



- WELCOME TO -

*Winter's  
Favorite  
Town*<sup>TM</sup>

park city

CHAMBER OF COMMERCE | CONVENTION & VISITORS BUREAU

# WINTER & SPRING MARKETING

## Organizational Objective

- Increase transient overnight visitation to Park City / Summit County during the Winter & Spring with an emphasis on “first-time” visitors.

## Marketing Objectives

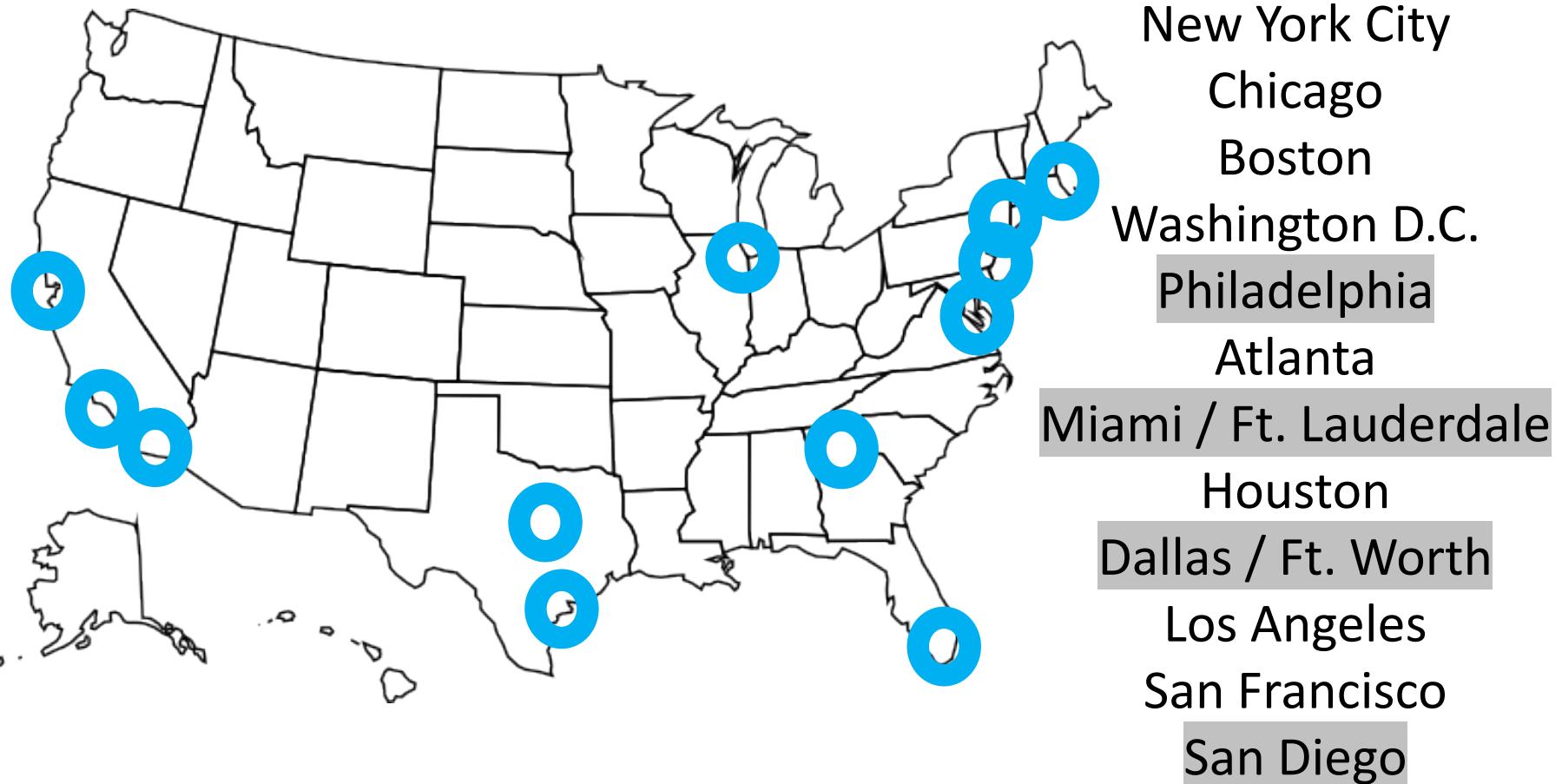
- Continue to build awareness, opinion and consideration of Park City / Summit County as a Winter & Spring overnight destination in key feeder markets.
- Increase qualified traffic to the website and drive engagement with content and booking engine conversion.

# WINTER & SPRING MARKETING

## Primary Strategies

- Continue “**Winter’s Favorite Town**” campaign for a second season with updated footage / images.
- Adjust the **Winter & Spring Media Buy** to include a mix of traditional television and introduce digital television.
- Increase the number of **Target Markets**, based on shifting a portion of budget out of network television.
- Continue to focus on **Need Periods** with a targeted messaging strategy:
  - Martin Luther King Jr. Holiday
  - Spring Skiing (March / April)

# WINTER & SPRING MARKETS



# WINTER & SPRING MARKETING

## Media Buy

- **Network Television – NBC:**

Los Angeles

Chicago



- **Digital Television – VIANTE:**

New York City

Philadelphia

Washington D.C.

Boston

Miami

Atlanta

Dallas / Ft. Worth

Houston

San Francisco

San Diego

**VIANT.**

# WINTER & SPRING MARKETING

## Media Buy

- **Digital Video & Radio:**
  - NBC Video
  - YouTube
  - Pandora Radio
  - Trade Desk Video



# WINTER & SPRING MARKETING

## Media Buy

- **Digital Display / Native:**

- Trip Advisor
- Outside Online
- G-Mail Ads
- Utah.com
- Trade Desk



# WINTER & SPRING MARKETING

## Media Buy

- **Social Media:**

- Facebook
- Instagram



- **Paid Search:**

- Google AdWords (National)



# WINTER & SPRING MARKETING

## Media Buy

- Print Advertising:
  - SKI Magazine (2X)
  - Ski Utah Magazine
  - Outside Magazine (2X)
  - Mountain Magazine
  - Departures



# WINTER PRINT AD



- IN -  
*Winter's  
Favorite  
Town™*



ADVENTURE  
IS RIGHT  
OUTSIDE  
YOUR DOOR.

Here winter means escaping to a charming town that has it all. Where you can experience The Greatest Snow on Earth\* at two distinctive ski resorts - Deer Valley and Park City Mountain. Where the scenery, nightlife, and dining are unforgettable. Yes, all that in an easy to get to ski-in/ski-out town. Discover why Park City, Utah is Winter's Favorite Town™ at [VisitParkCity.com](http://VisitParkCity.com).



park city  
UTAH

# WINTER PRINT AD

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# SPRING PRINT AD



- IN -  
*Winter's  
Favorite  
Town™*



SPRING IS FOR  
SOAKING UP  
MEMORIES IN  
THE SUNSHINE.

Spring in Park City, Utah is the best of both seasons. Bluebird days skiing at two distinctive resorts - Park City Mountain and Deer Valley. Afternoons lounging on our ski beaches, enjoying the après ski scene and live music. Evenings exploring nightlife on our historic main street. There's plenty to discover in our charming, easy to get to ski-in/ski-out town. Experience spring in Winter's Favorite Town™, at [VisitParkCity.com/spring](http://VisitParkCity.com/spring)



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UTAH

# EARNED-MEDIA

## Inbound Earned-Media

- Host 100+ Journalists Annually
- 12-14 Individual / Group FAM Tours
- 2-3 Targeted Influencer Campaigns

## Outbound Earned-Media

- Executed 200+ Deskside Visits
- 10-12 High-Potential Markets
- 4-Consumer / Media Events

Collaborate w/ Utah Office of Tourism & Ski Utah

TRAVEL+  
LEISURE

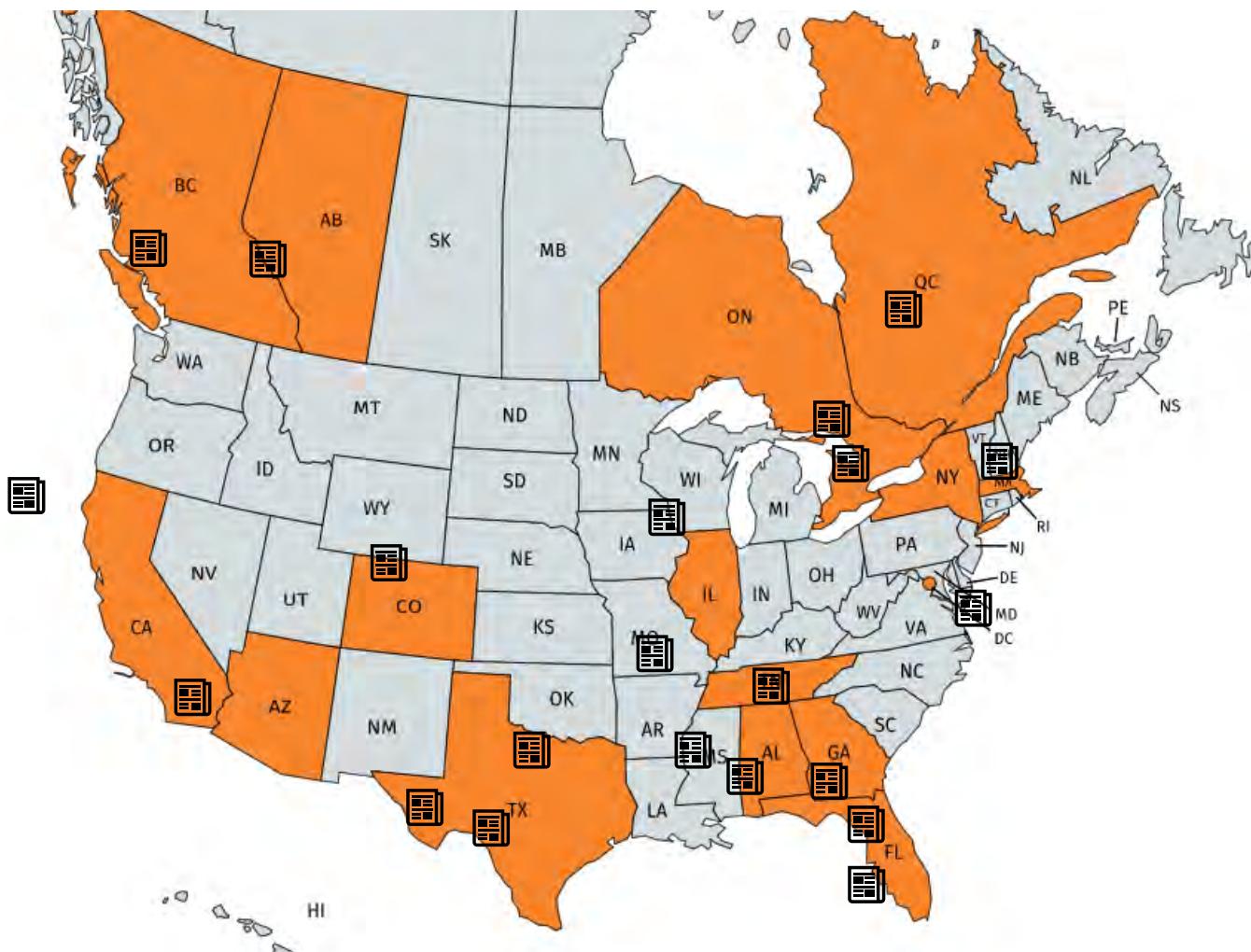
FOOD&WINE

Sunset

The Washington Post

BUSINESS  
INSIDER

# COMMUNICATIONS IN-MARKET MEDIA



New York City  
Chicago  
Boston  
Washington DC

Los Angeles  
San Francisco  
Phoenix  
Denver

Houston  
Dallas /  
Ft. Worth

Austin

Atlanta  
Miami  
Orlando  
Tampa

Jacksonville  
Birmingham  
Nashville

Calgary  
Toronto  
Montreal

Vancouver BC

# PARK CITY POLAR LOUNGE



# EARNED-MEDIA

## Four Consumer Ski Show & Event Integrations

- **Chicago Ski & Snowboard Show (9/27-29/19)**
  - Après Ski Lounge (10/2/19)
- **Toronto Ski & Snowboard Show (11/7-10/19)**
  - Après Ski Lounge (11/6/19)
- **Santa Barbara Warren Miller Film Premier (12/2/19)**
  - Delta Airlines New SBA to SLC 3X Daily
- **Los Angeles Ski & Snowboard Show (12/6-8/19)**
  - Après Ski Lounge (12/7-8/19)

# CONTENT DEVELOPMENT

## Content Development Themes

- **Experiential** – First-hand accounts of activities, tours, classes and tastings.
- **Unique** – Highlight experiences, people and products only found in Park City / Summit County.
- **Evergreen** – High-level content that can remain relevant over time.

### My Town Video Series

Park City is unique – from its authentic **silver mining history** to its **Olympic legacy, innovative culinary traditions** and **legendary recreational offerings**. But at the heart of Park City's character is its people – from all walks of life and all corners of the Earth. These are their stories. Come to Park City and you'll discover exactly why this special town ignites their passions.

#### WISH PARK CITY



Emily White, owner of **Wish Park City**, believes that it's important to celebrate life's special moments as it allows us to lasting memories with family and friends.

#### MOUNTAIN SONG FARM



There are many factors that contribute to the Park City area's uniqueness, including its people. Meet Lynsey Gammon, owner of **Mountain Song Farm**.

#### RED BICYCLE BREADWORKS



Brent Whitford and Brad Hart, co-founders of **Red Bicycle Breadworks**, have produced hand-crafted artisan bread, using the finest local ingredients, since 2007.

#### ERNESTO ROCHA



Ernesto Rocha, Executive Chef at **Washington School House Hotel**, finds much of his inspiration as a chef from different textures and colors.

