# Economic Analysis for the Final Clean Water Act Section 401 Water Quality Certification Improvement Rule

U.S. Environmental Protection Agency

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## Abbreviations

| | |
|---|---|
| BLM | Bureau of Land Management |
| CA | Certifying Authority |
| CFR | Code of Federal Regulations |
| Corps | U.S. Army Corps of Engineers |
| CWA | Clean Water Act |
| DWR | Division of Water Resources |
| EJ | Environmental Justice |
| EO | Executive Order |
| EPA | U.S. Environmental Protection Agency |
| FERC | Federal Energy Regulatory Commission |
| ICR | Information Collection Request |
| NPDES | National Pollutant Discharge Elimination System |
| NRC | Nuclear Regulatory Commission |
| NTTAA | National Technology Transfer and Advancement Act |
| NWP | Nationwide Permit |
| PP | Project Proponent |
| RFA | Regulatory Flexibility Act |
| RHA | Rivers and Harbors Act |
| SBREFA | Small Business Regulatory Enforcement Fairness Act |
| TAS | Treatment in a Similar Manner as a State |
| TDEC | Tennessee Department of Environment and Conservation |
| UMRA | Unfunded Mandate Reform Act |
| USDA | U.S. Department of Agriculture |
| WDEQ | Wyoming Department of Environmental Quality |
| WOTUS | Waters of the United States |
| WQS | Water Quality Standards |

# 1 Executive Summary

The U.S. Environmental Protection Agency (EPA) is finalizing revisions to the Clean Water Act (CWA) section 401 regulations to restore cooperative federalism principles and ensure that states and Tribes are empowered to protect water resources that are essential to public health, ecosystems, and economic opportunity. CWA section 401 provides states[1] and authorized Tribes[2] with the authority to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects. Under section 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 CWA section 401 water quality certification or waives certification. 33 U.S.C. 1341(a)(1).

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 14094 (Modernizing Regulatory Review), EPA has prepared this economic analysis to inform the public of potential effects associated with this rulemaking. This analysis is not required by the CWA.

This economic analysis assesses the potential impacts of the final CWA section 401 Water Quality Certification Improvement Rule. Pursuant to President Biden's EO 13990 "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," EPA reviewed the 2020 CWA section 401 rule.[4] In the spring of 2021, EPA determined that it would propose revisions to the 2020 Rule through a new rulemaking effort (U.S. EPA, 2021a). Due to ongoing litigation on the 2020 Rule, EPA considers two baselines in this economic analysis for the final rule: (1) a 1971 Rule baseline, and (2) a 2020 Rule baseline. In this economic analysis, EPA describes the final regulatory changes and evaluates the impacts to states, Tribes, and Federal agencies relative to the 1971 Rule and 2020 Rule baselines and implementation practices. Since the 2020 Rule was in effect before this final rule, the 2020 Rule should be considered the primary baseline, while the 1971 Rule is presented as an alternative baseline both for information purposes and because of the regulatory uncertainty surrounding the 2020 Rule, which has been challenged in Federal district court.

The final rule ensures that states and Tribes are empowered to protect water resources by clarifying key components of the water quality certification process and improving coordination among Federal agencies, certifying authorities, and project proponents. The economic impacts of the final rule are expected to be minimal, as it codifies many existing practices that have been widely implemented over the last 50 years or more and adds further clarity on several key issues. Key changes in the final rule that are intended to restore cooperative federalism, empower certifying authorities to protect their water resources, and improve Tribal rights/opportunities include: 1) an interpretation of the scope of a section

[1] 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).

[2] The term "authorized Tribes" refers to Tribes that have been approved for "treatment in a manner similar to a State" status for CWA section 401. *See* 33 U.S.C. 1377(e).

[3] The CWA, including section 401, uses the term "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The final rule uses the term "waters of the United States" interchangeably with "navigable waters."

[4] Clean Water Act section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (hereinafter, the 2020 Rule). For further discussion on the 2020 Rule, including legal challenges, please see Preamble Section IV.B.

401 certification as encompassing the "activity," which allows certifying authorities to protect their waters from the widest range of adverse water quality-related impacts; 2) a collaborative approach for Federal agencies and certifying authorities to jointly set the reasonable period of time to act on a request for certification; and 3) options for Tribes to apply for "treatment in a similar manner as a state" (TAS) status and participate in CWA section 401(a)(2), neighboring jurisdiction determinations.

The Agency anticipates that the final rule will result in more predictable, efficient decision-making by certifying authorities relative to the two baselines. Although the final rule may impose some burdens on certifying authorities (*e.g.,* reasonable period of time negotiations) and project proponents (*e.g.,* pre-filing meeting requests), the Agency expects that clear, unambiguous procedural requirements will improve section 401 procedural efficiencies for both certifying authorities and project proponents. The final rule clarifies ambiguities in the section 401 process, including scope, modifications,[5] neighboring jurisdictions assessments, and procedures that would apply when EPA acts as the certifying authority. These revisions will help standardize the certification process, reduce confusion, and promote efficient section 401 reviews. The final rule also creates a means for Tribes to obtain TAS for section 401 and/or section 401(a)(2) directly, which will limit costs for Tribes interested in obtaining TAS for section 401 and/or section 401(a)(2) that do not want to administer the section 303(c) program for water quality standards (WQS).

Although both baselines include the requirement that the Federal agency notify EPA upon receipt of an application for a Federal license or permit and a certification, the Agency has historically only received copies of the application and certification when EPA is the permitting Federal agency or is acting as the certifying authority. Thus, the Agency does not have comprehensive data to estimate the number of certification decisions (grant, grant with conditions, deny, or waive) per year, nor does the Agency have data to suggest how these decisions will change under the final rule. The lack of a national-level dataset on section 401 certification reviews limited EPA's ability to perform a quantitative analysis of the incremental impacts of the final rule. Thus, EPA qualitatively assessed potential impacts of the final rule. The qualitative analysis consisted of characterizing baseline conditions and identifying impacts of the regulatory changes based on information shared in pre-proposal input letters and public comments.

# 2 Introduction

Under Clean Water Act (CWA) section 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 (WOTUS) unless the certifying authority where the discharge would originate either certifies that the discharge will comply with applicable water quality requirements or waives certification. The certifying authority is determined based on the location where the discharge originates (or may originate) and can be a state, territory, authorized Tribe, and in some circumstances, EPA. Certifying authority under CWA section 401 can be assumed by Indian Tribes under section 518 of the CWA, which authorizes EPA to treat eligible Tribes with reservations in a similar manner to states (referred to as "treatment in a similar manner as a state" or TAS).[6] EPA is responsible for section 401 certification decisions in instances when a state or

[5] Certifying authorities and Federal agencies may agree to modify a grant of certification (with or without conditions). However, only the agreed upon portions may be modified.

[6] 33 U.S.C. 1377(e).

Tribal government lacks certification authority (*e.g.,* on Tribal lands where Tribal governments do not have TAS and on lands with exclusive Federal jurisdiction in relevant respects). As the Federal agency charged with implementing the CWA, as well as the certifying authority in certain instances, EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401.[7]

Congress enacted the Federal Water Pollution Control Act in 1948, but the law took on its modern form in 1972 in the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act). EPA promulgated regulations for water quality certification in May 1971. These regulations pre-date the passage of the 1972 CWA amendments and were based on CWA section 401's predecessor, section 21(b) of the Water Quality Improvement Act of 1970.[8] An April 2019 Executive Order (EO 13868) directed EPA to promulgate a new rule to clarify and modernize the Agency's 1971 Rule, and in 2020, EPA revised these regulations (U.S. EPA, 2020). On January 20, 2021, President Biden signed EO 13990 *"Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis"* directing Federal agencies to review rules issued in the prior four years that are, or may be, inconsistent with the policy goals of the new Administration.

Pursuant to President Biden's EO 13990, EPA reviewed the 2020 Rule. In the spring of 2021, EPA determined that it would propose revisions to the 2020 Rule through a new rulemaking effort (U.S. EPA, 2021a). The Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. As a result, the Agency announced its intention to revise the 2020 Rule in a manner that is well-informed by stakeholder input, better aligned with the cooperative federalism principles that have been central to the effective implementation of the CWA, and responsive to the national objectives outlined in EO 13990.

EPA is finalizing revisions to the 2020 Rule consistent with the principles outlined in EO 13990 and the Agency's legal authority. Additionally, EPA is revising the 2020 Rule in a manner that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input on the section 401 certification rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to CWA section 401. The final rule also includes conforming revisions to the water quality certification regulations for EPA-issued National Pollutant Discharge Elimination Systems (NPDES) permits to align with the final section 401 Rule.

To support the final rule, EPA has prepared this economic analysis and other related rule analyses to assess potential impacts of the rule. These analyses seek to evaluate the benefits and costs of the final rule and the effects of the rule on vulnerable groups and small entities. Section 3 of this economic analysis presents an overview of the practice under the 1971 Rule and 2020 Rule (two baselines), including a summary of Federal licenses and permits that require section 401 certification. Section 4 summarizes each provision and presents a qualitative assessment of the potential impacts of the final rule on project proponents, certifying authorities, and Federal agencies when transitioning from the two baselines to the new rule requirements. Section 5 presents an environmental justice analysis characterizing potential impacts of the final rule on communities with environmental justice concerns.

[7] 33 U.S.C. 1251(d), 1361(a).

[8] Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 91 (April 3, 1970).

Section 6 presents data limitations and uncertainties. Section 7 discusses consideration of statutory and Executive Order requirements.

# 3 Baseline Conditions

The baseline is a description of the world absent the final regulation and is the starting point for determining the potential benefits and costs of a final regulation. Due to ongoing litigation on the 2020 Rule, EPA is considering two baselines in this economic analysis. The primary baseline is the 2020 Rule that was in effect before this final rule, and the alternative baseline is the 1971 Rule with the regulations and practices that were in effect and occurred from 1971 through 2019.[9]

The CWA section 401 certification process provides an important tool for certifying authorities to protect their water quality from potential effects caused by the "activity" and discharges from federally licensed or permitted projects. A Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into a WOTUS unless the certifying authority where the discharge originates or would originate either issues a section 401 water quality certification verifying compliance with CWA sections 301, 302, 303, 306, and 307, and any other appropriate requirement of state or Tribal law, or waives certification.

Section 401 certification is required for various Federal licenses and permits including, but not limited to, dredge and fill activities that require CWA section 404 permits from the U.S. Army Corps of Engineers (Corps), CWA section 402 NPDES permits for industrial and municipal point source discharges issued by EPA, permits issued under sections 9 and 10 of the Rivers and Harbors Act (RHA) by the Corps (or the U.S. Coast Guard for bridges and causeways under section 9), mining plan of operations approvals issued by the Department of the Interior's Bureau of Land Management (BLM) and the U.S. Department of Agriculture's (USDA) Forest Service, projects requiring licenses from the Federal Energy Regulatory Commission (FERC) or the Nuclear Regulatory Commission (NRC), shoreline permits issued by the Tennessee Valley Authority, and permits for alcohol producers and manufacturers issued by the Alcohol and Tobacco Tax and Trade Bureau. Additional Federal licenses and permits are subject to section 401 if they authorize any activity that may result in a discharge from a point source into a WOTUS.

## 3.1 Description of Certifying Authority Determinations

A certifying authority may take four potential actions pursuant to its section 401 authority: grant, grant with conditions, deny, or expressly waive certification. If a certifying authority fails or refuses to act on a request for certification within the reasonable period of time, it will constructively waive certification. Though both baselines include the requirement that the Federal agency notify EPA upon receipt of an application for a Federal license or permit and a certification, the Agency has historically only received copies of the application and certification when EPA is the Federal permitting agency or is acting as the certifying authority. Thus, the Agency does not have comprehensive data on the number of certification decisions (grant, grant with conditions, deny, or waive) over time and therefore does not have available data to quantify the number of actions that fall into each of these categories.[10]

[9] Continuing to include both baselines also better facilitates comparison of the economic analyses at the proposal and final rule stages.

[10] See Section 3.2.5 below for discussion of an effort, via machine reading, to cull data from certification documents that states make available on their websites.

Under the two baselines, certifying authorities generally determined whether the federally licensed or permitted activity (1971 Rule) or discharge (2020 Rule) will comply with the listed CWA provisions and other appropriate requirements of state or Tribal law. Regarding the determinations certifying authorities may make, there are differences between the scope of review across the 1971 Rule, 2020 Rule, and the final rule that are further discussed in section 4.5 in this economic analysis.

Under the two baselines, certifying authorities make determinations as follows:

1) **Grant certification**. Under the 1971 Rule, certifying authorities may grant section 401 certification if they determine that the proposed activity will comply with water quality requirements. Under the 2020 Rule, certifying authorities may grant section 401 certification if they determine that the proposed discharge will comply with water quality requirements. When certification is granted by a certifying authority to a project proponent for a Federal license or permit under either rule, the Federal licensing or permitting agency (hereafter, the "Federal agency") may issue the license or permit.

2) **Grant certification with conditions**. Under the 1971 Rule, certifying authorities impose limitations or conditions in their section 401 certifications as necessary to ensure the activity will comply with water quality requirements. Under the 2020 Rule, certifying authorities impose limitations or conditions in their section 401 certifications as necessary to ensure the discharge will comply with water quality requirements. Section 401(d) requires the Federal agency to include all the certifying authority's conditions as part of the resulting license or permit.[11] When a certification is granted with conditions under either rule, the Federal agency may issue the license or permit, and any certification conditions included in the section 401 certification become part of the Federal license or permit.

3) **Deny certification**. Under the 1971 Rule, certifying authorities may deny section 401 certification if they cannot certify that the activity will comply with water quality requirements. Under the 2020 Rule, certifying authorities may deny section 401 certification if they cannot certify that the discharge will comply with water quality requirements. Under either rule, a certification denial prohibits the Federal agency from issuing the license or permit.

4) **Waive review**. Certifying authorities may waive section 401 certification, either expressly through notification to the project proponent or constructively by failing or refusing to act on the certification request within the reasonable period of time. The statute states that if a certifying authority fails or refuses to act on a certification request within the reasonable period of time, the certification requirement shall be waived (33 U.S.C. 1341(a)(1)). Under the 2020 Rule, a certifying authority may also fail or refuse to act where the certifying authority's action on a request for certification is procedurally deficient (*e.g.*, does not follow the 2020 Rule's procedural requirements for a denial of certification). 40 CFR 121.9(a)(2) (2020). A waiver does not necessarily indicate a certifying authority's opinion regarding the potential water quality implications of an activity since a certifying authority may waive certification for a variety of

[11] 33 U.S.C. 1341(d) (requiring "any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [sections 301, 302, 306, and 307] and with any other applicable requirement of State law . . . shall become a condition on any Federal license or permit . . . .").

reasons, including a lack of resources to evaluate the request. Under both rules, when certifying authorities waive certification, the Federal agency may issue the license or permit without a certification from the certifying authority.

## 3.2 Information from Certifying Authorities

To support this rulemaking effort, EPA investigated the possibility of generating comprehensive data on the section 401 process from the certifying authority perspective. EPA reviewed state and territory websites to investigate data availability and assemble available quantitative data. EPA also conducted a focused review of pre-proposal input letters[12] and comment letters[13] to extract any information concerning the number of requests for certifications and decisions (Section 3.2.1), certification processing fees (Section 3.2.2), the time to issue a certification decision (Section 3.2.3), and the time required for the public comment process (Section 3.2.4). This section summarizes results from website, pre-proposal input, and public comment reviews. EPA used results from the review of certifying authority websites, pre-proposal input, and public comments in the baselines to describe the available data on certification decisions, section 401 fees, and the time it takes for certifying authorities to act on certification requests.

EPA found that only five certifying authority websites[14] have readily usable public documentation of their annual average number of section 401 certification decisions for the purposes of creating a more robust characterization of certification decisions. EPA determined that seven additional certifying authorities have section 401 certification data publicly available in PDF format: Arkansas (AR DEQ, 2022), California Water Board of San Diego (California Water Board of San Diego, 2021), Idaho (ID DEQ, 2022), Mississippi (MS DEQ, 2022b), New Hampshire (NH DES, 2022), Oregon (OR DEQ, 2022), and Washington (WSDE, 2022). EPA investigated methods to extract data from PDFs for the purposes of further characterizing the available information on certification decisions (Section 3.2.5 below).

The available data are not sufficient for developing a nationally representative dataset for the annual average number of section 401 reviews conducted, the proportion of section 401 certification requests that are waived, or the proportion of reviews that result in certifications granted *without* conditions, certifications granted *with* conditions, or denials of certification. *See* Section 3.2.5 below for more information on this machine reading effort.

### 3.2.1 Quantitative Data on the Number of Section 401 Certification Requests and Decisions

Certifying authorities for some states provided information about the average number of section 401 certification requests *reviewed* each year. Among these states, Michigan, New York, and Tennessee review the most certification requests on an annual basis with Michigan reviewing an average of 4,000 certification requests, New York reviewing an average of 4,000 certification requests, and Tennessee reviewing between 3,610 to 4,000 general and 458 to 490 individual permit certification requests.[15]

[12] Docket ID No. EPA-HQ-OW-2021-0302.

[13] Docket ID No. EPA-HQ-OW-2022-0128.

[14] States with readily usable section 401 certification data: Connecticut (CT DEEP, 2021), Delaware (DE NREC, n.d.), Idaho (ID DEQ, 2021), Missouri (MO DNR, n.d.), and Oregon (OR DEQ, n.d.-a).

[15] Earthjustice (EPA-HQ-OW-2022-0128-0269). Basil Seggos, Commissioner of New York State Department of Environmental Conservation (0042). Note that this letter was submitted prior to the 2020 Rule in response to the 2019 proposed rule. Tennessee Department of Environment and Conservation (EPA-HQ-OW-2021-0302-0083). Tennessee Department of Environment and Conservation (EPA-HQ-OW-2022-0128-0180).

North Carolina and Washington stated that they review over 1,600 and 400 certification requests annually, respectively.[16] In contrast, Colorado and Utah review far fewer certification requests, as Colorado reviews only 14 annually since 2015, while Utah receives approximately 16 requests each year.[17] The Texas Railroad Commission also receives a small number of certification requests, between 10 and 20 annually, though the Texas Commission on Environmental Quality processes the majority of certification requests.[18]

EPA extracted limited quantitative information provided in pre-proposal input letters on the number of section 401 certifications granted by certifying authorities. Data limitations prevented a quantitative assessment of the final rule's impact on the number of certification grants. Certifying authorities for six states provided information about the number of section 401 certifications *granted* (with or without conditions) each year or over a specified period of time. Of the six states, the New York Department of Environmental Conservation and the California Water Boards issue the most certifications annually at approximately 4,050 certifications and over 1,000 certifications, respectively.[19] Additionally, the New Mexico Environmental Department stated that they issued over 1,000 certifications from 2017 to 2019, including 46 Federal CWA section 402 permits.[20] On the lower end of the spectrum, the Pennsylvania Department of Environmental Protection and the Washington Department of Ecology stated that they issue 350-500 and 400 certifications annually, respectively.[21] Lastly, two states provided information on certifications related to FERC licenses and licenses for other uses of water. Wisconsin stated that they certified 41 FERC-regulated dams over the past 30 years.[22] Between 2018 and 2021, the California Division of Water Rights stated that they issued 29 certifications, including amendments, related to FERC licenses and other Federal permits or licenses for the diversion or use of water.[23]

Certifying authorities for three states provided information about the number of section 401 certification *denials*. New York stated that they denied an average of eight certification requests per year prior to 2020.[24] Oregon stated that they denied a total of either five or eleven certification requests

[16] North Carolina Department of Environmental Quality (0124) and various attorneys general (0098) Part 2; State of Washington Department of Ecology (EPA-HQ-OW-2021-0302-0025).

[17] Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 1. Utah Department of Environmental Quality (EPA-HQ-OW-2022-0128-0158).

[18] EIP (EPA-HQ-OW-2022-0128-0127).

[19] Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 3; Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 1.

[20] Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 2.

[21] Pennsylvania Department of Environmental Protection (EPA-HQ-OW-2021-0302-0052); Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 1. In 2020, the section 401 workload tripled for the Washington Department of Ecology; by August 26, the department had already issued 396 certifications. The reason for the increase in section 401 certification is because "the invalidation of the nationwide aquaculture permits resulted in a flood of individual section 401 certification requests for shellfish growing operations."

[22] Wisconsin Department of Natural Resources (EPA-HQ-OW-2021-0302-0038).

[23] Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 1.

[24] Basil Seggos, Commissioner of New York State Department of Environmental Conservation (EPA-HQ-OW-2021-0302-0042). Note that this letter was submitted prior to the 2020 Rule in response to the 2019 proposed rule.

from 1999 to 2020.[25] Lastly, Wisconsin stated that they had not denied a certification request for FERC-regulated dams in over 30 years.[26]

Wisconsin is the only certifying agency that shared waiver information in its pre-proposal letter. The Wisconsin Department of Natural Resources waived section 401 review for 43 FERC-regulated dams over the past 30 years.[27]

### 3.2.2 Certification Processing Fees

Table 3-1 summarizes the various fees associated with the section 401 certification process that are available on state/territory websites. Twenty-eight states/territories list a section 401 fee, often increasing as the complexity or size of the project increases. Twelve states/territories explicitly state that they do not charge a section 401 fee,[28] while 16 states/territories do not include any fee information on their website.[29] In some cases, it is unclear if the reported fee is solely for section 401 certification or if it incorporates fees for other state permitting processes. Approximately 77% of fees have a maximum range between $385-$5,000. The average cost for states/territories with a flat fee instead of a range is $277. Reported fees that significantly exceed this range may incorporate fees for other state permitting processes (*i.e.*, joint permit fees).

**Table 3-1. Summary of section 401 certification fees**

| State / Territory | Section 401 Fee | Source |
|---|---|---|
| Alabama[a] | $800 - $25,920 | AL DEM (2021) |
| Alaska | $320 - $2,375 | AK DEC (2020) |
| California[a] | $645 - $2,417 | CA Water Boards (2022) |
| Colorado[a] | $1,122 - $3,876 | CO DPHE (2022) |
| Florida | $100 - $14,020 | FL DEP (2011) |
| Hawaii | $0 - $1,000 | HA DHCWB (2013) |
| Illinois[a] | $350 | IL EPA (2022a) |
| Kentucky | $1,000 - $5,000 | KY LRC (n.d.) |
| Louisiana | $37 - $385 | LA DEQ (n.d.) |
| Maine[a] | $263 - $1,881 | ME DEP (2021) |
| Maryland | $385 | MD DE (2022) |
| Massachusetts[a] | $90 - $490 | CMR (2021) |
| Missouri | $150 - $1,500 | MO COR (2020) |

[25] Oregon Department of Environmental Quality (EPA-HQ-OW-2021-0302-0045); Various attorneys general (EPA-HQ-OW-2021-0302-0098) attachment D Part 3. The number of denials reported in the attorneys general pre-proposal letter conflicts with the number reported in the Oregon Department of Environmental Quality pre-proposal letter; it is unclear which source is more accurate, thus EPA presents the range covering both sources.

[26] Wisconsin Department of Natural Resources (EPA-HQ-OW-2021-0302-0038).

[27] Wisconsin Department of Natural Resources (EPA-HQ-OW-2021-0302-0038).

[28] Twelve states/territories that do not charge a fee: Arizona (AZ DEQ, 2021a), Indiana (IN DEM, 2022a), Kansas (KS DHE, 2022), Minnesota (MN PCA, n.d.), Mississippi (MS DEQ, 2022a), Nebraska (NE DEE, 2021), New Hampshire (NH DES, 2022), New Mexico (NM ED, 2021a), North Dakota (ND DEQ, 2022), Pennsylvania (PA DEP, 2022), South Dakota (SD DANR, 2020), and Wyoming (WY DEQ, n.d.).

[29] Sixteen states/territories had no information available about section 401 certification fees on their websites: Arkansas (AR DEQ, n.d.), Connecticut (CT DEEP, 2021), Delaware (DE NREC, n.d.), District of Columbia (DC DOEE, n.d.), Georgia (ASWM, 2011c), Idaho (ID DEQ, 2021), Iowa (IA DNR, n.d.), Michigan (MI DEGLE, 2022), Nevada (NV DEP, n.d.), New York (NYS DEC, n.d.), Texas (TX CEQ, 2021), Washington (WSDE, n.d.), Puerto Rico (U.S. EPA, 2005), Guam (GU EPA, 2022), American Samoa (AS EPA, 2022), and the Virgin Islands (VI DPNR, 2019).

| Table 3-1. Summary of section 401 certification fees | | |
|---|---|---|
| **State / Territory** | **Section 401 Fee** | **Source** |
| Montana | $400 - $20,000 | ARM (n.d.) |
| New Jersey[a] | $0 - $5,000 | NJ DEP (2019) |
| Northern Mariana Islands[a] | $100-$5,000 | MP Administrative Code (2018) |
| North Carolina | $240 - $570 | NC DEQ (n.d.) |
| Ohio[a] | $200 | OH EPA (n.d.) |
| Oklahoma | $100 | OK DEQ (2022) |
| Oregon | $985 - $14,020 | Oregon State Archives (2022) |
| Rhode Island | $200 - $400 | RI DEM (2005) |
| South Carolina | $100 - $1000 | ASWM (2011a) |
| Tennessee | $0 - $5,000 | TN DEC (n.d.) |
| Utah | $100/ hour | UT DEQ (2022) |
| Vermont | $200 - $20,000 | VT DEC (2020) |
| Virginia | $0 or direct cost of WQC services | VA DEQ (n.d.) |
| West Virginia | $350 | WV DEP (n.d.) |
| Wisconsin[a] | $50 -$2,000 | ASWM (2011b) |

a. Fee(s) may be subject to additional stipulations, such as conditional processing fees, project type variations, expedition fees, project fees, annual fees, among others.

### 3.2.3 Time to Issue a Certification Decision

Fourteen states provide readily usable information—on their websites, in pre-proposal input letters, or in public comments—about the length of time to issue a certification decision. Most states issue certification decisions within 60-90 days. The North Carolina Department of Environmental Quality stated that over 90% of their applications between July 1, 2015, and June 30, 2017 (approximately 2,250 applications) were issued in under 60 days. Moreover, only 32 applications took over six months to certify and most of that time (over four months) was spent waiting on the applicant to provide additional information. Certification decisions for these applications were issued on average within 21 days after receipt of complete information.[30] The information provided by states on the length of time to issue a certification decision is summarized in Table 3-2 below.

