



Maryland

Department of the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Horacio Tablada, Secretary
Suzanne E. Dorsey, Deputy Secretary

August 1, 2022

Lauren Kasparek
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2022-0128, 40 CFR Parts 121, 122 and 124
Clean Water Act Section 401 Water Quality Certification Improvement Rule

Dear Lauren Kasparek:

This letter is in response to the U.S. Environmental Protection Agency (EPA) June 9, 2022 *Federal Register* notice EPA-HQ-OW-2022-0128; FRL-6976.1-01-OW for the proposed “Clean Water Act Section 401 Water Quality Certification Improvement Rule.” As the certifying agency for the state of Maryland, the Maryland Department of the Environment (MDE or Department) appreciates the opportunity to improve the water quality certification process and provide comments on the proposed rule.

The authority provided to states under Section 401 of the Clean Water Act (CWA) is essential to MDE’s ability to protect, preserve, and restore water quality, including designated uses, throughout Maryland. The current regulations unnecessarily increase state burdens, diminish state authority, and do not reflect the CWA objective of cooperative federalism, which is the shared responsibility by federal agencies and states to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹ The CWA clearly reserves to the states broad authority to make decisions, including decisions about what conditions are necessary in federally-issued permits to meet state requirements to protect water quality. In fact, under the CWA, it is the specifically enumerated “policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”² The Department supports EPA in the effort to improve clarity and restore balance in federal regulations and policies for the implementation of CWA Section 401, and the ability of states to protect their waters from discharges associated with federally-permitted activities.

This cover letter outlines a summary of MDE’s major concerns, including: 1) Certifying Agency Authority; 2) Inter-jurisdictional Discharges; 3) Modifications; 4) Certification Requests; and 5) Certification Decisions. MDE is providing comments in regard to the proposed regulatory language, as well as input on selected requests for comment from EPA. Please see Attachment I for more detailed information and comments.

¹ 33 U.S.C. § 1251(a).

² 33 U.S.C. § 1251(b) (emphasis added).

General comments:

- 1) **Certifying agency authority:** MDE supports the clarifications and revisions that ensure that federal agencies may not reject conditions imposed by certifying agencies. The proposed revision recognizes the state authority in imposing conditions, which may not be rejected by federal agencies, and reflects the legislative history of the CWA that Congress intended no federal role in the review and "approval" of state certification decisions under Section 401. Maryland believes that Section 401 envisions the broad review over all aspects of a project by a state to ensure that waters meet designated uses and other appropriate requirements of state law. The legislative history makes clear that Congress did not intend that EPA have any authority to independently review state certifications, and that Section 401(b) was intended to limit EPA's role to cases where a state has requested assistance. This proposed revision will prevent future situations such as a rejection of certification conditions. Maryland has firsthand experience as one of several states that had their Section 401 certifications for the 2021 finalized U.S. Army Corps of Engineers (USACE) Nationwide Permits "declined." Maryland met the requirements of the existing regulations and the accompanying conditions should have been recognized and accepted by USACE. Maryland's experience resulted in it expending limited existing resources in order to meet internal and federal requirements for individual water quality certifications for projects whose activities qualify for Nationwide Permits, which resulted in numerous individual water quality certification review and notice requirements and ultimately project delays for proponents. MDE supports the revision that returns the decision-making authority from the federal government to the states.

Maryland has some specific goals as well as an adaptation plan to improve climate resiliency. By acknowledging state authority and conditions, Maryland would be better positioned to include requirements, which prevent increased discharges from worsening water quality.

- 2) **Inter-jurisdictional discharges:** MDE continues to be concerned about the lack of articulated criteria to ensure that the EPA Administrator accurately determines whether there may be an effect on water quality in another state. Such criteria should be provided in regulation, and should address how EPA would determine when there may be an impact to another state; the information that EPA must provide to states; and a requirement to develop operating procedures with individual states to ensure effective implementation of this important provision of the CWA. This is of critical importance and interest to Maryland, given our extensive investment in meeting Chesapeake Bay Total Maximum Daily Load (TMDL) requirements. It is important that a jurisdiction's waters be adequately protected from pollution under the upstream state's law (with provisions for the downstream state to weigh in on discharge permits and standards) or, if not, be subject to federal jurisdiction so that the downstream state can, if need be, participate as a downstream state in the process of the permitting of discharges and the establishing of water quality standards for such a stream.

