

Attachment 1

I. Additional Comments

1. Scope of Certifications and Water Quality Reviews. As noted in *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006), and described in the 2010 EPA WQC Handbook and in EPA filings in Court cases prior to 2017 involving section 401, the scope of the water quality review is broad. MDE agrees that the scope of 401 review is broad and MDE supports the continued authority of the State to review an entire project for actions, deliberate or inadvertent, during construction, operation, maintenance and repair, which may result in any discharge to a navigable water.

MDE believes that §401 WQC is intended to ensure that no federal license or permits would be issued that would prevent a state or tribe from achieving State water quality goals and requirements, or that would violate CWA provisions.

MDE believes section 401 of the CWA provides MDE with the authority to impose “other limitations” on the project to assure compliance with other provisions of State law. We note that this interpretation is supported by the plain wording of the statute, by prior EPA interpretations, and by court decisions.

2. Criteria for Evaluating Interstate Actions. States would benefit and the regulations would benefit from a better articulation of the procedures and criteria which will be used by USEPA in determining whether or not a discharge from a federally permitted activity **may affect** a downstream State. This is of critical importance and interest to Maryland, given our extensive investment in meeting Chesapeake Bay TMDL requirements. These criteria should be included in any proposed regulations.
3. Time frame for review of a §401 certification request and the role of States in determining what information is reasonable for a particular project. MDE believes that federal agencies responsible for issuing permits and licenses should be required to work collaboratively with organizations representing State water programs (e.g., Association of Clean Water Administrators, Association of State Wetland Managers), as well as individual States, to ensure that timeframes for §401 WQC are achievable. The determination of what is a reasonable timeframe for a §401 WQC for a particular type of federal license or permit (not to exceed 1 year) should be arrived at in partnership with States in the spirit of cooperative federalism. Federal agencies alone should not set the time frame for review and decisions on certification.

MDE believes that additional guidance and revisions to existing USEPA regulations are needed to ensure that a request is complete for a §401 WQC evaluation and includes all the information, data, and analyses needed by a State in order for it to determine whether to approve, approve with conditions or deny certification within the prescribed

timeframes. The timeline for §401 WQC should not be considered to be started until the request is considered a bona fide request—which means that it includes all the needed data, information and analyses as determined to be needed by the State in which the §401 WQC is needed.

The nature and scope of information needed is best determined by the States and is commensurate with the scope of the project and its potential impacts. We strongly recommend that applicants be required to communicate with States prior to submission of requests to reach agreement on information needs and that the review period not be considered to have been started until all of the requested information is available and submitted along with the request for 401 certification.

The lack of timeframes for federal review and notification to States/tribes about “deficient” conditions allows for the possibility that States will have no time to properly respond, after which the federal agency may reject or declare that the State /tribe has waived certification. This is unacceptable and could result in waivers where there are significant water quality issues which need to be addressed.

3. Definitions. The following terms are proposed to be defined: “condition,” “discharge,” “failure or refuse to act,” “receipt,” and “water quality requirements.” In general, these definitions are written in a manner which would limit State/tribal authority. MDE strongly objects to the definitions proposed as they individually and collectively serve to limit state authority.
4. Need to promote timely Federal-State cooperation and collaboration. We agree that there is a need for timely Federal-State cooperation and collaboration. This should involve coordination during early parts of the planning process for the project, as alternatives are discussed and need is documented. However, the process is ultimately destined to fail if a request for certification to a state is made prior to completing the analyses required for the development of an environmental impact statement, and possibly the preceding environmental assessment. Information needed to develop these documents include information to characterize the resources in the entire project, and potential alternative locations, which may be affected. This information is an essential part of the determination for whether or not a project will meet state water quality requirements. If the certification request is made too early, a one-year time frame will typically be inadequate to certify that the project will meet water quality requirements, and, the certifying agency may then have to deny the application. If EPA moves forward to provide the federal permitting agency with the authority to review and “approve” denials and the federal agency declares waiver in cases where a State denies on the basis of water quality concerns but has insufficient information to more precisely quantify those concerns, States will likely challenge such waiver determinations as being inconsistent with the CWA.
5. Types of conditions that may be appropriate to include in a certification. MDE believes that section 401 of the CWA envisions the broad review over all aspects of pre- through

post-construction actions and that appropriate conditions may also be wide ranging and commensurate with the scale and potential impacts of the project. All are related to ensuring that waters meet designated uses and other appropriate water quality-related requirements of State law. These conditions include, but are not limited to:

- a) Pre-construction monitoring and assessment of resources;
- b) Use of certain construction practices and equipment;
- c) Time of year and other seasonal restrictions on construction or operation;
- d) Hiring of an independent environmental inspector, answerable to the certifying agency; to oversee construction;
- e) Additional monitoring for construction and post-construction impacts, discharges, and thresholds for meeting water quality standards;
- f) Preparation and implementation of a plan approved by the certifying agency to address inadvertent discharges and remediation which may be required by the certifying agency;
- g) Plan and performance standards for required compensatory mitigation and restoration of temporary impacts during construction;
- h) Validation of §401 certification contingent upon receiving other approvals; and
- i) Financial assurances for successfully meeting requirements.