EPA also used machine reading techniques to extract information about time to issue a certification from certification decision documents. *See* Section 3.2.5.2 below for a summary of the methodology and findings from this effort.

| Table 3-2. State-reported length of time to issue a certification decision | | |
|---|---|---|
| **State / Territory** | **Number of Days** | **Source** |
| Alaska | 60 | AK Department of Environmental Conservation (EPA-HQ-OW-2021-0302-0065) |
| Arkansas[a] | 93 | AR DEQ (2022) |
| Colorado[b] | 60 (majority of projects); 365 (for large projects) | Colorado Department of Public Health and Environment (EPA-HQ-OW-2022-0128-0322); (EPA-HQ-OW-2021-0302-0057) |
| Connecticut | < 180 | CT DEEP (2021) |
| Delaware[c] | 60 – 90 | DE NREC (n.d.) |
| Idaho | 60 | ID DEQ (2021) |
| Missouri[d] | 60 | MO DNR (n.d.) |

[30] North Carolina Department of Environmental Quality (EPA-HQ-OW-2021-0302-0124).

| Table 3-2. State-reported length of time to issue a certification decision | | |
|---|---|---|
| **State / Territory** | **Number of Days** | **Source** |
| North Carolina | 60 | NC Department of Environmental Quality (EPA-HQ-OW-2021-0302-0124) |
| Oregon[e] | 45; 60 – 180; 210 – 365 | OR DEQ (n.d.-a) |
| Tennessee[f] | 85 (individual permits); 6 (general permits) | TN Department of Environment and Conservation (EPA-HQ-OW-2021-0302-0083) |
| Utah | 80 | UT Department of Environmental Quality (EPA-HQ-OW-2021-0302-0028) |
| Virginia | 120 | Sothern Environmental Law Center (EPA-HQ-OW-2022-0128-0118) |
| Washington[g] | "several months" (seasonally dependent) | WA State Department of Ecology (EPA-HQ-OW-2021-0302-0025) |
| Wyoming | 60 | WY Department of Environmental Quality (EPA-HQ-OW-2021-0302-0019) |

a. Uses certification decision information from 2013 to the effective date of the 2020 Rule. 188 of 374 certifications did not contain enough information to calculate the issuance timeframe (*i.e.,* request and issuance dates). Based on the 186 section 401 certification decisions which contained this information, the average issuance timeframe was 93 days.
b. The Colorado Department of Public Health and Environment (CDPHE) stated that the full one-year time period was needed to complete section 401 review for large projects such as the last four water supply projects in the state.[31]
c. For certifications that require public notice.
d. For certification of section 404 permits.
e. The estimated timeframe depends on the complexity of the project, the quality of the information provided, significance of water quality concerns raised during the public commenting process, and the responsiveness of the applicant.
f. The numbers provided in the table are from the receipt of *complete applications*. The Tennessee Department of Environment and Conservation (TDEC) stated that the average processing time for individual and general permits is 205 and 34 days from the *initial certification requests* given that they often lack sufficient information to analyze water quality impacts and solicit public input.[32]
g. The Washington State Department of Ecology (WSDE) stated that the necessary time to complete a section 401 review is often influenced by the time of year (for example, wetland delineation work typically cannot be adequately completed during the dry summer months).[33]

### 3.2.4 Time Required for the Public Comment Process

State public notice periods for section 401 certifications range from 14 to 90 days, with 30 days as the most common timeframe. Certifying authorities for four states (New Hampshire, Rhode Island, Maryland, and Minnesota) described how a 60-day reasonable period of time was inadequate for completing the public comment process, which includes the time needed for comments to be received, to review and address comments, and/or to hold public hearings.[34] For example, the New Hampshire Department of Environmental Services and the Rhode Island Department of Environmental Management stated that they allow for a 30-day comment period and that additional time is needed to review and respond to these comments. The same two certifying authorities suggested that the minimum amount of time for section 401 certifications should be 120 days.[35] In their pre-proposal input

[31] Colorado Department of Public Health and Environment (EPA-HQ-OW-2021-0302-0057).
[32] Tennessee Department of Environment and Conservation (EPA-HQ-OW-2021-0302-0083).
[33] Washington State Department of Ecology (EPA-HQ-OW-2021-0302-0025).
[34] New Hampshire Department of Environmental Services (EPA-HQ-OW-2021-0302-0039); Rhode Island Department of Environmental Management (EPA-HQ-OW-2021-0302-0126); Maryland Department of the Environment (EPA-HQ-OW-2021-0302-0069); Minnesota Pollution Control Agency (EPA-HQ-OW-2021-0302-0047).
[35] New Hampshire Department of Environmental Services (EPA-HQ-OW-2021-0302-0039); Rhode Island Department of Environmental Management (EPA-HQ-OW-2021-0302-0126).

letters, Maryland and Minnesota did not describe their minimum public notice period. Table 3-3 summarizes states' public notice periods.

**Table 3-3. Time for the public comment period**

| State / Territory | Public Notice Period (days) | Source |
|---|---|---|
| Alaska | 30 | AK DEC (2022) |
| Arizona | 30 | AZ DEQ (2021b) |
| California | 21 | California Water Board of San Diego (2021) |
| Colorado | 30 | Code of Colorado Regulations (2019) |
| Delaware | 20 | DE NREC (n.d.) |
| Hawaii | 30 | HA DHCWB (2022) |
| Idaho | 21 | ID DEQ (2021) |
| Illinois | 14 | IL EPA (2022b) |
| Indiana | 30 | IN DEM (2022b) |
| Kansas | 21 | KS DHE (2022) |
| Kentucky | 30 | KY EEC (2019) |
| Massachusetts | 21 | CMR (2014) |
| Minnesota[a] | Case-by-case; 10-day minimum | MN ORS (2009) |
| Missouri | 21 | MO DNR (n.d.) |
| New Hampshire | 30 | NH DES (2022) |
| New Mexico | 30 | NM ED (2021b) |
| North Carolina | 30 | NC AC (2019) |
| Ohio[b] | 30-45 | OH EPA (2006) |
| Oklahoma | 30 | OK DEQ (2022) |
| Oregon | 30-35 | OR DEQ (n.d.-b) |
| Rhode Island | 30 | RI Department of Environmental Management (EPA-HQ-OW-2021-0302-0126) |
| Tennessee[b] | 30-90 | TN DEC (n.d.) |
| Utah | 30 | Utah DEQ (EPA-HQ-OW-2022-0128-0158) |
| Vermont | 30 | VT DEC (2022) |

a. Public comment period established by the commissioner on a case-by-case basis based on the scope, nature, and potential impacts on water quality of the project; public notice period cannot be shorter than ten days.
b. The public notice period increases to 45 days (Ohio) or 90 days (Tennessee) if a hearing is requested.

### 3.2.5 Certification Decision PDF Extraction Effort

Certifying authorities can act on requests for certifications in one of four ways: 1) grant certification, 2) grant certification with conditions, 3) deny certification, or 4) waive certification either expressly or constructively by failing to act on a request for certification within the reasonable period of time. To better understand certification decisions and the timing of the certification process, EPA searched for data on certification decisions. EPA found seven certifying authorities (Arkansas, California Water Board of San Diego, Idaho, Mississippi, New Hampshire, Oregon, and Washington) that make their certification decision documents publicly available online.

EPA took a machine reading approach and developed code using R, a statistical analysis software[36], to extract information from certification decision documents. The objective of this machine reading

[36] *See* the Certification Decision PDF Extraction Memo for further discussion about the specific software and package versions used for the certification decision type machine reading model and the time to issue the certification decision machine reading model.

exercise was to gather data on 1) the distribution of certification decision types (*see* Section 3.2.5.1 below) and 2) the length of time it takes for certifying authorities to act on a request for certification (*see* Section 3.2.5.2 below). EPA downloaded and organized certification decisions from the seven state certifying authority websites. When developing the download methodology, EPA aimed to prioritize recent certification decisions and include as many states as available. Some states (*e.g.,* Arkansas, California Water Board of San Diego, Idaho) had multiple years of certification decision documents available, while other states (*e.g.,* New Hampshire, Washington) had only the most recent certification decision documents posted. In total, EPA extracted a random sample of 200 certification decisions across the seven certifying authorities.[37] For details about the methodology for downloading section 401 certification decisions from state websites, *see* Clean Water Act Section 401 Water Quality Certification Improvement Rule – Final Rule, Memorandum to the File, Certification Decision PDF Extraction Effort ("Certification Decision PDF Extraction Memo"), available in Docket ID No. EPA-HQ-OW-2022-0128. The Agency then conducted a preliminary data review of the certification decision documents to determine whether they could be used for machine reading analysis and/or whether they were properly classified as certification decision documents. Eighteen files were removed prior to the machine reading analysis due to their classification as non-certification decision documents (e.g., modifications), duplicates, or non-machine-readable files. For more information on these specific files, please see Section 1.2 of the Certification Decision PDF Extraction Memo. Ultimately, the Agency used machine reading analysis on 183 certification decision documents; further discussion on the analysis is included below.

Overall, the machine reading effort did not generate data of a quality sufficient to pass EPA's quality assurance standards.[38] Section 401 and prior regulatory regimes do not prescribe the exact structure, format, or language that must be included in all certification decisions (*e.g*., how to communicate the nature of a certification decision). As a result, each state has developed its own structure, format, and language for certification decision documents. Although EPA developed code intended to capture variations in document structures, language usage, and date formats, the heterogenous nature of the certification decisions limited the practicality of using machine reading to extract information on the nature of the certification decision and the time to act on a request for certification. For example, certain formats may have caused the code to generate interpretation errors (*e.g*., various date formats) or miss relevant information (*e.g.*, the certifying authority uses different phrases than the target words).

Sampling limitations made it difficult to derive information that could provide nationally representative information for several reasons. First, section 401 does not require certifying authorities to make certification decision documents readily accessible. As a result, the findings from these extraction efforts are based on certification decisions from only seven states (*i.e*., the states that post their certification decisions on their websites). Second, due to the broad applicability of section 401 (*e.g*., all Federal

[37] EPA downloaded 40 certification decision documents from Arkansas, 41 from California Water Board of San Diego, 23 from Idaho, 39 from Mississippi, four from New Hampshire, 13 from Oregon, and 40 from Washington. The files included 201 PDFs because one certification decision from Oregon had two separate PDFs, a certification letter and a certification conditions document, that could not be combined into one file. These documents included a total of 2,680 pages, that would have taken considerable labor hours to read and record information, if done manually.

[38] *See* Certification Decision PDF Extraction Memo for further discussion on the limitations associated with machine reading models and the manual review efforts.

licenses or permits that may result in a discharge into waters of the United States), the certification decisions span multiple license or permit types, project sizes, and complexities. Lastly, fluctuations in applicable section 401 regulations and the different information requirements for a certification decision, particularly over the last three years, may have introduced further variation in certification decision documents.

Given these limitations, EPA determined that results of the machine reading effort were subject to significant limitations and did not attempt to expand the analysis beyond the sample of 183 certification decision documents.[39] Nevertheless, this section provides further discussion of EPA's machine reading efforts and outputs for informational purposes; because of the aforementioned data quality concerns, the following information was not used to inform decision-making in this final rule.

#### *3.2.5.1 Certification Decision Types*

The first extraction effort focused on determining the certification decision type (grant of certification, grant of certification with conditions, waiver of certification, or denial of certification) of each certification decision document. There were two components to this effort of gathering data on certification decision types. First, EPA used machine reading to search and count specified keywords associated with the types of certification decisions. Second, the Agency conducted a manual review of the certification decision documents to both check the machine reading results and ascertain the limitations of the machine reading model exercise.

##### 3.2.5.1.1 Machine Reading

Using R, EPA developed machine reading code to find terms associated with certification decision types in the certification documents (*see* Section 1.3.1 in Certification Decision PDF Extraction Memo). EPA expected to find at least one of the terms associated with certification decision types in each document. EPA combined phrase variations associated with each of the four decision types.[40] As the model looped through the PDFs, it counted the number of times each PDF used a keyword and grouped the count by certification decision type.

From this model output, EPA calculated the number of certification decision documents that included keywords for the four certification types and the percentage of documents for each decision type, which are presented in Table 3-4. (Table 3-4 also includes summary results for EPA's manual review of the certification decision documents discussed further below.) Approximately 97 percent of the 183 files run through the machine reading model contained keywords related to a grant of certification with conditions (i.e., "conditions" or "condition"). As anticipated based on other baseline information presented in Section 3.2 above, the percentage of certification decisions, identified in the machine reading exercise, with language about denials is small (approximately 11 percent). The actual distribution of decision types is uncertain given that the sum of percentages across the Certify,

[39] EPA considered conducting a machine learning effort but recognized that its results would likely still be of limited use because so few authorities post all, if any, of their certification decisions online. EPA thus determined that machine learning was beyond the scope of this analysis.

[40] EPA developed a list of 16 specific words and phrases (certify, certifies, grant, grants, granting, approve, approves, issues, waive, waives, waiver, deny, denies, denial, condition, and conditions). When the machine reading code found any of the search terms, it also copied the term and surrounding text to an output file to provide context regarding the usage of the word or phrase and help identify cases for which usage of the word or phrase was unrelated to the certification decision type.

Conditions, Deny, and Waive groupings exceeds 100 percent (due to certification decisions being assigned to more than one decision type).

| Table 3-4. Summary Results of the Certification Decision Type Extraction Effort | | | | |
|---|---|---|---|---|
| **Machine Reading Model** | **Certify** | **Conditions** | **Deny** | **Waive** |
| Number of certification decisions | 182 | 178 | 21 | 57 |
| Percentage | 99% | 97% | 11% | 31% |
| **Manual Review** | **Certify** | **Conditions** | **Deny** | **Waive** |
| Number of certification decisions | 4 | 176 | 2 | 1 |
| Percentage | 2% | 96% | 1% | 1% |

#### 3.2.5.1.2 Manual Review

As mentioned previously, EPA also conducted a manual review of certification decision documents as a quality assurance and quality control exercise. The Agency mined the PDF files for keywords related to certification decisions by reviewing each document using the Adobe Acrobat Pro search function for "Whole Words Only" to identify a set of pre-determined keywords that relate to a certification decision. The Agency used the same 16 keywords identified above for the machine reading analysis. The results of this manual review (Table 3-4) confirm some general finding patterns from the machine reading results, while also highlighting the limitations of the machine reading model. For example, the manual review validated the machine reading finding that a significant percentage of the documents are related to grants of certification with conditions. However, the manual review also shows that the results for the Certify group from the machine reading is highly inflated (99% in machine reading versus 2% in manual reading). This discrepancy is likely due to fact that the keywords selected for a "grant of certification" could also be used in other certification decision related contexts or in contexts entirely unrelated to the certification decision type, such as attestation statements. *See* the Certification Decision PDF Extraction Memo for examples.

The manual review confirms the general finding that denials and waivers make up lower percentages of the certification decisions, but with much smaller proportions in the manual review results (11% in machine reading versus 1% in manual reading for denials of certification and 31% in machine reading versus 1% in manual reading for waivers of certification). The differences and methods for the manual review and machine reading efforts are further discussed in the Certification Decision PDF Extraction Memo.

### *3.2.5.2 Time to Issue a Certification Decision*

The second extraction effort focused on dates available in certification documents, specifically the date that the request for certification was received (*i.e.,* when the certifying authority received the section 401 certification request), request for certification complete dates (*i.e.,* when the certifying authority deemed the section 401 certification request complete), and certification issuance dates (*i.e.,* when the certifying authority issued a decision). Similar to the certification decision type data extraction effort, there is a machine reading component and a manual review component for gathering data on the timing of certification decisions.

#### 3.2.5.2.1 Machine Reading

Using R, EPA developed machine reading code that extracted multiple dates in the certification decision documents to be used to calculate the time it takes to issue a certification decision (*see* Section 1.4.1 in

Certification Decision PDF Extraction Memo). The model searched for and extracted dates[41] that were close in proximity to keywords related to application date, certification issued, application completed, and submitted request. EPA included terms related to application completed and submitted request to capture the different terminology that different certifying authorities may use in their decision documents. Files that only included one date were not included in this part of the analysis, since more than one date is needed to calculate the timeframe of the certification decision. The model output provided dates for 61 of the 183 certification decision documents. As with the machine reading model for certification decision types, the code captured surrounding text for more context around the date extracted.

The machine reading model does not provide the calculations of the timing of certification decisions. Instead, it outputs the different types of dates extracted (i.e., application date, public notice, certification issued, application completed, and submitted request). In some cases, the machine reading code exported two competing dates for certain events such as the public notice or application submission. In these cases, EPA performed manual review of these certification documents and determined the correct dates.

EPA took the output files from the model and calculated the time difference between (1) the certification issuance date and the date the request for certification was received, (2) the certification issuance date and the request for certification complete date, and (3) the date the request for certification was received and request for certification complete date. With the need to manually calculate the timing and verify dates in the output, EPA used the opportunity to manually review the dates in the documents that the machine reading model extracted as discussed in the following section.

#### 3.2.5.2.2 Manual Review

In an effort to check the accuracy of the machine reading model, EPA conducted a manual review of the certification documents from which the machine reading model pulled dates. The machine reading code that EPA used to inform the calculation of certification issuance timeframes occasionally extracted incorrect dates. The amount of manual changes are reflected in the results in Table 3-5, which shows the percentage of dates correctly identified by the machine reading model for three certifying authorities. The model performed differently across the certifying authorities due to the document structure and terminology used by the certifying authority. Most certification decision documents contained at least one date (i.e., certification issuance date, date the request for certification was received, date the request for certification was complete) that required manual correction. It is unclear why the model missed certain dates, in particular dates that appeared around similar text and/or position in other certification decision documents by the same certifying authority. Additionally, certain formats may have caused the code to generate interpretation errors (e.g., various date formats).

[41] To extract dates for assessing time to issue a certification decision, EPA used code that could match varying dates in the text of the documents. The code identified text strings that follow the format of a word, followed by two digits, followed by four digits, as in, February 29, 2020.

| Table 3-5. Percentage of certification decisions with certification dates correctly identified by machine reading | | | |
|---|---|---|---|
| **Certifying authority** | **% Application date or Submit request date correctly identified by machine reading[1]** | **% Certification issue date correctly identified by machine reading** | **% Application complete date correctly identified by machine reading** |
| California (Water Board of San Diego) | 76% | 14% | 24% |
| New Hampshire | 0% | 0% | N/A |
| Washington | 57% | 0% | 0% |

[1]For four of the Washington certification decisions, the machine reading output identified the correct "submit request date" for manual verification; because the correct date still required manual verification and correction, the Agency is not counting these four PDFs in the percentage of correctly identified "submit request dates."

As mentioned above, the Agency calculated three different timeframes: (1) time between certification issuance date and the date the request for certification was received, (2) time between certification issuance date and the request for certification complete date, and (3) time between the date the request for certification was received and the request for certification complete date. Table 3-6 below includes the total number of PDFs (from the 61 PDF files identified in the machine reading output) with the relevant dates to conduct the timeframe determinations. Table 3-7 also includes the total number of PDF files with at least one corrected date used to calculate the timeframes.

The Agency calculated summary statistics (i.e., minimum, maximum, median, average days) for each timeframe determination. First, the Agency considered the time between certification issuance date and the date the request for certification was received. From this sample of certification decision documents, the results show a median value of 178 days and an average of 244 days.[42] Next, the Agency considered the time between the certification issuance date and the request for certification complete date. From this sample of the certification decision documents, the results show a median value of 84 days and an average of 151 days. Lastly, the Agency considered the time between the date the request for certification was received and the request for certification complete date. From this sample of certification decision documents, the results show a median value of 152 days and an average of 171 days of wait time between the certifying authority initially receiving a request for certification and the request for certification being deemed complete.

While the table below considers certification complete date, where available, the Agency did not analyze the certification decision documents to determine other relevant circumstances and/or information that might further inform the length of the timeframes (e.g., license or permit type, project type). When looking at the time between certification issuance date and the date the request for certification was deemed complete, only one certification decision was over the one-year statutory maximum timeframe for CWA section 401 (2017.03.09_SanDiegoYachtClub). The Agency did not analyze whether there was a difference in the timeframes between the 1971 Rule and 2020 Rule due to

[42] The document with the maximum time between the date the request for certification was received and the certification issuance date (2,457 days) is an extreme outlier. The values in this row of Table 3-6 would change to 40, 740, 177 and 207, were this one outlier dropped from the analysis. It was not; this information is shared to provide context.

inadequate sample size. Additionally, the Agency did not analyze the certification decisions to determine the reason the request for certification was not deemed complete and/or whether the reasons for incompleteness were readily apparent to project proponents prior to submitting their request for certification. However, as discussed in Section 3.2.2, certifying authorities previously have indicated that delays are associated with project proponent failure to submit additional information. *See* Section 4.2 and Section 4.3 for further discussion on the final rule's approach to the pre-filing meeting requests and the contents of a request for certification, which should ensure project proponents have a clear, early understanding of the information required to start the certification process and avoid delays in starting the certification process.

**Table 3-8. Timeframes between Certification Dates**

| Timeframe Determination | Total # PDFs with dates | Total # PDFs with dates, corrected | Summary Statistics | | | |
|---|---|---|---|---|---|---|
| | | | Minimum (days) | Maximum (days) | Median (days) | Average (days) |
| Time between certification issuance date and the date the request for certification was received[1] | 61 | 50 | 40 | 2457 | 178 | 244 |
| Time between certification issuance date and the request for certification complete date[2] | 24 | 21 | 22 | 686 | 84 | 151 |
| Time between the date the request for certification was received and request for certification complete date[3] | 24 | 19 | 2 | 472 | 152 | 171 |

[1]EPA determined the certification issuance timeframe by calculating the difference between the certification issue date and the date the request for certification was received. For certifications decisions with a missing certification issue date, EPA used the associated document date. Certification decisions analyzed by state: 29 from California Water Board of San Diego, 2 from New Hampshire, 30 from Washington.
[2]EPA determined the certification issuance timeframe by calculating the difference between the certification issue date and the request for certification complete date. Certification decisions analyzed by state: 21 from California Water Board of San Diego, 3 from Washington.
[3]EPA calculated the time between the date the request for certification was received and the request for certification complete date, when both date types were available. Certification decisions analyzed by state: 21 from California Water Board of San Diego, 3 from Washington.

## 3.3 Federal Agency Data on License and Permits by Certifying Authority

Table 3-7 presents summary information for Federal license/permits that may require section 401 certification. This table includes the annual average number of Federal licenses or permits issued that may require section 401 certification; this table does not include state permits or licenses (*e.g.*, state issued NPDES permits).[43] The table provides separate values for general and individual permits, when

[43] Most CWA section 404 permits are Federal permits, although a few states (Michigan, New Jersey, Florida) have assumed implementation of the CWA section 404 permit program. Most CWA section 402 permits are state-issued permits; only three states do not have any NPDES authorization and therefore all NDPES permits issued in those states are Federal permits (Massachusetts, New Hampshire, New Mexico).

applicable. General permits provide streamlined procedures for project proponents by authorizing categories of discharges or simplified review procedures when the discharges comply with specified requirements, whereas individual licenses and permits are customized to a specific project and discharge(s).

**Table 3-9: License and permit summary data by certifying authority**

| License/Permit Type | Annual Average # Federal Licenses/Permits Issued[a] | Timeframe set by Federal Agency for Section 401 Review |
|---|---|---|
| CWA section 404 | 45,725 general; 1,898 individual[b] | 60 days – 1 year[h] |
| Rivers and Harbors Act section 10 | 7,600 general; 1,391 individual[c] | 60 days – 1 year[h] |
| CWA section 402 | 16 general; 125 individual[d] | 60 days[i] |
| Rivers and Harbors Act section 9 | 40[e] | 1 year[e] |
| Federal Energy Regulatory Commission license | 44[f] | 1 year[j] |
| Nuclear Regulatory Commission license | 2[g] | 1 year |
| Totals | 53,341 general; 3,500 individual[h] | |

a. Includes all permits issued by the relevant Federal agency (section 401 certification either granted, granted with conditions, or waived). Due to data limitations, EPA is not able to estimate the proportion of licenses/permits in the summary that are subject to section 401 certification.
b. Estimate based on the annual average number of 404 permits from 01/01/2010 – 09/01/2020 based on counts provided by the Corps.
c. Estimate based on the annual average number of section 10 permits from 01/01/2010 – 09/01/2020 based on counts provided by the Corps.
d. Estimate based on the annual average of EPA-issued section 402 permits from 2010-2020.
e. Estimate based on personal communication with Bridge Permits and Policy Division, Coast Guard Bridge Program.
f. Estimate based on annual average license issuance for hydropower facilities/major natural gas pipelines from 01/01/2010 – 09/01/2020 (FERC, 2021a, 2021b)
g. Estimate based on annual average license issuance for operating nuclear power reactors (full-power operating licenses and combined operating licenses) from 01/01/2010 – 09/01/2020 (NRC, 2021)
h. Timeframe depends on Corps district. Corps regulations (33 CFR 325.2) specify that waiver could occur if the certifying authority does not issue a decision within 60 days. Historically, many Corps districts have allowed a longer timeframe.
i. 40 CFR 124.53(c)(3), unless unusual circumstances warrant a longer timeframe.
j. 18 CFR 4.34(b)(5)(iii)
h. The estimates for the last three permit average values were included in the totals as individual permits.

## 3.4 License and Permit Data Characterization

### 3.4.1 Section 404 Permits

The Corps issues two types of CWA section 404 permits, individual and general. Individual section 404 permits are for projects with more than minimal individual or cumulative impacts, while general section 404 permits are for activities that are similar in nature, cause only minimal individual adverse environmental impacts when performed separately, and have only minimal cumulative environmental impacts (U.S. EPA, 2021b). General permits automatically expire, unless renewed, every five years. There are several types of 404 general permits, including Nationwide Permits (NWPs), Regional General Permits (RGPs), and State Programmatic General Permits (SPGPs). The most common 404 general permits are NWPs, which provide streamlined review and authorization for activity categories that are determined by the Corps to have minimal adverse impacts, both individually and cumulatively, on the aquatic environment. The Corps has 57 NWPs that are effective through March 2026 (Corps, 2021a; 2021b). RGPs are issued on a regional basis by an individual Corps district (Corps, n.d.-a). There is no standard set of RGP activity categories that apply to all states, and there are varying numbers of RGPs issued by different Corps Districts. The SPGPs are administered by the state agency and are designed to

eliminate duplication of effort between Corps districts and states, as well as to make the permitting process more flexible and efficient (Corps, n.d.-b).

### 3.4.2 Section 402 NPDES Permits

The NPDES permit program addresses water pollution by regulating point sources that discharge pollutants to a WOTUS. For section 402 NPDES permits, section 401 certification only applies when EPA (a Federal agency) is the permitting authority. Program components of NPDES include the NPDES permit program, authority to regulate Federal facilities, pretreatment program, general permits program, and biosolids program (U.S. EPA, 2019), and a state may receive authorization to administer one or more of the NPDES program components. EPA retains administration for the program components for which a state is not authorized. For example, if the state has not received authorization for Federal facilities, EPA issues permits to Federal facilities (*e.g.,* military bases, national parks, Federal lands, etc.), and the state would have input on the permit via section 401. EPA is the sole NPDES permitting authority for three states (Massachusetts, New Hampshire, and New Mexico), the District of Columbia, all U.S. territories except the Virgin Islands, and generally on Tribal lands. All other states and the Virgin Islands have authorization to issue section 402 permits for either the entire NPDES program or certain components.

The two basic types of NPDEs permits are individual and general permits. NPDES individual permits are project-specific. Typically, dischargers seeking coverage under a NPDES general permit are required to submit a notice of intent to be covered by the permit. NPDES general permits cover discharges meeting general permit eligibility requirements in areas where EPA is the NPDES permitting authority (see U.S. EPA, 2017).

### 3.4.3 Interstate Natural Gas Pipeline and Hydropower Project Licenses

Projects requiring interstate natural gas pipeline and hydropower project licenses, which are issued by FERC (FERC, 2020), are also subject to section 401 certification. Certifying authorities typically review section 401 certification requests for these projects rather than waiving review.

### 3.4.4 Rivers and Harbors Act Sections 9 and 10 Permits

Rivers and Harbors Act sections 9 and 10 permits cover construction of structures in navigable waters. Section 9 permits authorize construction of bridges and causeways, which fall under U.S. Coast Guard jurisdiction, as well as dams and dikes, which fall under Corps jurisdiction. Section 10 permits authorize construction of wharfs, piers, dolphins, booms, weirs, breakwaters, bulkheads, jetties, and other structures, which all fall under Corps jurisdiction.