The ability to have involvement with determinations of inter-jurisdictional discharges and their review will aid Maryland in not only ensuring that increased discharges due to more intense precipitation events in upstream events will not adversely affect Maryland waters, but aid in equity and environmental justice for disadvantaged communities. Maryland would be able to develop criteria for review of inter-jurisdictional discharges, which may adversely and disproportionately affect disadvantaged communities.

MDE has listed some specific suggestions in Attachment I to suggest that federal agencies, the Regional Administrator, and certifying agencies work collaboratively to pre-identify locations, resources, or activity thresholds of concerns, and an earlier process to address concerns before a permit or license is issued.

- 3) **Modifications:** MDE strongly supports revisions to the regulations that allow certifying agencies to modify Section 401 certifications under certain circumstances and lessening the burden of the modification procedures by allowing modification without EPA Administrator approval, but with agreement between the federal licensing or permitting agency and the certifying agency. MDE does not agree with the position that a Section 401 certifying authority cannot revoke a grant of certification and then issue a denial, or waive Section 401 authority after issuing a certification. A certifying authority should be allowed to modify its Section 401 certification decision when new information is received pertaining to a project, which may substantively change the scope of work that may result in a discharge from the project affecting a state's water quality. Such a change is not to be made lightly. However, under certain circumstances, including where the discharges are substantially more severe than proposed, new information is obtained that contradicts the rationale for the certification decision, new information is available that assures water quality standards will be met, violations of related state regulations, submittal of fraudulent information or failure to comply with conditions, which are essential for compliance with water quality standards, the certification decision should be allowed to change. Such authority permits a state to reasonably consider all factors of water quality impacts, especially those that might be associated with issued general water quality certifications or those considered during emergency actions when there is an unacceptable threat to human life, water quality, or aquatic resources, or when it is necessary to abate a public health or safety threat.

- 4) **Certification requests:** MDE strongly supports the determination that certifying authorities have the authority to define in regulation the contents of a certification request and thereby define what constitutes a valid request for Section 401 certification. Based on MDE's experience regulating water quality matters, states should be permitted to determine if the information submitted is substantially complete in order to start the timeframe to make a decision. It is unreasonable to start the time period for a state certification decision before a state has received substantially all of the information needed to make that decision. Receipt of a valid request in accordance with a state's Section 401 certification requirements will trigger the start of the reasonable period of time, including the collaboration component of setting the reasonable period of time (not to exceed one year) with the federal permitting and licensing agency. MDE recognizes the challenges with the timing of a Section 401 certification request for all involved agencies and project proponents. We appreciate EPA's intention to ensure that adequate information is provided to Section 401 certifying authorities when a Section 401 certification request is submitted by a project proponent so that a decision can be made within a reasonable period of time.

MDE does not support the default due date of sixty (60) days should the federal and certifying authority not agree on the reasonable period of time. Defaulting to 60 days when agreement cannot be rendered under this revision undermines efficient review for federal consistency under the Coastal Zone Management Act (CZMA). Federal consistency review under the CZMA provides states with an important tool to manage coastal uses and resources, to facilitate cooperation and coordination with federal agencies, to work with non-federal entities seeking federal approval and authorizations, and to balance competing interests such as energy

development, tourism, recreation, and ecological protection. The regulations do not consider interactions of Section 401 certification and CZMA. MDE recommends that the timeframe for Section 401 review should never be shorter than the CZMA federal consistency period (6 months), particularly for activities in the coastal zone. It is unclear the role the project proponent has when "consulted" upon in determining the reasonable period of time; as such, the term "consulted" should be amended to "notice." For example, the project proponent should be provided notice of the determination of the reasonable period of time for the certifying authority to act when the determination is initially made or at any time it is extended, so long as the reasonable period of time does not exceed 1 year from the date of the valid Section 401 certification request as determined by the certifying authority.