# INTERNATIONAL SALES & MARKETING

## Key Market Focus

- **Australia / New Zealand**
- **China**
- **Central America** (Mexico / Costa Rica / Panama)
- **Europe** (Germany / Switzerland / Netherlands)
- **South America** (Argentina / Brazil)
- **United Kingdom** (England / Ireland / Scotland)



# INTERNATIONAL SALES & MARKETING

## Key Market Initiatives

- **In-Market Sales Missions:**
  - Tour Operator & Travel Agent Trainings
  - Media Deskside Visits & Group Media Events
  - Consumer Events & Ski Shows

**Mexico / Australia /  
New Zealand / Europe  
Brazil / United Kingdom  
/ Costa Rica / Panama**

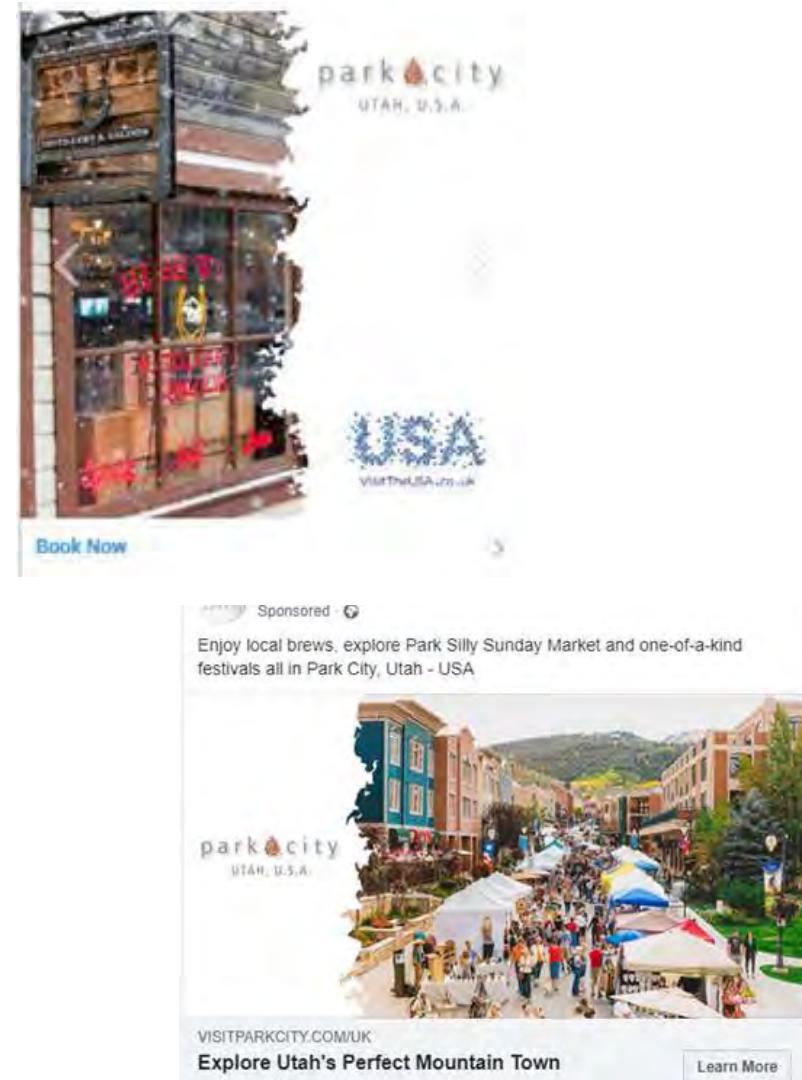


# INTERNATIONAL SALES & MARKETING

## Key Market Initiatives

- **Consumer Marketing:**
  - Travel Trade Co-Op
  - Digital / Social Media Marketing
  - Influencer Campaigns

Mexico / Australia  
Brazil / United Kingdom



# INTERNATIONAL SALES & MARKETING

## Key Market Initiatives

- **Inbound Earned-Media:**
  - Travel / Trade Partners
  - Media Partners
  - Influencers

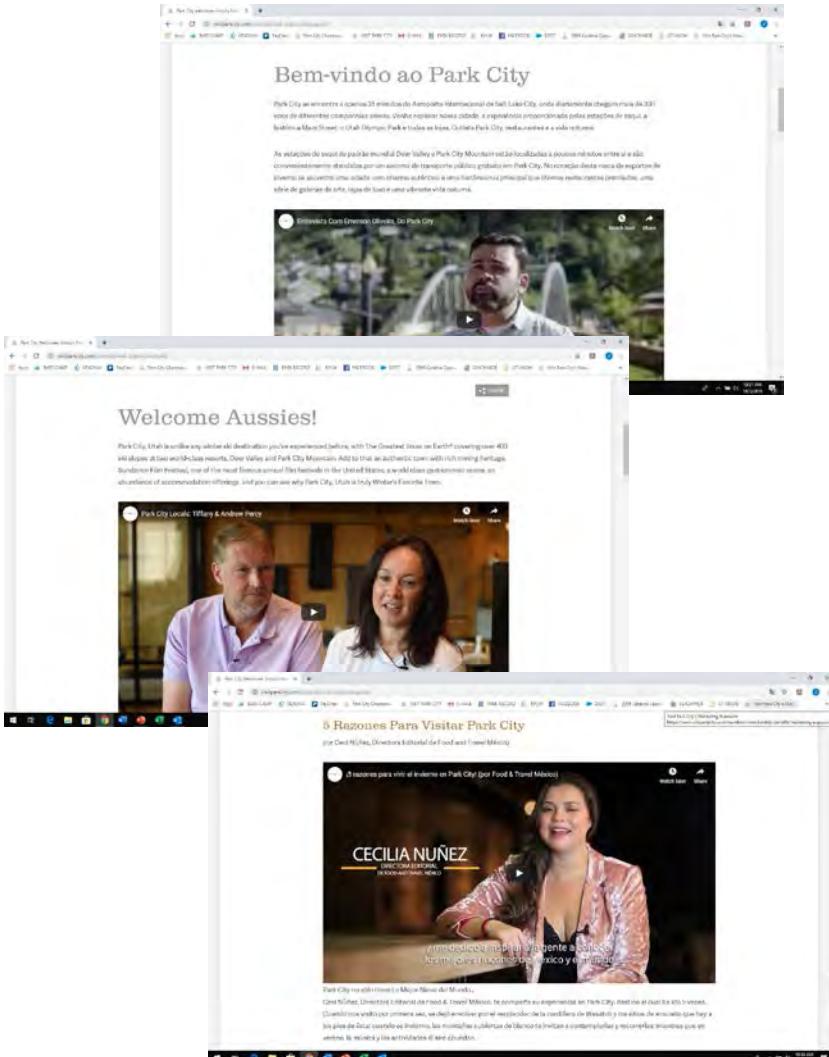


# INTERNATIONAL SALES & MARKETING

## Key Market Initiatives

- **Dedicated Landing Pages:**
  - Welcome Videos
  - Country Specific Content (Itineraries / Blog Posts)
  - Influencer Content
  - Airline Route Maps

**Mexico / Australia  
Brazil / United Kingdom**





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## STAFF REPORT

To: Summit County Council  
From: Janna Young, Member of Leadership Class 25  
Date of Meeting: October 9, 2019  
Type of Item: Work Session  
Subject: Presentation of Leadership Park City Class 25's Service Project

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### **Requested Council Action**

None.

### **Introduction**

Leadership Park City, now in its 26<sup>th</sup> year, is a yearlong program to identify, encourage and train new community leaders. Each year, around 35 individuals are selected for the class and participate in monthly education and training sessions. In addition, each class plans and completes a service project that benefits Summit County in some way. Class projects are proposed and selected by the class in March. These projects have included public art, green building, wind power, trails development, youth leadership, water conservation, voter awareness, community walkability, public transit usage, reduction of plastic bags usage, food sustainability, and many more.

### **Summary of Leadership Class 25's Service Project**

We are living in the era of megafires, forest blazes ten times bigger than ever seen before. Since 1988, fires have broken records in nine states and several have burned over half a million acres each. Scientists say we should brace ourselves for more and more of these fires in the coming years.

Factors, such as drought, climate change and Forest Service policy focused on suppression have led to a buildup of fuels in our nation's forests. As a consequence, when fires ignite, there is a lot more to burn than historically seen. This often results in catastrophic wildfire that threatens lives and destroys communities, wildlife, and watersheds at great cost to local, state and federal economies.

Park City and Summit County, situated in the wildland urban interface and surrounded by national forest full of dead timber caused by drought and bark beetle infestations is particularly at risk for megafire.

There are several steps homeowners can take to make their homes more resilient to wildfire, such as creating defensible space around their home, using resistant landscaping, roofing and siding, home hardening, and others. These measures have proven effective in protecting individual homes and reducing the potential for wildfire to spread to neighborhoods and the community at large.

Park City Leadership Class 25 chose for its class service project, community wildfire preparedness. The project scope involved two primary components: 1) public outreach and education; and 2) a community resource guide. The class also participated in an ancillary sub-project involving collecting soils to be used in a landscape analysis of soil carbon content.

### **Public Outreach and Education**

The public outreach component involved educating homeowners about our community's fire risk and how to make their homes more resilient to wildfire with the goal of directly reaching 2,000 individuals. Included in the messaging was the importance of establishing an evacuation plan, how to create defensible space around the home, removing leaves and debris from under decks and inside gutters, hardening homes by filling in eaves and utilizing fire resistant building materials, and other measures.

The class created firewise signs, designed a t-shirt, and disseminated information at four public events: Fourth of July parade, Silly Market, Summit County's Preparedness Fair, and Park City Municipal's May 15<sup>th</sup> documentary screening and community discussion on megafires. The class also created a Facebook page, canvassed neighborhoods, and made presentations on KPCW radio, Park City TV, and to local groups, such as Sunrise Rotary, Pinebrook HOA, Summit Community Gardens, and the Newcomers Club, among others.

In total, the class spent over 160 hours on community outreach and education, handed out hundreds of firewise pamphlets, and met the target of directly reaching 2,000 people.

### **Community Resource Guide**

As a tangible outcome of the project, the class developed a resource guide intended to provide Summit County homeowners with local information and tools to make their homes more likely to survive a wildfire, including how to assess their home's fire risk, mitigate hazards, harden home structures and create defensible space.

Included in this guide is a short public service video produced by a member of the class explaining the importance of assessing your home for fire risk and taking measures to mitigate those risks. The class asked for volunteers and conducted six lot assessments of properties across the county with the Summit County Fire Warden. At the end of each assessment, homeowners were provided a report indicating their fire risk level with suggestions of what to address or mitigate in order to make their homes more firewise. The video documents these assessments and the resource guide includes the lot assessment checklist so homeowners can conduct their own assessments.

In addition, the guide has other informational videos, a list of whom to call to perform the fire mitigation work on a home, city and county fire resources, websites that provide specific steps to take to create defensible space around one's home and programs to help homeowners remove fire hazards, such as Park City Fire District and Summit County's chipping services.

### **Landscape Analysis of Soil Carbon Content**

In March when the class was choosing its service project, one proposal offered was for a net zero carbon project, which many members of the class felt tied into the fire preparedness project. As such, the class decided to spend some resources on this effort as well. On Saturday, June 29<sup>th</sup>, the class collected soil samples and documented vegetation to assist with the development of a landscape analysis map. This map more accurately documents the vegetation and soils throughout our County than other maps that existed before. It shows which areas have higher carbon content in their soils and thus, are able to hold more water, making them more resistant to fire. This information can help in decision-making around water security, development, and proactive measures that can be taken to meet net zero carbon goals, improve snow pack, and protect wildlife habitat, among other things.

### **Current Status**

The class has completed all public outreach events that were planned, resulting in over 160 volunteer hours and around 2,000 contacts. The class has also shared the public service video on YouTube. The class is in the process of finalizing the resource guide and intends to publish and make it available on the County Fire Warden's website and Park City Emergency Management's website this fall. The landscape analysis map is also completed.

## **Conclusion**

The goal of Leadership Class 25's service project was to increase awareness throughout our community about our wildfire risk and encourage homeowners to prepare and harden their homes against wildfire, culminating in a resource guide that will be available to the public and updated over time.

Since the spring, when Leadership Class 25 began its outreach and education efforts, we have seen increased awareness of the wildfire risk across our community and homeowners taking proactive actions to harden their homes and make them more resilient to wildfire.

For example, both Park City Fire District and Summit County have reported record use of their chipper services as homeowners are trimming back brush and tree limbs to create defensible space around their homes. Both entities have received an increased volume of calls and requests for fire preparedness and prevention assistance as well. Park City Emergency Management has also sent out a comprehensive mailer to homeowners with information regarding home hardening and other fire preparedness measures.

As a result, Class 25 feels its service project has been effective and has had a positive impact on Park City and Summit County residents. We plan to continue the conversation and working with our neighbors to create a more fire resilient community.

Class 25 would like to credit the many partners that contributed to this project and to the Community Resource Guide: Summit County Fire Warden, Park City Fire District, Park City Fire District Fire Marshal, Park City Fire Marshal, Summit County and Park City Emergency Management, Leadership Park City alumni who volunteered their homes to be assessed by the County Fire Warden and included in the Class's Public Service Announcement, and countless others who assisted with this project.

## **Attachment**

"Be Prepared for Wildfire" Community Resource Guide



## Firewise Landscaping and Zoning

# Be Prepared for Wildfire

A Comprehensive Resource Guide for Summit  
County Homeowners provided by the  
members of Leadership Park City Class 25

## Contents

- We're all at risk . . .
- What can we do?
- Home/Lot Assessment
- Defensible Space
- Wood Chipping Service
- Fire Resistant Landscaping
- Home Hardening
- Annual Maintenance
- City and County Resources

We are living in the era of megafires, forest blazes ten times bigger than ever seen before. Since 1988, fires have broken records in nine states and several have burned over half a million acres each. Scientists say we should brace ourselves for more and more of these fires in the coming years.

Factors, such as drought, climate change and Forest Service policy focused on suppression have led to a buildup of fuels in our nation's forests. As a consequence, when fires ignite, there is a lot more to burn than historically seen. This often results in catastrophic wildfire that threatens lives and destroys communities, wildlife, and watersheds at great cost to local, state and federal economies.

Park City and Summit County, situated in the wildland urban interface and surrounded by national forest full of dead timber caused by drought and bark beetle infestations are particularly at risk for megafire.