### 3.4.5 Nuclear Power Plant Licenses

NRC issues licenses for nuclear power plants, which are often subject to section 401 review since they are often located adjacent to waters to support the power generation equipment and sometimes discharge cooling water (U.S. Energy Information Administration, 2021a). According to the Energy Information Administration (2021b), "[a]s of September 1, 2021, there were 55 commercially operating nuclear power plants with 93 nuclear power reactors in 28 U.S. states."

### 3.4.6 Mining Licenses

The USDA Forest Service and BLM are responsible for management of surface resources and government-owned minerals on National Forest Service lands. The Forest Service and BLM therefore must approve mine plans of operations before mining activity can take place. Other approvals, such as section 404 permits, may also be required for such activities.

### 3.4.7 Tennessee Valley Authority Shoreline Permits

The Tennessee Valley Authority (TVA) is responsible for protecting the shorelines within the Tennessee River watershed. Under Section 26A of the TVA Act, the TVA issues shoreline permits for construction projects that take place on shorelines in the Tennessee River watershed. These permits must be obtained before construction on projects can begin. Permits are issued by the TVA after they conduct a site visit and an environmental and programmatic review (TVA, n.d.-a). Shoreline permits are required for all construction activities on shorelines including construction on docks, boathouses, piers, walkways, and other shoreline stabilization activities (TVA, n.d.-b).

### 3.4.8 Alcohol and Tobacco Tax and Trade Bureau Permits for Alcohol Producers and Manufacturers

The Alcohol and Tobacco Tax and Trade Bureau (TTB) issues permits to alcohol and tobacco businesses, including wineries and distilled spirit plants (TTB, 2019). Prospective industry members must apply for a permit and receive TTB approval before they can commence operations. The required documentation differs based on the type of permit, the applicant's business structure, and the applicant's potential Federal excise tax liability (TTB, 2021).

## 3.5 Limitations and Uncertainties

### 3.5.1 Information from Certifying Authority Websites, Pre-proposal Input, and Public Comment

Only five of the 56 states and territories list the average annual number of certifications approved and/or denied on their websites. No state or territory websites provide information about how often they waive section 401 review.

Of the 56 state and territory websites searched, 18 did not have any information on section 401 fees. These states or territories either do not charge a section 401 fee, or their section 401 fees are not documented on their websites. For the states and territories with listed fees, some fees appear large for reviews solely for section 401 purposes and may be part of a larger permitting fee. For example, the fee range listed for Alabama's section 401 process ranged from $800-$25,920. The $800 minimum fee is listed for several project types, while the $25,920 fee is listed for "commercial and residential development 100 acres or greater in size" (AL DEM, 2021).

As summarized in Section 3.2, some states provided information about their average annual number of certification decisions and average issuance times in pre-proposal input letters and public comments. Although this information helps establish the section 401 baseline, the available data are not sufficient for developing a nationally representative dataset for the annual average number of section 401 reviews conducted and the resulting certification decisions.

### 3.5.2 Federal License and Permit Summary

Table 3-7 in Section 3.3 presents the average annual number of *issued* Federal licenses and permits for six licensing/permitting categories. However, the annual average number of licenses and permits issued does not capture the totality of section 401 certification reviews because the numbers do not account for certification requests that may be denied by certifying authorities or withdrawn by project proponents. Lastly, some licenses/permits in Table 3-7 may not meet the requirements that trigger section 401 certification, but EPA is unable to estimate the proportion of licenses/permits that require section 401 certification due to data limitations.

# 4 Potential Effect of Final Regulatory Revisions

EPA is finalizing a new certification rule that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input, and that is consistent with the cooperative federalism principles central to CWA section 401. EPA's efforts to reconsider the 2020 Rule identified certain procedural components of the 2020 Rule that adversely impacted the certification and licensing/permitting process. These efforts and subsequent stakeholder input informed the final rule provisions.

Overall, EPA anticipates that the final rule will result in more predictable, efficient decision-making by certifying authorities relative to either the 2020 Rule or 1971 Rule baseline. Additionally, the final changes are expected to improve certifying authorities' ability to protect water resources. Improved water quality protection is the main benefit anticipated to result from final changes to several provisions.[44] Although the final rule may impose some additional burdens on certifying authorities (*e.g.*, reasonable period of time negotiations relative to both baselines) and project proponents (*e.g.,* pre-filing meeting requests and participation relative to the 1971 Rule baseline), the Agency expects that clear, unambiguous procedural requirements will improve section 401 procedural efficiencies for both certifying authorities and project proponents. The final rule clarifies ambiguities in the current section 401 process, including scope, modifications, neighboring jurisdiction assessments, and procedures when EPA acts as the certifying authority. These revisions help standardize the certification process, reduce confusion, and promote efficient section 401 reviews. The final rule provides a means for Tribal governments to obtain TAS for section 401 and/or section 401(a)(2) directly, which will limit costs for Tribal governments interested in obtaining TAS for section 401 and/or 401(a)(2) that do not want to administer the section 303(c) program for WQS.

Sections 4.1 through 4.11 summarize each final rule provision—including a description of the 1971 Rule and 2020 Rule requirements, the final change, and the rationale for the final change—and discuss potential effects of each final rule provision on certifying authorities, project proponents, other stakeholders, and the environment, as compared with the 1971 Rule and 2020 Rule baselines. Section 4.12 discusses potential regulatory revisions that Federal agencies and certifying authorities may make in response to the final rule. Section 4.13 discusses the Information Collection Request (ICR) for the final rule. Section 4.14 summarizes in a table (Table 4-1) the potential effects of the final regulatory revisions relative to both the baselines. Table B-1 in Appendix B compares rule provisions, in plain language, under the 1971 Rule, the 2020 Rule, and the final rule.

[44] Use benefits are values individuals hold for an environmental improvement that can be inferred through a change in demand for one or more market goods (*i.e.*, purchases of complementary goods such as equipment and travel), and nonuse benefits are values individuals hold for an environmental improvement that are independent of purchases of market goods and services. The total benefits of an environmental improvement are the combination of use and nonuse benefits (Freeman III et al., 2014). Recent economic literature provides substantial empirical support that nonuse values, such as option and existence values, are greater than zero, and small per capita nonuse values held by a substantial fraction of the population can be very large in the aggregate.

## 4.1 When Section 401 Certification Is Required

### 4.1.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge into waters of the United States. 33 U.S.C. 1341(a)(1). The 2020 Rule explicitly provided in the regulatory text that certification is required for any activity that may result in a discharge. "Discharge" for purposes of section 401 is also defined in the 2020 Rule as a discharge from a point source into a water of the United States, consistent with *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998). While not addressed in the 1971 Rule, case law from the 9th Circuit holds that only a point source discharge triggers section 401 (*Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998)).
- **Description of final regulatory change:** The final rule explicitly reaffirms the longstanding Agency position that section 401 certification is required for any Federal licenses or permits that authorize any activity which may result in a point source discharge into waters of the United States. The preamble reaffirms that the Agency interprets discharge to include, but not be limited to, the discharge of pollutants, consistent with the holding in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006). Additionally, the preamble reaffirms that discharges must be from point sources to require section 401 certification. *Dombeck*, 172 F.3d 1092. This interpretation is consistent with the Agency's longstanding interpretation of section 401 and the judicial precedent mentioned above. *See* section IV.A in the preamble for further discussion of this aspect of the final rule.
- **Rationale for final regulatory change:** This provision reaffirms existing regulatory practice and continues to provide clarity for stakeholders involved in the certification process.

### 4.1.2 Potential Impacts of the Provision

#### *4.1.2.1 2020 Rule as the Baseline*

The final provision substantively replicates the 2020 Rule provision regarding when section 401 certification is required. As such, relative to the 2020 Rule baseline, this final rule provision does not have any potential impacts.

#### *4.1.2.2 1971 Rule as the Baseline*

The final provision clarifies when section 401 certification is required for certifying authorities, Federal agencies, and project proponents. Increased clarity on the section 401 certification process and implementation was a common request during pre-proposal feedback and public comment across stakeholder groups, and the final rule addresses these requests by codifying existing practices in the section 401 certification process. Overall, the increased clarity that will be gained from the final provision will result in small environmental benefits from improvements in the section 401 review process and small cost savings for certifying authorities, Federal agencies, and project proponents.

## 4.2 Pre-filing Meeting Requests

### 4.2.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Pre-filing meetings were introduced in the 2020 Rule. Project proponents were required to request pre-filing meetings at least 30 days prior to requesting certification. Under the 2020 Rule, certifying authorities did not have to grant the request for a pre-filing meeting, but they could not waive the 30-day wait period to submit a

request for certification. *See* 40 CFR 121.4 (2020). There was no requirement for early engagement between any section 401 stakeholders in the 1971 Rule or in the statute.

- **Description of final regulatory change:** EPA is retaining the 2020 Rule requirement for project proponents to request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a certification request. However, under the final rule, certifying authorities may shorten or waive this pre-filing meeting request requirement and direct the project proponent to proceed with submitting a certification request. *See* section IV.B in the preamble for further discussion of this aspect of the final rule.
- **Rationale for final regulatory change:** Many commenters recognized that pre-filing meetings can facilitate and streamline the certification process through early coordination. Several commenters supported the flexibility included in the proposed rule giving certifying authorities the ability to waive or shorten the requirement. Pre-filing meeting requests ensure that certifying authorities have an opportunity to receive early notification of and discuss the project and potential information needs with the project proponent before the statutory "reasonable period of time" for certification review begins (*e.g.*, allow the certifying authority to collect important details about a proposed project and its potential effects on water quality). The final rule provides flexibility for certifying authorities to decide whether to require pre-filing meeting requests based on project complexity and other factors, and supports cooperative federalism, allowing states and Tribal governments to choose which projects or scenarios, if any, require early coordination. The ability to waive a pre-filing meeting may be especially beneficial for certifying authorities (including Tribes with TAS) with limited resources under their existing section 401 programs, or for projects of limited scope and impact.

### 4.2.2 Potential Impacts of the Provision

#### *4.2.2.1 2020 Rule as the Baseline*

The final rule allows certifying authorities to waive the 30-day waiting period, at their discretion, following receipt of a pre-filing meeting request. The final provision allows greater flexibility to certifying authorities and project proponents when initiating the section 401 review process and will reduce delay when pre-filing meetings are not needed for a particular project, which will result in cost savings for both certifying authorities and project proponents relative to the 2020 Rule baseline.

#### *4.2.2.2 1971 Rule as the Baseline*

Although pre-filing meetings will place additional burden on both project proponents and certifying authorities (unless certifying authorities waive the requirement for a pre-filing meeting request), the process is ultimately expected to reduce burden elsewhere in the section 401 certification process. Informal engagement often occurs in the baseline after receipt of a certification request, such as when certifying authorities request additional information from project proponents to make a certification decision. The informal engagement often occurs at multiple points throughout the section 401 review process. The pre-filing meeting provides a more formal engagement opportunity between project proponents and certifying authorities prior to the initiation of the certification review process, which may help project proponents provide relevant information in the initial request for certification, help certifying authorities act within the reasonable period of time, and reduce back-and-forth communication between project proponents and certifying authorities. The requirement in the final rule for project proponents to submit a pre-filing meeting request provides certifying authorities with the option to learn about and discuss proposed projects prior to receiving requests for certification, which

represents an improvement from the baseline scenario. Pre-filing meetings benefit certifying authorities and project proponents by helping both parties to understand the proposed project and the type of information or data that may be necessary for a timely and complete section 401 review. It may also allow states to initiate their public notice processes more rapidly and provide better information for public comment.

Under the 1971 Rule baseline, the section 401 process is often delayed by incomplete section 401 requests. The Tennessee Department of Environment and Conservation (TDEC), for example, shared in pre-proposal input that their average time to process certification requests was often delayed because the initial requests lacked sufficient information to analyze water quality impacts and solicit public input. On average, TDEC reported a 120-day waiting period after receipt of the initial request for obtaining the information necessary to make a certification decision.[45] Alternatively, states that already utilize pre-filing meetings noted fewer delays due to incomplete requests. For example, the Wyoming Department of Environmental Quality (WDEQ) stated in its pre-proposal input letter that the section 401 review process can be completed within 60 days by properly using pre-filing meetings. WDEQ frequently encourages project proponents to submit pre-filing meeting requests at the conceptual or 30% design phase of the proposed project. WDEQ often includes several stakeholders in the pre-filing meeting process and discusses several projects at meetings with larger entities that are filing for multiple Federal licenses or permits. For certain projects, WDEQ also participates in the early stages of the National Environmental Policy Act review process to facilitate an efficient section 401 review process.[46] In addition to facilitating efficient section 401 reviews, early engagement may improve the quality of section 401 reviews by helping to ensure that necessary information is available prior to or early in the reasonable period of time, which may improve compliance with water quality requirements.

Flexibility in the pre-filing meeting provision minimizes burden on certifying authorities and project proponents. If a certifying authority decides to categorically waive pre-filing meetings for certain project types and makes that information publicly available, the project proponent does not have to request a pre-filing meeting and may proceed without any delay. Similarly, if a certifying authority declines a pre-filing meeting after a project proponent submits a pre-filing meeting request, the project proponent can proceed with submitting a request for certification without any additional delay. If a certifying authority decides to require a pre-filing meeting, the final rule clarifies that the project proponent must request the pre-filing meeting at least 30 days before requesting certification. However, the certifying authority may shorten the timeframe to reduce any delays in the certification process. Similarly, the certifying authority may advise a project proponent to submit a pre-filing meeting request more than 30 days before submitting a request for certification, as necessary, to ensure that the project proponent has sufficient time to gather the appropriate information to submit a certification request and that the certifying authority can make a certification decision within the reasonable period of time.

The final rule requirement for project proponents to submit a pre-filing meeting request to certifying authorities for all projects, unless otherwise waived, will result in an additional time burden for project proponents. The time burden increases when certifying authorities accept the request since project proponents will be expected to participate in a pre-filing meeting. Additionally, project proponents may be required to pay a fee for a pre-filing meeting. For example, Michigan uses a joint state and Corps

[45] Tennessee Department of Environment and Conservation (EPA-HQ-OW-2021-0302-0083).

[46] Wyoming Department of Environmental Quality (EPA-HQ-OW-2021-0302-0019).

permit application, and project proponents currently have the option to request a pre-application meeting for a fee up to $1,100 (Michigan Department of Environmental Quality, 2019). If pre-filing meetings become more common as a result of this rulemaking, certifying authorities may consider adding pre-filing meeting fees to help cover their administrative costs. Hence, project proponents may be more likely to incur this monetary burden. However, EPA does not have information on which states may impose these fees or the potential magnitude of such fees.

The burden of the pre-filing meeting provision on certifying authorities depends on multiple factors. First, the burden depends on the magnitude of the change in the number of pre-filing meetings from the baseline, as a result of the final rule provision. Some certifying authorities are already engaging in pre-filing meetings with project proponents and may experience limited to no changes. Additionally, to minimize costs and burdens on staff, certifying authorities can decline all meeting requests or choose to decline meeting requests for routine or non-complex projects and only accept the meeting for larger or complex projects. Second, the burden depends on the methodology that certifying authorities use to conduct pre-filing meetings. Certifying authorities can use methodologies that would limit staff time and resources, such as conducting the meeting online or via phone call. Lastly, the burden also depends on whether a certifying authority implements a pre-filing meeting fee to help cover costs. EPA recognizes that there is considerable uncertainty in estimating how certifying authorities will alter their current practice in response to the final rule.

To demonstrate how the actions of certifying authorities may alter the time burden imposed by the final rule requirement, suppose two scenarios: one in which the certifying authority accepts all pre-filing meeting requests and another in which the certifying authority rejects all pre-filing meeting requests. In the first scenario, the final rule requirement will lead to a large additional time burden for both certifying authorities and project proponents. In contrast, in the second scenario, the final rule requirement will not impose an additional time burden to certifying authorities.

In terms of process costs, EPA expects the final provision will result in cost savings for certifying authorities since they will only accept the pre-filing meeting request when such meetings will be beneficial for their section 401 review (*i.e.*, for large or complex projects). However, the overall cost effects are uncertain since the cost savings resulting from improved efficiencies may not exceed burden of submitting pre-filing requests, participating in pre-filing meetings when accepted, and potential fees that certifying authorities may charge for the pre-filing meetings.

## 4.3 Request for Certification

### 4.3.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** The statute states that a certifying authority's reasonable period of time to act starts after the certifying authority is in "receipt" of a "request for certification" from a project proponent (33 U.S.C. 1341(a)). The Agency defined both "certification request" and "receipt" in the 2020 Rule and provided an exhaustive list of items required in a certification request applicable to all certifying authorities. *See* 40 CFR 121.1(m), 121.5 (2020). The 2020 Rule required seven or nine components depending on whether the request for certification was for an individual license or permit or the issuance of a general license or permit. The 1971 Rule did not define either "request for certification" or "receipt." The 1971 Rule also did not define what is required in a "request for certification" when states or Tribal governments are the certifying authorities. However, when EPA is the certifying authority,

the 1971 Rule required project proponents to submit a signed certification request with "a complete description of the discharge involved in the activity," which included five components.

- **Description of final regulatory change:** The Agency is finalizing that any "request for certification" must be in writing, signed, and dated. The final rule bifurcates the minimum content requirements for an individual license or permit and the issuance of a general license or permit. 40 CFR 121.5(a). Under the final rule, if the request for certification is for an individual Federal license or permit, the request for certification must include a copy of the license or permit application and any readily available water quality-related materials that informed the development of the application. However, if the request for certification is for the issuance of a general Federal license or permit, then the request for certification must include a copy of the draft license or permit and any readily available water quality-related materials that informed the development of the draft license or permit. Beyond this requirement, EPA is not imposing further requirements for states or authorized Tribes who choose to define additional contents of a request for certification. *See* 40 CFR 121.5(c). Additionally, EPA is emphasizing that the additional components of a request must be water quality-related, and that states and authorized Tribes may define additional components of a request for certification in non-regulatory vehicles, such as guidance. Furthermore, such additional components must be identified prior to when the request for certification is made. When EPA acts as the certifying authority and when a state or authorized Tribe does not define additional contents of a request for certification, the final rule defines additional contents of a "request for certification." *See* 40 CFR 121.5(b). *See* section IV.C in the preamble for further discussion of this aspect of the final rule. The Agency also added language to section 121.6(a) to clarify that the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined at 40 CFR 121.5, in accordance with the certifying authority's applicable submission procedures.
- **Rationale for final regulatory change:** Many commenters supported certifying authorities having the ability to define the contents of a request for certification, saying that it ensures states and authorized Tribes have the information they need to protect their water quality. In order to effectuate Congress' goals for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. Defining an exclusive list of components for all requests for certification for all certifying authorities could inhibit a comprehensive review under section 401 in the reasonable period of time. The diverse nature of Federal licenses and permits, and the variety of potential water quality impacts from those different types of activities, does not lend itself to a one-size-fits-all approach. The Agency has also incorporated guardrails in the final rule to ensure such additional contents are within the scope of the final rule and transparent, while still allowing certifying authorities to act on a request for certification in a timely and informed manner. To provide additional certainty and transparency, the Agency is only defining additional contents of a "request for certification" when EPA acts as a certifying authority or for when a state or authorized Tribe does not define additional contents. This provision balances both transparency, efficiency, and flexibility for stakeholders. Additionally, in response to comments,

the final rule requires the Federal license or permit application, as opposed to a draft license or permit, for requests for certification on an individual license or permit. EPA's bifurcated approach is consistent with longstanding certifying authority practices and should work well for both individual licenses or permits as well as for the issuance of general licenses or permits.

### 4.3.2 Potential Impacts of the Provision

#### *4.3.2.1 2020 Rule as the Baseline*

Relative to the 2020 Rule, the final rule provides more flexibility in the request for certification definition. The 2020 Rule included a prescriptive list of components for a request for certification and did not allow certifying authorities to provide an alternative definition of a "request for certification." Under the final rule, certifying authorities will be able to maintain their existing definitions or components of a "request for certification," as long as the components are water quality-related and clearly defined prior to the request for certification. The final rule also requires project proponents to provide any readily available water quality-related materials that informed the application or draft general license or permit, which recognizes the importance of providing certifying authorities with critical information to inform their analysis while at the same time considering important implementation considerations. First, this requirement provides a predictable endpoint for project proponents because it is limited to existing data or information that was used in the development of the license or permit application or the draft general license or permit. Second, consistent with the scope of review under this final rule, this requirement limits any such materials to "water quality-related materials," which will ensure that project proponents provide certifying authorities with pertinent water quality-related information to fully inform their certification analyses. Since the provision affirms longstanding section 401 practices and some states already have request for certification definitions in regulations, guidance, or forms, EPA anticipates minimal costs for certifying authorities. Additionally, the provision does not require certifying authorities to develop additional components for a request for certification, nor does it prevent certifying authorities from requesting additional information after they receive a request for certification.

The "request for certification" provision when EPA is acting as the certifying authority or when certifying authorities have not provided their own definition will provide project proponents with greater clarity and certainty regarding what contents to include in certification requests. More complete initial certification requests may improve the quality of section 401 reviews and compliance with applicable water quality requirements. However, project proponents with projects that span multiple jurisdictions may also need to follow alternative definitions set by certifying authorities, which may be more cumbersome than one standard definition across jurisdictions.

Defining the additional contents of a certification request, beyond the minimum contents listed in section 121.5(a), when EPA is acting as the certifying authority or when certifying authorities have not defined a "request for certification" in their regulations will help to improve request for certification consistency by providing a backstop of information requirements. Although a list of required contents may not be sufficient for all project types with various levels of complexity, the pre-filing meeting provision of the final rule (*see* Section 4.2 above) will provide opportunities for certifying authorities to discuss data needs with project proponents before the submission of requests for certification. The provision will also provide flexibility for certifying authorities to define additional required contents of a request for certification.

The provision balances pre-proposal input and public comment received regarding certification requests. Many stakeholders recommended that certifying authorities be responsible for determining the information needed to process a complete certification request. Other stakeholders supported a standard request for certification definition because it eliminated confusion as to when a project proponent requests certification, created clarity and certainty around the timeline for certifying authority action, and ensured the statutory clock began with the basic information needed for review. Defining a request for certification when EPA is acting as the certifying authority or when certifying authorities do not have their own definition provides the clarity and certainty desired by project proponents while giving certifying authorities flexibility to set their own definition. Additionally, requiring any state- or Tribal-defined additional components to be water quality-related and clearly defined prior to the request for certification provides project proponents with further clarity and certainty for meeting the "request for certification" requirements and initiating the reasonable period of time.

Relative to the 2020 Rule baseline, this provision of the final rule will have positive environmental benefits and cost savings for both certifying authorities and project proponents. The final rule's minimal requirements will improve consistency of information provided in requests for certification via copies of the license or permit application (or draft general license or permit), and any readily available water quality-related materials that informed the application (or draft general license or permit) will improve the quality of section 401 reviews, particularly for certifying authorities with limited resources. Moreover, environmental benefits may be larger relative to the 2020 Rule baseline than relative to the 1971 Rule baseline because certifying authorities will be able to retain their own requirements for a request for certification, which can be tailored to best ensure compliance with applicable water quality requirements, instead of using the prescriptive list required by the 2020 Rule. In terms of process costs, the provision will result in cost savings for project proponents by streamlining the process when EPA is the certifying authority or when a certifying authority does not provide its own definition of a "request for certification." For certifying authorities, the ability to retain their own "request for certification" requirements may result in higher cost savings relative to the 2020 Rule baseline than relative to the 1971 Rule baseline.

#### *4.3.2.2 1971 Rule as the Baseline*

The 1971 Rule did not define what is required in a "request for certification" when states or authorized Tribes are the certifying authorities. The final rule requirement to include the license or permit application (or draft general license or permit) and any readily available water quality-related materials that informed the application (or draft general license or permit) will help standardize the level of information provided to certifying authorities. The final rule's minimal requirements for all requests for certification may help certifying authorities conduct more complete section 401 reviews and better ensure compliance with applicable water quality requirements. It is in the certifying authority's best interest to clearly define information needs before the certification process begins in order to fully avail themselves to the full reasonable period of time with all necessary information. Accordingly, with the new requirement, certifying authorities will be less likely to request additional information from project proponents to assess potential water quality impacts of the proposed project, which will increase efficiency in the section 401 certification process. This increased efficiency can benefit both project proponents and Federal agencies since licenses or permits may be issued more quickly. Section 4.3.2.1 in this economic analysis provides additional details about the ability for certifying authorities to

maintain their existing "request for certification" definitions or components, and the requirement to include a set list of components when certifying authorities do not have their own definition. When EPA is the certifying authority or when certifying authorities have not defined their own additional "request for certification" components, the final rule requires a set list of components in addition to the minimum requirements at section 121.5(a), which will provide additional clarification to project proponents and standardize the information that certifying authorities receive in certification requests.

Relative to the 1971 Rule baseline, this provision of the final rule will have similar positive environmental benefits as compared to the 2020 Rule baseline. EPA expects the final rule will have positive environmental benefits from higher quality section 401 reviews due to improved consistency of information provided in requests for certification. Additionally, project proponents will experience cost savings due to a more streamlined process when EPA is the certifying authority or when a certifying authority defines additional contents for a "request for certification."

## 4.4 Reasonable Period of Time

### 4.4.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** The statute states that a certifying authority waives its ability to certify a Federal license or permit if it does not act on a certification request within a reasonable period of time, which cannot exceed one year (33 U.S.C. 1341(a)). Other than specifying that the reasonable period of time "shall not exceed one year," the CWA does not define the reasonable period of time. Under the 2020 Rule, Federal agencies were required to set the reasonable period of time within 15 days of receiving the request for certification. The 2020 Rule provided that the reasonable period of time shall not exceed one year, as well as factors that Federal agencies must consider in setting the reasonable period of time. Under the 2020 Rule, the certifying authority could not ask a project proponent to withdraw and resubmit a certification request to restart the clock. The 1971 Rule reiterated from the statute that a certifying authority would waive its certifying ability if it did not act within "a reasonable period of time" and offered interpretations on two key reasonable period of time concepts: (1) the Federal licensing or permitting agency determines the length of the reasonable period of time, and (2) the reasonable period of time "shall generally be considered to be six months, but in any event shall not exceed one year" (40 CFR 121.16(b)(2019)). Additionally, the Agency is aware that there are instances where project proponents were asked to withdraw and resubmit a certification request, even though the 1971 Rule was silent on this practice (*see, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019)).
- **Description of final regulatory change:** EPA is finalizing a process whereby the Federal agency and certifying authority may jointly determine the length of the reasonable period of time on a categorical or case-by-case basis. If the Federal agency and certifying authority do not jointly determine the reasonable period of time, the reasonable period of time will default to six months. The provision also identifies scenarios where the reasonable period of time will automatically be extended upon notification by the certifying authority (*i.e.*, when necessary to accommodate a certifying authority's public notice procedures or force majeure events) but not beyond one year from the receipt of the certification request. Lastly, the Federal agency and certifying authority may jointly agree to extend the reasonable period of time once it has begun, provided that the reasonable period of time does not exceed one year from the date that the

request for certification was received. *See* section IV.D in the preamble for further discussion of this aspect of the final rule.

