct Tribes to utilize the existing regulation at 40 CFR 131.8 if they are interested in pursuing TAS for CWA section 401.[50] Additionally, the Agency is proposing to repeal the regulation at 40 CFR 121.11(d) that provides for Tribes to obtain TAS for the limited purpose of participating as a neighboring jurisdiction under CWA section 401(a)(2). The Agency is also proposing to repeal the definitions for ''Federal Indian Reservation, Indian reservation, or reservation,'' currently located at 40 CFR 121.1(d), and ''Indian Tribe or Tribe,'' currently located at 40 CFR 121.1(e), because these terms are only used in the context of the TAS 401 regulation located at 40 CFR 121.11 which EPA is proposing to repeal.

[49] For those projects that take longer than the default reasonable period of time, EPA encourages Federal agencies to engage in ongoing dialogue and coordination with the certifying authority, EPA, and any potential other State to proactively address potential adverse water quality impacts from discharges in other State waters.

[50] 40 CFR 131.8 establishes the basic regulatory requirements for eligible federally recognized Indian Tribes to meet in order to obtain TAS to administer the CWA section 303(c) water quality standards program. 40 CFR 131.4(c) states: ''Where EPA determines that a Tribe is eligible to the same extend as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extend as a State for purposes of certifications conducted under Clean Water Act section 401.''

2. Summary of Proposed Rule Rationale

Under section 518 of the CWA, EPA may treat Federally-recognized Indian Tribes in a similar manner as a State for purposes of administering most CWA programs over Federal Indian reservations. 33 U.S.C. 1377. Under section 518 and EPA's implementing regulations, an Indian Tribe is eligible for TAS to administer certain CWA regulatory programs, including section 401, if it can demonstrate that (1) it is Federally-recognized and exercises governmental authority over a Federal Indian reservation; [51] (2) it has a governing body carrying out substantial governmental duties and power; (3) it has the appropriate authority to perform the functions to administer the program; and (4) it is reasonably expected to be capable of carrying out the functions of the program it applied to administer. *See* 33 U.S.C. 1377(e), (h); *see also, e.g.,* 40 CFR 131.8.

Upon receiving TAS for CWA section 401, Tribes have two roles. First, Tribes that receive section 401 TAS are responsible for acting as a certifying authority for projects that may result in a discharge [52] on their Indian reservations. As certifying authorities, Tribes with TAS may grant, grant with conditions, deny, or waive certification based on whether a Federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirement of Tribal law. *See* 33 U.S.C. 1341(a)(1) and (d). Second, Tribes that receive section 401 TAS are accorded the status of ''neighboring jurisdiction'' for purposes of CWA section 401(a)(2). If EPA makes a ''may affect'' determination with respect to a neighboring jurisdiction, that neighboring jurisdiction may object to the Federal license or permit if they determine that the discharge ''will violate'' their water quality requirements, and may subsequently request a public hearing from the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2).

Tribes receive TAS for section 401 when they apply for and are approved by EPA, pursuant to 40 CFR 131.8, for TAS to administer the CWA section 303(c) water quality standards (WQS) program. 40 CFR 131.4(c) (''Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.''). At this time, 84 Federally-recognized Tribes (out of approximately 330 Tribes with reservation lands) have received TAS for CWA section 401 concurrently with obtaining TAS for CWA section 303(c).[53]

Under the 2023 Rule, EPA added new provisions to enable Tribes to obtain TAS solely for CWA section 401 at 40 CFR 121.11, as well as provisions on how Tribes could obtain TAS for the limited purpose of participating as a neighboring jurisdiction under CWA section 401(a)(2). 88 FR 66651. The Agency anticipated that these new standalone provisions would encourage more Tribes to seek TAS for section 401. *See id.* at 66653. The provisions were modeled after the TAS regulatory requirements for the CWA section 303(c) WQS program, located at 40 CFR 131.8, and the TAS regulatory requirements for the CWA section 303(d) impaired water listing and total maximum daily load program, located at 40 CFR 130.16. The regulation at 40 CFR 121.11 includes the criteria an applicant Tribe would be required to meet to be treated in a similar manner as States, the information the Tribe would be required to provide in its application to EPA, and the procedure EPA would use to review the Tribal application.