MDE does not support the requirement that a draft federal permit or license be prepared as a practicable solution to the issue of timing of a Section 401 certification request and review commencement. Federal agencies, such as the USACE, do not currently prepare publicly available draft permits, and for review to commence when the federal permitting or licensing agency review is essentially complete will eliminate opportunities for early coordination with project proponents. Such a late review for Section 401 in the federal license or permit application process may result in returning the project proponent back to square one of the federal permitting or licensing procedures for consideration of state water quality criteria not incorporated during project review, with major modification of a project potentially requiring a new Section 401 certification process to commence. An unintended consequence of this order of operations may result in substantial denials of Section 401 certification requests resulting in unnecessary litigation, costly design changes to the project proponents and project delays.

- 5) Certification decisions: MDE objects to including Section 121.7(d)(3), which requires that a rationale be included for each condition explaining why it is necessary to comply with water quality standards. This has been a particularly burdensome additional step for certifying agencies, and we believe it is unnecessary. MDE recommends that the requirement be deleted. MDE would also object to including a requirement for a legal citation allowing a condition, if EPA is considering including the revision, in the final version.

MDE remains available to coordinate with EPA on improvements to Section 401 of the CWA. Please do not hesitate to contact me or Lee Currey at lee.currey@maryland.gov for additional information and questions.

Sincerely,



Horacio Tablada
Secretary

Attachment

(by electronic mail)

cc: Jeannie Haddaway-Riccio, Secretary, Maryland Department of Natural Resources
Ariel Judah, Director Federal Relations, Office of Governor Larry Hogan
Maryland Congressional Delegation

Attachment I
EPA Request for Comments and MDE Response

Detailed comments are found below in response to the questions and issues as raised by EPA.

1) ***Definitions.***

MDE response:

- a) ***Activity as a whole:*** MDE supports the definition's inclusion of any aspect of the project which may affect water quality. MDE interprets aspects to include but not be limited to the construction or operation of the project as well as impacts in addition to those which triggered the request for Section 401 certification.
- b) ***Water quality requirements:*** MDE supports the expansive list of requirements to include any water quality-related requirement of state law, including those outside of Section 401 implementation.

- 2) ***Potential for a discharge to occur.*** The Agency requests comment on whether it should propose a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow in order to determine whether or not a federally licensed or permitted activity may result in a discharge and therefore require Section 401 certification.

MDE response: MDE recommends adding language which allows the option for a procedure to be developed between certifying agencies, federal agencies, and the Regional Administrator, but it does not need to be mandated.

- 3) ***Section 121.3 Scope of certification.*** The Agency invites comment on its proposal to readopt the "activity as a whole" definition of scope of review under Section 401(a)(1) and scope of conditions under Section 401(d). The Agency is also seeking comment on whether it should adopt the "discharge-only" scope of review announced in the 2020 Rule.

MDE response: MDE supports including the activity as a whole, the entire project (including direct and indirect impacts), and its operation as being subject to water quality certification review.

- 4) ***Section 121.4 Pre-filing meeting requests.*** EPA is requesting comment on whether the project proponent should have the opportunity to participate in determining the need for a pre-filing meeting request. For example, should there be a process for the project proponent to ask the certifying authority to waive the pre-filing meeting request requirement?

The Agency is requesting comment on whether it should exclude any particular project types from the pre-filing meeting request requirement and process. The Agency is also requesting comment on whether it should specify that all certifying authorities should respond with written acknowledgement and determination of the need for a pre-filing meeting and timeline within 5 days of receipt of the pre-filing meeting request, whether it should define the pre-filing meeting waiver process in regulation (either for EPA or all certifying authorities), or whether it should maintain certifying authority flexibility in setting the process.