Special conditions are frequently based on the designated uses of a water, which are in turn often based on the growth and propagation of aquatic life and wildlife as well as other uses. For example:

- The timing to conduct the activity may be restricted to times outside of reproductive season for certain fish;
- The design of any structure must allow for passage of aquatic life. Culverts may have to be bottomless to maintain natural stream bottoms for aquatic life and passage, also, flows through the pipe must be at non-erosive velocities to prevent erosion in the downstream channel. Recent work is focusing on velocities which may be blockages to passage of aquatic life, as well as the structure itself being a blockage;
- Untreated stormwater from impervious surface is typically not allowed due to the entry of pollutants into the water;
- Temporary disturbances, such as for installation of utility lines in wetlands, are conditioned to ensure that the activity is truly temporary, requiring re-filling trenches with the original soil material to pre-existing elevations, and re-planting with native vegetation. This allows for continued presence of wetlands and their associated designated uses;
- For certain utility lines, have a management plan in place for spills containing pollutants which may enter waters;
- Requiring use of certain practices and equipment, and the hiring of independent environmental monitors for activities and resources which are so sensitive, that

only precise actions will allow certification that the overall activity can meet water quality standards. These conditions are also useful in minimizing disturbance of soils which characteristically may have low pH, which, if released into a water, may violate the numerical criteria for pH in the water, thus violating a water quality standard;

- Limiting the loss of tree cover and shade over a water, when loss of this shade would result in heating the water and failing to meet temperature criteria for the water.

6. EPA's Proposed Rule Undermines the Maryland CMP and Does Not Comply with Federal Consistency Review requirements¹. The Federal Consistency provision is a cornerstone of the National Coastal Zone Management Act (CZMA) Program and a primary incentive for states' participation. Like section 401 of the Clean Water Act, federal consistency is a cooperative federalism that works. Federal Consistency provides states with an important tool to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies and to work with nonfederal entities seeking federal approval and authorizations. It is the lynchpin of vital federal-state-industry coastal coordination to ensure balance among competing interests such as energy development, tourism, recreation and ecological protection.

EPA's proposed rule has far-reaching, adverse consequences on state authorities and operations. By weakening and restricting the 401 certification process, the rule undermines the effectiveness of State Coastal Management Programs (CMPs) in achieving CWA goals and applying federal consistency to protect coastal resources and avoid or minimize coastal use conflicts. The proposed rule:

- a. Fails to consider interactions of 401 certification and federal consistency. In States such as Maryland, section 401 reviews and conditions are often intertwined with federal consistency reviews and conditions. EPA failed to address how the proposed 401 rule impacts this nexus in state operations and activities.
- b. Impacts review duration and timing. EPA's proposed rule proposes to let federal permitting agencies prescribe their own "reasonable" periods of time – but in no event should these be shorter than the federal consistency period (6 months) for activities in the coastal zone. Doing so creates serious coordination issues and problems.
 - a. Weakens the Maryland CMP by limiting the "scope" of 401 certification and conditions. Proposed provisions that limit the scope of 401 certification and

¹ Maryland's Coastal Management Program (MD CMP) was established through an Executive Order and approved by NOAA in 1978. The Coastal Program is a networked program and is comprised of several state planning and regulatory programs, as well as the Chesapeake and Coastal Bays Critical Areas Protection Program. The Department of Natural Resources is the lead agency. Maryland's coastal boundary follows the inland boundary of the counties (and Baltimore City) bordering the Atlantic Ocean, Chesapeake Bay, and the Potomac River (as far as the municipal limits of Washington, D.C.).

conditions to “EPA-approved CWA regulatory program provisions” significantly weaken State CMP implementation. Conditions are routinely coordinated between 401 and federal consistency. The proposed 401 rule would take many common 401 conditions off the table. This would mean that the Maryland CMP would have to pick them up and make sure they are included in federal consistency conditions. This could require a lot of additional work and coordination issues not evaluated by EPA in its proposal nor in its federalism review nor its “economic analysis.”

Finally, EPA’s proposed rule itself is likely subject to section 307 of the Coastal Zone Management Act (15 CFR Subpart C – Consistency for Federal Agency activities.) since there are obvious foreseeable coastal effects of a rule that diminishes State authority to protect its waters from pollution associated with federally permitted activities.² These “effects” include directly affecting the viability of State CMP and CWA regulatory authorities and operations. By weakening state CMPs, the rule will likely allow increased degradation of coastal resources by restricting regulatory oversight, limiting project reviews and reducing public input and oversight. It could result in new uses, due to lack of adequate conditions and oversight, that are incompatible with existing uses, inconsistent with enforceable policies and damaging to the value and sustainability of coastal resources. These obvious foreseeable coastal effects, both direct and indirect, should have triggered EPA to make a federal consistency determination under section 307 of the CZMA. Instead, the agency neglected its statutory responsibility to address the rule’s consistency with Maryland’s Coastal Management Program as well as those of other State CMPs.