In the July 2025 **Federal Register** notice, the Agency asked stakeholders for any data and information on their experiences with the 2023 Rule, including the provisions regarding TAS solely for section 401. 90 FR 29829. A few Tribes and Tribal associations expressed support for the TAS provisions, noting they provide a tool for Tribes with limited resources to protect their water quality, but acknowledged the process had not been used to date. A few of these Tribes noted the lack of use was not indicative of a lack of effectiveness. As of the publication of this proposed rule, the Agency has not received any applications for TAS solely for section 401; the Agency has received one application for TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2). One industry stakeholder questioned whether the Agency had authority to allow Tribes to be treated as States for the purpose of Section 401, while another industry stakeholder suggested that the Agency better communicate how TAS designations are shared with neighboring jurisdictions.

After considering stakeholder input, and in the interest of reducing redundancies across Agency regulations, as stated above, EPA is proposing to repeal 40 CFR 121.11(a)–(c) and instead appropriately direct Tribes to utilize the existing regulations at section 131.8 if they are interested in pursuing TAS for section 401. As an initial matter, the Agency sees several benefits to pursuing TAS for section 401 concurrently with TAS for section 303(c). Administration of the section 303(c) and section 401 programs are intrinsically related because WQS are one of the primary water quality requirements with which a certifying authority must certify compliance, *i.e.,* see proposed definition of water quality requirements at 40 CFR 121.1(f). By pursuing TAS for section 303(c) concurrently with CWA section 401, Tribes could develop WQS that can be implemented and enforced through the certification process, providing genuine and rigorous scientific and legal protection for their waters.

Additionally, the existing application process to obtain TAS to administer the WQS program found at 40 CFR 131.8, and by extension, obtain TAS for section 401 certification as provided by 40 CFR 131.4(c), is virtually identical to the standalone TAS section 401 certification application process that EPA is currently proposing to repeal. EPA does not, therefore, anticipate any significant additional burden in the TAS application requirements and review process for a Tribe to obtain TAS for section 401 under the preexisting regulations. As noted above, for instance, all TAS applications for CWA regulatory programs must demonstrate that a Tribe meets the same basic four criteria. In order to reduce duplication across regulatory programs, the Agency is proposing to remove 40 CFR 121.11 and related definitions for the reasons discussed above. The Agency is requesting comment on its proposed approach.

The Agency is also proposing to repeal the regulation at 40 CFR 121.11(d) which provides Tribes with the opportunity to apply for TAS for the limited purpose of participating as a neighboring jurisdiction under CWA section 401(a)(2). If a Tribe receives TAS for CWA section 401 as a whole, it is treated in a manner similar to a State and considered an ''authorized Tribe'' for purposes of exercising the statutory authority under section 401. Generally, the Federal statutory and regulatory requirements for State water quality certification would apply to authorized

[51] ''Federal Indian reservation'' means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. 33 U.S.C. 1377(h)(1).

[52] *See* footnote 27.

[53] *See https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.*

Tribes, including acting as a certifying authority and neighboring jurisdiction, as appropriate. Prior to the 2023 Rule, only Tribes with TAS for section 401 as a whole were able to participate as a neighboring jurisdiction under section 401(a)(2). There was no separate regulation providing for TAS solely for the section 401(a)(2) neighboring jurisdiction function. In the 2023 Rule, however, EPA promulgated 40 CFR 121.11(d) to provide Tribes with the ability to apply for TAS solely for the limited purpose of being a neighboring jurisdiction under CWA section 401(a)(2). *See* 88 FR 66653. The Agency asserted at the time that the neighboring jurisdiction role under section 401(a)(2) was reasonably severable from the statute's other water quality certification activities because section 401 provided ''separate and distinct roles for certifying authorities and neighboring jurisdictions.'' 87 FR 35372–73. As a result, EPA asserted that a Tribe could seek TAS authorization for the limited purpose of being a neighboring jurisdiction. *See id.* at 35373.