MDE response: Early coordination between applicants and regulatory entities is always encouraged, and is useful in addressing application deficiencies and regulatory requirements. The link between pre-filing requests and timeframe for submitting a certification request have been found to be problematic. This has served to delay projects unnecessarily and have the likely unintended consequences of disrupting an existing process to streamline Section 401 review with other State permits or licenses. MDE does not object to project proponents requesting a waiver to the pre-filing request for a project. The regulations do not require that a pre-filing meeting actually occur prior to a Section 401 certification request, as such this would simply pertain to the request for a pre-filing meeting. A formal process in federal regulations is not necessary, simply the ability of the certifying authority to waive or shorten the request requirement as is currently allowed in the proposed 40 C.F.R. 121.4. The certifying authority should maintain flexible authority to establish the process by which a Section 401 certification pre-filing meeting request can be waived and a Section 401 certification request submitted to the certifying authority.

MDE supports certifying authorities having the authority to preemptively waive pre-filing meeting request requirements based on impact thresholds or categories of projects. This would reduce the burden on certifying authorities, particularly since the proposal includes a requirement to confirm receipt of the request for certification to the project proponent and the Federal agency. Certifying authorities should be given discretion on when the pre-filing meeting request requirement is needed or not.

- 5) **Section 121.5 Request for Certification.** EPA is requesting comment on whether the Federal agency, as opposed to the project proponent, should provide a copy of the draft license or permit to the certifying authority when it is not otherwise already publicly available. EPA is requesting comments on its proposed list of additional components for a certification request when EPA acts as the certifying authority, or where a state or tribe does not define such additional requirements in regulation. Additionally, the Agency is requesting comment on the components as they would apply to state and authorized tribal certification requests, including where available, citations to existing regulations or any data on the time it takes project proponents to comply with these requirements.

MDE response: MDE recognizes and appreciates EPA's intention to include extensive supporting information as part of the certification. This would aid certifying authorities in meeting deadlines for review of the permit or license. However, the requirement to include a draft license or permit as part of the certification request is not practicable for several reasons:

- a) Lack of early coordination to resolve concerns. Some agencies, such as FERC, may select energy routes through their review process before coordinating with certifying agencies. As some of the impacts are extensive, and may even cross state boundaries, receipt of a draft license or permit undermines efforts to avoid and minimize water quality related impacts early in the planning process. The belated certification request may then revisit water quality related concerns or introduce new concerns that could have been better and more efficiently addressed earlier in the review process for the permit or license. The proposed delay is particularly problematic when the certifying authority's only role is through the Section 401 certification process, without a corresponding state authorization requirement.
- b) New requirement for draft permit or license. MDE has not known the U.S. Army Corps of Engineers (USACE) to issue draft Section 10 or Section 404 permits for individual projects,

outside of the Nationwide or General Permits. These are the most common federal permits or licenses which MDE reviews for water quality certifications. A requirement to prepare a new draft permit or license is additional work for USACE, and as it would be public information, may raise legal issues.

MDE believes that by the time that there is a draft permit or license, it is too late to have comments addressed in the early planning stages of a project where water quality issues are best resolved.

Furthermore, USACE regulations for Civil Works projects, which include federal navigation projects, require Section 401 certification from a certifying authority. In this scenario, there is no federal license or permit authorization since the USACE does not issue licenses or permits to itself. Compliance by the state in implementing these proposed regulations cannot be met under proposed 121.5(a).

- c) Multiple Public Notices and Hearings. MDE supports the opportunity for public comment; however, the requirement for a draft license or permit may result in at least three different notices and potential hearings in Maryland: 1) the federal permit or license notice; 2) state authorization and CZMA notice; and 3) the water quality certification notice. Each notice has an opportunity for a public hearing request. The timing of notices for comment cannot be consolidated and coordinated under the proposed requirement to submit a draft federal permit or license with a certification request.