II. Responses to Specific EPA Requests for Comment

- 1) Request for comment: whether it should rescind its June 7, 2019 guidance upon completion of this rulemaking or whether separate guidance would be helpful on implementation of the provisions that are finalized in this proposal.

Response: EPA should not issue any guidance to implement the provisions that are finalized in this proposal until all legal challenges to the final rule are fully resolved.

² § 930.31 Federal agency activity. (a) The term “Federal agency activity” means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term “Federal agency activity” includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency’s proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. “Federal agency activity” does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

- 2) Request for comment: The EPA solicits comments from state and tribal governments, and the public at large regarding the need for, and potential benefits of, a consistent, national and state regulatory approach to section 401 and how the EPA may best promote such consistency.

Response: Section 401 gives broad authority to states. Given the diversity of water resources and state programs, we do not believe that there is great need for a nationwide approach beyond process-related requirements which will ensure a more efficient review process. These include a requirement that applicants obtain from the state prior to requesting a 401 WQC a list of information needs and a requirement that all of the requested information be provided at the time of a "request".

- 3) The EPA solicits comment on whether the Agency should include additional procedures in its final regulations to ensure that the public is appropriately informed of proposed federally licensed or permitted projects, potential discharges, and related water quality effects. At a minimum, such procedures could include public notice and hearing opportunities, but they could also include mechanisms to ensure that the certifying authority is in a position to appropriately inform the public, as required by section 401(a)(1).

Response: Public notice should be required and a Hearing should be required whenever it is requested. It is critical that the public have a complete request (with all needed information) in order for the public to have a legitimate opportunity to comment. This should be factored into the issue of what is the minimum period of time States are given to make their decisions.

- 4) The Agency also solicits comment on whether it would be appropriate or necessary to require certifying authorities to submit their section 401 procedures and regulations to the EPA for informational purposes.

Response: MDE does not believe that it is necessary to require certifying agencies to provide their procedures and regulations to EPA. Such information is available upon request, and is typically available on agency websites.

- 5) Request for comment: The EPA requests certifying authorities and project proponents to submit comment on prior experiences with undertaking the certification process and later determining that the proposed federally licensed or permitted project would not result in an actual discharge.

Response: MDE is unaware of such examples.

- 6) The EPA also requests comment on whether there are specific procedures that could be helpful in determining whether a proposed federally licensed or permitted project will result in an actual discharge.

Response: MDE notes that Section 401 applies to activities which may result in a discharge, not that a discharge is a certainty.

- 7) Request for comment: Finally, the EPA requests comment on how project proponents may establish for regulatory purposes that there is no potential discharge and therefore no requirement to pursue a section 401 certification.

Response: Project proponents lack authority for determining for regulatory purposes, that there is no potential discharge. The determinations are made by the relevant federal and state agencies. Project proponents should be required to evaluate and assess all aspects of the proposed activity for any potential releases of pollution to waters whether through accidental or purposeful means.

- 8) The Agency is not proposing to further define this list but requests comment identifying other federal licenses or permits that may trigger the section 401 certification requirement.

Response: MDE's requests for 401 WQC have been limited to actions by FERC and USACE. However, any federal license or permit involving a land disturbance, in which pollution may enter a water of the US, could be viewed under the CWA as needing a 401 certification.

- 9) Request for comment: *Certification request* means a written, signed, and dated communication from a project proponent to the appropriate certifying authority that:
1. identifies the project proponent(s) and a point of contact;
 2. identifies the proposed project;
 3. identifies the applicable federal license or permit;
 4. identifies the locations and types and nature of any discharge that may result from the proposed project and the location of receiving waters;
 5. includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge;
 6. includes a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received; and
 7. contains the following statement: *'The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable time frame.'*
- a) The EPA solicits comment on whether this list of documents and information is appropriately inclusive, whether it is specific enough to inform project proponents of the submittal requirements, and whether it is clear enough to avoid subjective determinations by a certifying authority of whether submittal requirements have been satisfied.

Response: MDE objects to including these items in a definition. Information requirements are better placed in the body of regulation, rather than trying to regulate wholly by definition.

MDE also finds the list to be inadequate for required information. We note in particular that there is no information on the amount of discharge. And, downstream waters as well as upstream waters whose water quality may be impacted by the project are not required to be identified.

The nature and scope of information needed is best determined by the States and is commensurate with the scope of the project and its potential impacts. The decision as to what information is needed should be provided by the State to the applicant prior to the applicant making a request and a request should not be considered “bona fide” if it is not accompanied by all of the information that State has indicated it needs to complete its review.

Methods of construction and proposed compensatory mitigation should also be stated, as much as is known.

Existing information on resources and their condition should be included.

- b) The EPA solicits comment on whether the fourth and fifth items proposed to be required in a certification request are sufficiently broad to capture all potential federal licenses or permits.

Response: We cannot determine if the information is adequate for all federal licenses and permits; since we have not been provided with the full suite of licenses and permits issued by all federal agencies.

- c) The Agency solicits comment on whether it should include "any applicable fees" in the definition of certification request.