Upon reconsideration of this provision and the Agency's rationale, the Agency does not believe the neighboring jurisdiction role under section 401(a)(2) is reasonably severable from the statute's other water quality certification activities.[54] Fundamentally, both the certification and neighboring jurisdiction functions inform the Federal licensing or permitting process. While the neighboring jurisdiction's role in the section 401(a)(2) process is largely procedural, *see* 87 FR 35372, the neighboring jurisdiction may still play a significant role in the final disposition of a Federally licensed or permitted activity above and beyond merely providing comment on a project. Both a neighboring jurisdiction and a certifying authority evaluate and determine whether a discharge will comply with applicable water quality requirements. *See id.* at 1341(a)(1)–(2). If a neighboring jurisdiction determines that a discharge will violate its water quality requirement, it may object to the issuance of the Federal license or permit and request a public hearing from the Federal agency. The neighboring jurisdiction may recommend conditions to be added to the Federal license or permit or recommend that that license or permit not be issued. The Federal agency must consider the objection and recommended conditions or denial as part of its broader analysis and must either impose a neighboring jurisdiction's recommended conditions to the extent they are necessary to assure compliance with the neighboring jurisdiction's applicable water quality requirements, or if imposition of conditions cannot assure compliance, not issue the license or permit. *Id.* at 1341(a)(2). This is procedurally similar to the certification process. If a certifying authority places conditions on a Federal license or permit through a water quality certification, the Federal agency must incorporate those conditions into the license or permit. *Id.* at 1341(d). If a certifying authority denies certification, then the Federal agency may not issue the license or permit. *Id.* at 1341(a)(1).

A few Tribes and Tribal associations expressed support for the TAS provisions, including the standalone section 401(a)(2) TAS process. Although the proposed approach would eliminate TAS solely for the limited purpose of being a neighboring jurisdiction under section 401(a)(2), it does not prevent Tribes from obtaining TAS for this function through preexisting regulations. Tribes may still obtain TAS for section 401(a)(2) by pursuing TAS for section 303(c) and section 401, as discussed above. As discussed above, administration of the section 303(c) and section 401 programs are intrinsically related. By pursuing TAS for section 303(c) concurrently with section 401, Tribes could develop WQS that can be implemented and enforced through the section 401(a)(2) process, providing genuine and rigorous scientific and legal protection for their waters. The Agency is requesting comment on its proposed approach to repeal 40 CFR 121.11(d).

VI. Supporting Information

A. Economic Analysis

Consistent with Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14192 (Unleashing Prosperity Through Deregulation) the Agency has prepared an economic analysis to inform the public of potential effects associated with this proposed rulemaking. The analysis is contained and described more fully in the document Economic Analysis for the proposed rule, titled *Updating the Water Quality Certification Regulations* (''the Economic Analysis''). A copy of this document is available in the docket for this action.

To support the proposed rulemaking, the EPA prepared an economic analysis and other related rule analyses to assess potential impact of the rule. These analyses seek to evaluate the benefits and costs of the proposed rulemaking and the effects of the rule on small entities. The economic analysis presents an overview of practice under the 2023 Rule (baseline), a description of proposed changes, and an assessment of the potential impacts of the proposed rulemaking on applicants and certifying authorities when transitioning from the baseline of regulatory practice to the new proposed requirements.