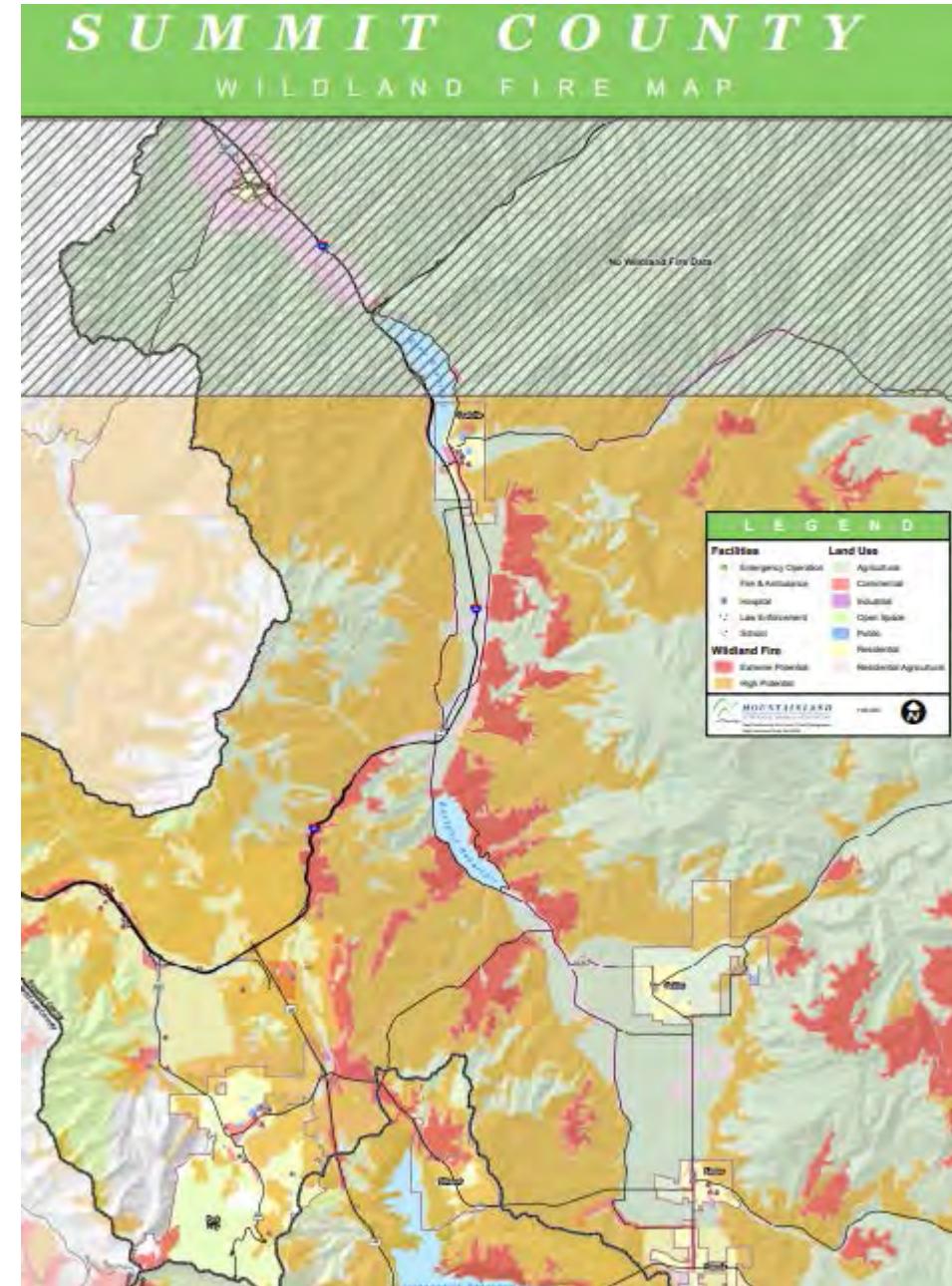
There are many actions homeowners can take to make their homes more resilient to wildfire, such as creating defensible space around their home, using fire resistant landscaping and fire resistant roofing and siding, home hardening, and more. These measures have proven effective in protecting individual homes and reducing the potential for wildfire to spread to neighborhoods and the community at large.

This community resource guide, developed by Leadership Park City Class 25, is intended to provide Park City and Summit County homeowners with information and tools to make their homes more likely to survive a wildfire, including how to assess their home's fire risk level, mitigate fire hazards, and take steps to harden home structures and create defensible space.

Leadership Park City, now in its 26<sup>th</sup> year, is a yearlong program to identify, encourage and train new community leaders. Each year around 35 individuals are selected for the class and participate in monthly education and training sessions. In addition, each class plans and completes a service project that benefits Summit County in some way. Class projects are proposed and selected by the class in March. This resource guide is a product of Class 25's service project to bring awareness about Summit County's wildfire risk and encourage homeowners to take measures to make their homes more resilient to wildfire.

We're all at risk . . .

- The wildland-urban interface (WUI) is the zone where structures and other human development meet and intermingle with undeveloped wildland.
- All developed areas of Park City and Summit County are in a WUI zone.
- Most of Summit County faces high or extreme risk of wildfire.



What can we do?

Defensible Space, Fire Resistant Landscaping, and Home Hardening . . .  
IT WORKS!



This home was well prepared for wildfire.



This home was not.

# Home / Lot Assessment

- Use this [Wildfire Hazard Checklist](#) to conduct an assessment of your own home and lot.
- A lot assessment identifies your home's fire risk level and helps you learn what you can do to make your home more resilient to wildfire.
- For more information, visit the [Summit County Fire Warden](#) webpage, or call (435) 640-2075.

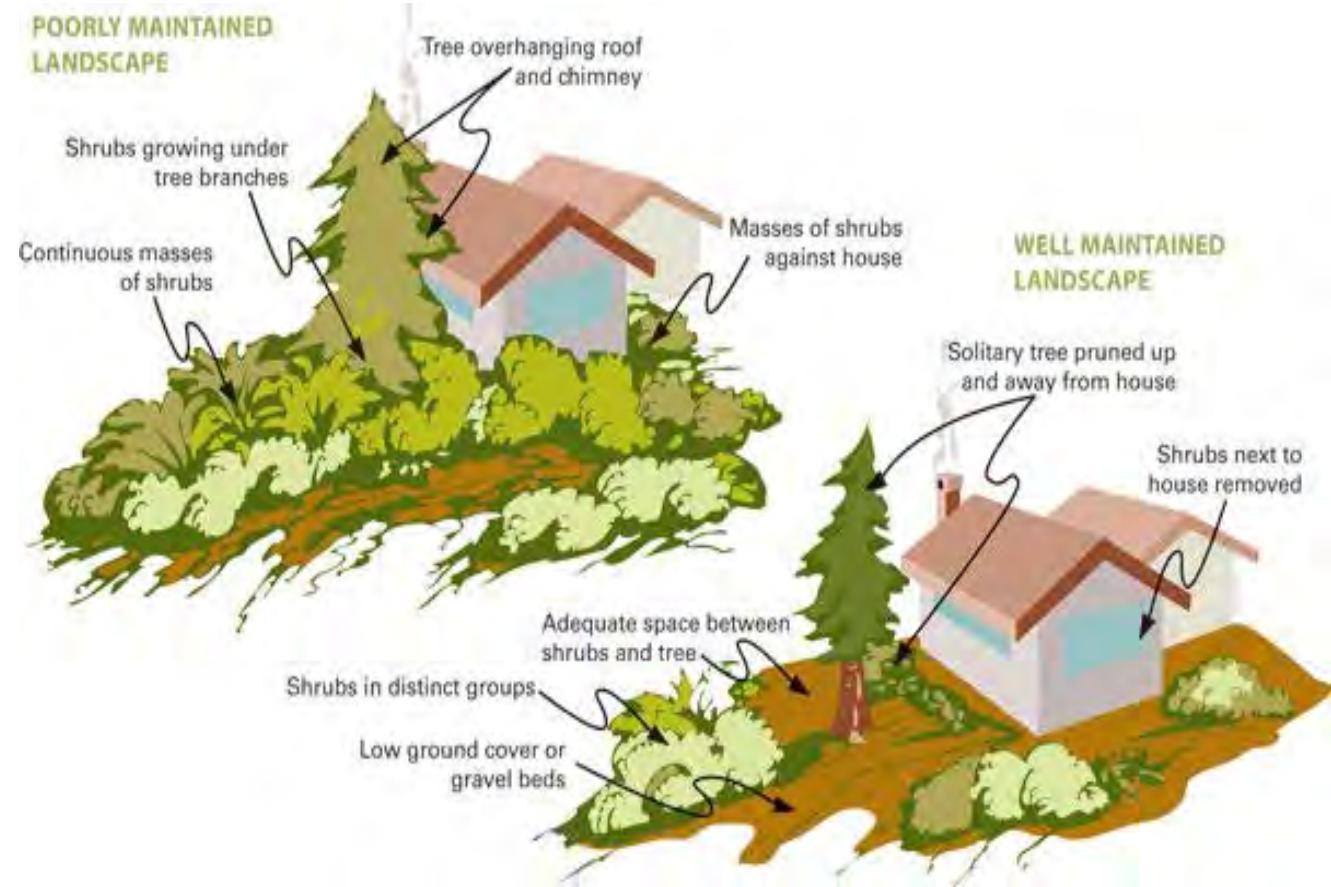
## Wildfire Hazard Lot Assessment

### CHECKLIST

| Lot Evaluation                                  |                |                 |   |
|---|----------------|-----------------|---|
| Is vegetation thinning required?                | Y=1            | N=0             | Suggested % of Vegetation Removal:                    |
| Is Limbing Up Required?                         | Y=1            | N=0             | If Yes, to what height?                               |
| Slash Disposal Needed?                          | Y=1            | N=0             | Is there an Accumulation of Dead Fuel?                |
| Recommended Type of Disposal:                   | Burn           | Chip            |   |
| Is there a Water Source?                        | Y=0            | N=1             | If Yes, What Type?                                    |
| Lot Evaluation Score:                           |                |                 |   |
| Access Evaluation                               |                |                 |   |
| Do Roads Have Adequate Width?                   | >20ft=0        | <20ft=1         | Do Roads Have Adequate Turn Around?                   |
| Does Driveway Have Adequate Width?              | >12ft=0        | <12ft=1         | Does Driveway Have Adequate Turn Around?              |
| Are Bridges Wide Enough?                        | Y=0            | N=1             | Weight Carrying Capacity of Bridge in lbs             |
| Are Gates Wide Enough?                          | Y=0            | N=1             | Are Gates Accessible by Fire Personnel at all Times?  |
| Access Evaluation Score:                        |                |                 |   |
| Structure Evaluation                            |                |                 |   |
| Roof Type (based on WUI Code)?                  | Class A=0      | Class B and C=1 | If Wood (i.e. Shake Shingle) = 6                      |
| Eaves Closed In?                                | Y=0            | N=1             | Vents Screened $\frac{1}{4}$ " or less?               |
| Chimney Screened?                               | Y=0            | N=1             | Rain Gutter Type?                                     |
| Are Gutters Clean and Free of Debris?           | Y=0            | N=1             | Siding Type?  |
| Is Fence (wood or vinyl) Attached to Structure? | Y=1            | N=0             | Is Deck (if wood or composite) Attached to Structure? |
| Is Deck Enclosed?                               | Y=0            | N=1             |   |
| Crawl Space Enclosed?                           | Y=0            | N=1             |   |
| Electrical Service:                             | Above Ground=1 | Below Ground=0  |   |
| Propane Tank?                                   | Y              | N               |   |
| Structure Evaluation Score:                     |                |                 |   |
| HAZARD RATING*                                  |                |                 |   |
| Total Score:                                    |                |                 |   |
| EXTREME (27-19)                                 |                | HIGH (18-10)    |   |
| MODERATE (9-1)                                  |                |                 |   |

# Fire Resistant Landscaping

- Landscaping choices are key to protecting your home in the event of a wildfire.
- Choose fire resistant plants and trees where feasible (see link on this page).
- Prune tree limbs up 6-10 feet from the ground.
- Follow the advice on creating defensible space on the following pages.