- **Rationale for final regulatory change:** In pre-proposal input, some stakeholders asserted that the 2020 Rule limited the role of state and Tribal authorities in setting the timeline for reviewing certification requests. EPA expressed similar concerns about the lack of flexibility for certifying authorities to inform the reasonable period of time in the *Federal Register* (U.S. EPA, 2021a). Many commenters expressed support for the collaborative approach of the Federal agency and certifying authority setting the reasonable period of time together. While still consistent with statutory text, the final rule balances equities between certifying authorities and Federal agencies. It provides the flexibility for cooperative federalism principles and allows certifying authorities and Federal agencies to determine the best method for establishing the reasonable period of time (*e.g.*, case-by-case or on a categorical or programmatic basis). Alternatively, if the agencies are unable to agree to a reasonable period of time, this option provides for a default reasonable period of time of six months. This "default" approach obviates the need for a potentially lengthy dispute resolution process in the event the certifying authority and Federal agency disagree about the reasonable period of time.

### 4.4.2 Potential Impacts of the Provision

#### *4.4.2.1 2020 Rule as the Baseline*

Relative to the 2020 Rule baseline, the final rule gives certifying authorities greater opportunity to ensure that the reasonable period of time is informed by the size and complexity of the project, the certifying authority's available resources (*e.g.*, staff size), and public notice and comment procedures. Negotiating the reasonable period of time upfront can improve the efficiency of the review process (*e.g.*, reduce the need for subsequent extension requests) and reduce the administrative burden on the certifying authority. If a longer reasonable period of time is negotiated, the final rule gives certifying authorities more time to review available information about potential water quality impacts of the proposed project, and, if needed to fully assess potential water quality impacts, to request additional information from project proponents. Additionally, the automatic extensions described in the final rule will give the certifying authority greater flexibility to account for the public comment process or unforeseen circumstances, such as a Federal government closure or natural disaster, which will further reduce burden on certifying authorities.

The final rule clearly outlines the process for extending the reasonable period of time, which may reduce the risk of certifying authorities issuing a denial due to a lack of time and necessary information to conduct a proper review. Automatic extensions may also reduce the risk of certifying authorities issuing project denials when unforeseen circumstances result in inadequate time to complete a review. A consensus among certifying authorities in the pre-proposal input letters was that the Federal agency typically set the reasonable period of time to be too short and did not account for adequate information needs and project complexity and size. Commenters from the public comment period asserted that Federal agencies lack the authority to unilaterally impose a shorter timeframe on certifying authorities. Since certifying authorities will have more influence on setting the reasonable period of time under this provision, the reasonable period of time may be longer on average than it would be if it was determined unilaterally by the Federal agency. As a result, the provision to allow certifying authorities and Federal agencies to jointly set the reasonable period of time can increase the risk of project delays as compared to the baseline, though this effect may be limited to the CWA section 402 and section 404 permit

programs (which currently have a default reasonable period of time of 60 days and which EPA expects will be negotiated to stay at 60 days). Additionally, the potential for project delays can be offset by pre-filing meeting coordination and a greater availability of information afforded to the certifying authority at the beginning of the certification review process under the final rule. As noted in Section 3.2.3 above, certifying authorities have delayed issuing certification decisions in the past due to incomplete information.

Greater flexibility for the certifying authority to influence the reasonable period of time can lead to more complete water quality impact analyses and better-informed certification decisions, which can positively impact water quality and better ensure adherence to water quality requirements. Jointly set reasonable period of time may provide more time for certifying authorities to include conditions, such as monitoring and reporting conditions, in their certification decisions, which may improve water quality protection but may also increase costs to the project proponent. Jointly setting the reasonable period of time may also reduce the number of denials issued due to insufficient time to complete a certification review, which will save time and reduce process-related costs for both certifying authorities and project proponents. Overall, the greater flexibility and efficiency of the section 401 process under the final rule may result in small positive environmental benefits.

The Agency expects many of the impacts described above to occur under both the 2020 Rule and 1971 Rule baselines. However, there may be additional potential impacts unique to the 2020 Rule baseline. The final rule will not require Federal agencies to determine the reasonable period of time by 15 days after receipt of a certification request. On average, Federal agencies may experience reduced administrative burden as a result of the removal of this deadline but may also experience a shared burden of negotiating the reasonable period of time with the certifying authority. Additionally, the 2020 Rule explicitly barred certifying authorities from asking project proponents to withdraw and resubmit certification requests, while the final rule does not take a position on the validity or permissibility of withdrawal and resubmission. In the pre-proposal input and public comment letters, industry stakeholders stated that the 2020 Rule helped prevent certifying authorities from requesting that project proponents withdraw and resubmit their certification requests. As a result, project proponents may experience additional project delays under the final rule, as well as additional costs, if the "withdraw and resubmit" practice is used. However, it is not clear what effect the 2020 Rule had on that practice independent of published court decisions. EPA assumes that the "withdraw and resubmit" approach has primarily been used when a certifying authority had inadequate water quality information to issue a decision and was confronted by an imminent reasonable period of time deadline. Under the final rule, it is likely that the certifying authority may not feel the need to request as much additional information (necessitating "withdrawal and resubmit") because the approach to a request for certification will have already required its submission. In such cases, the difference between the 2020 Rule baseline and the final rule for the reasonable period of time provision will be quite limited. Additionally, the ability of the Federal agency and certifying authority to collaboratively set the reasonable period of time will reduce the need for the "withdraw and resubmit" practice.[47]

This provision of the final rule may result in cost savings for certifying authorities. Certifying authorities will have the ability to influence the reasonable period of time, and as a result, will have greater

[47] To the extent this assumption is not accurate, a project proponent may experience more project delays under the final rule to the extent that the "withdraw and resubmit" approach would continue to be relied upon.

flexibility to conduct their section 401 reviews. These potential effects can translate into reduced administrative burden for certifying authorities. Federal agencies, however, may experience incremental costs from negotiating the reasonable period of time with certifying authorities.

#### *4.4.2.2 1971 Rule as the Baseline*

The Agency expects that many of the potential impacts of this provision will be the same with either the 1971 Rule or 2020 Rule as the baseline. For example, the Agency expects the potential impacts of certifying authorities and Federal agencies jointly setting the reasonable period of time and negotiating extensions to be identical relative to both baselines. Moreover, the potential impacts of automatic extensions will also likely be the same under the two baselines. Similar to the 2020 Rule baseline, this provision of the final rule can result in small environmental benefits due to the improved efficiency of the section 401 review process. This provision may also result in net cost savings for certifying authorities for the same reasons as discussed in Section 4.4.2.2 above.

A few potential impacts may be unique to the 1971 Rule baseline. The default reasonable period of time of six months in the final rule is consistent with the 1971 Rule; however, allowing the Federal agency and certifying authority to jointly negotiate the reasonable period of time can improve the efficiency of the review process. The Federal agency and certifying authority can negotiate a shorter reasonable period of time for projects that require less than six months to complete, and vice versa for projects that take longer to review. Shorter reasonable period of time timeframes can reduce delays for the project proponent, while longer reasonable period of time timeframes can increase delays. Overall, a joint reasonable period of time process will better account for time considerations of both Federal agencies and certifying authorities from the outset of the section 401 process, which will increase certainty regarding section 401 review timeframes for certifying authorities, Federal agencies, and project proponents.

## 4.5 Scope of Certification

### 4.5.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Section 401(a)(1) provides that a certification must be obtained by "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) (emphasis added)). Section 401(d) provides that a certifying authority may place conditions in a certification that are "necessary to assure that any *applicant* for a Federal license or permit will comply with" water quality requirements. *Id*. at 1341(d) (emphasis added). The 2020 Rule took a narrowed view regarding scope of review with a "discharge-only" approach that limited the scope of review to whether a discharge from a federally licensed or permitted activity will comply with water quality requirements. Water quality requirements were defined as the applicable provisions of CWA sections 301, 302, 303, 306, 307, and state or Tribal regulatory requirements for point source discharges into waters of the United States. The 1971 Rule did not explicitly address the scope of certification in regulatory text. In 1994, the U.S. Supreme Court held that section 401 "is most reasonably read" as authorizing the certifying authority to place conditions on what the Court described as the "project in general" or the "activity as a whole" once the predicate existence of a discharge is satisfied. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711-712 (1994). The Court also said its interpretation was consistent with EPA's 1971 Rule at 40 CFR 121.2(a)(3) (2019) (requiring reasonable assurance

that the "activity" will not violate applicable WQS) and with EPA's 1989 guidance (U.S. EPA, 1989).

- **Description of final regulatory change:** The Agency is finalizing a return to the scope of certification standard affirmed by the Supreme Court in *PUD No. 1*, which provides that a certifying authority's section 401 review and conditions may address the water quality-related impacts from the "activity" once section 401 certification has been triggered by the potential for a point source discharge into a WOTUS. The final rule also addresses regulated community concerns regarding pre-2020 Rule landscape and provides regulatory certainty by clarifying important concepts such as how certifying authorities are limited to considering adverse impacts to water quality. Under this approach, the certifying authority's evaluation is limited to water quality-related impacts from the activity subject to the license or permit, including the activity's construction and operation, regardless of whether those aspects are directly authorized by the Federal license or permit that has triggered the need for certification. 40 CFR 121.3(a); *see* section IV.E in the preamble for further discussion of this aspect of the final rule. The final rule also clarifies that the scope of review applies to any certification conditions necessary to assure that the activity will comply with water quality requirements. 40 CFR 121.3(b). Furthermore, the Agency is finalizing the definition of "water quality requirements" as "any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law." 40 CFR 121.1(j).
- **Rationale for final regulatory change:** During pre-proposal outreach and public comment, some states and Tribal authorities raised concerns that the scope of the 2020 Rule limited their ability to protect water quality. The final rule furthers the Administration's interest in enhancing and supporting cooperative federalism. The final approach is also environmentally protective and allows states and authorized Tribes to address, within the legal bounds of section 401, the broadest possible range of adverse water quality effects from Federally licensed or permitted projects. Furthermore, the "activity" interpretation of scope is the best interpretation of the statutory text, is most consistent with the legislative history, realigns scope with accepted practice for the 50 years preceding the 2020 Rule, best achieves the water quality protective goals of the CWA, and is most harmonious with the cooperative federalism principles underlying section 401. Lastly, the final rule's definition of "water quality requirements" interprets the term in a way that respects the full breadth of the Federal and state and Tribal water quality-related provisions that Congress intended a certifying authority to consider when determining whether to grant certification.

### 4.5.2 Potential Impacts of the Provision

#### *4.5.2.1 2020 Rule as the Baseline*

Relative to the 2020 Rule, the final rule shifts the scope of review away from consideration of only discharges associated with an activity authorized by a Federal license or permit towards consideration of the water quality impacts from the "activity." As a result, with the 2020 Rule as the baseline, the final rule will improve certifying authorities' ability to ensure compliance with water quality requirements and therefore protect water quality. Additionally, relative to the 2020 Rule, certifying authorities will face greater administrative costs from broadened section 401 reviews resulting from the final rule's scope shift to "activity," as described in more detail below.

Relative to the 2020 Rule, under which only impacts from discharges-could be considered, the final rule has significant potential to generate noticeable water quality benefits, such as during the construction phase of a project when land disturbance can lead to adverse stormwater runoff impacts and periods of excessive downstream siltation that can significantly affect aquatic habitat. The expansion of the scope of review relative to the 2020 Rule gives certifying authorities latitude to analyze a wide array of water quality-related impacts from the activity, aside from the point source discharge, such as those created by hydroelectric dams (*e.g.,* sedimentation, change in aquatic habitats, trash pollution). Under the 2020 Rule, certifying authorities could not analyze the water quality impacts that did not arise from point source discharges. As a result, certifying authorities may have been hampered from adequately protecting water quality via certification decisions and conditions issued under the 2020 Rule. Certifying authorities that would have analyzed such water quality impacts under the 1971 Rule but were prohibited from doing so under the 2020 Rule will be able to do so again under the final rule. The 2020 Rule limited the ability of the certifying authority to consider the full range of possible water quality impacts (and associated benefits and costs to society). In turn, the 2020 Rule increased the likelihood that projects not beneficial to society due to water quality impacts (negative net benefits) were approved. The "water quality requirements" definition included in the final rule provides clarity to certifying authorities and project proponents about the scope of water quality impacts that are subject to consideration under section 401. The final rule could discourage project proponents from applying for Federal licenses or permits for projects with adverse water quality impacts, either from the discharge itself or from other parts of the "activity," that would violate water quality requirements since they are unlikely to receive a section 401 certification.

Conversely, relative to the 2020 Rule, there may be increased risk of project delays and associated costs for project proponents. Water quality impact analyses could take longer when considering the "activity" as opposed to the "discharge only." Certifying authorities may request additional information from project proponents to consider the "activity" in their section 401 reviews. However, since these activity-related data requests may address data that project proponents must compile in any event for the Federal license or permit application, data requests for the section 401 process are unlikely to place any incremental burden on project proponents. Additionally, project proponents may be responsible for complying with a broader range of certification conditions due to the expanded scope of review (as compared to the 2020 Rule).

This provision of the final rule will result in environmental benefits as more certifying authorities will conduct more thorough water quality impact analyses with the expanded scope of review. The potential environmental benefits associated with the change in scope will vary depending on the nature, size, location, and type of projects that require a Federal license or permit. For example, when looking at a hydropower project, the "activity" scope allows a certifying authority to consider water quality-related impacts beyond the discharges from the tailrace or powerhouse. Depending on the activity specifics, such consideration could result in certification conditions that include building or maintaining fish passage or habitat restoration related to water quality protection. As another example, when reviewing the construction of a pipeline project, the "activity" scope allows a certifying authority to consider water quality-related impacts beyond the discharge of dredge or fill material from the construction and placement of the pipeline and, depending on the activity specifics, can include water quality impacts from non-discharge related erosion or sedimentation from the pipeline construction, as well as later water quality impacts from erosion and sedimentation from the operation and maintenance of the

pipeline. Certifying authorities can consider certification conditions that include monitoring, reporting, and adaptive management in response to the non-discharge-related water quality impacts of the activity, such as temperature, flow, riparian buffer conditions, and species impacts. These conditions can lead to water quality protections that result in improved ecosystem services that lead to use and nonuse benefits. *See* Section 4.14 and Figure 4-1 for examples of ecosystem service benefits. Use benefits are values individuals hold for an environmental improvement that can be inferred through a change in demand for one or more market goods (*i.e.*, purchases of complementary goods such as equipment and travel), and nonuse benefits are values individuals hold for an environmental improvement that are independent of purchases of market goods and services. The total benefits of an environmental improvement are the combination of use and nonuse benefits (Freeman III et al., 2014). Recent economic literature (*see* Section 4.14.1 below) provides substantial empirical support that nonuse values, such as option and existence values, are greater than zero for environmental improvements, and small per capita nonuse values held by a substantial fraction of the population can be very large in the aggregate.

#### *4.5.2.2 1971 Rule as the Baseline*

Relative to the 1971 Rule interpretation of scope of review, the clarified scope of review in the final rule gives certifying authorities more definitive authority to comprehensively analyze water quality impacts related to a proposed activity. The clarified scope may provide greater assurance to certifying authorities that they may analyze additional environmental impacts related to water quality. As a result, certifying authorities may have greater ability to make better-informed certification decisions and ensure compliance with water quality requirements. Moreover, certifying authorities will have clearer authority to base certification decisions on water quality-related impacts from the "activity" rather than water quality-related impacts resulting solely from the discharge. The final rule removes the need to rely solely on case law and codifies the scope of the "activity" clearly for stakeholders. To that end, the clarified scope of review in the final rule will likely reduce the risk of litigation against certifying authorities by project proponents since the codified "activity" interpretation reduces the likelihood of a condition or a denial being based on impacts outside of the section 401 scope of review.

The clarified scope of section 401 certification may lead to improved water quality protection, particularly if certifying authorities were not considering the "activity" under the 1971 Rule baseline. To illustrate, construction of a hydroelectric dam has much broader environmental implications than just those at the point of discharge. Hydroelectric dams can significantly impact water quality beyond the point of discharge by affecting fish migration patterns, downstream nutrient passage, build-up of sediments, and aquatic habitats. Explicitly setting the scope of certification to the "activity" can lead certifying authorities that were not considering this scope under the 1971 Rule baseline to analyze and set conditions in accordance with water quality considerations from both the discharge itself and water quality impacts beyond the discharge. As such, the clarified scope of section 401 certification could better protect water quality and result in both use and nonuse benefits.

Most certifying authorities are likely already considering water quality-related impacts of the "activity" when completing section 401 reviews because this is the standard set out by the U.S. Supreme Court in 1994 and is consistent with EPA's 1971 Rule. However, a small number of certifying authorities may see increased administrative costs due to the final rule if they are not currently evaluating water quality-related impacts from the "activity." Alternatively, a small number of certifying authorities that were

previously considering impacts outside of water quality-related impacts can see reduced administrative costs because of the final rule.

By clarifying the scope of review, the final rule will reduce the regulatory uncertainty of the section 401 review process for project proponents. The clarified scope can also reduce the risk of project delays from certification denials that are based on analyses of impacts beyond those water quality-related impacts of a proposed activity.

Relative to the 1971 Rule, this provision of the final rule may result in small positive environmental benefits due to the clarification of the scope of review as the "activity." It is uncertain if certifying authorities will experience incremental costs or cost savings because, relative to the 1971 Rule, some may conduct more thorough section 401 reviews than they would have before the rule's scope clarification. However, the clarified scope may also reduce risk of litigation (and the associated costs) from project proponents against certifying authorities that, in addition to their thorough water quality analyses, considered non-water quality-related issues. Project proponents may experience incremental costs due to an increase in the risk of project delays and denials.

## 4.6 Certification Decisions

### 4.6.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Section 401(a)(1) provides that a certifying authority may grant a certification, grant a certification with conditions, deny a certification, or waive a certification. The statute also says that, if a certifying authority fails or refuses to act on a certification request within a reasonable period of time after receipt of such request, the certification requirements shall be waived (33 U.S.C. 1341(a)(1)). Although EPA previously did not explicitly define "to act" on a request for certification, the 2020 Rule took the position that certifying authorities must make a decision on a certification request within the reasonable period of time. The 2020 Rule and 1971 Rule defined what certifying authorities must include in a certification or express waiver. The 2020 Rule required specific information to be included in any decision document written by the certifying authority. *See* 40 CFR 121.7 (2020).
- **Description of final regulatory change:** EPA is defining "to act on a request for certification" as one of the four certification decisions (grant, grant with conditions, deny, or expressly waive) to provide clarity and transparency about the certification process. Consistent with the previous practice and regulations, waivers can happen in one of two ways: 1) by the certifying authority expressly waiving review, or 2) by the certifying authority failing to act within the reasonable period of time. Under this final rule, if the reasonable period of time defaults to six months, the certification review is waived if the certifying authority does not act on the request for certification within six months. In contrast to the 2020 Rule, the Agency is not finalizing a mandatory list of requirements for certifying authorities to include in their certification decisions. Instead, the final rule defines *recommended* contents for a grant of certification, a grant of certification with conditions, a denial of certification, and an express waiver. *See* section IV.F in the preamble for further discussion of this aspect of the final rule.
- **Rationale for final regulatory change:** The final rule makes the Agency's prior position on what it means "to act on a certification request" explicit and aligns with previous practice. Certifying authorities have argued that the information requirements imposed under the 2020 Rule were burdensome and should not be required. In response to these stakeholders and in support of

the cooperative federalism balance central to section 401, the Agency is recommending but not requiring contents for a grant of certification, a grant of certification with conditions, a denial of certification, and an express waiver.

### 4.6.2 Potential Impacts of the Provision

#### *4.6.2.1 2020 Rule as the Baseline*

The additional clarity that "acting" equates to issuing a decision may help certifying authorities avoid exceeding the reasonable period of time and waiving their section 401 authority. Relative to the 2020 Rule, the final rule will reduce the informational burden on certifying authorities because it does not mandate the contents that certifying authorities must include in their certification decisions. Instead, the final rule includes recommended contents for a grant of certification (section 121.7(c)), a grant of certification with conditions (section 121.7(d)), a denial of certification (section 121.7(e)), and an express waiver of certification (section 121.7(f)). This approach addresses workload concerns expressed by certifying authorities and, in support of the cooperative federalism balance central to section 401, provides certifying authorities with the flexibility to determine how best to communicate certification decisions to project proponents and Federal agencies. Reductions in the information burden on certifying authorities may also benefit project proponents if the reduced informational burden on certifying authorities leads to more timely certification decisions and, in turn, fewer project delays. The final rule will also eliminate unnecessary potential disputes, sometimes in court, about whether a certifying authority complied with EPA-issued requirements for certification decision documents. Lastly, the recommended contents for a grant of certification, a grant of certification with conditions, a denial of certification, and an express waiver will largely continue potential benefits from the 2020 Rule of increased transparency in the certification process while providing certifying authorities with the added flexibility to include different or additional information in their certification decisions. Although project proponents may benefit from increased transparency in certification decisions, the additional flexibility afforded to certifying authorities may reduce consistency of any increased transparency. The degree to which certification decisions are made in a consistent manner depends upon how closely certifying authorities follow the content recommendations.

The final rule provision may lead to environmental benefits as well. The reduced informational burden on certifying authorities' certification decisions relative to the 2020 Rule may reduce constructive waivers of certifications. Under the 2020 Rule, constructive waivers could occur if certifying authorities did not comply with information requirements for conditions or denials, but under the final rule, constructive waivers are limited to failure to act within the reasonable period of time. The potential reduction in constructive waivers may help prevent harmful water quality impacts in constructive waiver cases when certifying authorities intended to grant a certification with conditions or deny the certification request.

#### *4.6.2.2 1971 Rule as the Baseline*

Relative to the 1971 Rule baseline, the final rule recommends contents for all certification decisions. The recommended contents, to the extent that certifying authorities include them, will provide additional transparency and clarity to project proponents and Federal agencies in the certification process. For example, in the case of certifications granted with conditions, the final rule recommends that certifying authorities provide reasoning for why the conditions are needed to assure that the activity will comply with water quality requirements. Similarly, in the case of certification denials, the final rule recommends

that certifying authorities provide information about the reason for denial (such as a description of any missing water quality-related information if the denial is based on insufficient information). Project proponents may be able to use this information to alter proposed projects to ensure compliance with water quality requirements and submit a revised certification request. The magnitude of this benefit is unclear since EPA is not aware of any major issues regarding clarity of information included in certification denials or certifications granted with conditions.

Additionally, relative to the 1971 Rule, the final rule will reduce burden on certifying authorities since it only includes informational recommendations rather than requirements for a grant of certification or express waiver. Reductions in the information burden on certifying authorities may also benefit project proponents if the reduced informational burden on certifying authorities leads to more timely certification decisions and, in turn, fewer project delays.

The final rule encourages a more transparent process and may lead to a better-informed public regarding why certifying authorities made certain certification decisions for specific projects. Lastly, the final rule may result in environmental benefits if the clarified definition of "to act on a request for certification" reduces the number of constructive waivers and ensures that certifying authorities are able to review projects for potential conflicts with applicable water quality requirements, but the reduction in constructive waivers may also increase costs for project proponents if the section 401 reviews result in certifications with conditions or denials.

## 4.7 Federal Agency Review

### 4.7.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Section 401 does not explicitly provide a defined role for Federal licensing or permitting agencies to review certifications. However, prior Agency guidance acknowledged case law on the topic. Several circuit courts have recognized that Federal agencies may review certification decisions only to see whether they meet the minimum facial requirements of section 401, including whether the decision was issued within the reasonable period of time, whether the certifying authority complied with its public notice procedures, and whether the proper certifying authority issued the decision. *See City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2007), *American Rivers v. FERC*, 129 F.3d 99, 110-11 (2d. Cir 1997). Under the 2020 Rule, Federal agencies were required to review water quality certification decisions to ensure that (1) the decision was made within the reasonable period of time, (2) the certifying authority provided public notice on the certification request, and (3) the certification decision included the informational requirements set out in the 2020 Rule. *See* 40 CFR 121.9(a)(2) (2020). If a Federal agency determined that a certifying authority failed to comply with the aforementioned procedural requirements, then the certification could be deemed waived under the 2020 Rule. Similarly, the Federal agency could find waiver with respect to specific certification conditions that failed to meet informational requirements. *See* 40 CFR 121.9(b) (2020). The 1971 Rule provided that a Federal agency may determine that a waiver had occurred if it determined that a certification decision was not issued within the reasonable period of time. 40 CFR 121.16(b) (2019).
- **Description of final regulatory change:** Consistent with case law and prior Agency guidance, the final rule provides that to the extent a Federal agency verifies compliance with the requirements of Clean Water Act section 401, its review is limited to whether: (1) the appropriate certifying

authority issued the certification decision; (2) the certifying authority confirmed that it complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1); and (3) the certifying authority acted on the request for certification within the reasonable period of time. Additionally, the Agency is not identifying the specific types of information that must be included in a certification decision to satisfy Federal agency review and is instead relying on the certifying authority to determine how to demonstrate that it met the facial requirements. Consistent with the statutory text, the provision clarifies that if a certification decision is not issued within the reasonable period of time, then a waiver occurs. If a Federal agency determines that the certification decision was not issued within the reasonable period of time, then the Federal agency shall promptly notify the certifying authority and project proponent in writing that a waiver has occurred. The Agency is also finalizing regulatory text that clarifies that such notification from the Federal agency satisfies the project proponent's requirement to obtain certification. However, the Agency is declining to finalize regulatory text on the process that Federal agencies and certifying authorities must follow for non-compliance with other facial requirements of CWA section 401. *See* section IV.G in the preamble for further discussion of this aspect of the final rule.

- **Rationale for final regulatory change:** The potential consequences of Federal agency review required by the 2020 Rule drew considerable pre-proposal input and public comment to the effect that the 2020 Rule's implementation could result in a Federal agency "veto" of a section 401 certification, and that it was contrary to the statute, the legislative history, and case law. The final rule clarifies that constructive waivers (as opposed to affirmative waivers) may only occur for failure to act within the reasonable period of time, consistent with the plain language of the statute and its legislative history. Additionally, the regulatory changes alleviate some cooperative federalism concerns by expressly limiting Federal agency review to facial requirements in section 401, consistent with certain case law and EPA's position prior to the 2020 Rule. The final rule clarifies the process that occurs once a Federal agency determines that a certifying authority has failed or refused to act within the reasonable period of time. However, the Agency is declining to define the process that Federal agencies and certifying authorities must follow for non-compliance with other facial requirements of CWA section 401 (*e.g.,* public notice procedures, wrong certifying authority). This approach is consistent with the Agency's approach to Federal agency review prior to the 2020 Rule and avoids unnecessarily encumbering the certification process with additional required procedures.

### 4.7.2 Potential Impacts of the Provision

#### *4.7.2.1 2020 Rule as the Baseline*

The final rule provides that the certification requirement shall be waived only if a certifying authority fails or refuses to act (*i.e.,* grant, grant with conditions, deny, or expressly waive) on a request for certification within the reasonable period of time. This provision reduces the number of constructive waivers when compared to the 2020 Rule baseline, which allowed constructive waivers to occur for failure to comply with procedural requirements in the 2020 Rule. Additionally, unlike the 2020 Rule, the final rule does not require the Federal agency to review every certification decision. This change will reduce burden in multiple ways: (1) reduced review time for Federal agencies, (2) reduced project delays associated with the Federal agency review process, which is beneficial for project proponents, and (3) reduced litigation associated with Federal agency review, which will save burden and costs for Federal agencies, certifying authorities, and project proponents. Additionally, the final rule includes

additional guidance by identifying, via preamble, certain ways in which a certifying authority may satisfy Federal agency review. The clarity provided by the additional guidance may reduce burden on certifying authorities associated with demonstrating compliance with facial requirements of section 401.