Response: Any reference to fees should be in the body of regulation rather than the definition.

- d) Pre-proposal recommendations to the EPA also requested that the Agency require project proponents to include existing documentation or reports showing prior contamination at the proposed federally licensed or permitted project site. The EPA solicits comment on whether this would be an appropriate requirement for all certification requests, or whether this information is best requested on a case-by-case basis by the certifying authority.

Response: It is appropriate to include any reports of contamination when the reports exist.

- e) Additionally, the EPA solicits comment on whether such documentation or reports would be appropriate if the permit or license is being reissued or amended, or only for initial license or permit processes.

Response: See previous response for d).

- f) The EPA also solicits comment on whether the Agency should generate a standard form that all project proponents can use to submit certification requests. A standard form could help project proponents provide all necessary information and help certifying authorities quickly identify all components of the certification request. If the EPA promulgated a standard form, it could include all seven items included in the proposed definition of certification request.

Response: MDE does not believe that it will be possible to develop a national standard form to meet needs of all certifying agencies, given variety of resources and authorities. Forms would be best developed by the individual certifying agency.

- 10) Request for comment: This proposal requires a project proponent to identify the location of a discharge in the certification request. To meet this requirement, the EPA recommends that the project proponent provide locational information about the extent of the project footprint and discharge locations, as shown on design drawings and plans. Project proponents should consider, but are not limited to, using the following formats:

- 1) ArcGIS File Geodatabase with accompanying Feature Classes
- 2) ArcGIS Shapefile
- 3) DXF or DWG (CAD files) projected to WGS 84 Decimal Degrees
- 4) KMZIKML (Google Earth)

Alternatively, the project proponent might consider identifying discharge locations on readable maps.

Response: MDE concurs that the suggested formats are acceptable, so long as other approaches may be found appropriate. Language must be written so that other methods may be used, as required by the certifying agency, and accommodate for change which would occur between revisions to regulation. Alternatively, the language may simply require location information be provided in the format required by the certifying agency.

- 11) Request for comment: The EPA solicits comment on whether the location of all potential discharges from proposed federally licensed or permitted projects can be identified with such specificity or if other methods may be more appropriate for different types of activities.

Response: There are sufficient technical instruments and software which allows for sufficiently precise locations for planned discharges. Project proponents must also use the tools to demonstrate sites of potential unplanned or inadvertent discharges.

- 12) Request for comment: The Agency requests comment on whether federal agencies should be subject to the same "certification request" submittal requirements as proposed, or if they require different considerations and procedures than section 401 certification requests by other nonfederal agency project proponents.

Response: Federal agencies should be subject to the same substantive requirements as nonfederal project proponents, recognizing of course that the Federal agency cannot issue a permit to itself.

- 13) Request for comment:

- a) The Agency solicits comment on other examples of certification conditions that may have been unrelated to water quality.

Response: MDE is not aware of conditions not associated with water quality, except for those in authorizations in which water quality is merged with other State requirements. Moreover, since water quality standards include designated uses and designated uses are often an expression of what one expects holistically from an aquatic system which itself functions as part of a larger ecosystem, even conditions relating to maintaining a healthy riparian area adjacent to a water can be viewed as being related to water quality.

- b) *Condition* means a specific requirement included in a certification that is within the scope of certification.

Response: We do not believe that it is necessary to define such a commonly used term as "condition" except if your purpose is to constrain State authority. Needless to say, MDE does not agree that what EPA is proposing with regard to diminishing State authority is lawful.

- c) Second, to assure that such "conditions" are appropriately tailored to the scope and authorized by law, this proposal would require the following information be provided for each condition included in a certification:
1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
 2. A citation to federal, state, or tribal law that authorizes the condition; and
 3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

Response: MDE objects to providing rationale, citation, and statement as described in items 1-3 in this heading. Under the CWA, certifying authorities have broad discretion in adding conditions under the CWA and under other State authorities. Project proponents may dispute conditions through the State court system and make whatever arguments they desire.

- d) The EPA solicits comment on whether the regulatory text should clarify that deficient conditions do not invalidate the entire certification or the remaining conditions.

Response: MDE does not believe that the CWA provides federal agencies with the authority to review and/or reject conditions. The State court system and certifying agency authorities make such decisions.

- e) The EPA also solicits comment on whether the proposed opportunity to remedy deficient conditions would be helpful and an appropriate use of federal agency resources, whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of EPA authority to establish through regulation.

Response: See previous response in d) above.

- f) The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient conditions, even if the reasonable period of time has not expired.

Response: Certifying agencies may modify conditions as appropriate under their authorities.

- 14) Request for comment: The proposed regulations clarify the EPA's interpretation that the appropriate scope of review under section 401(a) is limited to the potential water quality impacts caused by the point source discharge from a proposed federally licensed or permitted project to the waters of the United States.

The scope of certification also extends to the scope of conditions that are appropriate for inclusion in a certification- specifically, that these conditions must be necessary to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements, as defined at § 121.1 (p) of this proposal.