These online resources will help you create defensible space with smart landscaping choices:

<https://extension.usu.edu/ueden/ou-files/Firewise-Landscaping-for-Utah.pdf>

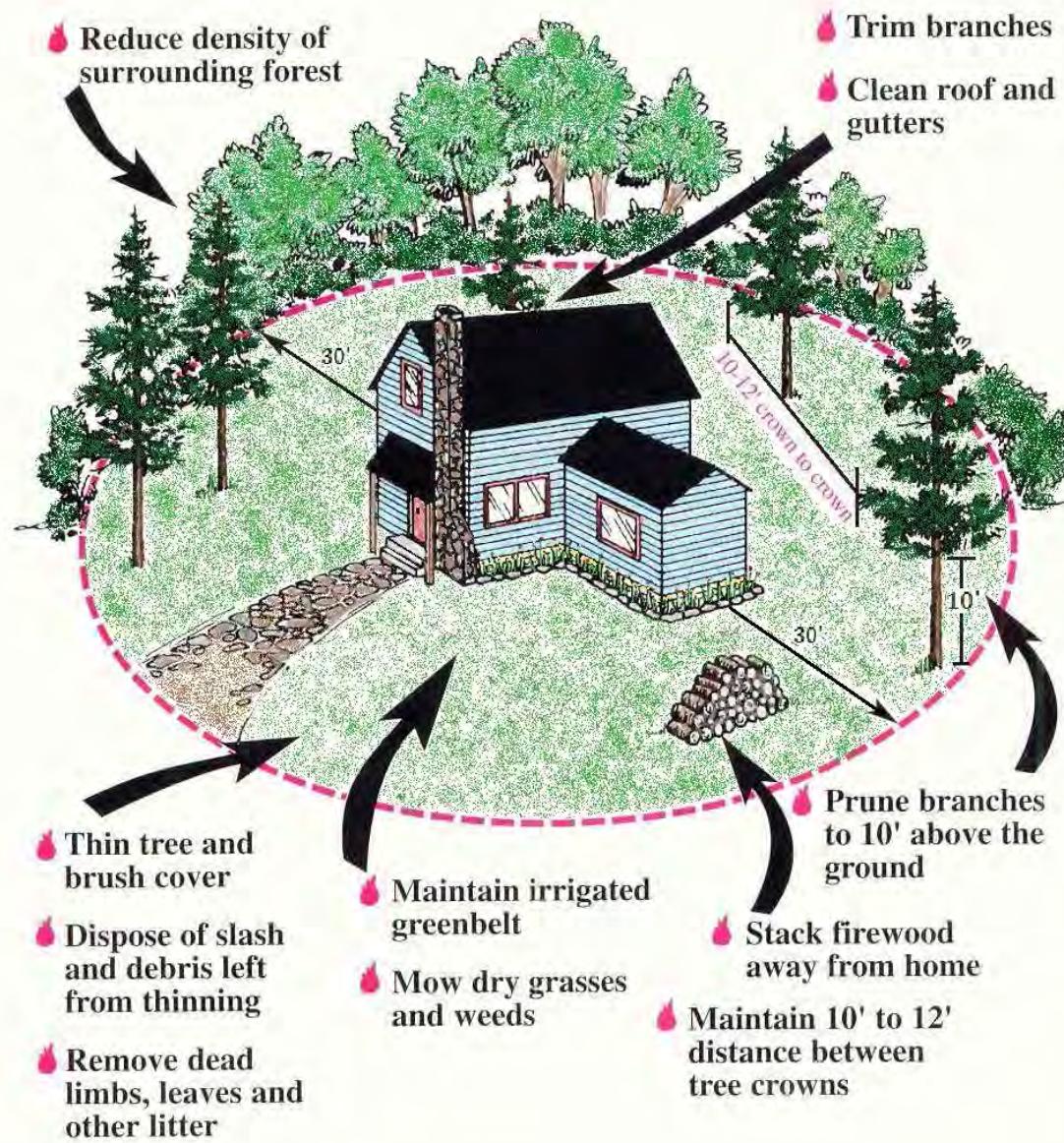
<https://www.slc.gov/fire/wp-content/uploads/sites/47/2019/04/Utah-Firewise-Plants.pdf>

<https://forestry.usu.edu/forest-fire/firewise-landscaping-basics>

## Defensible Space (Home Ignition Zones)

- Create a defensible space around your home to reduce the risk of it catching fire.
- Fire-resistant vegetation and building materials within the Home Ignition Zones can increase the chance your home will survive a wildfire.
- Landscaping around your home depends on how far the vegetation is from your house.
- Refer to the following pages for more information.

## Defensible Space Guidelines



## Home Ignition Immediate Zone (0-5 feet)

- Minimize all vegetation and other combustibles within 3-5 feet of the structure.
- Remove tree branches that overhang or touch the roof.
- Remove dead branches, dried leaves, pine needles, firewood, and other flammable material within this area.
- Replace decorative bark, mulch, and wood chippings with gravel, stone, or other non-combustibles.



These online resources can help you prepare your home and family for wildfires:

<https://www.utah.gov/beready/family/wildfires.html>

<https://www.nfpa.org/-/media/Files/Firewise/Fact-sheets/FirewiseHowToPrepareYourHomeForWildfires.pdf>

<https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA>

<https://www.fema.gov/pdf/hazard/wildfire/wdfrdam.pdf>

## Home Ignition Intermediate Zone (5-30 feet)

- Prune trees up 6-10 feet from ground so a surface fire does not climb the tree. For shorter trees, remove limbs on the lower 1/3 of the tree.
- Space trees for a minimum of 10 feet between branches.
- Choose deciduous trees over coniferous trees.
- Water plants, trees and lawns to keep them from drying out.
- Clear vegetation from around and under propane tanks.



These online resources can help you prepare your home and family for wildfires:

<https://www.utah.gov/beready/family/wildfires.html>

<https://www.nfpa.org/-/media/Files/Firewise/Fact-sheets/FirewiseHowToPrepareYourHomeForWildfires.pdf>

<https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA>

<https://www.fema.gov/pdf/hazard/wildfire/wdfrdam.pdf>

## Home Ignition Extended Zone (30-100 feet)

- Remove vegetation and other flammable material adjacent to outbuildings, such as garages, sheds, or barns.
- Thin trees by removing small conifers growing between mature trees.
- Thin other trees and brush to transition to wildland.
- Prevent build-up of dry vegetation by removing dead material



These online resources can help you prepare your home and family for wildfires:

<https://www.utah.gov/beready/family/wildfires.html>

<https://www.nfpa.org/-/media/Files/Firewise/Fact-sheets/FirewiseHowToPrepareYourHomeForWildfires.pdf>

<https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA>

<https://www.fema.gov/pdf/hazard/wildfire/wdfrdam.pdf>

# Free Wood Chipping Services

- Summit County and Park City Fire District offer free curbside wood chipping services.
- Stack all tree limbs under 6 inches in diameter at your curbside.
- Make sure the tree limbs are all facing the same direction.
- Sign up by clicking on the appropriate link on this page and following the instructions.



- Residents of eastern Summit County: <https://www.summitcounty.org/Facilities/Facility/Details/Mobile-Wood-Chipping-Unit-4>
- Residents of Snyderville Basin: <https://www.pcfd.org/fire-prevention/wood-chipping/registration/>

# Home Hardening

- Two out of every three homes destroyed by wildfire are ignited by wind-blown embers up to a mile away from the flames themselves.
- While defensible space helps guard against contact with flames, “hardening” your home and adjacent structures can help keep embers out.
- The following pages describe several actions you can take to harden your home.



## Roof, Eaves, Gutters, and Vents

- Avoid wood roofs.
- Repair or replace any loose or missing shingles to prevent ember penetration.
- Remove leaves, needles, and other debris from roof and gutters.
- Cover vents and other openings with 1/8 inch metal mesh screen to keep embers out.



<https://www.readyforwildfire.org/prepare-for-wildfire/get-ready/hardening-your-home/>

[https://ucanr.edu/sites/fire/Wildfire\\_Preparation\\_-\\_Recovery/Building/](https://ucanr.edu/sites/fire/Wildfire_Preparation_-_Recovery/Building/)

## Decks, Fences, and Carports

- Do not store flammable materials under elevated decks.
- Install 1/8 inch metal mesh screen between a low-profile deck and the ground to block embers from accumulating under the deck.
- Use non-flammable fencing material when attaching a fence to your home's siding.
- Remove flammable items from carports.



<https://www.readyforwildfire.org/prepare-for-wildfire/get-ready/hardening-your-home/>

[https://ucanr.edu/sites/fire/Wildfire Preparation - Recovery/Building/](https://ucanr.edu/sites/fire/Wildfire_Preparation_-_Recovery/Building/)

## Annual Maintenance

- Fire dangers develop every year as shrubs and branches grow back and leaves and tree needles die and fall on roofs and in gutters.
- You need to evaluate and maintain your house and surroundings on an annual basis.
- Review this checklist each spring to assess and eliminate the risks for the upcoming summer/fire season.

### ***Annual Home Safety Checklist***

- Clean roofs and gutters of dead leaves, debris, and pine needles that could catch embers
- Replace or repair any loose or missing shingles to prevent ember penetration
- Check the existence and stability of all under-eave and soffit vents and screens to prevent ember entry
- Cover all attic vents with wire mesh no larger than 1/8 inch to prevent sparks from entering home
- Repair any damaged or loose window screens and any broken windows
- Check the existence and stability of screens or barriers under patios and decks
- Move any flammable material away from exterior walls, including mulch, firewood, needles, and flammable plants
- Remove anything stored underneath decks or porches
- Remove or thin vegetation within 100 feet of your house as directed in prior slides (Use county chipping service for disposal)

# City and County Resources

- Summit County Fire Warden website provides information on open burn criteria, burn permits, fire pits, safety tips, defensible space, home hardening, firewise landscaping and other helpful links: <https://www.summitcounty.org/561/Fire-Warden>
- Park City Fire District (serves Park City and Snyderville Basin, countywide ambulance service): <https://www.pcfd.org/>
- North Summit Fire District (serves Henefer, Echo, Coalville, Upton, Hoytsville, Wanship): <http://northsummitfire.org/>
- South Summit Fire Protection District (serves Kamas, Francis, Marion, Oakley, Peoa, Woodland and unincorporated areas): [www.ssfd.us](http://www.ssfd.us)
- Summit County Emergency Management: <https://www.summitcounty.org/560/Emergency-Management>; or contact Chris Crowley, Emergency Manager at 435-333-1532, or [ccrowley@summitcounty.org](mailto:ccrowley@summitcounty.org)
- Park City Emergency Management: <https://www.parkcity.org/how-do-i/emergency-management>; or contact Mike McComb, Emergency Program Manager at 435-615-5185, or [mike.mccomb@parkcity.org](mailto:mike.mccomb@parkcity.org)
- Sign up with Everbridge, Summit County and Park City's emergency alert system, to receive emergency notifications countywide at: <https://member.everbridge.net/index/453003085613422#/login>
- Summit County and Park City Wood Chipping Service: After trimming your trees or removing brush to create defensible space around your home, schedule the chipper to come to your house to chip and carry away the branches and debris. This service is free to residents. If you live in east county, register with Summit County at <https://www.summitcounty.org/Facilities/Facility/Details/Mobile-Wood-Chipping-Unit-4>. If you live in Park City or the Snyderville Basin area, register with Park City Fire District at <https://www.pcfd.org/fire-prevention/wood-chipping/registration/>

# Private Resources

**Arborist**: call to assess the health of the trees around your house & to trim branches.



**Handyman**: call to help harden your home by filling in the eaves of your house, cleaning out gutters & under decks.

**Licensed contractor**: call for repairs or replacement of siding, decks, fences, and other larger projects subject to building code and permit requirements.

**Landscaper**: call to help create defensible space by removing bushes and installing fire resistant landscaping.



# Online Resources

<https://utahfireinfo.gov/>

<https://extension.usu.edu/ueden/ou-files/Firewise-Landscaping-for-Utah.pdf>

<https://www.slc.gov/fire/wp-content/uploads/sites/47/2019/04/Utah-Firewise-Plants.pdf>

<https://forestry.usu.edu/forest-fire/firewise-landscaping-basics>

<https://www.utah.gov/beready/family/wildfires.html>

<https://www.nfpa.org/-/media/Files/Firewise/Fact-sheets/FirewiseHowToPrepareYourHomeForWildfires.pdf>

<https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA>

<https://www.fema.gov/pdf/hazard/wildfire/wdfrdam.pdf>

<https://www.readyforwildfire.org/prepare-for-wildfire/get-ready/hardening-your-home/>

<https://ucanr.edu/sites/fire/Wildfire Preparation - Recovery/Building/>

Thank You to . . .

Summit County Fire Warden  
Park City Fire District  
Park City Fire District Fire Marshal  
Park City Fire Marshal  
Summit County and Park City  
Emergency Management  
Leadership Park City Class 25  
AND countless others who  
contributed to this Resource  
Guide.



## STAFF REPORT

TO: Summit County Council  
FROM: Matt Leavitt – Summit County Financial Officer  
DATE: October 3, 2019  
SUBJECT: Presentation of the Manager's 2020 operating budget recommendations

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### BACKGROUND:

In July departments began preparing and submitting budget requests for the 2020 budget. Departments are instructed to request resources to sufficiently perform the programs and services provided by their respective departments as well as identify areas where improvements in processes and efficiencies may be achieved. Submitting **departments requested \$68.4 million for operations** including over 50,800 (approximately 24.4 full-time equivalent) additional personnel hours through full-, part-time, temporary, seasonal employees.

Through the month of August and up to September 13<sup>th</sup> the budget committee met with certain departments and deliberated requests compared to estimated resources. After deliberations and careful consideration, the **budget committee recommended a 2020 operating budget of \$60.6 million** – a reduction of \$7.8 million from department requests, which was then presented to the County Manager.

The County Manager is required to submit a recommended budget to the County Council by October 15<sup>th</sup> of each year. The Manager takes into consideration the recommendations presented by the budget committee as well as any appeals from departments that do not agree with those recommendations. The Manager also weighs requests and recommendations against the strategic objectives of the Council. The following report presents the Manager's recommendations of the 2020 operating budget.

### COUNCIL REQUIRED ACTION:

**No action is required.** Additional documentation will be presented to the Council on October 9<sup>th</sup> and throughout the remainder of the budgeting process.

### SUMMARY INFORMATION:

**The Manager is currently recommending an operating budget of \$60.8 million.** The following highlights the significant changes.

- The recommended budget is a 9.2% increase over the 2019 adopted budget.
  - Of the \$5.1 million increase 57.8% (\$2.9 million) is a result of increased grants in Public Health for the Mental Wellness and Substance Abuse divisions.
  - Another \$1.2 million increase is anticipated through “natural” increases in taxes.

- Due to the State Legislature it is anticipated that Recorder fees will increase. The full amount of the increase has yet to be determined.
- Departmental changes:
  - The 2020 budget reflects a recommended budget for Financial Services; Communication & Public Engagement; and no longer funding the Major Crimes division in Law Enforcement at the recommendation of the Sheriff.
- Staffing changes: The following positions are being recommended in the 2020 operating budget:
  - The Manager's recommendation includes placeholders for 2% COLA, average of 3% merit increases per department, and offsets to health insurance;
  - Positions supported by new or additional resources:
    - **Mental health budget manager** – to help manage the increases in grant and Medicare contracts and supported by those resources;
    - **Stormwater inspector** – supported by anticipated engineering permit and MS4 fee increases;
    - **GIS technician** – supported by additional revenues in Recorder fees;
  - Positions without new funding:
    - **Inmate working crew deputy** – The Sheriff's Office projects that an additional crew can be provided and that this would provide savings to labor in both the Facilities, Fair and Public Works departments;
    - **Weeds code enforcement/equipment operator** – during summer months to help with the education and promotion of the weed program while being used as a snowplow operator during the winter season;
    - **Senior director** – increasing hours to full-time status.
- Program changes: The Manager is also proposing to implement a new benefit program of a 401(k) match in order to strengthen the County's benefit offerings in a time that has become more challenging to recruit and retain employees. This is also in response to feedback received from employees at town hall meetings and surveys. The benefit includes the following parameters:
  - Funding up to \$100 thousand;
  - Up to a 1% dollar-for-dollar County match for participating employees:
    - Qualified employees can no longer be in their orientation period;
    - Employees only become fully vested in the County match after five years of continuous employment.
- Fund balances: The Manager's goal is to increase general fund balances by an additional \$900 thousand. The currently proposed budget falls short of that objective. **However**, additional changes are being made to the budget document in order to achieve the desired outcome.