Relative to the 2020 Rule, the provision reduces the scope and potential impact of Federal agency review by limiting review of a certifying authority's certification decision to three facial statutory components of section 401, including failure to act within the reasonable period of time. The provision responds to concerns about the potential for Federal agency review to undermine cooperative federalism by making the scope of Federal agency review consistent with EPA's position prior to the 2020 Rule and relevant case law. The reduced scope of Federal agency review under the final rule may lead to reductions in the number of constructive waivers for certification decisions that otherwise would have been protective of water quality requirements. Thus, the reduced scope of Federal agency review mitigates potential negative impacts of the Federal agency review process on water quality.

#### *4.7.2.2 1971 Rule as the Baseline*

Relative to the 1971 Rule baseline, constructive waivers may increase as a result of this provision if Federal agencies review certification decisions more consistently and find that they exceed the reasonable period of time. However, the statutory language is clear that a waiver occurs if a certification is not issued within the reasonable period of time, and more consistent Federal agency review will enforce this statutory stipulation. With more consistent Federal agency review, project proponents may benefit from fewer project delays since certifying authorities will face having their certification decision waived during Federal agency review if they exceed the reasonable period of time. The public may also benefit from ensured involvement/engagement in the certification process since Federal agency review includes confirming that the certifying authority complied with its public notice procedures.

## 4.8 EPA's Roles Under Section 401

### 4.8.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** The Agency has a number of specific roles under section 401. First, EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification" (33 U.S.C. 1341(a)). The 2020 Rule placed restrictions on EPA when it acts as a certifying authority by prescribing timeframes on the public notice process and limiting requests for additional information. The 2020 Rule provided that EPA could only request additional information that could be collected or generated within the reasonable period of time. The 1971 Rule had provisions for when EPA acts as the certifying authority, including a provision on the contents of a certification request, a process for making certification decisions, and a process for pre-operation inspections pursuant to section 401(a)(4). EPA's second role is to provide technical assistance as requested by Federal agencies, certifying authorities, and project proponents for Federal licenses and permits. The 2020 Rule recognized EPA's role to provide Federal agencies, certifying authorities, and project proponents with technical assistance and information in regard to complying with water quality requirements. The 1971 Rule acknowledged this role but limited it to providing technical assistance on WQS to Federal agencies. A third role EPA plays is discussed in Section 4.10 below (neighboring jurisdictions process).
- **Description of final regulatory change:** The Agency is finalizing updates to the public notice procedures in the 2020 Rule applicable to EPA when it acts as the certifying authority to provide

greater flexibility. EPA is removing the 2020 Rule's limitations on EPA's ability to request additional information. EPA is also clarifying that once EPA provides public notice on receipt of a request for certification, EPA must provide an opportunity for public comment. The Agency is also finalizing minor updates to the 2020 Rule provision on technical assistance. Under the final rule, EPA can provide technical assistance on (1) applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and (2) any methods to comply with such limitations, standards, regulations, requirements, or criteria. *See* section IV.H in the preamble for further discussion of this aspect of the final rule.

- **Rationale for final regulatory change:** The regulatory changes will provide EPA with flexibility in the manner and methods of providing public notice when EPA is a certifying authority while maintaining accountability provided by the public notice procedures. The provision removes the 2020 Rule's limitations on EPA's ability to request additional information to allow for more informed certification decisions. The provision also makes minor conforming changes to the 2020 Rule's provision on technical assistance to be more consistent with the statutory language.

### 4.8.2 Potential Impacts of the Provision

#### *4.8.2.1 2020 Rule as the Baseline*

The 2020 Rule included the same 20-day timeframe as the final rule for providing public notice upon receipt of a certification request. The 2020 Rule also did not limit the scope of a public hearing on the certification process. As such, relative to the 2020 Rule, the final rule may not add as much regulatory certainty or improve public engagement at the same magnitude relative to the 1971 Rule. However, the final rule provision provides EPA with greater flexibility in determining the best manner to notify stakeholders relative to both baselines, which may result in cost savings for EPA, and can improve section 401 reviews and compliance with water quality requirements.

The 2020 Rule included provisions that limited the timeframe during which EPA could request additional information from project proponents (initial request by 30 days after receipt of a certification request) as well as the information that could be requested (information related to discharge only). As a result, relative to the 2020 Rule, the final rule broadens the Agency's ability to request information from project proponents. The broadened ability for EPA to request additional information has an uncertain impact on project proponents. Although project proponents may face increased regulatory burden and uncertainty from additional information requests, the increased flexibility for EPA to request information may allow the Agency to make certification decisions in cases for which a denial was likely to occur under the more restrictive 2020 Rule due to insufficient information. For such cases, the final rule likely reduces overall burden for project proponents. Relative to the 2020 Rule, the final rule may also improve the Agency's ability to assess compliance with water quality requirements, which can lead to certification decisions that better protect water quality.

The 2020 Rule included similar technical assistance provisions as the final rule, including expansion of technical assistance scope to include certifying authorities and project proponents. As such, the potential impacts described in Section 4.8.2.2 below related to technical assistance do not apply under the 2020 Rule baseline.

#### *4.8.2.2 1971 Rule as the Baseline*

Relative to the 1971 Rule baseline, the final rule provision is expected to be beneficial on several fronts. First, defining a timeframe for public notice when EPA is the certifying authority (within 20 days

following receipt of a certification request) will provide clearer guidance regarding the timeline that EPA must follow. For project proponents, clearer guidance on public notice procedures will provide more regulatory certainty. Additionally, defining the timeframe for public notice will provide more certainty to the public regarding when public comment occurs, and increasing predictability of public comment periods may improve public engagement. Such effects may ultimately improve section 401 reviews and compliance with water quality requirements.

The final rule provision will also provide EPA with greater flexibility to determine the best manner and method to notify stakeholders, which may result in cost savings for EPA. This flexibility will provide the Agency with the latitude to reach the broadest number of potentially interested stakeholders, which should also improve section 401 reviews and compliance with water quality requirements. The revision to broaden the scope of EPA's technical assistance will reduce burden on certifying authorities and project proponents by increasing the range of issues for which they can seek technical assistance from EPA, including (1) any applicable effluent limitations, or other limitations, standards, regulations, requirements, or water quality criteria, and (2) any methods to comply with such limitations, standards, regulations, requirements, or criteria.

## 4.9 Modifications

### 4.9.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** The 2020 Rule did not include a certification modification provision and instead relied on other Federal agency regulations to address modifications (*e.g.*, the NPDES regulations allow for certification modifications based on changes in underlying law or in response to a court decision). 85 FR 42279. The 1971 Rule allowed certification modifications to occur after a certification was issued, provided the certifying authority, Federal agency, and the EPA Regional Administrator agreed to the modification. 40 CFR 121.2(b) (2019).
- **Description of final regulatory change:** The Agency is reintroducing a provision for modification of granted certifications (with or without conditions), allowing certifying authorities and Federal agencies to coordinate when circumstances warranting modification to a granted certification arise at any time after a grant of certification is issued. EPA is not defining such circumstances, but section 121.10 requires the certifying authority and Federal agency to agree in writing prior to the certifying authority modifying the certification. The final rule states that the certifying authority is not required to obtain the Federal agency's agreement on the language of the modification itself. In addition, this provision clarifies that the certifying authority is not permitted to revoke a grant of certification or to change a grant of certification into a denial or waiver of certification under section 121.10. Unlike the 1971 Rule, the Agency is not including EPA in the certification modification process where the Agency is neither the certifying authority nor the Federal licensing or permitting agency. *See* section IV.I in the preamble for further discussion of this aspect of the final rule, as well as a discussion on the improved clarity and process limitations around modifications to a grant of certification.
- **Rationale for final regulatory change:** In pre-proposal outreach and public comments, stakeholders expressed interest in having a process for certification modifications to address changing, unseen, or emergency circumstances relevant to water quality that may occur after a certification has been issued. From a resource perspective, re-initiating the entire certification process for each changing detail of a certified license or permit would be procedurally and

financially burdensome to all parties and would not allow for efficient adaptive management. The final rule is in line with cooperative federalism principles because it provides a balance between the needs and authorities of the certifying authority, the Federal licensing or permitting agency, and the project proponent.

### 4.9.2 Potential Impacts of the Provision

#### *4.9.2.1 2020 Rule as the Baseline*

Relative to the 2020 Rule, the final rule authorizes modifications to a grant of certification (with or without conditions) within certain limits. The revisions will provide several benefits for certifying authorities, Federal agencies, and project proponents, as well as the environment.

In response to the 2020 Rule's absence of a modification provision, some commenters called the proposed modification provision an improvement over the 2020 Rule. Many commenters stated that including a provision for certification modifications provides the ability to adapt to changes in circumstance, such as changes to projects, water quality requirements, and environmental conditions over time. Several commenters added that modifications may be necessary to maintain water quality protection when new information and data become available after the issuance of a certification, during the life of the Federal license or permit. Some commenters asserted that modifications may be necessary to account for unforeseen water quality impacts, particularly for projects that can last for decades.

The final rule allows project plans to evolve after issuance of a grant of certification (with or without conditions), providing added flexibility to project proponents while avoiding the burden of having to seek a new certification for changes. Project proponents will face limited regulatory uncertainty because this provision will require certifying authorities to first coordinate with the Federal agency before modifying a certification. Requiring agreement between the certifying authority and the Federal agency will protect the reliance interests of Federal agencies and project proponents by limiting the circumstances under which certification modification can occur and, thus, prohibiting unilateral modifications. The provision will also limit regulatory uncertainty for project proponents by clarifying that the modification provision only applies to grants of certification (with or without conditions), and that the certifying authority is not permitted to revoke or change a grant of certification into a denial or waiver of certification through the process outlined in section 121.10.

Reintroduction of the modification process respects state and Tribal rights, as these jurisdictions are often more familiar with local conditions and able to manage local waters more effectively. The final provision is in line with the cooperative federalism principles of the CWA because it provides a balance between certifying authority, Federal agency, and project proponent needs as projects change and new information arises throughout the life of the Federal license or permit. Reintroducing the explicit ability to modify certifications supports certifying authorities by preserving their ability to protect their water resources in the event of changes to the water quality impacts of certified projects.

Relative to the 2020 Rule baseline, the final rule provision provides compliance and economic benefits to certifying authorities, project proponents, and Federal agencies. The inability to modify certifications might create costly project delays and increase state administrative costs if – due to changes – the entire certification process needs to be reinitiated. From a resource perspective, reinitiating the entire certification process – instead of modifying a certification that has already been granted – for each

changing detail of a project, license, or permit is procedurally and financially burdensome to all parties and does not allow for efficient adaptive management. Furthermore, some certifying authorities might be inclined to issue more denials of certification if they do not possess a mechanism to evaluate new data and information about long-term projects after issuing a certification decision.

#### *4.9.2.2 1971 Rule as the Baseline*

Relative to the 1971 Rule, the final rule clarifies the roles that certifying authorities, Federal agencies, and project proponents play in the modification process, which will improve efficiencies and reduce burden associated with modifications. The final rule provision also promotes the principle of cooperative federalism and increases regulatory certainty in comparison to the 1971 Rule provision.

Unlike the 1971 Rule, the Agency is not including EPA in the certification modification agreement process when the Agency is neither the certifying authority nor the Federal licensing or permitting agency. As such, EPA is removing itself from the list of entities included in the 1971 Rule that must reach agreement for most modifications to occur. This simplification may improve the likelihood of reaching a modification agreement in cases when EPA is neither the certifying authority nor the Federal licensing or permitting agency.

Relative to the 1971 Rule, the final rule provides more clarity around the limitations of the modification process. The final rule clarifies that: 1) unilateral modifications cannot occur, and 2) the nature of a certification decision cannot be changed (*e.g.*, change a grant into a denial or waiver) through the modification process. In addition, under section 121.10, certifying authorities and Federal agencies may agree to modify a grant of certification (with or without conditions), but the certifying authority may modify only those portions of the certification that the two parties agreed upon. The final rule is more explicit than the 1971 Rule about the nature of the agreement – section 121.10 states that the certifying authority is not required to obtain the Federal agency's agreement on the language of the modification after obtaining agreement that the certifying authority may modify the granted certification. These final changes promote regulatory certainty during the modifications process. As such, the final changes align with the cooperative federalism principles of the CWA by providing a balance between the needs and authorities of the certifying authority, Federal licensing or permitting agency, and project proponent.

## 4.10 Neighboring Jurisdictions Process

### 4.10.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Section 401(a)(2) establishes a process for states and authorized Tribes to participate in the Federal licensing or permitting process in circumstances where a discharge originating in another jurisdiction may affect their water quality. This section 401(a)(2) process is referred to as the neighboring jurisdictions process. For purposes of initiating this process, section 401(a)(2) requires a Federal agency to "immediately" notify EPA upon receipt of a license or permit application and section 401 certification. Under the 2020 Rule, Federal agencies were required to notify EPA within five days of receiving the certification and application for the license or permit. The 2020 Rule also defined the contents that EPA would provide to neighboring jurisdictions when EPA makes a "may affect" determination, as well as the contents required from a neighboring jurisdiction when it makes any "will violate" objection. The 2020 Rule also asserted that it was within the Agency's discretion whether to make a "may affect" determination in the first place, and that EPA was, therefore, not required to make such a determination. Under the 1971 Rule, Federal agencies were required to notify

EPA upon receipt of an application and certification or waiver. 40 CFR 121.16 (2019). If the documents did not contain sufficient information for EPA to make a "may affect" determination, EPA could request supplemental information. 40 CFR 121.12 (2019). Within 30 days of receiving notification, EPA may determine, at its discretion, that the discharge may affect the water quality of a neighboring jurisdiction (which includes states and authorized Tribes). 40 CFR 121.13 (2019). If EPA makes a "may affect" determination under section 401(a)(2), EPA must notify the neighboring jurisdiction, Federal agency, and the project proponent, and the neighboring jurisdiction has 60 days to determine whether the discharge will violate its water quality requirements, object to the license or permit, and request a hearing. The 1971 Rule established a process for EPA to provide notification to neighboring jurisdictions in a manner similar to that subsequently set forth in section 401(a)(2) in 1972.

- **Description of final regulatory change:** The Agency is retaining the 2020 Rule process for Federal agencies to "immediately" notify EPA by requiring notification within five days of receiving an application and certification or waiver and finalizing a definition for the contents of a notification. The Agency also agrees with the 2021 *Fond du Lac* court that EPA must determine whether a discharge "may affect" a neighboring jurisdiction once it receives notification of the application and certification or waiver.[48] The Agency is also providing greater clarity regarding factors it could consider in making a "may affect" determination in the preamble. Additionally, EPA is revising the 2020 Rule's procedural framework for the neighboring jurisdiction objection process under section 401(a)(2), including adding a provision for the notified neighboring jurisdiction to withdraw its objection prior to the public hearing. *See* section IV.K in the preamble for further discussion of this aspect of the final rule.
- **Rationale for final regulatory change:** The final changes provide transparency to Federal licensing and permitting agencies about the information EPA expects in section 401(a)(2) notifications and streamlines EPA's section 401(a)(2) review by standardizing the timing and content of notifications from Federal agencies. Most commenters addressing factors for EPA to consider in "may affect" determinations supported EPA providing some identification of such factors in the final rule. Such commenters noted that identification of factors clarifies and provides broader understanding of EPA's process in making a "may affect" determination and may improve efficiency in making this determination. The final rule preamble clarifies the factors EPA may consider in making a "may affect" determination without inappropriately limiting the Agency from considering other relevant factors or requiring it to apply factors where they are irrelevant. Multiple commenters recommended that EPA include language allowing neighboring jurisdictions to withdraw their objection before the hearing, therefore eliminating the requirement to hold a public hearing. Including a provision addressing withdrawal of an objection improves the efficiency of the neighboring jurisdictions process, as it recognizes the possibility that neighboring jurisdictions may be able to resolve objections before the hearing stage of the neighboring jurisdictions process, conserving resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances.

[48] *Fond du Lac Band of Lake Superior Chippewa v. EPA*, 519 F.Supp.3d 549 (D. Minn. 2021).

### 4.10.2 Potential Impacts of the Provision

#### *4.10.2.1 2020 Rule as the Baseline*

Some stakeholders indicated that the neighboring jurisdictions process is currently underused. Even with more attention on this provision during the development and finalization of the 2020 Rule, EPA has not seen a significant increase in the number of section 401(a)(2) actions to date. The final rule provision improves and clarifies the Federal agency notification process by defining the contents of a Federal agency's notice to EPA and allowing EPA to request supplemental information, which the 2020 Rule limited to copies of the certification and the Federal license or permit application. The final rule provision also allows EPA to enter into agreements with Federal agencies regarding the manner and contents of notification.

Further, relative to the 2020 Rule baseline, the final rule will ensure that—following receipt of notice—EPA assesses whether a project "may affect" a neighboring jurisdiction and, if so, provides notice to that neighboring jurisdiction. Receipt of such notice will allow notified neighboring jurisdictions to conduct their own review of the project to determine if a discharge from the project will affect the quality of its waters so as to violate any water quality requirements in its jurisdiction. The 2020 Rule gave EPA discretion regarding whether to make such a "may affect" determination for neighboring jurisdictions, whereas the final rule clarifies that—upon receipt of notice—EPA *must* determine whether a discharge "may affect" water quality in a neighboring jurisdiction. Mandatory "may affect" determinations may have positive environmental impacts.

A potential increase in "may affect" determinations and neighboring jurisdiction objections can lead to incremental costs to project proponents if the neighboring jurisdictions process results in more Federal licenses and permits being granted with additional conditions or denied. However, the final rule also clarifies that the neighboring jurisdiction may withdraw its objection before the public hearing, in the case that the neighboring jurisdiction receives more information, no longer objects, and finds the public hearing is no longer necessary. This addition in the final rule may help mitigate time delays and conserve project proponent and Federal agency resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances.

#### *4.10.2.2 1971 Rule as the Baseline*

Greater clarity regarding the "may affect" interpretation provided by the final rule provision may increase efficiency of neighboring jurisdiction assessments. In both pre-proposal input and the public comment period, stakeholders recommended increased clarity on the "may affect" determination, including the timing and process of EPA making the determination. Additionally, establishing a procedural framework for objections and hearings under section 401(a)(2) and clarifying the information that EPA expects in section 401(a)(2) notifications may reduce burden on Federal licensing or permitting agencies, improve efficiency of neighboring jurisdiction assessments, and reduce project delays. Clarifying that EPA must conduct a "may affect" determination once it receives notification of the application and certification or waiver and the added procedural clarity may increase the number of jurisdictions that decide to object or request a hearing on a Federal license or permit, which can lead to incremental costs to project proponents if the neighboring jurisdictions process results in more Federal licenses and permits being granted with additional conditions or denied. However, similar to the 2020 Rule baseline (Section 4.10.2.1), the final rule clarification that a neighboring jurisdiction may withdraw

its objection before the public hearing helps mitigate time delays and conserve project proponent and Federal agency resources.

Ultimately, clarifications regarding when neighboring jurisdiction assessments are required will help bring stability to the neighboring jurisdiction assessment process. The revisions regarding when neighboring jurisdiction assessments are required will help ensure that neighboring jurisdictions that EPA determines may be affected by a federally licensed or permitted project have an opportunity to provide input on whether the project complies with their water quality requirements and, thus, that the section 401 process considers and accounts for potential effects on water quality in neighboring jurisdictions. Consistent with the statute, if conditions added to the license or permit cannot ensure compliance of water quality requirements in neighboring jurisdictions, the Federal agency cannot issue the license or permit.

## 4.11 TAS and Other Tribal Issues

### 4.11.1 Summary of Provision

- **2020 Rule and 1971 Rule requirements:** Under section 518 of the CWA, EPA may treat federally recognized Indian Tribes in a similar manner as a state (TAS) for purposes of administering most CWA programs for the Federal Indian reservations that they govern. 33 U.S.C. 1377. Neither the 2020 Rule nor the 1971 Rule included TAS provisions for section 401. In the absence of TAS provisions solely for section 401, Tribes have received TAS for section 401 by obtaining TAS to administer the section 303(c) program for WQS (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"). As certifying authorities, Tribes with TAS may waive certification or grant, grant with conditions, or deny certification based on whether discharges from a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of Tribal law. As a neighboring jurisdiction, if EPA makes a "may affect" determination, Tribes with TAS may object to projects if they determine that the discharge "will violate" their water quality requirements, and request a public hearing from the Federal licensing or permitting agency.
- **Description of final regulatory change:** The final rule adds provisions for how Tribes may obtain TAS solely for section 401, as well as provisions on how Tribes may obtain TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2). *See* section IV.L in the preamble for further discussion of this aspect of the final rule.
- **Rationale for final regulatory change:** The regulatory changes provide Tribes with a greater ability to protect their water resources from the adverse effects of pollution from federally licensed or permitted projects. The first change provides Tribes more options in deciding whether to seek TAS for section 303(c), section 401, or both. Decoupling section 401 TAS provisions from section 303(c) recognizes that section 401 and section 303 administration are related but distinct functions. Several commenters also expressed concern about Tribes without TAS being unable to participate in the section 401(a)(2) neighboring jurisdictions process, asserting that waters on reservations are susceptible to degradation from upstream, off-reservation discharges. The second change is responsive to Tribes who have expressed an interest in the neighboring jurisdictions process and having a mechanism for objecting and requesting a hearing on the issuance of Federal permits or licenses, even if they are not

interested in issuing certifications (under section 401(a)(1)) and/or developing WQS (under section 303(c)).

### 4.11.2 Potential Impacts of the Provision

#### *4.11.2.1 2020 Rule as the Baseline*

Relative to the 2020 Rule, the TAS provision of the final rule will provide several benefits. Providing a pathway for Tribes to obtain TAS for section 401 (as a whole) or for section 401(a)(2) alone may improve section 401 certification reviews and compliance with water quality requirements, as Tribes are most familiar with their local waterways. The provision provides Tribes with the ability to obtain TAS for section 401 (as a whole) or specifically for section 401(a)(2) without having to also meet requirements for section 303(c). A separate pathway to obtain TAS for section 401 (as a whole) or for section 401(a)(2) will provide Tribal stakeholders with more tools for ensuring that water quality requirements are met. Project proponents may benefit from the final rule provision by working directly with Tribes as opposed to EPA as the certifying authority, increasing clarity and efficiency.

As Tribes take a more active role in the section 401 certification process, there may be an increase in the number of certifications granted with conditions or the average number of conditions added to each certification, which may lead to an increase in costs for project proponents. These additional conditions may lead to water quality benefits in Tribal waters. However, EPA anticipates that the increase in the number of conditions will be minimal since EPA already adds conditions, on a Tribe's behalf, as needed to assure compliance with Tribal water quality requirements. Tribes that newly obtain TAS for section 401 may require some time to learn the certification process, which may increase review time and reduce efficiency in the short-term.

#### *4.11.2.2 1971 Rule as the Baseline*

Similar to the 2020 Rule, the 1971 Rule does not provide Tribes with the opportunity to receive TAS solely for section 401. Therefore, the potential impacts of the final rule provision are the same under the two baselines (*see* Section 4.11.2.1).

## 4.12 Potential Effects on Federal Agency and Certifying Authority Regulations and Guidance

### 4.12.1 Potential Effects on Federal Agency Regulations

Federal agencies can play an important role in facilitating information collection, sharing information with involved parties, and clearly communicating project milestones and deadlines during the Federal licensing or permitting process. The final rule does not explicitly require other Federal agencies to change their existing regulations to reflect the revised requirements in the final rule. For this reason, this economic analysis does not attempt to quantify costs of regulatory updates for other Federal agencies.

As mentioned previously, the final rule includes conforming amendments to regulations for water quality certifications on EPA-issued NPDES permits. These revisions will make the NPDES regulations consistent with the approaches and impacts already discussed in this economic analysis. This economic analysis does not attempt to differentiate the costs of regulatory updates for EPA's NPDES program from the changes to the section 401 regulations.

### 4.12.2 Potential Effects on Certifying Authority Regulations and Guidance

Certifying authorities generally delineate their section 401 requirements in statutes, regulations, guidance documents, and forms. The final rule does not require states or Tribes to update their

regulations, statutes, guidance documents, or forms. CWA section 401 provides states and authorized Tribes with the ability to grant (with or without conditions), deny, or waive certification for federally licensed or permitted projects that may result in a discharge into waters of the United States. Unlike the CWA section 402 and section 404 permitting programs, the CWA does not require EPA to approve state administration of the section 401 program. The CWA also does not require states or authorized Tribes to establish regulations to implement section 401, but many states and some authorized Tribes have promulgated section 401 implementing regulations. Additionally, any changes made by a state or authorized Tribe to their section 401 program do not require formal approval by EPA. In summary, with this rulemaking, EPA is neither mandating that conforming changes be made to state or Tribal regulations, nor overseeing in any capacity such changes. EPA is not aware to what extent states or Tribes may update their requirements, so this document does not attempt to quantify potential costs associated with states or Tribes doing so. The Agency recognizes that to increase certainty and clarity and to avoid other negative outcomes, certifying authorities may update their section 401 requirements. As a result, states or authorized Tribes that have section 401 regulations, statutes, guidance documents, and forms that are inconsistent with this final rule may incur costs to conform their requirements to the final rule. However, the Agency does not expect that most certifying authorities will need to update their requirements to conform with the final rule provisions. The costs to certifying authorities for updating any requirements are expected to be minimal, due to the final rule codifying longstanding practices and case law on section 401. As discussed below, some certifying authorities may opt to modify their requirements for a request for certification, specify if and when pre-filing meetings may occur, and alter fees associated with certifications. However, any costs associated with such modifications will be incurred as a result of a certifying authority's own decision-making and not required by the final rule.

Because certifying authorities delineate their requirements in different ways, EPA is unable to fully describe all potential revisions states or Tribes may make or the associated costs. However, the following paragraphs discuss potential changes states or Tribes may make in response to the final rule. EPA reviewed select topics covered in state section 401 regulations that may differ from the final rule provisions.

Some state section 401 regulations include language stating that the reasonable period of time begins after the state receives a complete application or after the certifying authority determines that a certification request is complete. Such language is not in conflict with the final rule provisions as long as these states also clearly define the contents of a "request for certification." If a state does not clearly define the contents of a certification request, then the final rule defines the contents for certification requests that must be met before the reasonable period of time begins. The default list may not include all contents that the certifying authority may otherwise want to consider during section 401 reviews. States can rectify the situation by providing their own definition for a "request for certification" that includes all contents that they want to consider.

Some state section 401 regulations recommend or encourage project proponents to request meetings with the state certifying authority prior to the submittal of a certification request, and several certifying authorities have updated their section 401 documentation to address the 2020 Rule requirement for project proponents to request a pre-filing meeting. Similar to the 2020 Rule, the final rule requires project proponents (including Federal agencies seeking to issue general licenses or permits) to request pre-filing meetings before every certification request, unless the certifying authority waives the

requirement (either universally or on a categorical basis). Even when a pre-filing meeting request is required by the certifying authority, the certifying authority is not required to accept the pre-filing meeting request. States may choose to update their regulations to specify that project proponents are required to request a pre-filing meeting for all projects (if they have not already done so under the 2020 Rule) or specify which project types require a pre-filing meeting request. However, the final rule does not establish the manner or method for certifying authorities to communicate whether it will hold pre-filing meetings or waive them; as a result, some certifying authorities may opt to communicate such approaches through less formal means than regulations (*e.g.,* website updates, guidance forms).