Section 401 certification decisions have varying effects on certifying authorities and applicants. However, the Agency has limited data regarding the number of requests for certification submitted and the outcome of those requests (*i.e.,* whether the requests for certification were granted, granted with conditions, denied, or waived). The lack of a national-level dataset on section 401 certification reviews limited the EPA's ability to perform a quantitative analysis of the incremental impacts of the proposed rule. The EPA has historically only received copies of the application for a Federal license and certification when the EPA is the permitting Federal agency or is acting as the certifying authority. Thus, the EPA lacks sufficient data to estimate the number of certification decisions (grant, grant with conditions, deny, or waive) per year. The EPA, however, evaluated the number of certification decisions received by the U.S. Army Corps of Engineers (Corps) since the 2023 Rule went into effect. These are the best data available to the EPA on certification actions and, because the Corps issues the majority of Federal permits, this dataset serves as a reasonable representation of certification decision trends.

The EPA anticipates the proposed rule would result in more predictable, efficient decision-making by certifying authorities which would result in a cost decrease and reduction in burden to certifying authorities and applicants. The Agency is seeking comment on the Economic Analysis and the information collection request, including the information used to inform the Agency's understanding of baseline conditions. Additionally, the EPA is requesting comment on any additional data sources that can be used to characterize the baseline for section 401 implementation and serve as the basis for understanding the potential impacts of any of these proposed regulatory changes.

B. Children's Health

This proposed action is not subject to the EPA's Children's Health Policy (*https://www.epa.gov/children/*

[54] The Agency notes that CWA section 518 does not list CWA section 401(a)(2) as one of the provisions for Tribes to establish treatment in a similar manner as a State. *See* 33 U.S.C. 1377(e).

childrens-health-policy-and-plan) because EPA does not believe the action has considerations for human health. The proposed rule addresses procedural and substantive aspects of the certification process, but does not concern human health.

VII. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. The EPA prepared an economic analysis of the potential costs and benefits associated with this action. The ''Economic Analysis for the Proposed Updating the Water Quality Certification Regulations'' is available in the docket and briefly summarized in Section VI.

B. Executive Order 14192: Unleashing Prosperity Through Deregulation

This action is expected to be an Executive Order 14192 deregulatory action. This proposed rule is expected to provide burden reduction by establishing a more predictable, efficient decision-making certification process. Additionally, the proposed changes would be expected to result in clear, unambiguous procedural requirements. Although the proposed rule could impose some additional burdens on certifying authorities and applicants (*e.g.,* modifications), many of the revisions would improve section 401 procedural efficiencies for both certifying authorities and applicants. The proposed rule clarifies ambiguities in the current section 401 processes (*e.g.,* request for certification, timeframe for certification analysis and decisions, contents of certification decision, and neighboring jurisdictions). Overall, these revisions are expected to reduce overall costs associated with section 401 reviews.

C. Paperwork Reduction Act

The information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2603.09 (OMB Control No. 2040–0295). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The information collected under section 401 is used by certifying authorities and EPA to evaluate potential water quality impacts from Federally licensed or permitted projects. When States or Tribes with TAS act as the certifying authority, the primary collection of this information is performed by Federal agencies issuing licenses or permits or the States and Tribes acting as certifying authorities. When EPA acts as the certifying authority or evaluates potential neighboring jurisdiction impacts pursuant to section 401(a)(2), the information is collected by EPA. Information collected directly by the EPA under section 401 in support of the section 402 program is already captured under existing EPA ICR No. 0229.225 (OMB Control No. 2040–0004). The proposed rule specifies the information that applicants must provide to request a section 401 certification and provides a role for applicants in the certification modification process. The proposed rule also specifies the scope of a certifying authority's analysis and defines information that certifying authorities must provide when acting on a request for certification. The proposed rule also removes provisions regarding Tribes obtaining TAS solely for either section 401 or section 401(a)(2). EPA solicits comment on whether there are ways it can increase clarity, reduce the information collection burden, or improve the quality or utility of the information collected, or the information collection process itself, in furtherance of goals and requirements of section 401.

In the interest of transparency and public understanding, the EPA has provided here relevant portions of the burden assessment of the proposed rule. More information about the burden assessment can be found in the supporting statement for the ICR.

Respondents/affected entities: Applicants, State and Tribal reviewers (certifying authorities).