- a) The EPA solicits comment on the extent to which project proponents have received non-water quality related conditions in certifications.

Response: MDE is not aware of conditions not associated with water quality, except for those in authorizations in which water quality is merged with other State requirements.

- b) The EPA also solicits comment on whether this proposal regarding the scope of certification and conditions is an appropriate and useful way to ensure that federal licenses will not contain non-water quality related certification decisions and

conditions, or if there are other more useful and appropriate tools or mechanisms the EPA should consider to address these concerns.

Response: The scope is not appropriate. Neither EPA nor any other federal agency are the responsible entities for determining appropriateness of conditions from certifying agencies. These decisions should be addressed in State court or through other administrative appeals processes of the certifying agencies.

- 15) Request for comment: EPA solicits comment on its interpretation of the phrase "any other appropriate requirements of State law" as limited to requirements in EPA-approved state and tribal CWA regulatory programs.

Response: We do not believe that the EPA interpretation is correct. The CWA gave broad authority to States/certifying agencies in attaching conditions, and this authority cannot be changed by EPA action.

- a) In particular, EPA solicits comment on whether EPA should interpret that phrase more broadly to include *any* requirement of State law, any *water quality related requirement* of State law (regardless of whether it is part of an EPA-approved program), or any different universe of state or tribal requirements (reflecting, or not, CWA sections or programs) that might be broader or narrower in scope than this proposal.

Response: The phrase should be interpreted broadly to allow States/certifying agencies broad authority for appropriate conditions. At a minimum it should include any water quality related requirement of State law (regardless of whether it is part of an EPA-approved program).

- b) The EPA also solicits comment on whether this proposal will facilitate enforcement of certification conditions by federal agencies, or whether there are other approaches the Agency should consider beyond requiring a citation to state, tribal, or federal law or explaining the reason for a condition.

Response: Once incorporated into a federal permit, these conditions are enforceable under the authority of the statute which governs the federal permit which was issued. No further action is needed by EPA. If necessary, legal authorities and rationale can be provided by the State/certifying agency upon request if there is a need.

- c) EPA solicits comment on whether given the explicit limitations on conditions in this proposal, it may still be necessary or appropriate to expressly preclude these or other types of conditions that may create regulatory uncertainty.

Response: It is not appropriate nor legal under the CWA for EPA to place limitation on conditions, or to expressly preclude any conditions.

- 16) Request for comment: EPA is soliciting comment on an alternate approach that it is considering taking whereby the Agency would interpret CWA sections 401(a) and 401(d) as providing two different scopes for action on a certification request.

Specifically, section 401(a) could be read to authorize review of a section 401 certification only on the basis of determining whether the discharge would comply with the enumerated sections of the CWA; and section 401(d) could be read to authorize consideration of "any other appropriate requirement of State law" only for purposes of establishing conditions once the certifying authority has determined to grant certification. Under this alternate approach, a certification request could be denied only if the certifying authority cannot certify that the discharge will comply with applicable provisions of CWA sections 301,302, 303,306 and 307.

This proposal would also define the term "any other appropriate requirement of State law" to mean EPA-approved state or tribal CWA regulatory program provisions (e.g., state water quality standards, NPDES program provisions). The EPA solicits comment on this alternate interpretation.

The EPA also solicits comment on whether establishing two different scopes for action under section 401 would clarify the certification process or if it could cause further confusion or potential delays in processing certification requests.

Response: We do not see the actions as being separate and do not believe that it would clarify the certification process. We disagree with the 2019 EPA interpretation of "any other appropriate requirement of State law" and believe that the CWA and the legislative history is quite clear that this authority extends beyond EPA-approved State or tribal CWA regulatory provisions.

- 17) Request for comment: The Agency solicits comment on whether there is any legal basis to allow a federal agency to extend the reasonable period of time beyond one year from receipt.

Response: MDE strongly supports the one-year time frame beginning only after the requestor provides to the certifying agency all the information it needs in order to complete a thorough evaluation of water quality impacts. In addition, in a case where an applicant withdraws a request rather than be issued a denial (as appeared to be the case with Exelon and their Conowingo Dam 401 WQC request in 2014), EPA should indicate in this regulation what the State is to do when there is nothing for the State to act upon. The regulation needs to be clear as to what the law requires. States would want to protect against future claims of waiver in such a circumstance.

- 18) Request for comment: The Agency solicits comment on whether the pre-filing meeting process would be helpful for other certifying authorities, whether it is an appropriate mechanism to promote and encourage early coordination between project proponents and certifying authorities, and if there are other options that may also be appropriate from a regulatory perspective.

Response: MDE supports pre-application communication or filing requests for early coordination and identification of potential issues and information needs.

- 19) Request for comment: EPA solicits comment from certifying authorities on the extent to which section 401 programs are funded by states and tribes and the number of full or part time employees that are assigned to evaluate and take action on certification requests.

Response: MDE's 401 program is integrated with implementation of independent State authorities for tidal and nontidal wetlands, waterways, and their 100-year floodplain. If Maryland lacked these State authorities, MDE would have relied heavily on 401 certification for reviewing the approximately 2,800 applications received each year.