**The Council is required to adopt a budget on or before December 31. Currently, public hearings are anticipated for the December 4<sup>th</sup> and 11<sup>th</sup> Council meetings with the expectation that the budget is adopted by the Council on the 11<sup>th</sup>.**

To Summit County Council,

This is the petition and signatures to have Summit County take over maintaining Aspen Dr. off Highway 150. It is approximately 1 mile from Highway 150 to the gates of Manorlands and Uintalands. There are approximately 640 property owners that use this road year round, including Wilderness acres, Manorlands, and Uintalands.

We would like to be on the agenda for October 2, 2019 with Summit County Council.

Thank you,

Max Schramm  
[schrammkelly@hotmail.com](mailto:schrammkelly@hotmail.com)  
801-547-0102

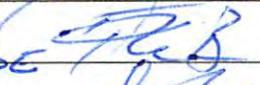
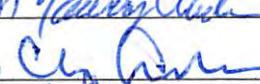
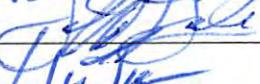
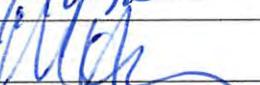
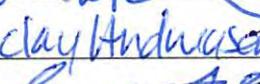
RECEIVED SEP 24 2019

# Petition to Have Summit County Maintain Aspen Dr.

Please enter your name, Lot# and address of your property in Manor Lands, Uinta lands, or Wilderness Acres, and signature to the petition for Summit County to take over the maintenance of Aspen Dr. from Hwy 150 to the gates of Manor Lands and Uinta lands. This would free up money we could use on the roads within Manor Lands and Uinta Lands.

**Please sign and return by August 31, 2019**

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| Printed Name       | Signature   | Address of Lot | Comment | Date    |
|--------------------|---|----------------|---------|---------|
| Todd McBride       |    | #1             |         | 8/10/19 |
| Stacie McBride     |   | #1             |         | 8/10/19 |
| Nancy Anderson     |  | #5C            |         | 8/10/19 |
| Clay Anderson      |  | 5C             |         | 8/10/19 |
| Shan Kinsel        |  | 5A             |         | 8/10/19 |
| Shelly Kinsel      |  | 5A             |         | 8/10/19 |
| Dr. Pauline Kinsel |  | 56B            |         | 8/10/19 |
| Glade Parkin       |  | 70A            |         | 8/10/19 |
| Cheryle Bane       |  | 51B            |         | 8/10/19 |
| David Bryant       |  | 90C            |         | 8/10/19 |
| MANKUMAR           |  | 71ABC          |         | 8/10/19 |
| Tracy Hale         |  | 60B            |         | 8/10/19 |
| Tiffany Hale       |  | 60B            |         | 8/10/19 |
| Andy Tatum         |  | 70B            |         | 8/10/19 |
| Max Hindman        |  | 11C            |         | 8/10/19 |
| Clay Hindman       |  | 11C            |         | 8/10/19 |
| Tanya Hale         |  | 60B            |         | 8/10/19 |
| Natalie Stevens    |  | 60B            |         |         |

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Daddy - Please Give this to Max

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| Printed Name     | Signature        | Address                       | Comment | Date      |
|------------------|------------------|-------------------------------|---------|-----------|
| Mary Wilson      | Mary AL          | 4371 Hilltop Cir              |         | 4/29/19   |
| Thomas Page      | Thomas Page      | 605 Yellowpine Rd             |         | 4/29/19   |
| Carry Beckstead  | Carry Beckstead  | 1113 Foothill DR.             |         | 4/29/19   |
| Trent Hocom      | Trent Hocom      | 936 Forrest DR.               |         | 4/29/19   |
| Thomas Brown     | Thomas Brown     | 631 Evergreen                 |         | 4/29/19   |
| Frank Zwech      | Frank Zwech      | 811 Pineview                  |         | 4/29/19   |
| Sue Zwech        | Sue Zwech        | 811 Pineview                  |         | 4/29/19   |
| Bruce Richins    | Bruce Richins    | 4993 Pine Ridge Road          |         | 4/29/2019 |
| Hal Hallett      | Hal Hallett      | 309 Foothill                  |         | 4/29/2019 |
| Shayne Purser    | Shayne Purser    | 5180 yellow Pine              |         | 4/29/2019 |
| Terry Kilburn    | Terry Kilburn    | 5655 Evergreen                |         | 4/29/2019 |
| Brian Darnell    | Brian Darnell    | 1015 East Loop                |         | 4/29/19   |
| Nancy Over       | Nancy Over       | 5371 Pineview Rd.             |         | 4/29/19   |
| Bruce Waymet     | Bruce Waymet     | Forest                        |         | 4/29/19   |
| Brent Boero      | Brent Boero      | 5821 Wilderness Rd            |         | 4/29/19   |
| David Hutchinson | David Hutchinson | Lots # 429/430/208            |         | 4/29/19   |
| Dale S. Perry    | Dale S. Perry    | 5775 Pineview Loop<br>Lot 933 |         | 4/29/18   |
| Dick Wells       | Dick Wells       | LOT 607 & 608                 |         | 4/29/19   |



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|------------------|------------------|---|---------------------------------|-------------|
| Kay Sanderson    | Kay Sanderson    | 11210 S. 55th Bachtel Ln  |                                 | 4/29/19     |
| Don Curtis       | Don J. Curtis    | 1124 Turnberry  |                                 | 4/29/19     |
| Rick Williams    | Rick Williams    | 6329 Crossback  |                                 | 4/29/19     |
| Rusty Larson     | Rusty Larson     | 6223 W 10220 N  |                                 | 4/29/19     |
| Richard Burt     | Richard Burt     | 1159 Dahl Ave SLC UT 84116  |                                 | 4/29/19     |
| Brian Sanderson  | Brian Sanderson  | 11210 S. 55th Bachtel Ln  |                                 | 4/29/19     |
| J. D. BANE       | J. D. BANE       | 5564 Uinta Dr.  |                                 | 4/29/19     |
| Kerry FUIT       | Kerry FUIT       | 2921 W 1010 N Clarendon Ut  |                                 | 4/29/19     |
| MICHAEL Bettin   | MICHAEL Bettin   | 630 S. Elizabeth St 84102   |                                 | 4/29/19     |
| Karen Sneed      | Karen Sneed      | LOT 1902<br>412 X 31 Quail Ridge<br>1362 F 1700 S. BRYCE UT 84023<br>(4308 Foothill Dr. VE) |                                 | 4-29-2019   |
| DEREK NEWMAN     | Derek Newman     | 416 & 417 Foothill Dr.  |                                 | 4/29/19     |
| LINDA NEWMAN     | Linda Newman     | 416 & 417 Foothill Dr.  |                                 | 4/29/19     |
| STANLEY I. LYMAN | Stanley I. Lyman | 245 South 200 West<br>KARSVILLE, UT   | LOT # 1125<br>4192 Foothill Dr. | 29 APR 2019 |
| Pat Hallett      | Pat Hallett      | 2934 N 725 W<br>Layton UT 84041   | Lots 30A<br>308 B               | 4/29/19     |
| Bobby Maki       | Bobby Maki       | 165 1/2 Perimeter<br>Stanley Park Rd. 84041<br>LOT # 613                                    |                                 | 04-29-19    |
| Michelle Main    | Michelle Main    | 195 Lakeside<br>Stanley Park Rd. 84041  | LOT 613                         | 4/29/19     |
| Mark Rocco       | Mark Rocco       | 19184 N 6580 N<br>Highway, UT 84023   | LOT 109                         | 4/29/19     |
| ANN EGGETT       | Ann Eggett       | LOT 1, 202 Aspen Dr   |                                 | 4/29/19     |



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| NOLAN HAYWARD    | Nolan Hayward    | 2048-A1                       |         | 4/30/19   |
| MARY ANN HAYWARD | Mary Ann Hayward | 837 Forest Drive              |         | 4/30/19   |
| EME HARVEY       | Eme Harvey       | 6245 Forest                   |         | 4/30/19   |
| Robert Hartman   | Robert Hartman   | 5716 Wilderness Rd<br>lot 502 |         | 4/30/19   |
| John Eggers      | John Eggers      | 1201A Aspen Dr                |         | 4/29/19   |
| Natalie Kelker   | Natalie Kelker   | 5582 Aspen Dr. lot 1203       |         | 4/29/19   |
| Julie Barker     | Julie Barker     | 907 Pinewiew                  |         | 4/29/19   |
| Steve Barker     | Steve Barker     | 907 Pinewiew                  |         | 4/29/19   |
| Jolleen Larson   | Jolleen Larson   | aspen dr                      |         | 4/29/19   |
| Harold Biggs     | Harold Biggs     | 1717 Vista Cir                |         | 4/29/19   |
| Kerry Bowman     | Kerry Bowman     | 209 aspen Dr                  |         | 4-29-19   |
| Johnna Ross      | Johnna Ross      | 1019 No Forest Dr             |         | 4/29/19   |
| Cody Ross        | Cody Ross        | 1019 No Forest Dr             |         | 4/29/19   |
| Seth Poll        | Seth Poll        | lot 1038, 1039, 1041          |         | 4-29-2019 |
| Rebecca Poll     | Rebecca Poll     | lots 1038, 1039, 1041         |         | 4/29/2019 |
| George Wilson    | George Wilson    | 1911                          |         | 4/29/19   |
| Sheila Stark     | Sheila Stark     | 937 Forest Drive              |         | 4/29/2019 |
| ALAN BLACK       | Alan Black       | 517 Wilderness                |         | 4/29/19   |



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| Printed Name       | Signature          | Address            | Comment | Date     |
|--------------------|--------------------|--------------------|---------|----------|
| Jeff Holton        | Jeff Holton        | Lot 63C Uintalands |         | 5/8/2019 |
| Mike Mayan         | Mike Mayan         | 15c ✓              |         | 5/8/19   |
| Bret Andley        | Bret Andley        | 24A                |         |          |
| Brian Stockton     | Brian Stockton     | 25A                |         | 5/8/19   |
| Shelly Roberts     | Shelly Roberts     | Lot 36B            |         | 5/8/19   |
| Doug MacLean       | Doug MacLean       | Lot 2-C            |         | 5/8/19   |
| Melanie Anderson   | Melanie Anderson   | 11C                |         | 5/8/19   |
| Todd M. Berde      | Todd M. Berde      | 1                  |         | 5/8/19   |
| Shirlene Van Alten | Shirlene Van Alten | 77A                |         | 5/8/19   |
| Glen Adams         | Glen Adams         | 22A                |         | 5/15/19  |
| Scott Adams        | Scott Adams        | 40A                |         | 5-15-19  |
| Paul Berglund      | Paul Berglund      | 36A                |         | 5-15-19  |
| Kathy Page         | Kathy Page         | 34A                |         | 5/15/19  |
| Douglas Patterson  | Douglas Patterson  | 46A                |         | 5/15/19  |
| Jay Beckstrom      | Jay Beckstrom      | 28A                |         | 5/17/19  |
| Phil Peterson      | Phil Peterson      | S-2040-A-4         |         | 5/15/19  |
| Elizabeth Rice     | Elizabeth Rice     | 17A 17C            |         | 5/15/19  |
| Robert Speirs      | Robert Speirs      | 41-C 42B           |         | 5/15/19  |
| Christa Fries      | Christa Fries      | 52C Uintalands     |         | 5/15/19  |

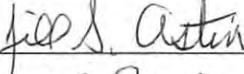
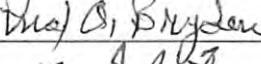
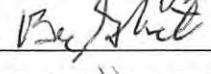
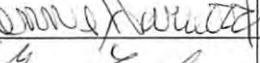
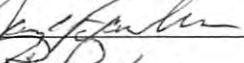
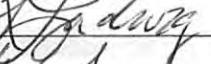
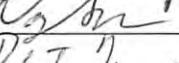
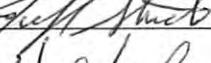
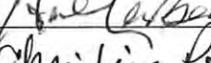
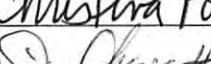
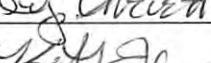
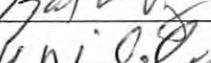
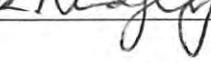


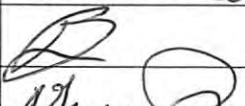
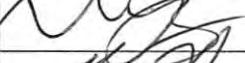
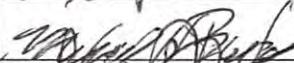
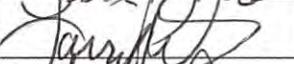
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**Please sign and return by August 1, 2019**