We believe that it would be beneficial to list additional information requirements which would be part of the certification request in lieu of the requirement for a draft license or permit, in addition to the limited information listed in the proposed regulations. This is particularly important to ensure that reviews of discharges in upstream states consider all relevant information, especially when the upstream state has fewer requirements than a downstream state, which may receive potentially harmful discharges. At a minimum, the additional specific information which may be requested by certifying agencies may include:

- d) Itemized type, location, and extents of discharges into waters, including wetlands;
- e) Methods of construction and proposed compensatory mitigation, if applicable;
- f) Existing information and data on natural and water resources, and their functional or condition assessments should be included;
- g) All other application requirements of State wetland and water permits, which relate to potential discharges affecting water quality; including:
 - i) Appropriately sized site plans showing location of unregulated and regulated water resources, including wetlands and discharges; property lines, sites where data was collected; mean high water and mean low water lines; navigation channels; existing and proposed structures;
 - ii) Photographs and data sheets from field investigations;
 - iii) Maps of other suitable sites where the discharge may be undertaken with fewer potential impacts;

- iv) Specialized field surveys for water quality and living resources which are part of designated uses;
 - v) Other watershed, basin, or flood management plans related to improving or maintaining water quality;
 - vi) Hydrologic and hydraulic computations which may be used to determine effects of potential discharges;
 - vii) Stormwater management plans;
 - viii) Erosion and sediment control plans;
 - ix) Methods of dredging and disposal sites;
 - x) Tests for potential contaminants in waters or which may be released into waters;
 - xi) Monitoring and maintenance plan and schedule, as determined by the certifying agency;
 - xii) Plan for addressing inadvertent returns of material into waters;
 - xiii) Plan to manage the discharge for climate resiliency;
 - xiv) Considerations and efforts to minimize adverse water quality effects to disadvantaged/environmental justice communities; and
 - xv) Communication documentation to disadvantaged/environmental justice communities about the project and potential for discharges to affect water quality.
- h) Additional information should include characterizations for alternate locations of the project; if not yet constructed; minimization efforts to reduce proposed and potential discharges; and a rationale for the recommended site. Land, water/wetland, and human resources within the appropriate area of influence should be characterized by alternatives, if appropriate, with itemized impacts by resource type. This is necessary for agencies to categorize resources according to relevant State requirements and designated uses.
- 6) **Section 121.6 Reasonable period of time.** The Agency is requesting comment on whether there should be a specified timeframe for when the certifying authority should send written confirmation to the project proponent and Federal agency of the date of receipt of the request for certification. The Agency is requesting comment on its proposed definition for receipt and the start of the reasonable period of time.

MDE response: We do not recommend including in regulation a specified timeframe for when a certifying authority should send the written confirmation of the receipt of the request for certification and certainly not one that is shorter than the 30 days currently proposed for a federal agency and the certifying authority to determine a reasonable period of time outside of any proposed default reasonable period of time. It is not clear if there are consequences for failing to meet this deadline either. Any shorter period of time to confirm receipt may result in incomplete information being provided to a project proponent or multiple correspondences conveying similar or differing information about a project which can lead to confusion by all parties. For example, conveying receipt of a request should also convey the reasonable period of time for the certifying authority to act and that can happen up to 30 days after receipt of a certification request. We also recommend that certifying authorities and federal agencies have the opportunity to establish by overarching agreement of a default reasonable period of time instead of the default sixty (60) days listed in the proposal. As stated previously a recommended default due date should be minimally 180 days or six months. Defaulting to sixty (60) days under this revision undermines efficient review for federal consistency under the Coastal Zone Management Act (CZMA). MDE recommends that the timeframe for Section 401 review should never be shorter than the CZMA federal consistency period (6 months)-particularly for activities in the coastal zone. It is unclear

the role the project proponent has when “consulted” upon when determining the reasonable period of time, as such, the term “consulted” should be amended to “notice.” For example, the project proponent should be provided notice of the determination of the reasonable period of time for the certifying authority to act when the determination is initially made or at any time it is extended, so long as the reasonable period of time does not exceed one year from the date of the valid Section 401 certification request as determined by the certifying authority.