States also have different fee structures for section 401 certifications. Some state section 401 regulations mention the existence of a fee but do not include specific language about the response to nonpayment of the fees. Other states include language about nonpayment of applicable fees; for example, regulations may specify that fees must be paid to produce a complete application and start the review process, or that an application is considered withdrawn if the project proponent fails to pay the appropriate fee within a specified time period. States may have addressed such language in response to the 2020 Rule, which did not include fee payment as a required "request for certification" element. For states that still have such language in their section 401 documentation, the language is not in conflict with the final rule provisions if these states also provide their own definition or components for a "request for certification" that include fee payment as a required element. The final rule definition for a "request for certification," which applies when EPA is the certifying authority and when states or authorized Tribes do not have their own "request for certification" definition, does not include fee payment as a required component of certification requests. States with such conflicts can rectify the discrepancy by providing their own definition for a "request for certification" that includes fee payment as a required element.

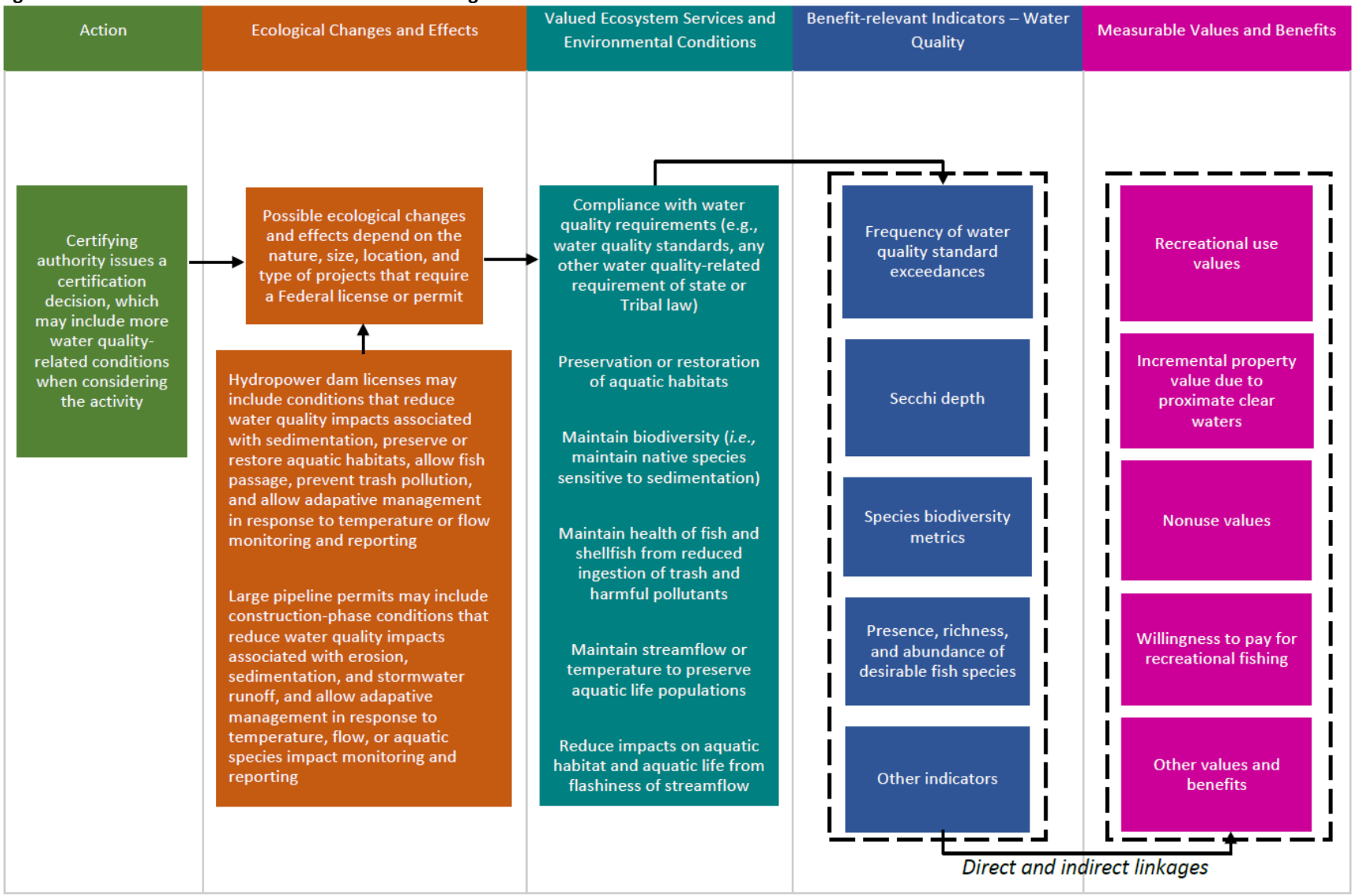
## 4.13 Information Collection Request Burden Estimates

In accordance with the Paperwork Reduction Act, EPA has developed an ICR for the final rule. ICRs are developed based on available information about how a regulation may affect a respondent. The total annual burden for respondents, which includes project proponents, certifying authorities, and Tribes applying for TAS, has decreased when compared to the estimates in the collection for the 2020 Rule, as well as compared to the estimates in the collection for the 1971 Rule. According to the ICR, the total annual burden is anticipated to be 861,274 hours (552,500 hours for certifying authorities, 308,000 hours for project proponents, 322 hours for tribes applying for TAS for section 401, and 452 hours for Tribes applying for TAS for section 401(a)(2)) with associated annual labor costs being approximately $48 million ($29 million for certifying authorities, $19 million for project proponents, and $25,850 for Tribes applying for TAS for section 401, and $36,252 for Tribes applying for TAS for section 401(a)(2)). These changes are mainly due to refinements in how the estimates are calculated, updated information regarding the average annual number of licenses or permits issued, and updated information regarding the annual number of certification requests rather than the Agency's ability to quantify differential burden under the particular requirements of the final rule. Please see the Supporting Statement in the docket for this rulemaking for further discussion on the estimates for this collection (OMB Control No. 2040-0295). The ICR estimates are based on overall burden of section 401, including changes associated with this rule, and do not represent the incremental burden of the final rule.

## 4.14 Summary of Potential Effects

Figure 4-1 presents a schematic diagram of the potential environmental benefits resulting from the final rule, focusing primarily on the impacts from the change in scope of certification. The ultimate benefits are expressed as values people hold for the expected environmental improvements. Reading the figures from left to right, the specific action resulting from the final rule is described in increasing specificity, first as ecological changes and effects, then as changes in ecosystem services. Benefit-relevant indicators of water quality are the metrics that can be used to demonstrate the magnitude of environmental benefits, and finally, the values people hold for ecosystem services are often measured in quantifiable effects on the delivery of ecosystem services. The dashed line around the blue boxes in the fourth column and the magenta boxes in the fifth column signal that the ecosystem services in the teal boxes in the third column may be related to one or more of the metrics and values pairs.

**Figure 4-1. Incremental benefits of the final rulemaking**



### 4.14.1 Incremental Benefits

Overall, the final rule is anticipated to have positive environmental benefits, particularly incremental water quality improvements resulting from efforts to standardize information included in requests for certification (Section 4.3 above) and changes in scope of certification relative to the 2020 Rule (Section 4.5 above).

Society values such ecological improvements by a number of mechanisms, including increased frequency and value of use of the improved surface waters for recreational and educational activities. In addition, individuals also value the protection of habitats and species that would be adversely affected by stream degradation from particular projects, even when those individuals do not use or anticipate future use of the affected waterways for recreational or other purposes, resulting in nonuse values.[49]

Water-based recreational activities that will be enhanced by surface water quality improvements may include swimming, recreational fishing, boating, and other outings. In each case, improved water quality may increase water quality benefits in two ways: (1) an increase in the value of a recreational trip resulting from a more enjoyable experience, and (2) an increase in the number of recreational trips.

Swimmers benefit from more sites suitable for swimming and enhanced experiences when waters are safer for swimming with fewer pathogen-induced illnesses; reduced pollutant loadings are also likely to increase the aesthetic appeal (*i.e.,* clarity and lack of odor) and enjoyment. Anglers benefit from improved fish populations and more waters being suitable as habitat (*e.g.,* increased levels of dissolved oxygen, allowing fish to breathe; improved fish passage at dams; temperatures staying in ranges suitable to native species). Fish populations also improve from reduction in pollutants that inhibit reproduction, growth, and survival of species (e.g., Mason, 2011; Kahn et al., 2014; Alkire et al., 2020), which may also increase species diversity. Improved aesthetic qualities also enhance fishing recreation. Boaters may benefit from reductions in secondary-contact illnesses and improved aesthetics leading to a better recreational experience. Boaters also benefit from better opportunities for companion activities, such as swimming, fishing, and wildlife viewing. Other outings include recreational activities such as hiking, jogging, picnicking, and wildlife viewing; these activities are enhanced by better aesthetic experiences and more opportunities to view wildlife, whether aquatic, terrestrial or avian (*e.g.,* piscivorous birds, such as osprey and eagles), that result from water quality improvements and improved fish populations. Water quality improvements improve wildlife diversity since excessive nutrient loadings can lead to eutrophic and turbid waters with few plants, invertebrate, and fish food sources for waterfowl and other wildlife (MDNR, 2010).

In addition to recreation benefits, water quality improvements resulting from the final rulemaking may also have property value benefits. Numerous economic studies (e.g., Leggett et al., 2000; Bin et al., 2013; P. J. Walsh et al., 2011; Tuttle et al., 2015; Klemick et al., 2018; Kung et al., 2022) suggest that waterfront property is more desirable when located near unpolluted water. Some previously published hedonic property studies (e.g., P. J. Walsh et al., 2011; Netusil et al., 2014; Liu et al., 2017; Klemick et al.,

[49] Observed data on use behavior can be analyzed to assess use values (e.g., travel cost models for water-based recreation), but nonuse values do not have corresponding observable behavior. In analyzing benefits associated with water quality improvements, EPA has in the past used a regression-based meta-analysis of 189 estimates of total willingness to pay (including both use and nonuse values) for water quality improvements, provided by 59 original studies (U.S. EPA (2020a)).

2018) found that the property value premium for increased water quality also extends to homes up to one kilometer from the water. EPA was not able to quantify or monetize the potential increase in property values associated with the environmental benefits expected to result from the final rule. The magnitude of the potential increase depends on many factors, including the number and context of future section 401 certification cases whose outcomes might be affected by this rule, the number of housing units located near the waterbodies in question, and other factors.

The total benefits of an environmental improvement are the combination of use and nonuse benefits (Freeman III, 1993; Freeman III, 2014).[50] Recent economic literature provides substantial empirical support that nonuse values, such as option and existence values, are greater than zero. In fact, small per capita nonuse values held by a substantial fraction of the population can be very large in the aggregate. Consequently, both EPA's own Guidelines for Preparing Economic Analysis and the Office of Management and Budget's (OMB) Circular A-4 governing regulatory analysis support the need to assess nonuse values (U.S. EPA, 2010; U.S. OMB, 2003).

Although EPA is not always able to estimate changes in nonuse values as part of regulatory development, an extensive body of environmental economics literature demonstrates that the public holds significant value for services flowing from natural resources well beyond those associated with direct uses (Boyd et al., 2001; Fischman, 2001; Heal et al., 2001; Herman et al., 2001; Ruhl and Gregg, 2001; Salzman et al., 2001; Wainger et al., 2001). Studies have documented public values for services provided by a variety of natural resources potentially affected by the final rule, including fish and wildlife (Loomis et al., 2000; Stevens et al., 1991); wetlands (Woodward and Wui, 2001); wilderness (Walsh et al., 1984); critical habitat for threatened and endangered species (Haqen et al., 1992; Loomis and Ekstrand 1997; Whitehead and Blomquist 1991); shoreline quality (Grigalunas et al., 1988); and beaches, shorebirds, and marine mammals (Rowe et al. 1992), among others. Many ecosystems provide goods and services that contribute to societal well-being but may be generally unrecognized because of the indirect nature of the effect. As such, valuations based solely on the analysis of markets are unlikely to capture the full economic value of the affected ecosystem services. For example, stream improvements will create recreational opportunities, increase commercial activity in the affected neighborhoods, and improve community wellbeing.

### 4.14.2 Incremental Costs

Overall cost impacts are uncertain. While some provisions are expected to lead to cost savings for both certifying authorities and project proponents (*e.g.,* request for certification, EPA's roles under section 401), other provisions have uncertain overall cost impacts for certain stakeholders (*e.g.,* pre-filing meeting requests for project proponents, reasonable period of time for Federal agencies) or incremental costs (*e.g.,* scope of certification, neighboring jurisdictions process). By promoting efficiency and certainty in the certification process, the final rule will standardize the certification process, reduce confusion, and promote efficient section 401 reviews. However, if the scope of the certification changes relative to practice under the 2020 Rule, the final rule may result in incremental costs.

Section 4.13 presents ICR burden estimates, including cost estimates. However, the estimates are based on overall burden of section 401, not the incremental burden of the final rule. The ICR includes some

[50] This additive property holds under traditional conditions related to resource levels and prices for substitute goods in the household production model (Freeman III, 1993).

assessment of how burden is expected to change under the final rule relative to the 2020 Rule baseline. For example, EPA expects that the hourly burden of the final rule to project proponents, on average, will be similar to that under the 2020 Rule for several reasons. First, the final rule includes similar levels of requirements as the 2020 Rule with some added flexibility. With certifying authorities having the ability to waive or shorten the pre-filing meeting request requirement and define contents of requests for certification, changes in burden from the 2020 Rule will depend on certifying authorities use of the final rule flexibilities. Therefore, the final rule may or may not result in an incremental burden reduction relative to the 2020 Rule. Second, the minimum contents in a request for certification should be readily available and already developed as part of the license or permit application process.

### 4.14.3 Net Benefits

Table 4-1 summarizes the expected benefits and costs from individual rule provisions. The net benefits expected from each provision—and from the rule as a whole—are uncertain given uncertainty about the magnitude of expected environmental benefits, cost savings, and incremental costs (see additional discussion in Section 6). EPA emphasizes that Table 4-1 is meant to present *aggregate* effects of rule provisions across all section 401 reviews. EPA anticipates variation in rulemaking effects for singular section 401 reviews, particularly across individual rule provisions. For example, projects that more clearly trigger the neighboring jurisdictions process under the final rule may have incremental costs that override cost savings under other final rule provisions. However, when considering the full universe of section 401 reviews, EPA expects positive environmental benefits and cost savings for most rulemaking provisions and for the overall rulemaking.

Table 4-1 presents a summary of potential effects relative to both the 1971 Rule and 2020 Rule baselines. In the "environmental benefits" columns, positive effects correspond to environmental improvements. EPA differentiates between environmental benefits that are "positive" and "positive but small," the latter signaling where benefits are expected to be *de minimis* (e.g., small environmental benefits from improvements in the section 401 review process due to increased clarity regarding when section 401 certification is required). In the "process costs" columns, "incremental costs" correspond to additional costs, while "cost savings" correspond to net cost reductions.

As mentioned above, "environmental benefit" and "process cost" determinations in Table 4-1 represent aggregate effects of rule provisions. For example, changes to the pre-filing meeting request provision may lead to cost savings for certifying authorities relative to both the 2020 Rule and 1971 Rule baselines. Relative to the 2020 Rule, the provision allows certifying authorities to waive the 30-day waiting period after receiving a pre-filing meeting request, which will reduce delay when pre-filing meetings are not needed for a particular project. Relative to the 1971 Rule, which does not include a pre-filing meeting component, certifying authorities are expected to only accept pre-filing meeting requests when such meetings will be beneficial for their section 401 review (i.e., if the additional time burden of the pre-filing meeting is more than offset by the time savings from a more efficient section 401 certification review process), such as in the case of large and complex projects. To illustrate the potential magnitude of cost savings from changes to the pre-filing meeting provision under the 1971 Rule baseline, assume that certifying authorities save one business day of time (i.e., 8 hours) during the certification review process by participating in a pre-filing meeting, and assume that certifying authorities accept the pre-filing meeting request for all individual licenses or permits since individual licenses or permits are typically required for more complex projects. If 3,500 individual licenses or permits are reviewed annually (*see* Table 3-7), the total time savings for certifying authorities from pre-

filing meetings would be 28,000 hours. Assuming hourly wages are at least $36, the cost savings would be on the order of millions of dollars but not on the order of tens of millions of dollars. However, relative to the 1971 Rule baseline, pre-filing meeting process costs are uncertain for project proponents because cost savings resulting from improved efficiencies in the certification process may not exceed burden of submitting pre-filing requests, participating in pre-filing meetings when accepted, and potential fees that certifying authorities may charge for the pre-filing meetings.

**Table 4-1. Summary of potential effects of the final rule, relative to the 1971 Rule and 2020 Rule baselines**

| Provision | 1971 Rule Baseline | | 2020 Rule Baseline | |
|---|---|---|---|---|
| | Environmental Benefits | Process Costs | Environmental Benefits | Process Costs |
| When Section 401 Certification is Required | Positive but small | Cost savings (but small) for CAs, PPs, and FAs | NA | NA |
| Pre-filing Meeting Request | Positive | Cost savings for CAs; uncertain for PPs | NA | Cost savings for CAs and PPs |
| Request for Certification | Positive | Cost savings for CAs and PPs | Positive | Cost savings for CAs and PPs |
| Reasonable Period of Time | Positive but small | Cost savings for CAs and PPs; incremental costs for FAs | Positive but small | Cost savings for CAs, PPs, FAs |
| Scope of Certification | Positive but small | Uncertain cost impacts for CAs; incremental costs (but small) for PPs | Positive | Incremental costs for CAs and PPs |
| Certification Decisions | Positive | Cost savings for CAs and PPs (but small) | Positive | Cost savings for CAs and PPs |
| Federal Agency Review | Positive | Uncertain cost impacts for CAs and PPs | Positive | Incremental costs for PPs |
| EPA Roles under Section 401 | Positive but small | Cost savings for CAs, PPs, and EPA | Positive but small | Cost savings for EPA; uncertain for PPs |
| Modifications | Negligible | Cost savings for CAs, PPs, and FAs | Positive | Cost savings for CAs, PPs, and FAs |
| Neighboring Jurisdictions Process | Positive | Incremental costs for PPs | Positive | Incremental costs for PPs |
| TAS and Other Tribal Issues | Positive | Uncertain cost impacts for PPs | Positive | Uncertain cost impacts for PPs |

Notes: CA = certifying authority; PP = project proponent; FA = Federal agency

# 5 Environmental Justice

Executive Order (EO) 12898 directs agencies to make environmental justice (EJ) part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations in the United States. Moreover, EO 12898 provides that each Federal agency must conduct its programs,

policies, and activities that substantially affect human health or the environment in a manner that ensures such programs, policies, and activities do not have the effect of (1) excluding persons or populations from participation in, or (2) denying persons or populations the benefits of, or (3) subjecting persons or populations to discrimination under such programs, policies, and activities because of their race, color, or national origin.

EO 14008 expands on the policy objectives established in EO 12898 and directs Federal agencies to develop programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related, and other cumulative impacts on vulnerable, historically marginalized, and overburdened communities, as well as the accompanying economic challenges of such impacts.

EO 14096 expands on the policy objectives of EO 12898 and EO 14008 by further embedding environmental justice for all through a whole-of-government approach to environmental justice and directing Federal agencies to consider measures to address and prevent disproportionate and adverse environmental and health impacts on communities, to actively facilitate meaningful public participation and just treatment for all people in agency decision-making, to identify and address gaps in science, data, and research related to environmental justice, and to increase accountability and transparency in federal environmental justice policy.

Other recent executive actions that touch on environmental justice include EO 13985, EO 13990, and EO 13653. EPA also published "Technical Guidance for Assessing Environmental Justice in Regulatory Analysis" (U.S. EPA, 2016) to provide recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time and resource constraints, and analytic challenges will vary by media and circumstance.

For the final rule, the Agency qualitatively assessed whether the change in benefits from the rulemaking may be differentially distributed among communities with environmental justice concerns. The Agency determined that the final rule may have some positive impacts for communities with environmental justice concerns, which may include Tribal communities. Such impacts are explored in Sections 5.1 and 5.2 below.

## 5.1 Impacts on Communities with Environmental Justice Concerns

Several revisions in this rulemaking may give communities with environmental justice concerns greater autonomy and influence over the quality of waters in their area. This section outlines the positive impacts to these communities that may result from several final rule provisions: (1) pre-filing meeting requests; (2) request for certification; (3) reasonable period of time; (4) scope of certification; (5) Federal agency review; (6) EPA's roles under section 401; (7) modifications; and (8) neighboring jurisdictions process.

Pre-filing meetings may provide certifying authorities with an early opportunity to request and receive project details, allowing for better informed certification decisions that may affect communities with environmental justice concerns. Thus, the pre-filing meetings provision of the final rule may have positive environmental justice (EJ) effects relative to the 1971 Rule baseline. Since the 2020 Rule included a pre-filing meeting requirement, the pre-filing meeting provision of the final rule is unlikely to have any EJ-related effects relative to the 2020 Rule baseline.

By explicitly providing that certifying authorities can define the contents of a request for certification, the final rule ensures that states and authorized Tribes have the information they need to complete their review of the request as it relates to protecting their water quality. Additionally, by requiring minimum contents for all requests for certification, the Agency provides safeguards for certifying authorities that have not defined contents of a request for certification. Efforts to standardize information included in certification requests may improve the quality of section 401 reviews, which may translate to water quality improvements near communities with environmental justice concerns.

The collaborative approach for the reasonable period of time determination provides certifying authorities with negotiation power. The certifying authority can take the needs of communities into account when trying to determine the length of time needed to review and evaluate the potential impacts of the proposed project on the communities' water resources. The six-month default reasonable period of time, if there is no agreement between the Federal agency and certifying authority, balances the bargaining power of both parties.

The revision to set the scope of certification review to the "activity" can also provide positive impacts on communities with EJ concerns. This approach gives certifying authorities serving communities with environmental justice concerns a broader scope of review to address water quality-related impacts to their water resources. Under the 2020 Rule, the scope of review was limited to assuring that any discharge from the project (as opposed to the "activity") would comply with water quality requirements. Additionally, the 2020 Rule limited water quality requirements to Federal, state, and Tribal laws regulating point source discharges. By contrast, the final rule allows certifying authorities to evaluate the "water quality-related impacts from the activity subject to the license or permit, including the activity's construction and operation." 40 CFR 121.3(a).

Communities with environmental justice concerns will also benefit from the final rule's considerations for Federal agency review. Relative to the 2020 Rule, the final rule limits the scope of Federal agency review to three facial statutory components of section 401. It also eliminates the possibility of constructive waiver of a certification decision with conditions designed to protect these communities from negative water quality impacts for failure to comply with the informational requirements set out in the 2020 Rule. Under the final rule, constructive waivers only occur if the certifying authority fails to act within the reasonable period of time.

The provisions regarding EPA's roles under section 401 may also benefit communities with environmental justice concerns. Updating the public notice procedures and defining a timeframe for public notice when EPA acts as the certifying authority will provide more certainty to the public regarding when public comment occurs and may improve community engagement. Broadening the scope of EPA's technical assistance provides more support to stakeholders in the certification process, including certifying authorities. Since the 2020 Rule broadened the scope of EPA's technical assistance, the final rule provisions related to technical assistance are unlikely to have any EJ effects relative to the 2020 Rule baseline.

Retaining the modifications provision can also have positive impacts on communities with environmental justice concerns since the public can inform the certifying authority and the Federal agency when circumstances warranting certification modification arise. Allowing certification modifications, and therefore project modifications, reduces the potential of environmental degradation in these communities and has further positive impacts on water quality. This provision will also allow

certifying authorities to consider potential environmental degradation and impacts to communities of concern that can result from project/license/permit adjustments. However, the provision's stipulation that the certifying authority and Federal agency must agree on proposed certification modifications can limit the ability of certifying authorities to make desired changes should the Federal agency disagree that a modification to the certification is appropriate. The 2020 Rule removed the modification provision and instead relied on other Federal agency regulations to address modifications. Using the 2020 Rule as a baseline, the final rule will have substantial benefits, as listed above, by allowing certifying authorities and Federal agencies to agree to modify a grant of certification. Relative to 1971 Rule baseline, the final rule provision adds clarification regarding the allowable scope and extent of modifications. The increased clarity relative to the 1971 Rule baseline can improve the modification process and make certifying authorities and Federal agencies more likely to agree to modify a certification under changing project conditions.

Revisions to the neighboring jurisdiction provision will allow other affected communities to provide input on section 401 certifications. EPA's revisions to clarify the objection and hearing process may allow neighboring jurisdictions with communities with environmental justice concerns to better participate in the section 401 process. The final rule clarifies the neighboring jurisdictions process and can reduce harms to communities with EJ concern located near waters affected by a proposed project in a neighboring jurisdiction. Relative to the 2020 Rule, which gave EPA discretion regarding whether to make a "may affect" determination for neighboring jurisdictions, the final rule will ensure that EPA always assesses potential impacts to neighboring jurisdictions and makes a "may affect" determination. Ensuring that EPA makes a "may affect" determination will increase the potential for neighboring jurisdictions to protect communities with environmental justice concerns from negative water quality impacts originating in other jurisdictions.

## 5.2 Tribal Impacts

A few aspects of the final rulemaking will provide clarity and greater flexibility for Tribal governments to manage water quality in their jurisdictions. The provisions of the rulemaking relevant to Tribes include: (1) scope of certification; (2) Federal agency review; (3) EPA's roles under section 401; (4) modifications; (5) neighboring jurisdictions process; and (6) TAS and other Tribal issues.

Clarifications that the scope of certification includes effects from the "activity" will allow Tribal governments with TAS and those without TAS for which EPA acts as the certifying authority to have greater autonomy and control to ensure that Federal projects affecting waters in their jurisdiction meet all applicable water quality requirements, including water quality-related religious, economic, and/or cultural requirements. Other Tribal and non-Tribal stakeholders stated in pre-proposal input that it is critical to allow certifying authorities the ability to evaluate proposed activities beyond point source discharges to preserve water quality requirements specific to their respective jurisdictions. Some commenters from the public comment period asserted that a broader scope of review was necessary for certifying authorities to holistically and effectively protect their water quality. While this provision has been practiced historically based on case law under the 1971 baseline, adding clarity in the final rule may protect Tribal certifying authorities from legal disputes. Under the 2020 Rule, the scope of review was limited to assuring that any discharge from a Federal project would comply with water quality requirements as opposed to the activity. Additionally, the 2020 Rule limited water quality requirements to Federal, state, and Tribal laws regulating point source discharges. The final rule allows Tribal

governments to evaluate all aspects of a project that can impact compliance with their water quality requirements.

Tribal communities can also benefit from the final rule's considerations for Federal agency review. Relative to the 2020 Rule, the final rule limits the scope of Federal agency review to three facial statutory components of section 401 and eliminates the possibility of a constructive waiver of a Tribal certification for failure to comply with the informational requirements set out in the 2020 Rule.