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|---------------------------------|---|--|--|
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| Action petitioned for           | We, the undersigned, are concerned citizens who urge our leaders to act now to take over maintenance of Aspen Dr.   |  |  |

| Printed Name    | Signature   | Address            | Comment | Date    |
|-----------------|---|--------------------|---------|---------|
| Steve Morris    |    | 10-25B             |         | 5/15/19 |
| Kirk Meadow     |   | 11-51 Woodmorn dr. |         | 5-19-   |
| Jill S. Austin  |  | 69A&B UintaDrive   |         | 5-15-19 |
| Mark Bryden     |  | 66A moose lane     |         | 5-15-19 |
| BARRY Mortenson |  | 10C                |         | 5-15-19 |
| JENNIE Harwood  |  | 12B                |         | 5-15-19 |
| Gary Franklin   |  | 84 B               |         | 5-15-19 |
| Robert Ladwig   |  | 18 B               |         | 5-15-19 |
| Wayne Snow      |  | 2040 Moose Lane    |         | 5/15/19 |
| Robert Thompson |  | 4331 Elk Lane      |         | 5/15/19 |
| Richard Caley   |  | 38 B 4492 Bearskin |         | 5/15/19 |
| JEFF Sucki      |  | 10000 79 C         |         | 5/15/19 |
| Teri LABELLE    |  | 51-C 6155 Aspen    |         | "       |
| Christina Poore |  | 44C Uinta Drive    |         | 5/15/19 |
| Phil Averett    |  | 64 A 1004          |         | 5/15    |
| Katherine Vack  |  | 1239 Deer Lane     |         | 5/15/19 |
| Keith midgley   |  | 325 Paradise Lane  |         | 5/15/19 |

| Printed Name            | Signature   | Address   | Comment   | Date    |
|-------------------------|---|---|-----------|---------|
| Cathy Rallison          | Cathy Rallison  | 744 E. 16 <sup>th</sup> Ave, <del>Sec 37103</del>             | 32 Spruce | 5/15/19 |
| Karen Blackham          | Karen Blackham  |   | 82B       | 5/15/19 |
| Ryan Mower              |    |   | 28C       | 5/15/19 |
| Charles Peeler          | Charles Peeler  | 5250 Ham Ln   | Block     | 5/15/19 |
| JERRY Rodehouse         | Jerry Rodehouse   | 814 E 2000 N  | Layton    |         |
| Steve Womack            | Steve Womack  | 20-C  | Leaphorn  | 5-15-19 |
| Rich Green              | Rich Green  | 64-C 3703 Norse   |           | 5-15-19 |
| Kathryn Prater          | Kathryn Prater  | 4528 Arcata Rd  | 23ABC     | 5/15/19 |
| Scott Harper            | Scott Harper  | 647 N 40 E Farmington   | 65C       | 5-15-19 |
| Donna Butler            | Donna Butler  | 278 S 300W Kays   | 92 C      | "       |
| Charles Lewis           |    | 905 N Main St C1  | 78C       | 5/15    |
| Carri Green             | Carri Green   | 2263 West Gentile, Layton                                     | 52 A      | 5/15    |
| MARK FOX                |    | 2335 E EVERGREEN MURKIN                                       | 13 A      | 5/15    |
| Karen Flannery          |   | 340 W 500 N RSL CITY  | 90A 90B   | 5/15/19 |
| Markie Conner           |  | 2740 LUMPTON DR. DOWNTOWN                                     | 35A       | 5/15/19 |
| Colleen Kresser Bywater | Colleen Kresser Bywater   | 3117 Robinwood Dr.<br>Taylorsville, UT 84129                  | 90 C      | 5/15/19 |
| John Davidson           |  | 4284 Hidden Cove  | 79B       | 5/15/19 |
| Jared Stubbs            |  | 595 N. 100E <sup>Cent</sup> <del>apart</del> <sup>apart</sup> | 93 C      | 5/15/19 |
| Kyle Robinson           |  | 1805 N 1100 W. <sup>west</sup> <del>bowling</del>             | 43 C      | 5-15-19 |
| Pam Lakomski            | Pam Lakomski  | 440 N. Virginia St. AC  | 58 A      | 5-15-19 |
| Shawnmen                |  | 1407 S Seaway   |           | 5-15    |
| Mike Burton             |  | 610 Adams St  | 37 A      | 5-15-19 |
| Larry Petersen          |  | 11307 S Trent Dr  | 36 B      | 5/15/19 |
| Lori Duncan             | Lori Duncan   | 1018 W. 1490 N WB   | 27 A      | 5-15-19 |
| Kim Duncan              |  | "   | 27 A      | 5-15-19 |

## Petition to Have Summit County Maintain Aspen Dr.

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Please sign and return by ~~August 31~~, 2019

August 31

|                                 |   |
|---------------------------------|---|
| Petition summary and background | This petition is to have Summit County Maintain Aspen Dr. from Hwy 150 to the entry gates of Manor Lands and Uintalands, approximately one mile. There are approximately 640 land owners paying property tax in Manor Lands and Uinta Lands and receiving no services.. |
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| Printed Name    | Signature       | Address of Lot | Comment        | Date    |
|-----------------|-----------------|----------------|----------------|---------|
| MATT Lee        | MATT Lee        | 56C            | Agreed         | 6/21/19 |
| John Davidson   | John Davidson   | 79B            | Thank you!     | 6/21/19 |
| Barry Mortenson | Barry Mortenson | 40C            | Agreed         | 6/21/19 |
| S. Woody        | S. Woody        | 60C            |                | 6/21/19 |
| Kendal Madsen   | Kendal Madsen   | 40B            | Yes!!!!        | 6/21/19 |
| Terry Blume     | Terry Blume     | 3819 38B 38C   | Agreed         | 6/22/19 |
| Terry Warren    | Terry Warren    | 19C            | YEP            | 6/22/19 |
| Eric Cisneros   | Eric Cisneros   | 8B             | Yes            | 6/22/19 |
| Lynn Barker     | Lynn Barker     | 72A            | Agree          | 6/22/19 |
| Blake Peterson  | Blake Peterson  | 34C            | yes            | 6/22/19 |
| Skewwarrell     | Skewwarrell     | 20C            | its about time | 6/22/19 |
| Gloria Clark    | Gloria Clark    | 50B + 50C      |                | 6/23/19 |
| Alan Boynton    |                 | 54A            | agree / yes    | 6/23/19 |
| Justin Bennett  | Justin Bennett  | 42A            | yes            | 6/23/19 |
| Thomas Matthews | Thomas Matthews | 49C            |                | 6/23/19 |
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| Printed Name      | Signature         | Lot# and Address   | Phone        | Date      |
|-------------------|-------------------|--------------------|--------------|-----------|
| GUY L. GREEN      | Guy L. Green      | 1511 4721 alpine   | 801-573-7090 | 4/13/19   |
| L. KAE ANDREASON  | L. Kae Andreason  | 1106 4444 foothill | 801-540-5489 | 4/16/19   |
| David D Andreason | David D Andreason | 1107 Foothill      | 801-244-1698 | 4/16/19   |
| Larry Savage      | Larry Savage      | 901 Pineview       | 801-499-9200 | 4/29/19   |
| DEBORA WILHELMSEN | Debora WilhelmSEN | 603 48110w 86110   | 801-414-1493 | 4/29/19   |
| Dennis Astin      | Dennis Astin      | 219 Sagewood Dr    | 801-254-0818 | 4/29/19   |
| Alex Wallberg     | Alex Wallberg     | Lot 710 Pinehill   | 719-522-3295 | 4/29/19   |
| Mike Wallberg     | Mike Wallberg     | 711 Pinehill       | 801-588-9190 | 4/29/2019 |
| Sherron Sheen     | Sherron Sheen     | 1901               | 801-592-2184 | 4/29/19   |
| Mark Green        | Mark Green        | 11605              | 801-231-4261 | 4/29/19   |
| Mark Green        | Mark Green        | 1606               | 801-231-4261 | 4/29/19   |
| David Ingleby     | David Ingleby     | 514 Cresthill      | 801-718-6186 | 4/29/18   |

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My Absentee Ballot is Attached

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| Printed Name         | Signature   | Lot# and Address    | Phone          | Date    |
|----------------------|---|---------------------|----------------|---------|
| Shawn "Scott" Seiler |  | 6525 Aspen Dr       | (321) 693-0253 | 3/29/19 |
|                      |   | 214A Kamia Ut 82430 |                |         |
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| Printed Name     | Signature        | Address of Lot  | Comment | Date    |
|------------------|------------------|-----------------|---------|---------|
| Steve DeLoach    | Steve DeLoach    | 1211 Club Dr    |         | 7-10-19 |
| Mike Westover    | Mike Westover    | 2123 Uinta Dr.  | For     | 7-10-19 |
| Doug Madsen      | Doug Madsen      | 5622 Aspen      | For     | 7-11-19 |
| Glade Parkin     | Glade Parkin     | 70A             |         | 7-11-19 |
| Roger Peterson   | Roger Peterson   | 4717            |         | 7-11-19 |
| JAMES PAGE       | JAMES PAGE       | 34A             | FOR     | 7/12/19 |
| Dennis Boyer     | Dennis Boyer     | 16 AB           | For     | 7/12/19 |
| Phil Brandy      | Phil Brandy      | 27B             | FO      | 7/12/19 |
| Don Erickson     | Don Erickson     | 80-C            | For     | 7/14/19 |
| Don Erickson     | Don Erickson     | 56A             | For     | 7/14/19 |
| Gordon Smith     | Gordon Smith     | 28B             | For     | 7-19-19 |
| Kristen Smith    | Kristen Smith    | 28B             | For     | 7-19-19 |
| Merrill Sherriff | Merrill Sherriff | 24              | For     | 7-19-19 |
| Madelyn          | Madelyn          | 3371 for Willym |         | 7-19-19 |





Michael R. Howard

Summit County Auditor

September 30, 2019

County Council,

Please reconvene as the Board of Equalization on October 9, 2019. Consider approving the Stipulations of Agreements for the 2019 property tax appeals. As you are aware, they need the approval of the council before they can be mailed out to the property owners for their agreement or disagreement. The property owner has ten days to return the stipulation from the mailing date. If they disagree with the appraiser's decision they can call to schedule an informal hearing. If the appellant does not return the stipulation to our office, it is presumed they agree with the decision. Also, if the appellant disagrees with the informal hearing decision, they can appeal to the State Tax Commission.

Thanks for your consideration.

Sincerely,

A handwritten signature in black ink that reads "LoraLea McKnight". The signature is fluid and cursive, with "LoraLea" on the first line and "McKnight" on the second line.