Respondent's obligation to respond: Required to obtain 401 water quality certification (33 U.S.C. 1341(a)(1)).

Estimated number of respondents: 154,000 responses from 77,147 respondents annually.

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

Total estimated burden: 786,965 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $49.7 Million (per year), includes $0 Million annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in title 40 of the CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this proposed rule. The EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. OMB must receive comments no later than February 17, 2026.

D. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). In making this determination, the EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the agency is certifying that this rule is not expected to have a significant economic impact on a substantial number of small entities because the proposed rule relieves regulatory burden (relative to the 2023 Rule baseline) on the small entities subject to the rule.

The small entities subject to the requirements of this action are applicants that are small businesses applying for Federal licenses or permits subject to section 401 certification, which includes construction, manufacturing, mining, and utility businesses. Section 401 requires applicants to obtain a water quality certification from the certifying authority where the potential discharge originates or will originate before it may obtain such Federal license or permit. This proposed action provides applicants with greater clarity and regulatory certainty on the substantive and procedural requirements for obtaining a water quality certification (*i.e.,* contents of a request for certification, certification decisions, and

the scope of certification). The Agency anticipates this proposed action could result in faster, more efficient and more transparent decision-making by certifying authorities. As discussed in the Economic Analysis accompanying this proposed rule, the Agency concludes that improved clarity concerning the scope for certification review and updated procedural requirements (*e.g.,* contents of a certification request and decision, modifications, and section 401(a)(2) processes) may make the certification process more efficient for applicants, including small entities, and does not expect the cost of the rule to result in a significant economic impact on a substantial number of small entities. The Agency has therefore concluded that this action will relieve regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act

This action does not contain an unfunded mandate of $100 million (adjusted annually for inflation) or more (in 1995 dollars) as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates enforceable duties for the private sector, the cost does not exceed $100 million or more. This action does not create enforceable duties for State and Tribal governments. *See* Section VI of this notice for further discussion on the Economic Analysis.

F. Executive Order 13132: Federalism

The EPA has concluded that this action could have federalism implications because it may impact how some States have historically implemented water quality certification programs. This proposed rule makes the EPA's CWA section 401 regulations consistent with the best reading of the statutory language.

The EPA provides the following federalism summary impact statement. The EPA consulted with State and local officials, or their representative national organizations, early in the process of the developing of the proposed action as required under the terms of Executive Order 13132 to permit them to have meaningful and timely input into its development. On July 7, 2025, the EPA initiated a 60-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 July 22, 2025; attendees included representatives of intergovernmental associations and other associations representing State and local government. Organizations in attendance included: the Association of Clean Water Administrators, US Conference of Mayors, and National Association of Wetland Managers. This consultation process closed on September 7, 2025. Additionally, on July 16 and July 30, 2025, the EPA hosted two webinar-based listening sessions to hear input on six topics identified in the **Federal Register** notice. These sessions were open to States, Tribes, applicants, and the public. The EPA accepted written feedback for 30 days (July 7 through August 6, 2025).

These webinars, meetings, and letters provided a diverse range of interests, positions, and recommendations to the Agency. Letters received by the Agency during Federalism consultation may be found on the pre-proposal recommendations docket (Docket ID No. EPA–HQ–OW–2025–0272). The Agency has prepared a report summarizing its consultation and additional outreach to State and local governments and the results of this outreach. A copy of this report is available in the docket (Docket ID No. EPA–HQ–OW–2025–2929) for this proposed rule.

During Federalism consultation and engagement efforts, some States and State organizations expressed support for the 2023 Rule and recommended that the Agency continue engaging with co-regulators to identify any implementation challenges. Meanwhile, other States supported revising specific aspects of the 2023 Rule, namely the scope of certification provisions to align with the 2020 Rule approach.