When EPA acts as a certifying authority on behalf of Tribal governments, the Agency provides public notice on any requests for certification. The revisions to the public notice provision when EPA is a certifying authority are expected to provide more clarity to Tribal communities regarding when to provide input on a project in the section 401 certification process.[51] This provision of the rulemaking can give Tribal members greater involvement with local water quality when they are not the certifying authority because the public notice will be provided in a timely manner. Tribal governments and members can also utilize the expanded scope of EPA's technical assistance (relative to the 1971 Rule baseline) to learn more about water quality requirements or methods to comply with applicable water quality requirements.

Allowing for a certification modification when the Federal agency and the certifying authority agree will respect state and Tribal rights and promote cooperative federalism. Commenters from the public comment period added that the ability to modify certification conditions is vital for certifying authorities to protect their water quality. Should conditions in waters of importance to over-burdened and/or under-served communities or Tribal communities change during the licensing or permitting period, a certification modification will allow these communities more flexibility to address the changing conditions. In pre-proposal input letters, stakeholders asserted that certifying authorities are in the best position to determine whether a certification modification is required. Reintroducing the collaborative process from the 1971 Rule stipulating that the Federal agency must agree with the certifying authority prior to the certifying authority modifying the certification can limit a Tribal government's authority if the Federal agency disagrees. The 2020 Rule removed the modification provision and instead relied on other Federal agency regulations to address modifications. Using the 2020 Rule as a baseline, the final rule will have substantial benefits, as listed above, by allowing certifying authorities and Federal agencies to agree to modify a grant of certification as appropriate if project conditions change.

Revisions to the neighboring jurisdictions and TAS provisions can have substantive positive impacts on Tribal communities. Clarifications regarding when neighboring jurisdiction assessments are required will standardize the neighboring jurisdiction assessment process and ensure that Tribal governments with TAS (either for section 401 as a whole or just section 401(a)(2)) have the opportunity to provide input if EPA determines that a discharge originating from a neighboring jurisdiction may affect their water quality. The final rule provision to develop separate TAS provisions for section 401, rather than requiring TAS for section 303(c) to obtain TAS for section 401, provides Tribal governments with more options in their decision to seek TAS. Increased Tribal section 401 authority will allow Tribal governments to gain autonomy in maintaining water quality requirements in Tribal waters. Additionally, a separate TAS

[51] Of note, each EPA regional office has also developed Regional Consultation Procedures in line with EPA's *Policy on Consultation and Coordination with Indian Tribes*. These guidance documents describe the specific consultation practices of each EPA region and what activities are appropriate for consultation.

provision for section 401(a)(2) will allow Tribal governments that do not wish to take on the entire section 401 program to be notified and participate in the neighboring jurisdictions process when EPA determines that its waters may be affected by a discharge.

# 6 Data Limitations and Uncertainty

Table 6-1 summarizes the limitations and uncertainties that EPA faced in assessing the potential impacts arising from the final rule, which necessitated the use of qualitative rather than quantitative analysis. This section focuses on limitations and uncertainties from the overall analysis rather than specific rule provisions. Whether these limitations and uncertainties, taken together, are likely to result in an understatement or overstatement of the potential impacts is not known.

**Table 6-1. Limitations and uncertainties in estimating effects of final rule**

| Uncertainty/Data Limitation | Notes |
|---|---|
| Lack of a national-level dataset of section 401 certification reviews | The lack of a national-level dataset of section 401 water quality certification reviews limited EPA's ability to perform a quantitative analysis of the potential impacts of the final rule in this economic analysis. EPA has limited data regarding the number of section 401 reviews that each certifying authority conducts annually, the number of certification actions (grant, grant with conditions, deny, or waive), average time spent per review, and other time requirements. For the final rule, EPA attempted to increase available data via machine reading of PDFs of section 401 certification decisions, but this effort was subject to significant limitations and did not generate data of a quality sufficient to pass EPA's quality assurance standards (*see* Section 3.2.5 above). For detailed discussion on the certification decision machine reading effort, please see the Certification Decision PDF Extraction Memo, available in the docket for this rulemaking. Additionally, the code and outputs for this effort are publicly accessible and can be found in the docket for this rulemaking. |
| Uncertainty regarding the baseline for the final rule | Due to ongoing litigation on the 2020 Rule, the baseline for the final rule has changed from the 1971 Rule to the 2020 Rule and remains uncertain. *See* Section III.C of the final rule preamble for further discussion on ongoing litigation on the 2020 Rule. This baseline uncertainty required assessing final rule impacts relative to both the 1971 Rule and the 2020 Rule. |
| Lack of information to determine how certifying authorities will respond to the final rule (*e.g.*, fee changes, acceptance rate of pre-filing meeting request requirement) | The impact of the final rule on both certifying authorities and project proponents could vary depending on certifying authority response. For example, certifying authorities may adjust their fee structure for section 401 reviews to account for changing costs or keep their fee structure (or lack thereof) the same. In another example, the impact of the pre-filing meeting request requirement depends on whether the certifying authority currently engages in pre-filing meetings, whether the certifying authority will require pre-filing meeting requests for all projects, how frequently the certifying authority may accept the meeting request (if at all), the methodology used to conduct pre-filing meetings, and whether the certifying authority implements a pre-filing meeting fee to help cover costs. *See* Section 4.2.2.2 for additional details. |
| Lack of information to determine how often the 6-month reasonable period of time is in effect and how often the reasonable period of time is | The final rule requires certifying authorities and Federal agencies to set the reasonable period of time collaboratively, with a six-month default reasonable period of time if an agreement cannot be reached and if none of the auto-extension conditions apply. Auto-extensions apply when certifying authorities have public notice procedures that make meeting a |

| Table 6-1. Limitations and uncertainties in estimating effects of final rule | |
|---|---|
| **Uncertainty/Data Limitation** | **Notes** |
| exceeded for reasons covered by the auto-extension process | six-month reasonable period of time impossible, or when there are force majeure events (*e.g.*, Federal government closures, natural disasters). Quantifying the impacts of this provision would require data about how often the six-month default reasonable period of time would be in effect and how often the auto-extension conditions would apply. |
| Lack of information to determine change in certification denials | With the reasonable period of time starting after receipt of a request for certification, certifying authorities may deny certification if they do not receive additional information that they assert is needed to make a determination. The actual change resulting from the final rule is uncertain since pre-filing meetings and revisions to standardize information included in requests for certification will likely increase the initial availability of information that may be necessary to make a certification decision. |
| Lack of information to determine impacts of Federal agency review | The final rule defines three facial statutory aspects of a certification decision that are subject to Federal agency review. Quantifying the impacts of this provision would require data regarding the frequency of: (1) challenges to certification decisions, and (2) challenged certifications not complying with the three facial statutory aspects. |
| Lack of information about the number of Tribes interested in obtaining TAS for section 401 and 401(a)(2) alone | The final rule provides a pathway for Tribal governments to apply directly for TAS for section 401 or 401(a)(2), rather than obtaining section 401 authority by applying for TAS for section 303(c). Quantifying the impacts of this provision would require information about the number of Tribal governments interested in obtaining TAS for section 401 or 401(a)(2) alone rather than TAS for both sections 303(c) and 401. |
| Lack of information to assess the combined effect of final rule provisions | EPA anticipates that, overall, the final rule will result in more predictable, efficient decision-making by certifying authorities as compared with both the 2020 Rule and 1971 Rule baselines. Quantifying the combined effect of the final rule on certifying authorities, project proponents, and other stakeholders would require quantifying and adding together the effects of individual provisions. |

# 7 Statutory and Executive Order Requirements

The statutory requirements considered during development of the final rule include the Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA), the Paperwork Reduction Act, the Unfunded Mandate Reform Act, and the National Technology Transfer and Advancement Act (NTTAA). The analysis is also conducted pursuant to Executive Orders 12866 (Regulatory Planning and Review), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13132 (Federalism), 13175 (Consultation and Coordination with Indian Tribal Governments), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), 13211 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use), 14008 (Revitalizing Our Nation's Commitment to Environmental Justice for All), and 14094 (Modernizing Regulatory Review). Requirements with specific import for an economic and programmatic analysis are described in the sections below; others are addressed in the preamble to the final rule. Some are addressed in both documents.

## 7.1 Unfunded Mandate Reform Act

The Unfunded Mandate Reform Act (UMRA) contains requirements for agencies when regulations include unfunded Federal mandates imposed by the Federal government on state, local, and Tribal

governments. For reasons noted previously, EPA does not have comprehensive data with which to analyze fully the costs of the final rule and therefore conducted a qualitative analysis of the rule relative to the UMRA threshold. The requirement of the final rule that most lends itself to cost analysis is the pre-filing meeting request, which was included in the 2020 Rule. Rough estimates of wage rates and labor hours associated with the pre-filing meeting request and meeting suggest costs on the order of several thousand dollars at the upper end. However, unlike the 2020 Rule, the final rule only requires the project proponent to request a pre-filing meeting if a certifying authority does not otherwise waive the requirement. The final rule allows the certifying authority to waive the meeting requirement or shorten the wait time between requesting a pre-filing meeting and requesting certification. EPA also notes that Table 3-7 shows that about 94 percent of Federal licenses or permits are general licenses or permits, which apply when specific conditions are known to apply to the project, such as limitations on the acreage of the project. Many general licenses or permits receive certification for issuance, so project proponents seeking authorization under a general license or permit will only be subject to the pre-filing meeting request requirement if the certification was denied. In those instances, EPA assumes that certifying authorities may use the known conditions of the general license or permit as a rationale for waiving the pre-filing meeting. Based on these assumptions, EPA anticipates a rough cost estimate of the pre-filing meeting request requirement burden measured in a few tens of millions of dollars. EPA expects that some licenses or permits can have higher costs due to other provisions of the final rule, but also expects those costs to be measured in tens or hundreds of thousands of dollars and the number of such licenses and permits to be a small fraction of those subject to requesting the pre-filing meeting. In the aggregate, EPA expects the costs of this rule to be well below $160 million, the UMRA threshold of $100 million adjusted for inflation to 2021 dollars using the GDP implicit price deflator. Therefore, this action does not contain an unfunded mandate exceeding the UMRA threshold as described in 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. If a state chooses to participate in the section 401 process, and by choosing to do so may be subject to some requirements in the rule, that choice does not rise to the level of “enforceable duty” under the statute.

## 7.2 Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All

EO 12898 requires Federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law. EO 14096 directs Federal agencies to consider measures to address and prevent disproportionate and adverse environmental and health impacts on communities, to actively facilitate meaningful public participation and just treatment for all people in agency decision-making, to identify and address gaps in science, data, and research related to environmental justice, and to increase accountability and transparency in federal environmental justice policy. The Agency has conducted an environmental justice analysis for the final rule to qualitatively assess whether the change in benefits from the rulemaking may be differentially distributed among communities with environmental justice concerns The Agency determined that the final rule may have some positive impacts for communities with environmental justice concerns, which may include Tribal communities. See Section 5 of this economic analysis for further discussion.

## 7.3 Executive Orders 12866 Regulatory Planning and Review and 14094 Modernizing Regulatory Review

EPA anticipates that the final rule will have varying effects on certifying authorities, project proponents, and Federal agencies. However, the Agency is unable to fully quantify the impacts of the final rule due to several data limitations and uncertainties, which are described in Section 6 of this document. Due to the limitations, any attempts to quantify the benefits and costs of the final rule provisions would be highly speculative and imprecise. Therefore, EPA included a qualitative assessment of the potential impacts of the final rule on project proponents, certifying authorities, and Federal agencies in this economic analysis.

EPA acknowledges that there will likely be some costs associated with project proponents, certifying authorities, and Federal agencies reviewing the final rule language and ensuring that their activities going forward comply with the final rule.

## 7.4 Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

EPA expects that the final rule will improve coordination between project proponents, certifying authorities, and Federal agencies, which will in turn reduce regulatory uncertainty and project delays for project proponents, including small entities. The small entities subject to the requirements of this action are small businesses applying for Federal licenses or permits subject to section 401 certification, which could include construction, manufacturing, mining, and utility businesses.[52] Based on the qualitative analysis, the Agency has determined that some small entities may experience some impact from the final rule but that the impact would not be significant. This final rule may impact states and authorized Tribes that implement section 401 in the form of administrative burden and cost. States and Tribal governments are not small entities under the RFA.

There are five provisions from the final rule that may have some impact on project proponents (as mentioned above, these are the impacts that would apply to small entities): (1) the pre-filing meeting request requirement; (2) the contents of a request for certification; (3) the scope of certification; (4) modifications; and (5) the section 401(a)(2) review process. A qualitative summary of these anticipated impacts on small entities as compared to the 1971 Rule and 2020 Rule baselines is discussed below.

### 7.4.1 Final Rule Provisions that May Have Some Impact on Project Proponents

First, the Agency is retaining the requirement for project proponents to request a pre-filing meeting from the 2020 Rule; the 1971 Rule did not include a pre-filing meeting request requirement. However, specific to the final rule provision, the certifying authority may waive the requirement for a pre-filing meeting request. In pre-proposal input, several project proponents noted that while pre-filing meetings had some utility, they had also resulted in delays in some instances and recommended that the Agency provide greater flexibility for the pre-filing meeting request requirement, including allowing for waivers or shortening the period between submitting a pre-filing meeting request and a request for

[52] During the development of this final rule, the Agency considered public comment letters from various stakeholders whose membership included small entities from these sectors. *See, e.g.*, Mississippi Manufacturers Association (EPA-HQ-OW-2022-0128-0152); Petroleum Association of Wyoming (EPA-HQ-OW-2022-0128-0160); Tennessee Chamber of Commerce and Industry (EPA-HQ-OW-0128-0129).

certification.[53] Project proponents during the public comment period reiterated the value and potential of pre-filing meetings to streamline the certification process, and they supported the early engagement provision with flexibility for certifying authorities to waive or shorten the requirement.[54] The final rule provision provides certifying authorities with the flexibility to determine whether a pre-filing meeting request is needed and allows certifying authorities to shorten the waiting period between submitting a pre-filing meeting request and a request for certification. As a result, there are no additional requirements being imposed upon project proponents, including small entities, with respect to this aspect of the final rule when compared to the 2020 Rule baseline. Although the pre-filing meeting request requirement is new when compared to the 1971 Rule baseline, the pre-filing meeting process will ultimately reduce burden elsewhere in the section 401 certification process (*e.g.*, reduce project delays due to incomplete requests for certification). Certifying authorities may be more likely to waive the pre-filing meeting request requirement for small, routine projects,[55] which are more likely to involve small entities. Therefore, the Agency expects the changes to the pre-filing meeting requirement to be a reduction of direct economic impact on project proponents when the certifying authority determines that both a pre-filing meeting request and a pre-filing meeting are not necessary prior to the submission of a request for certification.[56]

Second, the Agency is updating the 2020 Rule provision describing the contents of a request for certification for all certifying authorities; the 1971 Rule only described the contents of a request for certification when EPA acted as the certifying authority. In pre-proposal input and public comment, several project proponents noted that it was important to have clarity and predictability regarding the elements of a request for certification and expressed support for the 2020 Rule's uniform requirements for all certification requests.[57] In public comment, several project proponents expressed concern over project delays and workload due to the proposed inclusion of a copy of the draft license or permit and any existing and readily available data in all requests for certification.[58] Several project proponents also generally supported the Agency's proposed alternative approach to include the application with a request for certification on an individual license or permit, as opposed to the draft license or permit,

[53] *See, e.g.*, Association of American Railroads (EPA-HQ-OW-2021-0302-0021), Metallurgical Coal Producers Association (EPA-HQ-OW-2021-0302-0036), MJB&A Permitting and Infrastructure Coalition (EPA-HQ-OW-2021-0302-0064), Alaska Oil and Gas Association (EPA-HQ-OW-2021-0302-0090).

[54] *See, e.g.,* Interstate Natural Gas Association of America (EPA-HQ-OW-2022-0128-0122), Alaska Oil and Gas Association (EPA-HQ-OW-2022-0128-0136), American Exploration & Mining Association (EPA-HQ-OW-2022-0128-0147).

[55] *See, e.g.*, Natural Gas Supply Association (EPA-HQ-OW-2022-0128-0185), Washington Department of Ecology (EPA-HQ-OW-2021-0302-0025), Utah Department of Environmental Quality (EPA-HQ-OW-2021-0302-0028), D.C. Department of Energy and Environment (EPA-HQ-OW-2021-0302-0035).

[56] *See* Section 4.2.2 for further discussion on the potential impacts of the provision from the 1971 Rule and 2020 Rule baselines.

[57] *See, e.g.*, Edison Electric Institute (EPA-HQ-OW-2021-0302-0049), GPA Midstream Association (EPA-HQ-OW-2021-0302-0050), Natural Gas Supply Association (EPA-HQ-OW-2021-0302-0074), Williams Company (EPA-HQ-OW-2021-0302-0084), Alaska Oil and Gas Association (EPA-HQ-OW-2022-0128-0136), J.R. Simplot Company (EPA-HQ-OW-2022-0128-0268), Mississippi Manufacturers Association (EPA-HQ-OW-2022-0128-0152), Williams Company (EPA-HQ-OW-2022-0128-0137).

[58] *See, e.g.*, Cross Cutting Issues Group (EPA-HQ-OW-2022-0128-0171), Mississippi Manufacturers Association (EPA-HQ-OW-2022-0128-0152), Natural Gas Supply Association (EPA-HQ-OW-2022-0185).

including one commenter who asserted that this alternative would significantly reduce the timeframe within which a project proponent can receive all necessary permits.[59] As discussed further below, the Agency has revised the proposed approach to support a clear, predictable certification process. The Agency anticipates that this provision includes direct impacts to small entities regarding the contents of a request for certification. Specifically, in contrast to the 1971 Rule and 2020 Rule, when a project proponent submits a request for certification to any certifying authority, the final rule bifurcates the minimum content requirements for an individual license or permit and for the issuance of a general license or permit. 40 CFR 121.5(a). Under the final rule, if the request for certification is for an individual Federal license or permit, the request for certification must include a copy of the Federal license or permit application and any readily available water quality-related materials that informed the development of the application. However, if the request for certification is for the issuance of a general Federal license or permit, then the request for certification must include a copy of the draft Federal license or permit and any readily available water quality-related materials that informed the development of the draft Federal license or permit. The final rule also provides a standardized list of additional components that must be included in a request for certification when EPA acts as the certifying authority or in instances when a state or authorized Tribe declines to define additional components. *See* preamble section IV.C. Although the Agency is allowing states and authorized Tribes to define their own additional requirements for a request for certification, the provision provides a clear backstop for those states or authorized Tribes who do not choose to define any additional requirements. However, if a state or authorized Tribe chooses to define additional requirements, the final rule provides that those additional components must be water quality-related and must be identified prior to when the request for certification is made. The Agency expects that this will ensure that project proponents have full transparency and certainty as to what is required as well as ensure that the request remains within the scope of certification. Additionally, EPA anticipates that allowing states and authorized Tribes to define additional contents of a certification request may reduce the need for additional information requests. As a result, the Agency anticipates this new requirement to result in faster, more efficient decision-making by the certifying authorities than under the 1971 Rule and 2020 Rule baselines, which may reduce the economic impact on project proponents.

Third, EPA is also returning to the longstanding "activity" scope of certification review, which represents a change from the 2020 Rule baseline. The 1971 Rule did not explicitly address the scope of certification in regulatory text. However, the U.S. Supreme Court held that section 401 "is most reasonably read" as authorizing the certifying authority to evaluate and place conditions on the "activity as a whole" to assure compliance with various provisions of the CWA and "any other appropriate requirement of State law" once the predicate existence of a discharge is satisfied. *PUD No. 1 of Jefferson County v. WA Dept. of Ecology*, 511 U.S. 700, 711-12 (1994). In pre-proposal input, several project proponents asserted that prior to the 2020 Rule, certifying authorities considered non-water quality-related issues and supported the 2020 Rule's discharge-only scope of review.[60] In public comment, several project proponents expressed concern over certifications or conditions that are not related to water quality effects or water

[59] *See, e.g.,* Edition Electric Institute (EPA-HQ-OW-2022-0128-0153); Petroleum Association of Wyoming (EPA-HQ-OW-2022-0128-0160).

[60] *See, e.g.*, National Hydropower Association (EPA-HQ-OW-2021-0302-0048), Interstate Natural Gas Association of America and American Gas Association (EPA-HQ-OW-2021-0302-0058), Equitrans Midstream Corporation (EPA-HQ-OW-2021-0302-0073).

quality impacts.[61] Although the final rule returns to the "activity" scope of review, the provision retains the Agency's longstanding position that certifying authorities may only consider water quality-related impacts when acting on a request for certification. The final rule preamble also clarifies that the certifying authority's analysis is limited to addressing impacts from an activity that adversely affects water quality in a manner that causes or contributes to noncompliance with a water quality requirement. The "activity" scope of review can result in an increase in the number of water quality certification conditions, relative to the 2020 Rule baseline and proportional to the size and complexity of the activity; however, this provision clarifies that the scope of certification is limited to water quality-related impacts. As a result, certification decisions, including any certification conditions, are more likely to be appropriately limited to water quality-related impacts. Given these factors and that most certifying authorities are familiar with the "activity" approach, the direct economic impact of this change on project proponents is not expected to be significant.

Fourth, the Agency is reintroducing a certification modifications provision. In response to pre-proposal input, stakeholder recommendations, and public comment to allow certification modifications, the Agency is finalizing a process similar to the 1971 Rule that allows a certifying authority to modify a grant of certification after reaching an agreement to do so with the Federal licensing or permitting agency. In contrast, the 2020 Rule removed the 1971 Rule's modification provision in its entirety, and instead relied on other Federal agencies to define if and when such modifications could occur. The 2020 Rule preamble also suggested that there might be circumstances warranting the submission of a *new* request for certification; however, the Agency declined to identify circumstances that might warrant the submission of a new certification request. Therefore, during the pre-proposal input period, stakeholders said they need more flexibility than the 2020 Rule provided for modifications.[62] In response to the proposed approach, several commenters asserted that finalizing a provision for limited certification modifications will provide necessary flexibility for project proponents without resulting in delays or inefficiencies that would happen if they had to re-request certification after the project is already under construction.[63] Relative to the 2020 Rule, the Agency expects the reintroduction of a certification modification provision to reduce burden on small entities acting as project proponents by adding the flexibility they need to adapt to changing circumstances or new information, without limiting them to submission of a new request for certification when the Federal agency has not established other modification mechanisms. The final rule certification modification provision protects the reliance interests of project proponents because it is clear that unilateral modifications are not allowed, and through the modification process a certifying authority cannot revoke or change a grant of certification into a denial or waiver of certification. Furthermore, this provision reduces the burden on small entities acting as project proponents, relative to the 1971 Rule, because the revision does not include a third-

[61] *See, e.g.*, Association of American Railroads (EPA-HQ-OW-2022-0122), Calista Corporation (EPA-HQ-OW-2022-0099), Cleco Corporate Holdings (EPA-HQ-OW-2022-0121), Interstate Natural Gas Association of America and American Gas Association (EPA-HQ-OW-2022-0122).

[62] *See, e.g.*, American Association of State Highway and Transportation Officials (EPA-HQ-OW-2021-0302-0029), Edison Electric Institute (EPA-HQ-OW-2021-0302-0049), Massachusetts Department of Transportation (EPA-HQ-OW-2021-0302-0055).

[63] *See, e.g.*, Natural Gas Supply Association (EPA-HQ-OW-2022-0128-0185), California Department of Transportation (EPA-HQ-OW-2022-0128-0105), Cross Cutting Issues Group (EPA-HQ-OW-2022-0128-0171).

party role for EPA participation in certification modifications. EPA anticipates that the exclusion of the third-party role for EPA will streamline collaboration regarding certification modifications.

Lastly, the Agency is updating the 2020 Rule regulatory text regarding the section 401(a)(2) process (also known as the neighboring jurisdictions process) to provide greater clarity regarding how the section 401(a)(2) process is initiated and conducted. These updates include clarifying that waivers in addition to certifications trigger the section 401(a)(2) process; defining the contents of notification from a Federal agency to EPA; clarifying that EPA must determine whether a discharge may affect a neighboring jurisdiction after it receives notification; and clarifying the notified neighboring jurisdiction's objection process. Although project proponents are not directly impacted by the neighboring jurisdictions process, the Agency anticipates that the provision may have an indirect impact on project proponents (some of which may be small entities) because a Federal license or permit may not be issued until the neighboring jurisdictions process concludes. The provision reintroduces the longstanding practice of waivers, in addition to certifications, triggering the neighboring jurisdictions process. However, the provision provides further clarification of the neighboring jurisdictions process beyond what was included in the 2020 Rule (*e.g.,* contents of notification) and adds a provision for the notified neighboring jurisdiction to withdraw its objection prior to the public hearing, which will allow the neighboring jurisdictions process to be more efficient. The Agency also anticipates greater efficiency when moving from the 1971 Rule baseline to the final provision, due to the clarifications and procedural framework for objections and hearings included in the final rule. EPA acknowledges that the clarity may increase the number of jurisdictions that object or request hearings under section 401(a)(2).

### 7.4.2 Anticipated Impacts to Small Entities

Despite the direct impacts discussed in Section 7.4.1 above to project proponents, including some small entities, the Agency has concluded that this final rule will not have a significant economic impact on a substantial number of small entities. To support a certification under RFA, EPA has conducted a qualitative analysis of the impacts to small businesses, as a courtesy, as these small businesses are not directly regulated by this rule.

Approximately 94 percent of certification requests derive from general licenses or permits (*see* Table 3-7). EPA expects that the small entities affected by this final rule are the project proponents who predominantly avail themselves of general licenses or permits. This presumption is based on the likelihood that small firms develop expertise around filling economic niches in which larger firms are uninterested, because the larger firms can make greater profits on projects for which they have a size advantage (*e.g.,* there are market-based barriers to entry for small firms). For example, the CWA section 404 general permit for Residential Developments is limited to projects resulting in the loss of non-tidal waters of the United States of no more than a half-acre. Of course, a large residential development, built by a large firm, could have an impact that would be this minimal on waters of the United States. However, all other things being equal, the likelihood of disturbing more acres grows with the size of the development, and the more diverse skills required to manage the greater rigors of the individual permit process are more likely to be found in larger firms. If a project proponent uses a general license or permit that has already obtained certification (*i.e*., certification on the issuance of the general license or permit), then the project proponent does not need to seek certification prior to authorization. However, if the general license or permit requires a project-specific certification prior to authorization, the project proponent will be required to seek certification in accordance with this final rule. EPA assumes that a greater number of project proponents (especially small entities) seeking general license or permit

authorizations will not need to request certification, but the incremental impacts of this final rule on project proponents who will be required to seek section 401 certification are qualitatively discussed below.

For the qualitative assessment, EPA considered the impacts on project proponents seeking certification by dividing them into three mutually exclusive and exhaustive groups: 1) project proponents for whom there are no incremental costs; 2) project proponents for whom the pre-filing meeting request requirement is the largest impact; and 3) project proponents for whom one or more of the other provisions have an impact (*e.g.,* scope of certification, modifications, neighboring jurisdictions process, etc.). This analysis describes the three groups and their particular features first, and then analyzes the small business impacts relative to each baseline. Although EPA lacks detailed information on project proponents, the total effect across these three groups, under both baselines, gives EPA confidence that there is no significant impact on a substantial number of small entities.