LoraLea McKnight

Clerk of the Board of Equalization

# 2019 BOE Adjustments

| Account # | RDN      | Serial #      | New Market Value | Old Market Value | MV Difference   | New Taxable Value | Old Taxable Value | Taxable Difference | County Tax Dollar Difference | Old Tax Estimate | % Difference | Explanation for adjustment               |
|-----------|----------|---------------|------------------|------------------|-----------------|-------------------|-------------------|--------------------|------------------------------|------------------|--------------|--|
| 0036693   | 91-03-23 | 3K-5-C        | \$ 700,000.00    | \$ 700,000.00    | \$ -            | \$ 385,000.00     | \$ 700,000.00     | \$ (315,000.00)    | \$ (261.77)                  | \$ 5,821.20      | -45.00%      | Change to primary residence              |
| 0193791   | 05-02-02 | AF-41         | \$ 2,445,224.00  | \$ 2,445,224.00  | \$ -            | \$ 1,344,873.00   | \$ 2,445,224.00   | \$ (1,100,351.00)  | \$ (914.39)                  | \$ 20,334.48     | -45.00%      | Change to primary residence              |
| 0345060   | 14-05-20 | BHWKS-1-5-2AM | \$ 602,290.00    | \$ 602,290.00    | \$ -            | \$ 331,259.00     | \$ 602,290.00     | \$ (271,031.00)    | \$ (225.23)                  | \$ 4,779.77      | -45.00%      | Change to primary residence              |
| 0301048   | 14-02-10 | BN-A-3-62     | \$ 1,166,156.00  | \$ 1,166,156.00  | \$ -            | \$ 640,385.00     | \$ 1,166,156.00   | \$ (525,771.00)    | \$ (436.92)                  | \$ 9,254.61      | -45.09%      | Change to primary residence              |
| 0259626   | 91-05-02 | CHC-109       | \$ 130,000.00    | \$ 130,000.00    | \$ -            | \$ 71,500.00      | \$ 130,000.00     | \$ (58,500.00)     | \$ (48.61)                   | \$ 1,081.08      | -45.00%      | Change to primary residence              |
| 0342505   | 91-09-24 | CSLC-A138-AM  | \$ 1,020,000.00  | \$ 1,200,000.00  | \$ (180,000.00) | \$ 1,020,000.00   | \$ 1,200,000.00   | \$ (180,000.00)    | \$ (149.58)                  | \$ 9,979.20      | -15.00%      | Adjust value to reflect comparable sales |
| 0342513   | 91-09-24 | CSLC-A201-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342521   | 91-24-24 | CSLC-A202-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342539   | 91-09-24 | CSLC-A209-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342547   | 91-09-24 | CSLC-A210-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342554   | 91-09-24 | CSLC-A223-AM  | \$ 1,040,000.00  | \$ 1,200,000.00  | \$ (160,000.00) | \$ 1,040,000.00   | \$ 1,200,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,979.20      | -13.33%      | Adjust value to reflect comparable sales |
| 0342562   | 91-09-24 | CSLC-A224-AM  | \$ 1,087,500.00  | \$ 1,200,000.00  | \$ (112,500.00) | \$ 1,087,500.00   | \$ 1,200,000.00   | \$ (112,500.00)    | \$ (93.49)                   | \$ 5,488.56      | -9.38%       | Adjust value to reflect comparable sales |
| 0342588   | 91-09-24 | CSLC-A238-AM  | \$ 980,000.00    | \$ 1,200,000.00  | \$ (220,000.00) | \$ 980,000.00     | \$ 1,200,000.00   | \$ (220,000.00)    | \$ (182.82)                  | \$ 9,979.20      | -18.33%      | Adjust value to reflect comparable sales |
| 0342596   | 91-09-24 | CSLC-A301-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342604   | 91-09-24 | CSLC-A302-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342612   | 91-09-24 | CSLC-A309-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0350620   | 91-09-24 | CSLC-A310-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342638   | 91-09-24 | CSLC-A317-AM  | \$ 1,050,000.00  | \$ 1,200,000.00  | \$ (150,000.00) | \$ 1,050,000.00   | \$ 1,200,000.00   | \$ (150,000.00)    | \$ (124.65)                  | \$ 9,979.20      | -12.50%      | Adjust value to reflect comparable sales |
| 0342653   | 91-09-24 | CSLC-A323-AM  | \$ 1,040,000.00  | \$ 1,200,000.00  | \$ (160,000.00) | \$ 1,040,000.00   | \$ 1,200,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,979.20      | -13.33%      | Adjust value to reflect comparable sales |
| 0342661   | 91-09-24 | CSLC-A324-AM  | \$ 1,040,000.00  | \$ 1,200,000.00  | \$ (160,000.00) | \$ 1,040,000.00   | \$ 1,200,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,979.20      | -13.33%      | Adjust value to reflect comparable sales |
| 0342679   | 91-09-24 | CSLC-A332-AM  | \$ 1,300,000.00  | \$ 1,400,000.00  | \$ (100,000.00) | \$ 1,300,000.00   | \$ 1,400,000.00   | \$ (100,000.00)    | \$ (83.10)                   | \$ 11,642.40     | -7.14%       | Adjust value to reflect comparable sales |
| 0342687   | 91-09-24 | CSLC-A338-AM  | \$ 980,000.00    | \$ 1,200,000.00  | \$ (220,000.00) | \$ 980,000.00     | \$ 1,200,000.00   | \$ (220,000.00)    | \$ (182.82)                  | \$ 11,642.40     | -18.33%      | Adjust value to reflect comparable sales |
| 0342695   | 91-09-24 | CSLC-A409-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342703   | 91-09-24 | CSLC-A410-AM  | \$ 1,360,000.00  | \$ 1,400,000.00  | \$ (40,000.00)  | \$ 1,360,000.00   | \$ 1,400,000.00   | \$ (40,000.00)     | \$ (33.24)                   | \$ 11,642.40     | -2.86%       | Adjust value to reflect comparable sales |
| 0342711   | 91-09-24 | CSLC-A417-AM  | \$ 1,050,000.00  | \$ 1,200,000.00  | \$ (150,000.00) | \$ 1,050,000.00   | \$ 1,200,000.00   | \$ (150,000.00)    | \$ (124.65)                  | \$ 9,979.20      | -12.50%      | Adjust value to reflect comparable sales |
| 0342737   | 91-09-24 | CSLC-A423-AM  | \$ 1,040,000.00  | \$ 1,200,000.00  | \$ (160,000.00) | \$ 1,040,000.00   | \$ 1,200,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,979.20      | -13.33%      | Adjust value to reflect comparable sales |
| 0342752   | 91-09-24 | CSLC-A432-AM  | \$ 1,300,000.00  | \$ 1,400,000.00  | \$ (100,000.00) | \$ 1,300,000.00   | \$ 1,400,000.00   | \$ (100,000.00)    | \$ (83.10)                   | \$ 11,642.40     | -7.14%       | Adjust value to reflect comparable sales |
| 0342760   | 91-09-24 | CSLC-A438-AM  | \$ 980,000.00    | \$ 1,200,000.00  | \$ (220,000.00) | \$ 980,000.00     | \$ 1,200,000.00   | \$ (220,000.00)    | \$ (182.82)                  | \$ 11,642.40     | -18.33%      | Adjust value to reflect comparable sales |
| 0350599   | 91-09-24 | CSLC-B-267-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350581   | 91-09-24 | CSLC-B-270-AM | \$ 940,000.00    | \$ 1,100,000.00  | \$ (160,000.00) | \$ 940,000.00     | \$ 1,100,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,147.60      | -14.55%      | Adjust value to reflect comparable sales |
| 0350615   | 91-09-24 | CSLC-B-273-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350607   | 91-09-24 | CSLC-B-276-AM | \$ 970,000.00    | \$ 1,160,000.00  | \$ (190,000.00) | \$ 970,000.00     | \$ 1,160,000.00   | \$ (190,000.00)    | \$ (157.89)                  | \$ 9,646.56      | -16.38%      | Adjust value to reflect comparable sales |
| 0350631   | 91-09-24 | CSLC-B-279-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350623   | 91-09-24 | CSLC-B-282-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350656   | 91-09-24 | CSLC-B-285-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350649   | 91-09-24 | CSLC-B-288-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350664   | 91-09-24 | CSLC-B-294-AM | \$ 1,100,000.00  | \$ 1,100,000.00  | \$ -            | \$ 1,100,000.00   | \$ 1,100,000.00   | \$ -               | \$ -                         | \$ 9,147.60      | 0.00%        | No change made                           |
| 0350672   | 91-09-24 | CSLC-B-298-AM | \$ 1,240,000.00  | \$ 1,400,000.00  | \$ (160,000.00) | \$ 1,240,000.00   | \$ 1,400,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 11,642.40     | -11.43%      | Adjust value to reflect comparable sales |
| 0350698   | 91-09-24 | CSLC-B-367-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350680   | 91-09-24 | CSLC-B-370-AM | \$ 940,000.00    | \$ 1,100,000.00  | \$ (160,000.00) | \$ 940,000.00     | \$ 1,100,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 9,147.60      | -14.55%      | Adjust value to reflect comparable sales |
| 0350714   | 91-09-24 | CSLC-B-373-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350706   | 91-09-24 | CSLC-B-376-AM | \$ 970,000.00    | \$ 1,160,000.00  | \$ (190,000.00) | \$ 970,000.00     | \$ 1,160,000.00   | \$ (190,000.00)    | \$ (157.89)                  | \$ 9,646.56      | -16.38%      | Adjust value to reflect comparable sales |
| 0350730   | 91-09-24 | CSLC-B-379-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350722   | 91-09-24 | CSLC-B-382-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350755   | 91-09-24 | CSLC-B-385-AM | \$ 930,000.00    | \$ 1,160,000.00  | \$ (230,000.00) | \$ 930,000.00     | \$ 1,160,000.00   | \$ (230,000.00)    | \$ (191.13)                  | \$ 9,646.56      | -19.83%      | Adjust value to reflect comparable sales |
| 0350748   | 91-09-24 | CSLC-B-388-AM | \$ 1,100,000.00  | \$ 1,100,000.00  | \$ -            | \$ 1,100,000.00   | \$ 1,100,000.00   | \$ -               | \$ -                         | \$ 9,147.60      | 0.00%        | No change made                           |
| 0350763   | 91-09-24 | CSLC-B-394-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350771   | 91-09-24 | CSLC-B-398-AM | \$ 1,240,000.00  | \$ 1,400,000.00  | \$ (160,000.00) | \$ 1,240,000.00   | \$ 1,400,000.00   | \$ (160,000.00)    | \$ (132.96)                  | \$ 11,642.40     | -11.43%      | Adjust value to reflect comparable sales |
| 0350797   | 91-09-24 | CSLC-B-485-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350789   | 91-08-24 | CSLC-B-488-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0350805   | 91-09-24 | CSLC-B-494-AM | \$ 930,000.00    | \$ 1,100,000.00  | \$ (170,000.00) | \$ 930,000.00     | \$ 1,100,000.00   | \$ (170,000.00)    | \$ (141.27)                  | \$ 9,147.60      | -15.45%      | Adjust value to reflect comparable sales |
| 0001044   | 37-33-40 | CT-185        | \$ 127,428.00    | \$ 127,428.00    | \$ -            | \$ 70,085.00      | \$ 127,428.00     |                    |                              |                  |              |  |