- 20) Request for comment: EPA solicits comment on the responsibilities of federal agencies, ways to facilitate technical and procedural information sharing among federal agencies, project proponents, and certifying authorities, and ways to provide technical and procedural assistance to project proponents and certifying authorities.

Response: The CWA Section 401 and the legislative history are clear in establishing a very limited role for the federal government in implementing Section 401. Section 401 certification decisions are not to be reviewed and "approved" by EPA per the clear language of 401 and the legislative history, nor does Section 401 provide the permitting agencies with any review and approval authority over State decisions. In terms of ways to provide support to States, MDE recommends EPA provide funding support for regional information exchange, such as the Mid-Atlantic Wetland Workgroup, and NEBAWWG (New England Biological Assessment of Wetlands Work Group); increase funding for State Wetland Program Development Grant; and provide funds for program implementation.

- 21) Request for Comment: In setting the reasonable period of time for a certification-either on a project-by-project basis or categorically through a rulemaking-the EPA proposes to require federal agencies to consider:

1. The complexity of the proposed project;
2. The potential for any discharge; and
3. The potential need for additional study or evaluation of water quality effects from the discharge.

- a) The EPA solicits comment on whether these factors are appropriate and whether there are other factors that a federal agency should consider when establishing the reasonable period of time (e.g., permit type within a federal agency, certifying authority resources and capacity to review).

Response: MDE recommends adding "the extent of impacts from the discharge" to the factors influencing the time frame for review as well as the procedural requirements of

existing State law. MDE strongly recommends that EPA retain 6 months as the minimum amount of time allowed for State actions.

- b) The EPA also solicits comment on whether the Agency should establish reasonable periods of time for different federal permit types on a categorical basis in its final rule.

Response: A minimum of 6 months with the ability for a State to obtain another 6 months for good cause should be the general rule.

- c) The Agency is also soliciting comment on an alternate approach that it is considering taking whereby the EPA would retain the language in its existing certification regulations that specifies a reasonable period of time "shall generally be considered to be 6 months, but in any event shall not exceed 1 year." 40 CFR 121.16(b).

Response: The existing language is acceptable, however, if a certifying agency lacks all necessary information to complete its review, even a 1-year time frame would be inadequate. Thus, it is critical that EPA require applicants to obtain from the State its list of information needs prior to filing the request and for the "clock" to not start until the required information has been provided.

- d) In the event the EPA pursues this alternate approach, the Agency requests comment on whether six months is an appropriate general rule, if a longer or shorter period of time would be more appropriate as a general rule, and whether having such a general rule is appropriate. Such alternate approach would retain the federal agencies ability to determine the reasonable period of time but would allow for a default reasonable period of time in the event that a federal agency fails to establish a reasonable period of time or prefers to rely on the default.

Response: MDE recommends no less than a 6 month default timeframe.

- 22) Request for comment: Under this proposal, upon submittal of the request for certification, the project proponent would contact the federal agency to provide notice of the certification request. Within 15 days of receiving a notice of the certification request from the project proponent, the federal agency would provide, in writing, the following information to the certifying authority: the applicable reasonable period of time to act on the request, the date of receipt, and the date upon which waiver will occur if the certifying authority fails to act.

The EPA solicits comment on whether the proposed process is the most efficient way to provide clarity and transparency, or if there are other procedural or administrative mechanisms that may be more effective.

Response: There is no accountability for federal agencies failing to provide information to the certifying agency within 15 days.

In an alternate approach the EPA could require federal agencies to post the reasonable period of time notification on a public website, instead of requiring it be sent to the certifying authority.

Response: Federal agencies should notify the certifying agency in writing for each project, or according to procedures agreed upon by the federal and certifying agencies.

- 23) Request for comment: The EPA also solicits comment on whether, if a federal agency promulgates reasonable periods of time categorically based on project type, the notification process in this proposal would still be necessary.

Response: Notification should still be required.

- 24) Request for comment: The EPA solicits comment on whether FERC's hydropower regulations, or other existing federal regulations, provide clear enough procedure and transparency that the additional notice to the certifying authority proposed in this rule would be redundant, unnecessary, or a waste of resources.

Response: MDE has found that coordination with FERC has been lacking in comparison to coordination with the U.S. Army Corps of Engineers. FERC should work more closely with certifying agencies early in their review process, when project alternatives and locations may be discussed. Notification from FERC should be required.

- 25) Request for comment: *Fail or refuse to act* means the certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time.

Response: We do not believe that this phrase needs to be defined. Certifying agencies should conduct reviews according to the CWA, not as how the CWA is interpreted in this proposal. MDE does not support limiting authority through restrictive definitions of commonly used terms.

- 26) Request for comment: This proposal also includes a process by which, if a certifying authority denies certification on grounds outside the scope of certification, and the reasonable period of time has not yet expired, the federal agency may provide an opportunity for the certifying authority to remedy the deficient denial, so long as the remedy occurs within the original reasonable period of time. This process is intended to promote actions by certifying authorities that are within the scope of certification and provide an ability to remedy deficient denials so long as it does not extend the reasonable period of time, and therefore does not delay the federal licensing or permitting process.