#### *7.4.2.1 Group 1: Project Proponents for Whom there Are No Incremental Costs*

The first group includes project proponents for whom the pre-filing meeting request requirement is waived by the certifying authority under the final rule. Relative to the 2020 Rule baseline, this group will not face incremental costs because the pre-filing meeting was also a feature of the 2020 Rule. In fact, this group will realize cost savings relative to the 2020 Rule because the pre-filing meeting request cannot be waived under that baseline; these cost savings are expected to be relatively low, on the order of hundreds to thousands of dollars. Relative to the 1971 Rule baseline, this group will not face incremental costs under the final rule because waiver of the pre-filing meeting request requirement is equivalent to the 1971 Rule's lack of a pre-filing meeting request requirement.

Pre-filing meeting requests ensure that certifying authorities can receive early notification of and discuss the project and the required contents of the request for certification with the project proponent before the submission of the request for certification. It is important to understand the required contents of the request for certification because the statutory "reasonable period of time" for certification review begins on the date that the certifying authority receives the request for certification. EPA assumes that if a certifying authority has chosen to waive the pre-filing meeting request requirement, the project proponent's request for certification will be generic – and could even be a project-specific request for certification to obtain a general license or permit authorization. Under the final rule, project proponents are required to provide a request for certification that, at a minimum, includes a copy of the license or permit application and any readily available water quality-related materials that informed the development of the application (for individual licenses and permits). This information should not require any additional, independent development by the project proponent since it includes information the project proponent has already developed for the license or permit application process. Furthermore, some certifying authorities may return to the joint application process that was used prior to the 2020 Rule's required contents for all requests for certification. Therefore, EPA anticipates that project proponents in this category will not face any incremental costs relative to the 1971 Rule practice, while there will be a cost reduction relative to the 2020 Rule because under the 2020 Rule, project proponents could not jointly apply for the Federal license or permit and certification.

Once the request for certification is submitted, the certifying authority is responsible for evaluating whether the activity will comply with applicable water quality requirements. As discussed above, the "activity" scope of review represents a return to pre-2020 Rule practices. There can be an increase in

the number of water quality certification conditions, relative to the 2020 Rule baseline and proportional to the size and complexity of the activity; however, the final rule clarifies that the scope of certification is limited to water quality-related impacts. As a result, certification decisions, including any certification conditions, are more likely to be appropriately limited to water quality-related impacts. Given these factors and that most certifying authorities are familiar with the "activity" approach from before the 2020 Rule, the direct economic impact of this change on project proponents seeking certification for small/generic projects (*e.g.*, for authorization under a general license or permit) is not expected to be significant.

After a certifying authority grants certification (with or without conditions) or waives certification, the Federal agency must provide written notification to EPA within five days of the date that it received both the application and either a certification or waiver, pursuant to the section 401(a)(2) neighboring jurisdictions process. Because the Federal agency cannot issue the license or permit until the process concludes, EPA acknowledges that some project proponents may have to wait longer for the process to conclude – because under the 2020 Rule, waivers of certification did not trigger the neighboring jurisdictions process. However, this change represents a return to the 1971 Rule practice, but the final rule provides additional clarity that is intended to support streamlining/efficient determinations (*e.g.*, the content of the notification to EPA). Furthermore, smaller projects that are generally less complex are less likely to lead to a "may affect" finding (*e.g.*, when project proponents are seeking a project-specific certification to obtain a general license or permit authorization because general licenses or permits are developed to minimize cumulative adverse effects). Therefore, EPA anticipates that the return to past practices in combination with the additional clarity will not result in significant incremental costs for project proponents seeking certification for smaller/generic projects.

Lastly, under the modification provision in the final rule, a certifying authority may only modify a grant of certification (with or without conditions) after the certifying authority and the Federal agency have agreed in writing that the certifying authority may modify an element or portion of the certification. The final rule protects the reliance interests of project proponents by preventing unilateral modifications after the reasonable period of time, and under the final rule provision, a certifying authority cannot revoke or change a grant of certification into a denial or waiver of certification. EPA anticipates that this provision will reduce costs, relative to the 2020 Rule, for project proponents who would have been required to re-initiate the certification process in light of a shift in project design or construction after the certification was issued. Relative to the modification provision in the 1971 Rule, the modification agreement can be reached more quickly because the final rule does not include EPA as a party to the modification agreement when EPA is neither the certifying authority nor the Federal permitting agency. This means that the final rule will also reduce project proponent costs compared to the 1971 Rule.

To summarize the impacts to this group relative to the 2020 Rule baseline, there is potential for both incremental costs and cost reductions, but these impacts are quite low and thus not expected to be significant impacts. To summarize the impacts to this group relative to the 1971 Rule baseline, the impacts result in no net burden.

#### *7.4.2.2 Group 2: Project Proponents for Whom the Pre-filing Meeting Request Requirement Is the Largest Impact*

The second group faces more costs under the final rule than the first group, because the certifying authority does not waive their pre-filing meeting request requirement. What distinguishes this group

from the third group is that the higher costs they face relative to the first group are limited to the pre-filing meeting request requirement. Although it would be difficult to predict with much specificity the costs of pre-filing meetings, a reasonable set of assumptions includes that pre-filing meetings will entail approximately 30 labor hours (abstracting from several people for a few hours, plus preparation) at an average wage rate of $100/hour (abstracting from labor categories).[64] Thus, EPA estimates that these costs in the abstract are on an order of magnitude in thousands of dollars per certification decision. These relative costs are therefore not expected to impose a significant impact on project proponents, with the possible exception of the very smallest firms in this group. Furthermore, this group is not expected to be comprised solely of small entities, but rather that small businesses would be a subset of this group. Additionally, the project proponents in this group are expected to be comprised of a minority of the general licenses or permits and most of the individual permits or licenses in Table 3-7 (the remaining of this latter category being in the third group).

To summarize the impacts to this group relative to the 2020 Rule baseline, the impacts result in no net burden because project proponents in this group are treated similarly under the 2020 Rule baseline and final rule. To summarize the impacts to this group relative to the 1971 Rule baseline, there are impacts, but these impacts are only expected to be significant for an insubstantial number of small entities. Additionally, early engagement through pre-filing meetings may reduce burdens in other aspects of the certification process, such as helping project proponents provide relevant information in the initial request for certification, helping certifying authorities act within the reasonable period of time, and reducing back-and-forth communication between project proponents and certifying authorities.

#### *7.4.2.3 Group 3: Project Proponents for Whom One or More of the Other Provisions Have an Impact*

The third group is the group most likely to face costs of a magnitude that could rise to the level of significant impacts, because they face the same costs under the final rule as the second group, as well as costs associated with another part of the section 401 process, such as the request for certification, scope of certification, modifications, or the neighboring jurisdictions process. For example, if a certifying authority defines additional contents for a request for certification, it may require additional materials for more complex and/or larger projects, in addition to the minimum contents required for a request for certification. A more complex and/or larger project could also require more certification conditions or require modifications at a later date. Similarly, a more complex and/or larger project in a shared watershed may be more likely to lead to a "may affect" determination and/or "will violate" determination that may delay license or permit issuance. EPA acknowledges that in some instances, these costs could impose a significant impact. However, EPA assumes that the project proponents facing these impacts would most likely not be small entities, precisely because these more complex situations or larger projects require broader skill sets most often found in firms exceeding the small business size standards. Additionally, these projects are more likely to require individual licenses or permits (as opposed to general licenses or permits), which EPA assumes are generally obtained by project proponents that are not small entities.

To summarize the impacts to this group relative to the 2020 Rule baseline, there will be either impacts associated with request for certification, scope of certification, modification, or neighboring jurisdiction (or all); these impacts can be of a magnitude that would be significant for small entities, but EPA does not expect that there are a substantial number of small entities in this group. However, these impacts

[64] This wage rate is on the order of magnitude of the wage rates used in the ICR for this final rule.

can be mitigated by the final rule's clarification of these provisions. For the request for certification, the final rule clarifies that any additional components in a request for certification must be water quality-related and clearly defined prior to the request for certification. For the scope of certification, the final rule clarifies that the scope of certification is limited to water quality-related impacts. For modifications, the final rule limits modifications to grants of certification (with or without conditions) subject to Federal agency and certifying authority agreement. For the neighboring jurisdictions process, the final rule provides additional clarity that is intended to support streamlining/efficient determinations.

To summarize the impacts to this group relative to the 1971 Rule baseline, there will be no impacts associated with request for certification, scope of certification, or modification, though there can be neighboring jurisdiction impacts; the final rule, however, introduces greater procedural clarity and efficiency in the neighboring jurisdiction process, including the ability for notified neighboring jurisdictions to withdraw objections to the issuance of a license or permit, which can mitigate some of the impact. These impacts could be of a magnitude that would be significant for small entities, but EPA does not expect there to be a substantial number of small entities in this group.

## 7.5 Executive Order 13211 Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

Some Federal licenses and permits that relate to the supply and distribution of energy, such as Federal construction and operation licenses or permits, are subject to CWA section 401 certification if the activity may result in a discharge into waters of the United States. However, this rulemaking does not impact existing federally licensed or permitted projects – except for making it easier to modify elements of a previously issued grant of certification. *See* Section 4.9 for discussion of the modification provision. As discussed throughout this economic analysis, EPA anticipates that this final rule will improve the efficiency of the certification review process for new requests for certification, which will support efficiency in the related Federal license or permit review processes. Therefore, there are no direct impacts from this rulemaking on the supply, distribution, or use of energy, and any indirect impacts of this final rule will be neither adverse nor significant on the supply, distribution, or use of energy.

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# Appendix A. Rule Provision Comparison

Table A-1 compares major rule provisions, in plain language, under the 1971 Rule, the 2020 Rule, and the final rule.

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
|---|---|---|
| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| **When certification is required** | | |
| • A project proponent must request section 401 certification from the appropriate certifying authority if a federally licensed or permitted activity may result in a discharge into waters of the United States.<br>• While not addressed in 1971 Rule, case law from the 9th Circuit held that only a point source discharge triggers section 401 (*ONDA v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998)). | • Same as 1971 practice, but the regulatory text explicitly provided that certification is required for any license or permit that authorizes an activity that may result in a discharge.<br>• Defined "discharge" for purposes of section 401 as a discharge from a point source into a water of the United States, consistent with *ONDA*. | • Same as 1971 practice, but the regulatory text explicitly provides that a certification or waiver is required for any license or permit that authorizes any activity which may result in a point source discharge into waters of the United States.<br>• Preamble provides that a discharge for purposes of section 401 is a discharge from a point source into waters of the United States, consistent with *ONDA*. |
| **Pre-filing meeting request** | | |
| • Pre-filing meeting requests were not required by rule but were encouraged by some certifying authorities. | • Project proponents were required to request a pre-filing meeting from a certifying authority at least 30 days before requesting certification. | • Project proponents are required to request a pre-filing meeting with a certifying authority at least 30 days prior to requesting certification, unless waived or shortened by the certifying authority. |
| **Request for certification** | | |
| • Included five components that must be in a certification request when EPA is the certifying authority.<br>• Did not define a certification request for other certifying authorities.<br>• In practice, some states and authorized Tribes said a "complete application" constituted a certification request. | • Required all certification requests to be written, signed, and dated and include either seven or nine components, which are based on whether the certification request was for an individual license or permit, or the issuance of a general license or permit. | • Requires all requests for certification to be in writing, signed, and dated.<br>• If the request for certification is for an individual license or permit, it must include a copy of the license or permit application submitted to the federal agency and any readily available water quality-related materials that informed the development of the application. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| | | • If the request for certification is for the issuance of a general license or permit, it must include a copy of the draft license or permit and any existing and readily available water quality-related materials that informed the development of the draft license or permit.<br>• Requires all requests for certification to EPA to include seven additional items, as applicable; this requirement also applies to requests for certification to states or authorized Tribes that do not identify additional contents for a request for certification.<br>• States and authorized Tribes are free to identify additional contents for a request for certification that are relevant to the water quality-related impacts from the activity prior to when the request for certification is made. |
| **Reasonable period of time (RPT)** | | |
| *When the RPT starts:* | | |
| • The RPT began after the receipt of a certification request.<br>• In practice, some certifying authorities required a "complete application" to start the RPT. | • A project proponent was required to submit a certification request to the certifying authority and Federal agency concurrently.<br>• The RPT began on the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures. | • The RPT begins on the date that the certifying authority receives a request for certification as discussed in the section above and in accordance with the certifying authority's applicable submission procedures.<br>• Certifying authority must notify the Federal agency and project proponent, in writing, of the date that the request for certification was received. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| *Timeline for acting:* | | |
| • A certifying authority must act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency.<br>• Rule provided for a default RPT of generally six months. | • A certifying authority had to act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency.<br>• Rule did not provide a default RPT. | • A certifying authority must act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency and certifying authority.<br>• If the certifying authority and Federal agency do not come to an agreement on the RPT, it will default to six months. |
| *How the RPT is set:* | | |
| • Federal agency expected to set the RPT; process not specified in rule.<br>• In practice, Federal agencies specified default RPT in regulations. | • Federal agency was required to set the RPT either categorically or on a case-by-case basis within 15 days of receiving a certification request.<br>• Preamble provided that the RPT will default to a categorical RPT (if specified in a Federal agency's regulations) or one year (if the Federal agency did not have a categorical RPT in its regulations) if the Federal agency failed to set an RPT within 15 days of receiving a certification request.<br>• Rule provided factors that the Federal agency must consider when establishing the RPT. | • Certifying authority and Federal agency may jointly set the RPT.<br>• If the certifying authority and Federal agency do not reach an agreement on the RPT in writing, the RPT defaults to six months.<br>• Final rule does not specify factors that the Federal agency and certifying authority must consider when setting the RPT. |
| *Extending the RPT:* | | |
| • Not specified in rule, but some Federal agencies included procedures for modifying the RPT in their water quality certification implementation regulations. | • Certifying authorities and project proponents could request an extension to the RPT, but the Federal agency was not required to grant the extension request.<br>• The extension may not extend the RPT beyond one year from receipt of the certification request. | • RPT is automatically extended upon notification by the certifying authority prior to the end of the reasonable period of time in two scenarios: need to meet public notice procedures and force majeure events.<br>• RPT may be extended upon certifying authority and Federal agency agreement for any reason, as long as it does not extend |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| | | beyond one year from the date that the request for certification was received. |
| *Stopping/pausing the RPT:* | | |
| • Not specified in rule.<br>• In practice, some certifying authorities requested or allowed project proponents to withdraw their applications to stop/pause/restart the clock. | • The withdrawal/resubmit practice was prohibited in regulatory text. | • Declines to take a position on validity of the withdrawal/resubmit practice. |
| **Scope of review and scope of conditions** | | |
| • Not specified in regulatory text.<br>• In 1994, the Supreme Court stated that the scope of a jurisdiction's certification review includes assuring that any potential point source discharge, as well as the licensed/permitted activity as a whole, will comply with sections 301, 302, 303, 306, and 307 of the Clean Water Act and "any other appropriate requirements of State or tribal law." (*PUD No. 1 of Jefferson County v. WA Dept. of Ecology*, 511 U.S. 700 (1994)) | • The scope of certification was limited to assuring that a discharge from a federally licensed or permitted activity will comply with water quality requirements.<br>• Water quality requirements were defined as the applicable provisions of CWA sections 301, 302, 303, 306, and 307, and state or Tribal regulatory requirements for point source discharges into waters of the United States. | • The scope of certification is based on whether the activity will comply with applicable water quality requirements.<br>• The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the license or permit, including the activity's construction and operation.<br>• Water quality requirements are defined as any limitation, standard, or other requirement under CWA sections 301, 302, 303, 306, and 307, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.<br>• Scope of review for a certification decision is the same as the scope of permissible conditions that may be added to that certification. |
| **Certification decisions** | | |
| *Granting certification:* | | |
| • A grant of certification included five elements that must be included in a certification, | • A grant of certification was required to be in writing and include a statement that the | • A grant of certification must be in writing and should include (1) identification of the |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| including "[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." | discharge from the proposed project will comply with water quality requirements. | decision as a grant of certification (2) identification of the applicable Federal license or permit, (3) a statement that the activity will comply with water quality requirements, and (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1). |
| *Granting certification with conditions:* | | |
| • A grant of certification with conditions included the same elements as a grant of certification, including "a statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity."<br>• No further information required with the certification condition. | • A grant of certification with conditions for an individual license or permit was required to be in writing and include (1) a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and (2) a citation to Federal, state, or Tribal law that authorizes the condition.<br>• Included a similar requirement for a grant of certification with conditions on issuance of a general license or permit. | • A grant of certification with conditions must be in writing and should include (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 activity will comply with water quality requirements, (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1). |
| *Denying certification:* | | |
| • Not specified. | • A denial of certification on an individual license or permit was required to be in writing and include (1) the specific water quality requirements with which the discharge will not comply, (2) a statement explaining why the discharge will not comply with the identified water quality | • A denial of certification must be in writing and should include (1) identification of the decision as a denial of certification, (2) identification of the applicable Federal license or permit, (3) a statement explaining why the certifying authority cannot certify that the activity will comply with water quality |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| | requirements, and (3) if the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.<br>• Included a similar requirement for a denial of certification on issuance of a general license or permit. | requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information, and (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1). |
| *Waiving certification:* | | |
| • A certifying authority could waive certification (1) expressly or (2) by failing or refusing act, which was not defined in the regulation, although in practice Federal agencies sometimes determined waiver occurred by passage of time. | • A certifying authority could waive certification (1) expressly or (2) by failing or refusing to act.<br>• An express waiver was required to be in writing.<br>• A certifying authority could fail or refuse to act on a request for certification by (1) failing or refusing to act on a certification request within the RPT, (2) failing or refusing to satisfy the requirements for a grant of certification (described above), (3) failing or refusing to satisfy the requirements for a denial of certification (described above), or (4) failing or refusing to comply with other procedural requirements of section 401.<br>• A certifying authority could also waive a certification condition by failing or refusing to satisfy the requirements for a grant of certification with conditions (described above). | • A certifying authority may waive certification (1) expressly or (2) by failing or refusing to act.<br>• An express waiver must be in writing and should include (1) identification of the decision as an express waiver of certification, (2) identification of the applicable Federal license or permit, (3) a statement that the certifying authority expressly waives its authority to act on the request for certification, (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).<br>• A certifying authority fails or refuses to act on a request for certification by failing to make a certification decision within the RPT. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| **Federal agency review** | | |
| *Scope of Federal agency review* | | |
| • Not addressed in rule but, in practice, a Federal agency determined whether a certifying authority failed to act within the RPT.<br>• Some case law provided Federal agencies with the ability to review for compliance with facial section 401 statutory requirements, including public notice provision, RPT, and appropriate certifying authority. | • A Federal agency was required to review a grant of certification, grant of certification with conditions, or denial of certification to determine whether it complied with the procedural requirements for those actions (*e.g.,* denial of certification element requirements), whether the actions were issued within the RPT, and whether the actions followed the other procedural requirements of section 401 (*e.g.,* public notice). | • A Federal agency may verify compliance with three requirements of section 401: (1) whether the appropriate certifying authority issued the decision, (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and (3) whether the certifying authority acted on the request for certification within the RPT.<br>• Explicitly limits Federal agency review to the three factors above.<br>• Defers to certifying authorities to determine how to demonstrate that it met the three listed facial elements. |
| *Consequences of Federal agency review* | | |
| • Not addressed in rule. In practice, a waiver occurred if Federal agency determined the certifying authority failed to act within the RPT. | • A Federal agency could waive a state's or authorized Tribe's certification decision or condition for failure to act within the RPT, and failure to comply with the procedural requirements of section 401 (*e.g.,* public notice) or the 2020 Rule (*e.g.,* denial of certification element requirements).<br>• Federal agencies were not required to provide the certifying authority with the opportunity to remedy any deficiency. | • A waiver may only occur for failure to act within the RPT. |
| **Modifications** | | |
| • The 1971 Rule allowed modifications upon agreement by the Federal agency, certifying authority, and EPA. | • Removed the 1971 modification provision. | • Clarifies that unilateral modifications to granted certifications are not allowed. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| | • The 2020 Rule relied on other Federal agency regulations to address certification modifications instead. | • A certifying authority and a Federal agency may agree to modify a grant of certification (with or without conditions). The modification is limited to the scope of the agreement (*e.g.,* if they agree that the construction timeframe needs to be extended, only that aspect of the certification may be modified); however, the certifying authority is not required to obtain the Federal agency's agreement on the text of the modification.<br>• EPA is removing itself from the list of entities in the 1971 Rule that must reach agreement for modifications to occur.<br>• Clarifies that the modification process cannot be used to revoke or change a grant of certification into a denial or waiver. |
| **Neighboring Jurisdictions Process** | | |
| *Notice from Federal agency to EPA* | | |
| • Required Federal agency to notify EPA upon receipt of an application and a certification or waiver.<br>• Notification included a copy of the certification or waiver, and the portions of the Federal license or permit application related to water quality considerations.<br>• EPA could ask Federal agency to procure additional information from the project applicant. | • Required the Federal agency to notify EPA within five days of receiving a license or permit application and the related certification.<br>• Did not define the contents of a Federal agency's notification to EPA.<br>• Allowed EPA to request copies of the certification and the Federal license or permit application. | • Requires the Federal agency to notify EPA within five days of receiving the application and either a certification or waiver.<br>• Defines the contents of a Federal agency's notification to EPA, but also provides EPA with the option of entering into agreements with Federal agencies regarding the manner and contents of notification.<br>• Allows EPA to request supplemental information. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| *EPA's "may affect" evaluation and notice to neighboring state/authorized Tribe* | | |
| • Rule did not define what "may affect" means; in practice, EPA interpreted section 401(a)(2) as providing EPA with the discretion to determine whether the discharge from a project may affect the water quality in a neighboring jurisdiction; however, one district court found that EPA is required to make a determination about whether a discharge may affect a neighboring state/authorized Tribe (*Fond du Lac Band of Lake Superior Chippewa v. EPA*, 519 F.Supp.3d 549 (D. Minn. 2021)).<br>• Rule provided that if EPA determines that the discharge from a project may affect water quality in a neighboring jurisdiction, EPA shall notify the neighboring jurisdiction, certifying authority, Federal agency, and applicant.<br>• Required EPA to send any materials it reviews to the neighboring state/authorized Tribe. | • Provided that the Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction.<br>• Defined what EPA would have to provide to neighboring states and authorized Tribes when it determines that a discharge may affect a neighboring state or authorized Tribe.<br>• Required EPA to notify the neighboring state or authorized Tribe, Federal agency, project proponent, and the certifying authority.<br>• Clearly stated that a Federal license or permit may not be issued until the neighboring jurisdictions process concludes. | • Clarifies that EPA must determine whether a discharge "may affect" water quality in a neighboring state or authorized Tribe.<br>• Defines what EPA provides to neighboring states and authorized Tribes when it determines that a discharge from the project may affect a neighboring state or authorized Tribe.<br>• Requires EPA to notify the neighboring state or authorized Tribe, Federal agency, and project proponent.<br>• Clearly states that a Federal license or permit shall not be issued until the neighboring jurisdictions process concludes. |
| *Neighboring state/authorized Tribe "will violate" objection* | | |
| • Not specified in rule. | • Required the neighboring jurisdiction to notify EPA and the Federal agency if it objected to the issuance of the Federal license or permit.<br>• Defined what the neighboring jurisdiction must provide in its notification to EPA and the Federal agency. | • Requires the neighboring jurisdiction to notify EPA and the Federal agency if it objects to the issuance of the Federal license or permit.<br>• Defines what the notified neighboring jurisdiction must provide in its notification to EPA and the Federal agency. |
| *Objection and hearing process* | | |
| • Required the Federal agency to notify EPA at least 30 days before the public hearing.<br>• Required EPA to provide its evaluation and recommendations at the public hearing, | • Required the Federal agency to notify EPA at least 30 days before the public hearing.<br>• Required EPA to provide its evaluation and recommendations at the public hearing. | • Allows the notified neighboring jurisdiction to withdraw its objection prior to the public hearing. |

| Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule | | |
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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| including recommendation as to whether and under what conditions the license/permit should be issued. | • Clarified that the license or permit may not be issued if additional license or permit conditions cannot ensure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements. | • Explicitly reiterates that the Federal agency must hold a public hearing if the notified neighboring state or authorized Tribe requests one.<br>• Requires the Federal agency to provide public notice to interested parties at least 30 days prior to the hearing.<br>• Requires EPA to provide its evaluation and recommendations at the hearing.<br>• Clarifies that the license or permit may not be issued if additional license or permit conditions cannot ensure that the discharge from the project will comply with the notified neighboring jurisdiction's water quality requirements. |
| **Treatment in a Similar Manner as a State for Section 401** | | |
| • Rule did not provide Tribes with the opportunity to receive TAS solely for section 401.<br>• In practice, Tribes received TAS for section 401 by receiving TAS for water quality standards.<br>• Tribes without TAS were unable to participate as a neighboring jurisdiction under the section 401(a)(2) neighboring jurisdictions process. | • Rule did not provide Tribes with the opportunity to receive TAS solely for section 401.<br>• In practice, Tribes received TAS for section 401 by receiving TAS for water quality standards.<br>• Tribes without TAS were unable to participate as a neighboring jurisdiction under the section 401(a)(2) neighboring jurisdictions process. | • Provides Tribes with a new section 401-specific alternative option for obtaining section 401 TAS without also obtaining TAS for water quality standards.<br>• Provides Tribes with an option to obtain TAS solely for participating as a neighboring jurisdiction in the section 401(a)(2) neighboring jurisdictions process. |
| **EPA as a Certifying Authority** | | |
| • Specified how/to whom EPA must provide public notice on a certification request when it is the certifying authority. | • Clarified when EPA acts as the certifying authority on behalf of a jurisdiction.<br>• Required EPA to provide public notice within 20 days of receiving a certification request to parties known to be interested in the | • Clarifies when EPA acts as the certifying authority on behalf of a jurisdiction.<br>• Requires EPA to provide public notice within 20 days of the date that the request for certification was received, but enables EPA to |

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| **1971 Rule and Practice** | **2020 Rule** | **Final Rule** |
| • Limited the subject matter of a public hearing to whether EPA should grant or deny a request for certification. | proposed project or in the receiving waters into which the discharge may occur.<br>• Did not limit the scope of a public hearing on a certification request.<br>• Allowed EPA to request additional information from a project proponent on a request for certification, but only if the initial request is made within 30 days of receipt of the certification request.<br>• Limited EPA's request for additional information to only that which was within the scope of certification, directly related to the discharge from the proposed project and its potential effects on receiving waters, and able to be collected or generated in the reasonable period of time. | determine the best methods/means to provide the public notice.<br>• Clarifies that EPA must provide an opportunity for public comment after providing notice.<br>• Does not limit the scope of a public hearing on a request for certification. |
| **Technical Assistance** | | |
| • EPA may, and upon request shall, provide Federal agencies with determinations, definitions, and interpretations with respect to the meaning and content of federally approved water quality standards, and findings with respect to the application of all applicable water quality standards.<br>• EPA may, and upon request shall, advise Federal agencies as to the status of compliance by dischargers with the conditions and requirements of applicable water quality standards.<br>• EPA may advise Federal agencies with respect to conditions to achieve compliance with the CWA's purpose where there are no applicable water quality standards. | • EPA may, and upon request shall, provide Federal agencies, certifying authorities, and project proponents with relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements. | • Upon request, EPA must provide Federal agencies, certifying authorities, and project proponents with 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 project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria. |