The Agency acknowledges that the proposed rule may change how States administer the section 401 program but anticipates that that the proposed rule would result in greater consistency with the best reading of the Clean Water Act, efficient decision-making by certifying authorities, and certainty in the certification process.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, Nov. 9, 2000), requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This action has Tribal implications. However, it will neither impose substantial direct compliance costs on Federally recognized Tribal governments nor preempt Tribal law.

During both Tribal consultation and engagement efforts, Tribes underscored the importance of preserving Tribal sovereignty and the integrity of the CWA section 401 certification process as outlined in the 2023 Rule, and expressed significant concern over potential changes that could undermine their ability to protect water quality and uphold treaty rights. Tribes were concerned with how changes to the 2023 Rule might affect how Tribes obtain TAS for section 401 and how Tribes with TAS for CWA section 401 administer their section 401 program; such changes would not have an administrative impact on Tribes for whom the EPA certifies on their behalf. The proposed rule maintains the ability for Tribes to provide input in the certification process and preserves the robust Tribal role in the certification process in a manner consistent with the CWA.

The Agency consulted with Tribal officials to permit meaningful and timely input, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes. The EPA initiated a Tribal consultation and coordination process before proposing this rule by sending a ''Notification of Consultation and Coordination'' letter dated July 7, 2025, to all 574 Federally recognized Tribes. The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process. The Agency held one webinar on this action for Tribal representatives on July 23, 2025. The Agency also presented on this action at the National Tribal Water Council meeting on July 17, 2025, and the Region 9 Regional Tribal Operations Committee meeting on July 30, 2025. Additionally, Tribes were invited to two webinars for the public on July 16, 2025, and July 30, 2025. Tribes and Tribal organizations sent 12 pre-proposal recommendation letters (including two letters from two Tribes) to the Agency as part of the consultation process. All Tribal and Tribal organization letters may be found on the pre-proposal recommendations docket (Docket ID No. EPA–HQ–OW–2025–0272). The Agency met with Tribes requesting engagement or consultation, holding staff-level meetings with one Tribe and leader-to-leader meetings with two Tribes.

The Agency has prepared a report summarizing the consultation and further engagement with Tribal nations. This report is available in the docket for this proposed rule.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

List of Subjects in 40 CFR Part 121

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

Lee Zeldin,

Administrator.

For the reasons set out in the preamble, EPA proposes to amend 40 CFR part 121 as follows:

PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 33 U.S.C. 1251 *et. seq.*

■ 2. Revise the table of contents for part 121 to read as follows:

■ 3. Amend § 121.1 by:
■ a. Revising paragraph (a);
■ b. Removing paragraphs (d), (e), (g), (h), and (i);
■ c. Redesignating paragraphs (c), (f), and (j) as paragraphs (d), (e), and (f);
■ d. Adding new paragraph (c); and
■ e. Revising the newly designated paragraphs (e) and (f).

The revisions and additions read as follows:

§ 121.1 Definitions.

(a) *Administrator* means the Administrator, Environmental Protection Agency (EPA), or any authorized representative.

* * * * *

(c) *Discharge* for purposes of this part means a discharge from a point source into waters of the United States.

(d) *Federal agency* means any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401.

(e) *License* or *permit* means any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge.

(f) *Water quality requirements* means applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality-related regulatory requirements for discharges.

■ 4. Revise § 121.2 to read as follows:

§ 121.2 When certification is required.

Certification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge.

■ 5. Revise § 121.3 to read as follows:

§ 121.3 Scope of certification.

The 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 applicable and appropriate water quality requirements.

■ 6. Revise § 121.4 to read as follows:

§ 121.4 Pre-filing meeting requests.

The applicant shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request.

■ 7. Revise § 121.5 to read as follows:

§ 121.5 Request for certification.