MDE concurs that the definition of receipt is directly linked to the certifying authorities’ requirements for applicable submission procedures, which should include the necessary documentation and information needed to evaluate a request for certification.

- 7) **Section 121.7 Certification decisions.** EPA requests comment on whether it should define in more detail—as it did in the 2020 Rule—what information should be included in support of a certification condition and examples of such information (*e.g.*, statutory and regulatory citations).

MDE response: MDE objects to including Section 121.7(d)(3), which requires that a rationale be included for each condition explaining why it is necessary to comply with water quality standards. This has been a particularly burdensome additional step for certifying authorities and we believe it is not necessary. MDE recommends that the requirement be deleted. Maryland has specific goals as well as an adaptation plan to improve climate resiliency. MDE would also object to including a requirement for a legal citation allowing a condition, if EPA is considering including the revision in the final version. By acknowledging a certifying authority’s ability to include certification conditions relative to achieving water quality, Maryland will be better positioned to include requirements which prevent new or increased discharges from degrading water quality.

- 8) **Section 121.9 Federal agency review.** EPA is requesting comment on whether the Agency should develop procedures regarding how a certifying authority should respond to a Federal agency’s notice regarding deficiencies in its certification decision. For example, should EPA provide a timeframe for the certifying authority to affirmatively respond to the Federal agency’s notice of deficiency and provide a justification for any extension to the reasonable period of time (*e.g.*, length of the public notice period)? EPA also is requesting comment on all aspects of its proposed rulemaking regarding Federal agency review and its understanding of the potential consequences of Federal agency review.

MDE response: MDE strongly supports the clarification that the federal agency role is limited to ensuring that the certification decision (grant, grant with conditions, deny, or waive) is clearly indicated; that the proper agency issued the certification decision; that public notice was provided; and that the decision was made within the defined reasonable time allowed. Previously, MDE experienced the “declination” of water quality certification conditions by a federal agency, leading to additional review requirements and processing by applicants and MDE. The new proposed language addresses that issue and recognizes the broad authority of states to impose conditions which must be incorporated into the federal license or permit.

MDE supports a general time frame of at least sixty (60) days to remedy a deficient certification when the one-year timeframe has not expired. However, federal and certifying agencies should have the flexibility to set mutually agreeable deadlines to address deficiencies.

- 9) **Section 121.10 Modifications.** EPA is also requesting comment on whether the certification modification process should account for (1) whether there is a Federal license or permit modification process already in place and (2) the point in time at which a modification may be made (*e.g.*, if new information supporting a modification arises either before or after issuance of the final license or permit).

MDE response: MDE supports the provision allowing for certifications to be modified. This is sometimes necessary when there are changes to the location and extent of impacts which may not have been accounted for in the original license. Modifications may also be necessary to be consistent with changes that occur over the course of the duration of the federal license or permit. We also recommend that applicants for permits or licenses be allowed to revise their denied application, permit, or license to bring it into compliance with water quality standards so that it may be certified.

MDE does not agree that a modification should never result in a change in the fundamental decision (*i.e.*, Changing a grant of certification to a denial or waiver). Such a change is not to be made lightly; however, under certain circumstances—including where the discharges are substantially more severe than proposed; new information is obtained which contradicts the rationale for the certification decision; violations of related state regulations; submittal of fraudulent information; or failure to comply with conditions which are essential for compliance with water quality standards—the certification decision should be allowed to change.

- 10) **Section 121.12 Notification to the Regional Administrator.** (EPA asked for several comments related to this section, MDE has broken responses out below for ease of reference.)
- a) *EPA request for comment.* EPA is soliciting comment on whether it should interpret “immediately” in this context to mean a different period of time than five days, and whether five days provides Federal agencies with sufficient time to provide notice to EPA or if additional time is required.

MDE Response: The five-day deadline for a federal agency to submit an application and certification or waiver to the Regional Administrator is a short time frame, but is reasonable provided that the federal agency has adequate resources. It is not clear if there are consequences for failing to meet this deadline, or if there are current challenges in meeting this deadline. Likewise, we are concerned about consequences if the Regional Administrator does not act within prescribed 30-day time frames for acknowledging the inter-jurisdictional issues and that an inter-jurisdictional review must occur. Downstream jurisdictions should not be faced with upstream discharges which may harm water quality because there was a delay by a federal agency in providing the information to the Regional Administrator.