The Agency solicits comment on whether the opportunity to remedy deficient certifications or conditions would be helpful and appropriate, or if it could create additional delays in the federal licensing or permitting process.

The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient denials, even if the reasonable period of time has not expired.

The Agency also solicits comment on whether there are other mechanisms that may also promote timely and appropriate action on certification requests.

Response: As MDE as previously commented, it would be the role of the State Courts, not the federal agencies, to review if challenged the appropriateness of any conditions.

- 27) Request for comment: The EPA solicits comment on whether this opportunity to remedy a deficient denial would be helpful and an appropriate use of federal agency resources, whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of Agency authority to establish through regulation.

Response: It is not the role of the federal agency to decide on the appropriateness of denials. This is a role for State Courts.

- 28) Request for comment: If the EPA in its discretion determines that a public hearing is appropriate or necessary, the Agency would, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony at a public hearing.

The Agency requests comment on whether providing public notice within 20 days of receipt is appropriate or whether more or less time would be appropriate.

Response: Hearings should be held when there is sufficient information available to inform the public, and allow for meaningful comment. A 30 day advance notice of a Hearing is the minimum that MDE would recommend. Our own regulations require 45 day notice of a Hearing.

- 29) The EPA seeks comment on the proposed pre-filing meeting process. The EPA is particularly interested in comments related to existing state, tribal or federal agency pre-filing notice or meeting requirements and whether such requirements have favorably affected the review and disposition of certification requests, particularly with respect to timely receipt of information relevant for reaching informed section 401 certification decisions.

The EPA also solicits comment on whether states, tribes and project proponents would like this pre-filing meeting process to be required for all certification requests, including those where the EPA is not the certifying authority, and what legal authority the EPA would have to impose such requirements on states and tribes through this rulemaking.

The EPA also solicits comment on whether such pre-filing meeting process, if adopted nationwide, should be mandatory or discretionary.

Response: MDE supports pre-application communication or filing requests for early coordination and identification of potential issues and information needs.

- 30) Request for comment: The EPA is also proposing that the Agency would have 30 days after the receipt of a certification request to seek additional information from the project proponent. Additional information may include more detail about the contents of the potential discharge from the proposed federally licensed or permitted project or specific information about treatment or waste management plans or, where the certification will also cover a federal operation permit, additional details about discharges associated with the operation of the facility.

Response: Since this proposal refers to circumstances where EPA is the certifying agency, we have no comment.

- 31) Request for comment:

- a) The EPA solicits comment on whether 30 days would be too long in cases with a 60-day reasonable period of time for a certifying authority to act on a request.

Response: A 30-day time frame, with a 60-day deadline for making a decision, are both inadequate timeframes for certain projects with large discharges or discharges into sensitive water resources.

- b) The EPA also solicits comment on other appropriate timelines for requesting additional information that would be consistent with the reasonable period of time established by the federal agency.

Response: Timelines are best set by the certifying agency, but must allow for sufficient information to be collected that may only be available seasonally.

- c) The EPA solicits comment on whether nationally consistent procedures for requesting and receiving additional information to support a certification request would provide additional clarity and regulatory certainty for certifying authorities and project proponents.

Response: We do not believe that nationally consistent procedures should be used, given the variability in water resources and State/tribal programs and certifying agency requirements. Certifying agencies would be the appropriate entity to set review procedures, information requirements, and deadlines which would be the most effective and efficient in reviewing projects.

- d) The EPA solicits comment on whether the procedures in this proposal should be encouraged or required for all certifying authorities, not just the EPA, and under what authority the Agency could require states and tribes to comply with these procedures.

Response: Since Section 401 of the CWA is largely about a State certification of federally-issued permits, MDE would argue that EPA and the Executive Branch

generally has little authority to dictate State process and procedures and content. No authority exists except the overall deadline in the CWA—and in this case, it would be helpful if EPA regulations required applicants to obtain from the State its information needs prior to making a request and if EPA regulations required to clock to start upon State receipt of all of the needed information.

- 32) The EPA is proposing that its notification to neighboring jurisdictions be in writing, dated, and state that the affected jurisdiction has 60 days to notify the EPA and the federal agency, in writing, whether or not the discharge will violate any of its water quality requirements (as defined at § 121.1(p) of this proposal) and whether the jurisdiction will object to the issuance of the federal license or permit and request a public hearing from the federal agency.

The EPA is also proposing that, if an affected jurisdiction requests a hearing, the federal agency forward the hearing notice to the EPA at least 30 days before the hearing takes place. The EPA would then provide its recommendations on the federal license or permit at the hearing. After considering the EPA and affected jurisdiction's input, the federal agency would under this proposal be required to condition the license or permit as necessary to assure that the discharge from the certified project will comply with applicable water quality requirements. Under this proposal, if additional conditions cannot assure that the discharge from the certified project will comply with water quality requirements, the federal agency would not issue the license or permit.