Where an applicant is seeking certification from any certifying authority, the request for certification shall be in writing, signed, and dated, and shall include:

(a) A copy of the Federal license or permit application submitted to the Federal agency or a copy of the draft Federal license or permit;

(b) Any readily available water quality-related materials on any potential discharges from the federally licensed or permitted activity that informed the development of the application or draft license or permit; and

(c) Additional project information if not already included in the request for certification in accordance with paragraphs (a) and (b) of this section, as applicable:

(1) A description of the proposed discharge(s) from the federally licensed or permitted activity;

(2) The specific location of any discharge(s) that may result from the federally licensed or permitted activity;

(3) A map or diagram of the proposed discharge(s) from the federally licensed or permitted activity, including the proposed activity boundaries in relation to local streets, roads, and highways;

(4) A description of current site conditions where discharges are proposed, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; and

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

■ 8. Amend § 121.6 by:
■ a. Revising paragraph (a);
■ b. Removing paragraph (d);
■ c. Redesignate paragraph (e) as paragraph (d); and
■ d. Adding new paragraph (e).

The revisions and additions read as follows:

§ 121.6 Reasonable period of time.

(a) The reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5, in accordance with the certifying authority's applicable submission procedures. The certifying authority shall send written confirmation to the applicant and Federal agency of the date that the request for certification was received.

* * * * *

(d) The Federal agency and certifying authority may agree in writing to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

(e) The certifying authority may not request the applicant to withdraw a request for certification and may not take any action to extend the reasonable period of time other than specified in § 121.6(d).

■ 9. Amend § 121.7 by revising paragraphs (c) through (g) as follows:

§ 121.7 Certification decisions.

* * * * *

(c) A grant of certification shall be in writing and shall include the following:

(1) Identification of the decision as a grant of certification;

(2) Identification of the applicable Federal license or permit; and

(3) A statement that the discharge(s) will comply with water quality requirements.

(d) A grant of certification with conditions shall be in writing and shall include the following:

(1) Identification of the decision as a grant of certification with conditions;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why each of the included conditions is necessary to assure that the discharge(s) will comply with water quality requirements; and

(4) A citation to the water quality requirement upon which each condition is based.

(e) A denial of certification shall be in writing and shall include the following:

(1) Identification of the decision as a denial of certification;

(2) Identification of the applicable Federal license or permit; and

(3) A statement explaining why the certifying authority cannot certify that the discharge(s) will comply with water quality requirements, including the specific water quality requirements that may be violated, or if the denial is based on insufficient information, a description of any missing water quality-related information.

(f) An express waiver shall be in writing and shall include the following:

(1) Identification of the decision as an express waiver of certification;

(2) Identification of the applicable Federal license or permit; and

(3) A statement that the certifying authority expressly waives its authority to act on the request for certification.

(g) If the certifying authority determines that no water quality requirements are applicable to the discharge(s) from the federally licensed or permitted activity, the certifying authority shall grant certification.

■ 10. Amend § 121.9 by revising paragraph (b) to read as follows:

§ 121.9 Failure or refusal to act.

* * * * *

(b) If the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and applicant in writing that the certification requirement has been waived in accordance with § 121.8. Such notice shall satisfy the applicant's requirement to obtain certification.

■ 11. Amend § 121.10 by revising paragraph (a) to read as follows:

§ 121.10 Modification to a grant of certification.

(a) Provided that the Federal agency, the certifying authority, and applicant agree in writing that the certifying authority may modify a grant of certification (with or without conditions), the certifying authority may modify only the agreed-upon portions of the certification. The certifying authority is required to obtain the applicant's agreement on the language of the modification.

* * * * *

§ 121.11 [Removed]

■ 12. Remove § 121.11.

Subpart B—Other States

■ 13. Revise the subpart heading of subpart B to read as set forth above.

§§ 121.12 through 121.19 [Redesignated]

■ 14. Redesignate §§ 121.12 through 121.19 as follows.

Old Section and subpart	New section and subpart
121.12, subpart B	121.11, subpart B.
121.13, subpart B	121.12, subpart B.
121.14, subpart B	121.13, subpart B.
121.15, subpart B	121.14, subpart B.
121.16, subpart C	121.15, subpart C.
121.17, subpart C	121.16, subpart C.
121.18, subpart D	121.17, subpart D.
121.19, subpart E	121.18, subpart E.