MDE has concerns about review on effects to neighboring jurisdictions commencing after a certification or waiver has been issued. Inter-jurisdictional issues would be better addressed by establishing a process for evaluating discharges and their locations which are likely to affect other jurisdictions prior to a certification being issued. This would involve the Regional Administrator(s), federal agencies, and the certifying authorities to collaborate to develop the process, relevant information, and criteria, which should include early notification of a certification request or certification public notice to an affected jurisdiction. While there would be an

additional commitment of personnel to develop the process, we believe that this would be the most effective approach for addressing effects of discharges on downstream states earlier in the certification process instead upon conclusion of a process. This requirement, as written has the unintended consequence of potentially adding significant time to a project proponents timeline

- b) *EPA Request for comment*: EPA is asking for comment on whether such a list of specific factors that EPA must consider in making a “may affect” determination should be set forth in regulation and, if so, what factors should be included.

MDE response: MDE believes that a list of factors would be useful in regulation, provided that there is opportunity to consider additional factors as requested by the jurisdictions. Proximity to jurisdictional boundaries, type and extent of project and potential discharges; natural, water, and cultural resources of interest to the downstream jurisdiction; environmental justice; climate change factors; other health and safety issues are all relevant but are not all of the factors which should be considered. The ability to have involvement with determinations of inter-jurisdictional discharges and their review will aid Maryland in not only ensuring that increased discharges due to more intense precipitation events in upstream events will not adversely affect Maryland waters, but aid in equity and environmental justice for disadvantaged communities.

- c) *EPA Request for comment*: EPA is not proposing to require the neighboring jurisdiction to identify a license or permit condition that it thinks would resolve the objection; however, EPA encourages neighboring jurisdictions to offer such a condition or conditions and is requesting comment on whether this element should be required by regulation.

MDE response: MDE recommends that regulations allow jurisdictions to identify permit conditions which would resolve objections, and that the requirement for that condition be included in the permit or license.

- d) *EPA Request for comment*: States have a 60-day deadline for objecting to a permit or license which has received a “may affect” determination from EPA, and the state may request a public hearing. EPA is requesting comment on whether a neighboring jurisdiction could withdraw its objection before the hearing is held and, thus, eliminate the requirement to hold a public hearing. EPA is also requesting comment on whether it should develop any regulatory text to clarify this aspect of the section 401(a)(2) process.

MDE response: MDE agrees that a neighboring jurisdiction may withdraw its objection and eliminate the need for a public hearing.

11) *Section 121.13 Determination of effects on neighboring jurisdictions.*

MDE response: As we described in item #9 above, there should be a collaborative process between the Regional Administrator, federal agencies, and neighboring jurisdictions to develop a process and requirements for review and inter-jurisdictional discharges. The ability to have

involvement with determinations of inter-jurisdictional discharges and their review will aid Maryland in not only ensuring that increased discharges due to more intense precipitation events in upstream events will not adversely affect Maryland waters, but aid in equity and environmental justice for disadvantaged communities.

12) *All sections*. EPA is requesting comment on the types of implementation materials that EPA should develop to assist Federal agencies and certifying authorities to implement any proposed or alternative provisions discussed throughout this preamble.

MDE response: EPA previously released a detailed guidebook which included useful, background and suggested steps to follow for implementation. An update to the guidebook would be useful to states and project proponents. Other useful implementation materials would include a Frequently Asked Questions document that is available online and downloadable. Also, a dedicated webpage and linking to other federal agency procedures and requirements for certification would be useful. Additionally, interactive digital mapping that identify resources that will trigger neighboring jurisdictional effects determinations automatically will be useful for project proponents and jurisdictions (i.e., use of the Water Resources Registry for additional layers) in the planning and review of a project.