The EPA solicits comments on this approach and whether additional process or clarification is needed to explain the EPA's role in determining the effects on neighboring jurisdictions.

Response: Regulations should clearly describe the criteria and steps EPA will take in determining whether other jurisdictions may be affected. This is of great interest to Maryland, given the efforts to restore Chesapeake Bay. We also believe that 60 days would often not be an adequate time for determining if another jurisdiction's water quality requirements would be met or not, when adequate information is not provided by the project proponent. The other affected jurisdiction should have an equivalent period of time as the jurisdiction in which the discharge originated, as well as having authority to require additional information.

- 33) Request for comment: Under this proposal and consistent with the Act, a federal agency would be responsible for enforcing conditions included in a certification that are incorporated into a federal license or permit.
- a) The EPA requests comment on these provisions, and whether additional enforcement procedures may be appropriate to further define the federal agency's enforcement obligations. In limited circumstances, the EPA's existing certification regulations require the Agency to provide notice of a violation and allow six months for a project proponent to return to compliance before pursuing further enforcement. *See* 40 CFR 121.25.

Response: Federal enforcement provisions should be strengthened in regard to enforcing certification conditions. There should not be a six month delay in bringing a violation into compliance for water quality violations. Interim timelines should be established and violators should document progress toward bringing the violation into compliance.

Nothing in the CWA prevents a State/tribal certifying agency from pursuing their own compliance actions based upon their own authorities. The ability of State/tribal agencies to enforce their own authorities must remain.

- b) The Agency solicits comment on whether specific procedures such as these would be reasonable to include in section 401 regulations, or whether the general enforcement provisions of the CWA provide sufficient notice and procedure.

Response: Specific provisions which are no less stringent than other CWA provisions should be included for violations of certification conditions. Provisions should include coordination with affected jurisdictions.

- c) Once the certifying authority acts on a certification request, section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law; rather, that role is reserved to the federal agency issuing the federal license or permit.

The Agency solicits comment on this interpretation and whether clarification on this point may be appropriate to include in the regulatory text.

Response: Under State law certifying agencies may have enforcement authority to enforce conditions which are related to meeting state water quality requirements.

- d) Consistent with section 401, this proposal provides certifying authorities the opportunity to inspect the project facility or activity prior to operations, in order to determine if the discharge from the certified project will comply with the certification. After an inspection, the certifying authority would be required to notify the project proponent and federal agency in writing if the discharge from the certified project will violate the certification. The certifying authority would also be required to specify recommendations of measures that may be necessary to bring the certified project into compliance with the certification.

The Agency solicits comment on whether there are additional procedures or clarifications that would provide greater regulatory certainty for certifying authorities, federal agencies, and project proponents.

Response: Certifying agencies should be allowed to inspect facilities or activities during operation/construction. Maryland authorities specifically allow this under the Environment Article and State Government Article, Annotated Code of Maryland.

- 34) Request for comment: EPA's existing certification regulations provide the Agency a unique oversight role in the context of a modification to an existing water quality certification 40 CFR 121.2(b). The EPA is proposing to remove this provision from the regulatory text as it is inconsistent with the Agency's role for new certifications.

In the alternative, the Agency requests comment on whether it should maintain the existing oversight provision for certification modifications to provide a regulatory backstop for ensuring consistency with the CWA, given the relative infrequency of occurrence and the unique nature the circumstances giving rise to a modification request.

Response: MDE supports removing the oversight of EPA over modifications to certifications. Modifications should be accepted and incorporated as if they were the original certification.

- 35) The Agency also solicits comment on the appropriate scope of the EPA's general oversight role under section 401, whether the EPA should play any role in oversight of state or tribal certifications or modifications, and, if so, what that role should be.

Response: EPA should not have oversight of State certifications or modifications. The legislative history is clear that EPA is not to have review and approval authority over State certification actions. Any attempt by EPA through the "back door" to give itself that authority (for example, by limiting State review to only EPA approved CWA program provisions) is similarly unlawful.

- 36) The Agency also requests comment on the legal authority for a more involved oversight role in individual water quality certifications or modifications.

Response: We do not believe that there is legal authority for more involved federal oversight of water quality certifications or modifications. Per the CWA, certifications and conditions are to be part of the federal license or permit. EPA should not have oversight of State certifications or modifications. The legislative history is clear that EPA is not to have review and approval authority over State certification actions. Any attempt by EPA through the "back door" to give itself that authority (for example, by limiting State review to only EPA approved CWA program provisions) is similarly unlawful.

- 37) In addition, in light of the statute's one-year time limit for acting on a section 401 certification, the EPA solicits comment on whether and to what extent states or tribes should be able to modify a previously issued certification, either before or after the time limit expires, before or after the license or permit is issued, or to correct an aspect of a certification or its conditions remanded or found unlawful by a federal or state court or administrative body.

Response: States or tribes should have full authority, as included in their own certification program authorities, for modifying any certification as long as the license or permit is in effect. A list of modifications would include, but not be limited to: minor

modifications, such as a change in ownership, or major as in changes in discharge extent, modifications based on monitoring information or compliance issues, or other new information.