■ 15. Amend the newly designated § 121.11 by:

■ a. Revising the section heading and paragraphs (a) introductory text, (a)(2), and (b); and

■ b. Removing paragraph (c).

The revisions read as follows:

§ 121.11 Notification to the Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the Administrator.

(1) * * *

(2) The notification shall also contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (*e.g.,* latitude and longitude), a project summary including the nature of any discharge(s) and size or scope of activity relevant to the discharge(s), and whether the Federal agency is aware of any other State providing comment about the project. If the Federal agency is aware that another State provided comment about the project, it shall include a copy of those comments in the notification.

(b) If the Administrator determines there is a need for supplemental information to make a determination about potential effects to other States pursuant to Clean Water Act section 401(a)(2), the Administrator may make a written request to the Federal agency that such information be provided in a timely manner for EPA's determination, and the Federal agency shall obtain that information from the applicant and forward the additional information to the Administrator within such timeframe.

■ 16. Revise the newly designated § 121.12 to read as follows:

§ 121.12 Determination of effects on other States.

(a) Within 30 days after the Administrator receives notice in accordance with § 121.11(a), the Administrator shall determine either categorically or on a case-by-case basis whether a discharge from the project may affect water quality in another State.

(b) If the Administrator determines that the discharge from the project may affect water quality in another State, within 30 days after receiving notice in

accordance with § 121.11(a), the Administrator shall notify the other State, the Federal agency, and the applicant in accordance with paragraph (c) of this section.

(c) Notification from the Administrator shall be in writing and shall include:

(1) A statement that the Administrator has determined that a discharge from the project may affect the other State's water quality;

(2) A copy of the Federal license or permit application and related certification or waiver; and

(3) A statement that the other State has 60 days after such notification to notify the Administrator and the Federal agency, in writing, if it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency.

(d) A Federal license or permit shall not be issued pending the conclusion of the process described in this section, and §§ 121.13 and 121.14.

■ 17. Revise the newly designated § 121.13 to read as follows:

§ 121.13 Objection from notified other State and request for a public hearing.

(a) If another State notified by the Administrator pursuant to § 121.12(b) determines that a discharge from the project will violate any of its water quality requirements, it shall notify the Administrator and the Federal agency in accordance with paragraph (b) of this section within 60 days after receiving such notice from the Administrator.

(b) Notification from the notified other State shall be in writing and shall include:

(1) A statement that the notified other State objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the notified other State's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of and citation to those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on the notified other State's objection.

(c) The notified other State may withdraw its objection prior to the public hearing. If the notified other State withdraws its objection, it shall notify the Administrator and the Federal agency, in writing, of such withdrawal.

■ 18. Revise the newly designated § 121.14 to read as follows:

§ 121.14 Public hearing and Federal agency evaluation of objection.

(a) Upon a request for hearing from a notified other State in accordance with § 121.13(b), the Federal agency shall hold a public hearing on the notified other State's objection to the Federal license or permit and take an action in accordance with paragraphs (d) and (e) of this section within 90 days of the receipt of the objection, unless the objection is withdrawn in accordance with § 121.13(c).

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified other State, the certifying authority, the applicant, and the Administrator.

(c) At the hearing, the Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the notified other State and the Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional Federal license or permit conditions may be necessary to ensure that any discharge from the project will comply with the other State's water quality requirements. If such conditions may be necessary, the Federal agency shall include them in the Federal license or permit.

(e) If additional Federal license or permit conditions cannot ensure that the discharge from the project will comply with the notified other State's water quality requirements, the Federal agency shall not issue the Federal license or permit.

■ 19. Revise the newly designated § 121.17 to read as follows:

§ 121.17 Review and advice.

Upon the request of any Federal agency, certifying authority, or applicant, the Administrator shall provide any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

[FR Doc. 2026–00754 Filed 1–14–26; 8:45 am]

BILLING CODE 6560–50–P