| Account # | RDN      | Serial #       | New Market Value | Old Market Value | MV Difference   | New Taxable Value | Old Taxable Value | Taxable Difference | County Tax Dollar Difference | Old Tax Estimate | % Difference | Explanation for adjustment                           |
|-----------|----------|----------------|------------------|------------------|-----------------|-------------------|-------------------|--------------------|------------------------------|------------------|--------------|--|
| 0312540   | 25-28-01 | FE-7           | \$ 937,779.00    | \$ 1,080,762.00  | \$ (142,983.00) | \$ 566,403.00     | \$ 645,044.00     | \$ (78,641.00)     | \$ (65.35)                   | \$ 5,592.53      | -12.19%      | Adjust value to reflect comparable sales             |
| 0391247   | 37-34-60 | FRTR-6         | \$ 274,334.00    | \$ 274,334.00    | \$ -            | \$ 150,883.00     | \$ 274,334.00     | \$ (123,451.00)    | \$ (102.59)                  | \$ 2,128.28      | -45.00%      | Change to primary residence                          |
| 0174338   | 91-04-07 | FVL-20         | \$ 1,200,000.00  | \$ 1,200,000.00  | \$ -            | \$ 660,000.00     | \$ 1,200,000.00   | \$ (540,000.00)    | \$ (448.74)                  | \$ 9,979.20      | -45.00%      | Change to primary residence                          |
| 0283089   | 03-05-01 | FWM-56         | \$ 1,205,609.00  | \$ 1,205,609.00  | \$ -            | \$ 663,084.00     | \$ 1,205,609.00   | \$ (542,525.00)    | \$ (450.84)                  | \$ 10,025.84     | -45.00%      | Change to primary residence                          |
| 0353379   | 14-03-20 | GFRCH-2-AM     | \$ 1,240,177.00  | \$ 1,240,177.00  | \$ -            | \$ 691,088.00     | \$ 1,240,177.00   | \$ (549,098.00)    | \$ (456.29)                  | \$ 10,645.68     | -44.28%      | Change to primary residence                          |
| 0284079   | 91-01-21 | GG-401         | \$ 380,000.00    | \$ 440,000.00    | \$ (60,000.00)  | \$ 380,000.00     | \$ 440,000.00     | \$ (60,000.00)     | \$ (49.86)                   | \$ 3,659.04      | -13.64%      | Adjust value to reflect comparable sales             |
| 0374219   | 14-04-10 | GWLD-II-105-AM | \$ 2,700,000.00  | \$ 2,998,773.00  | \$ (298,773.00) | \$ 2,700,000.00   | \$ 2,998,773.00   | \$ (298,773.00)    | \$ (248.28)                  | \$ 22,643.73     | -9.96%       | Adjust value to reflect fee appraisal                |
| 0374243   | 14-04-10 | GWLD-II-108-AM | \$ 658,125.00    | \$ 709,875.00    | \$ (51,750.00)  | \$ 658,125.00     | \$ 709,875.00     | \$ (51,750.00)     | \$ (43.00)                   | \$ 5,360.27      | -7.29%       | Adjust value to reflect comparable sales             |
| 0374292   | 14-04-10 | GWLD-II-113-AM | \$ 2,815,594.00  | \$ 2,815,594.00  | \$ -            | \$ 1,549,252.00   | \$ 1,549,252.00   | \$ -               | \$ -                         | \$ 11,698.40     | 0.00%        | No change made                                       |
| 0132617   | 17-04-02 | HE-A-352-B     | \$ 558,243.00    | \$ 768,879.00    | \$ (210,636.00) | \$ 558,243.00     | \$ 768,879.00     | \$ (210,636.00)    | \$ (175.04)                  | \$ 4,430.22      | -27.40%      | Adjust value to reflect comparable sales             |
| 0037329   | 03-14-01 | HR-15          | \$ 1,614,530.00  | \$ 1,614,530.00  | \$ -            | \$ 928,491.00     | \$ 1,614,530.00   | \$ (686,039.00)    | \$ (570.10)                  | \$ 13,426.43     | -42.49%      | Change to primary residence                          |
| 0038160   | 03-14-01 | HR-92          | \$ 639,230.00    | \$ 639,230.00    | \$ -            | \$ 351,576.00     | \$ 639,230.00     | \$ (287,654.00)    | \$ (239.04)                  | \$ 5,315.84      | -45.00%      | Change to primary residence                          |
| 0412522   | 18-01-10 | HSD-25         | \$ 1,700,000.00  | \$ 1,743,902.00  | \$ (43,902.00)  | \$ 935,000.00     | \$ 1,743,902.00   | \$ (808,902.00)    | \$ (672.20)                  | \$ 15,232.98     | -46.38%      | Adjust value to reflect comparable sales and Primary |
| 0234363   | 14-02-40 | JR-3-315       | \$ 1,037,143.00  | \$ 1,037,443.00  | \$ (300.00)     | \$ 570,428.00     | \$ 1,037,443.00   | \$ (467,015.00)    | \$ (388.09)                  | \$ 8,233.15      | -45.02%      | Change to primary residence                          |
| 0234736   | 14-02-40 | JR-3-356       | \$ 1,063,516.00  | \$ 1,063,516.00  | \$ -            | \$ 584,934.00     | \$ 584,934.00     | \$ -               | \$ -                         | \$ 4,642.04      | 0.00%        | No change made                                       |
| 0234892   | 14-02-40 | JR-3-372       | \$ 1,025,000.00  | \$ 1,125,652.00  | \$ (100,652.00) | \$ 563,750.00     | \$ 1,025,000.00   | \$ (461,250.00)    | \$ (383.30)                  | \$ 8,140.69      | -45.00%      | Change to primary residence                          |
| 0234991   | 14-02-40 | JR-3-382       | \$ 1,773,889.00  | \$ 1,773,889.00  | \$ -            | \$ 975,638.00     | \$ 1,773,889.00   | \$ (798,251.00)    | \$ (663.35)                  | \$ 14,077.58     | -45.00%      | Change to primary residence                          |
| 0185979   | 14-02-40 | JR-85          | \$ 1,066,000.00  | \$ 1,122,739.00  | \$ (56,739.00)  | \$ 586,300.00     | \$ 617,506.00     | \$ (31,206.00)     | \$ (25.93)                   | \$ 4,900.53      | -5.05%       | Adjust value to reflect fee appraisal                |
| 0185987   | 14-02-40 | JR-86          | \$ 917,668.00    | \$ 917,668.00    | \$ -            | \$ 504,717.00     | \$ 917,668.00     | \$ (412,951.00)    | \$ (343.16)                  | \$ 4,005.43      | -45.00%      | Change to primary residence                          |
| 0201222   | 92-04-04 | JW-AM-9        | \$ 550,000.00    | \$ 707,000.00    | \$ (157,000.00) | \$ 302,500.00     | \$ 388,850.00     | \$ (86,350.00)     | \$ (71.76)                   | \$ 3,085.91      | -22.21%      | Adjust value to reflect comparable sales             |
| 0450905   | 92-02-12 | LBHV-III-4401  | \$ 425,000.00    | \$ 425,000.00    | \$ -            | \$ 233,750.00     | \$ 425,000.00     | \$ (191,250.00)    | \$ (158.93)                  | \$ 3,209.18      | -45.00%      | Change to primary residence                          |
| 0432975   | 91-06-26 | LINE-13        | \$ 250,000.00    | \$ 250,000.00    | \$ -            | \$ 137,500.00     | \$ 250,000.00     | \$ (112,500.00)    | \$ (93.49)                   | \$ 2,079.00      | -45.00%      | Change to primary residence                          |
| 0408132   | 18-01-08 | LOR-16         | \$ 1,108,675.00  | \$ 1,108,675.00  | \$ -            | \$ 1,108,675.00   | \$ 1,108,675.00   | \$ -               | \$ -                         | \$ 9,864.28      | 0.00%        | No change made                                       |
| 0488463   | 19-10-01 | LR-3-193-AM    | \$ 453,943.00    | \$ 453,943.00    | \$ -            | \$ 249,668.00     | \$ 453,943.00     | \$ (204,275.00)    | \$ (169.75)                  | \$ 4,184.90      | -45.00%      | Change to primary residence                          |
| 0284616   | 11-05-01 | MH-1           | \$ 1,053,590.00  | \$ 1,242,920.00  | \$ (189,330.00) | \$ 579,474.00     | \$ 683,606.00     | \$ (104,132.00)    | \$ (86.53)                   | \$ 5,425.10      | -15.23%      | Adjust value to reflect comparable sales             |
| 0284921   | 11-05-01 | MH-32          | \$ 1,028,886.00  | \$ 1,184,192.00  | \$ (155,306.00) | \$ 565,873.00     | \$ 651,306.00     | \$ (85,433.00)     | \$ (70.99)                   | \$ 5,168.76      | -13.12%      | Adjust value to reflect comparable sales             |
| 0285258   | 11-05-01 | MH-II-64       | \$ 1,770,188.00  | \$ 1,770,188.00  | \$ -            | \$ 973,603.00     | \$ 973,603.00     | \$ -               | \$ -                         | \$ 7,726.51      | 0.00%        | No change made                                       |
| 0447147   | 41-03-15 | MVSO-I-12-AM   | \$ 1,694,499.00  | \$ 1,901,076.00  | \$ (206,577.00) | \$ 1,490,793.00   | \$ 1,697,370.00   | \$ (206,577.00)    | \$ (171.67)                  | \$ 12,406.08     | -12.17%      | Adjust value to reflect fee appraisal                |
| 0447192   | 41-03-15 | MVSO-I-17-AM   | \$ 2,098,605.00  | \$ 2,331,426.00  | \$ (232,821.00) | \$ 1,764,550.00   | \$ 1,997,371.00   | \$ (232,821.00)    | \$ (193.47)                  | \$ 14,598.78     | -11.66%      | Adjust value to reflect fee appraisal                |
| 0447332   | 41-03-15 | MVSO-I-31-AM   | \$ 1,987,372.00  | \$ 2,186,712.00  | \$ (199,340.00) | \$ 1,313,921.00   | \$ 1,513,261.00   | \$ (199,340.00)    | \$ (165.65)                  | \$ 11,060.42     | -13.17%      | Adjust value to reflect fee appraisal                |
| 0447060   | 41-03-15 | MVSO-I-4-AM    | \$ 3,158,633.00  | \$ 3,567,612.00  | \$ (408,979.00) | \$ 2,848,106.00   | \$ 3,257,084.00   | \$ (408,978.00)    | \$ (339.86)                  | \$ 23,806.03     | -12.56%      | Adjust value to reflect fee appraisal                |
| 0447084   | 41-03-15 | MVSO-I-6-AM    | \$ 1,692,388.00  | \$ 1,862,039.00  | \$ (169,651.00) | \$ 1,396,318.00   | \$ 1,565,969.00   | \$ (169,651.00)    | \$ (140.98)                  | \$ 11,445.67     | -10.83%      | Adjust value to reflect fee appraisal                |
| 0390298   | 25-28-01 | NBF-22         | \$ 311,606.00    | \$ 311,606.00    | \$ -            | \$ 171,383.00     | \$ 311,606.00     | \$ (140,223.00)    | \$ (116.53)                  | \$ 2,701.62      | -45.00%      | Change to primary residence                          |
| 0045009   | 91-05-07 | NC-102         | \$ 230,000.00    | \$ 230,000.00    | \$ -            | \$ 126,500.00     | \$ 230,000.00     | \$ (103,500.00)    | \$ (86.01)                   | \$ 1,051.97      | -45.00%      | Change to primary residence                          |
| 0176812   | 37-33-43 | NS-378-A       | \$ 408,944.00    | \$ 408,944.00    | \$ -            | \$ 239,037.00     | \$ 409,944.00     | \$ (170,907.00)    | \$ (142.02)                  | \$ 3,074.85      | -41.69%      | Change to primary residence                          |
| 0084065   | 37-32-22 | NS-476-B       | \$ 302,476.00    | \$ 302,476.00    | \$ -            | \$ 166,361.00     | \$ 302,476.00     | \$ (136,115.00)    | \$ (113.11)                  | \$ 2,290.35      | -45.00%      | Change to primary residence                          |
| 0085930   | 37-32-21 | NS-604-B       | \$ 349,849.00    | \$ 349,849.00    | \$ -            | \$ 349,948.00     | \$ 193,486.00     | \$ 156,462.00      | \$ 130.02                    | \$ 1,465.08      | 55.29%       | Change to Non primary residence                      |
| 0086326   | 37-32-22 | NS-621         | \$ 203,700.00    | \$ 240,861.00    | \$ (37,161.00)  | \$ 112,035.00     | \$ 132,474.00     | \$ (20,439.00)     | \$ (16.98)                   | \$ 1,003.09      | -15.43%      | Adjust value to reflect comparable sales             |
| 0410443   | 37-32-22 | NS-631-D       | \$ 613,152.00    | \$ 613,152.00    | \$ -            | \$ 377,739.00     | \$ 613,152.00     | \$ (235,413.00)    | \$ (195.63)                  | \$ 4,642.79      | -38.39%      | Change to primary residence                          |
| 0033153   | 91-03-20 | PAC-121-AM     | \$ 480,000.00    | \$ 480,000.00    | \$ -            | \$ 264,000.00     | \$ 480,000.00     | \$ (216,000.00)    | \$ (179.50)                  | \$ 3,991.68      | -45.00%      | Change to primary residence                          |
| 0226351   | 13-03-30 | PB-8-346       | \$ 1,065,594.00  | \$ 1,119,318.00  | \$ (53,724.00)  | \$ 586,076.00     | \$ 615,625.00     | \$ (29,549.00)     | \$ (24.56)                   | \$ 4,885.60      | -4.80%       | Adjust value to reflect comparable sales             |
| 0287676   | 13-03-30 | PBOS-1         | \$ 185,070.00    | \$ 185,070.00    | \$ -            | \$ 185,070.00     | \$ 185,070.00     | \$ -               | \$ -                         | \$ 1,397.46      | 0.00%        | No change made                                       |
| 0311062   | 13-03-31 | PB-PR-50       | \$ 1,140,399.00  | \$ 1,140,399.00  | \$ -            | \$ 1,140,399.00   | \$ 1,140,399.00   | \$ -               | \$ -                         | \$ 9,050.21      | 0.00%        | No change made                                       |
| 0311310   | 13-03-31 | PB-PR-75       | \$ 1,403,214.00  | \$ 1,403,214.00  | \$ -            | \$ 771,767.00     | \$ 1,403,214.00   | \$ (631,447.00)    | \$ (524.73)                  | \$ 11,135.91     | -45.00%      | Change to primary residence                          |
| 0154074   | 41-03-30 | PE-2-203       | \$ 14,000.00     | \$ 25,000.00     | \$ (11,000.00)  | \$ 14,000.00      | \$ 25,000.00      | \$ (11,000.00)     | \$ (9.14)                    | \$ 182.73        | -44.00%      | Adjust value to reflect comparable sales             |
| 0155162   | 41-03-30 | PE-4-435       | \$ 12,500.00     | \$ 25,000.00     | \$ (12,500.00)  | \$ 12,500.00      | \$ 25,000.00      | \$ (12,500.00)     | \$ (10.39)                   | \$ 182.73        | -50.00%      | Adjust value to reflect comparable sales             |
| 0155220   | 41-03-30 | PE-4-44        | \$ 15,000.00     | \$ 25,000.00     | \$ (10,000.00)  | \$ 15,000.00      | \$ 25,000.00      | \$ (10,000.00)     | \$ (8.31)                    | \$ 182.73        | -40.00%      | Adjust value to reflect comparable sales             |
| 0142582   | 37-35-80 | PI-B-22        | \$ 204,341.00    | \$ 204,341.00    | \$ -            | \$ 112,702.00     | \$ 204,341.00     | \$ (91,639.00)     | \$ (76.15)                   | \$ 1,536.44      | -44.85%      | Change to primary residence                          |
| 0269591   | 11-09-04 | PP-2-A-1       | \$ 6,181,872.00  | \$ 6,181,872.00  | \$ -            | \$ 170,245.00     | \$ 6,181,872.00   | \$ (6,011,627.00)  | \$ (4,995.66)                | \$ 45,733.49     | -97.25%      | Change Land to FAA ( Greenbelt)                      |
| 0296511   | 13-03-30 | PP-41-A        | \$ 34,455.00     | \$ 34,455.00     | \$ -            | \$ 34,455.00      | \$ 34,455.00      | \$ -               | \$ -                         | \$ 260.17        | 0.00%        | No change made                                       |
| 0344931   | 13-03-30 | PP-43-A-14     | \$ 123,890.00    | \$ 123,890.00    | \$ -            | \$ 123,890.00     | \$ 123,890.00     | \$ -               | \$ -                         | \$ 935.49        | 0.00%        | No change made                                       |
| 0053763   | 13-03-30 | PP-49-C        | \$ 5,310.00      | \$ 5,310.00      | \$ -            | \$ 5,310.00       | \$ 5,310.00       | \$ -               | \$ -                         | \$ 40.10         | 0.00%        | No change made                                       |
| 0344949   | 13-03-30 | PP-49-C-7      | \$ 1,500.00      | \$ 1,500.00      | \$ -            | \$ 1,500.00       | \$ 1,500.00       | \$ -               | \$ -                         | \$ 11.33         | 0.00%        | No change made                                       |
| 0198626   | 13-03-30 | PP-49-G        | \$ 8,655.00      | \$ 8,655.00      | \$ -            | \$ 8,655.00       | \$ 8,655.00       | \$ -               | \$ -                         | \$ 65.35         | 0.00%        | No change made                                       |
| 0296495   | 13-03-30 | PP-54-C        | \$ 4,875.00      | \$ 4,875.00      | \$ -            | \$ 4,875.00       | \$ 4,875.00       | \$ -               | \$ -                         | \$ 36.81         | 0.00%        | No change made                                       |
| 0296503   | 13-03-30 | PP-54-D        | \$ 386,125.00    | \$ 386,125.00    | \$ -            | \$ 386,125.00     | \$ 386,125.00     | \$ -               | \$ -                         | \$ 2,915.63      | 0.00%        | No change made                                       |
| 0054928   | 16-10-09 | PP-87-21       | \$ 1,329,200.00  | \$ 1,329,200.00  | \$ -            | \$ 1,329,200.     |                   |                    |                              |                  |              |  |

| Account # | RDN      | Serial #     | New Market Value | Old Market Value | MV Difference   | New Taxable Value | Old Taxable Value | Taxable Difference | County Tax Dollar Difference | Old Tax Estimate | % Difference | Explanation for adjustment                             |
|-----------|----------|--------------|------------------|------------------|-----------------|-------------------|-------------------|--------------------|------------------------------|------------------|--------------|--|
| 0045876   | 91-05-11 | PSC-129      | \$ 105,000.00    | \$ 105,000.00    | \$ -            | \$ 57,750.00      | \$ 57,750.00      | \$ -               | \$ -                         | \$ 480.25        | 0.00%        | No change made   |
| 0045892   | 91-05-11 | PSC-131      | \$ 105,000.00    | \$ 105,000.00    | \$ -            | \$ 57,750.00      | \$ 57,750.00      | \$ -               | \$ -                         | \$ 480.25        | 0.00%        | No change made   |
| 0417836   | 18-01-16 | PSKY-5       | \$ 3,456,711.00  | \$ 3,456,711.00  | \$ -            | \$ 1,901,281.00   | \$ 3,456,711.00   | \$ (1,555,430.00)  | \$ (1,292.56)                | \$ 29,385.50     | -45.00%      | Change to primary residence                            |
| 0222699   | 92-03-01 | PWL-1-J      | \$ 230,000.00    | \$ 230,000.00    | \$ -            | \$ 126,500.00     | \$ 230,000.00     | \$ (103,500.00)    | \$ (86.01)                   | \$ 1,003.90      | -45.00%      | Change to primary residence                            |
| 0222855   | 92-03-01 | PWL-2-N      | \$ 230,000.00    | \$ 230,000.00    | \$ -            | \$ 126,500.00     | \$ 230,000.00     | \$ (103,500.00)    | \$ (86.01)                   | \$ 1,825.28      | -45.00%      | Change to primary residence                            |
| 0193155   | 92-01-01 | PWV-B-34-AM  | \$ 800,000.00    | \$ 800,000.00    | \$ -            | \$ 440,000.00     | \$ 800,000.00     | \$ (360,000.00)    | \$ (299.16)                  | \$ 6,348.80      | -45.00%      | Change to primary residence                            |
| 0253322   | 16-10-04 |              | RCRK-6           | \$ 2,600,000.00  | \$ 3,190,640.00 | \$ (590,640.00)   | \$ 2,600,000.00   | \$ 3,190,640.00    | \$ (590,640.00)              | \$ (490.82)      | \$ 24,092.52 | -18.51%  |
| 0378558   | 14-03-40 | RRH-23       | \$ 2,615,121.00  | \$ 2,615,121.00  | \$ -            | \$ 1,526,876.00   | \$ 2,615,121.00   | \$ (1,088,245.00)  | \$ (904.33)                  | \$ 19,746.78     | -41.61%      | Change to primary residence                            |
| 0305221   | 23-20-01 | SAGE-1       | \$ 396,958.00    | \$ 396,958.00    | \$ -            | \$ 154,542.00     | \$ 280,524.00     | \$ (125,982.00)    | \$ (104.69)                  | \$ 2,239.14      | -44.91%      | Change to primary residence                            |
| 0228001   | 91-09-21 | SEK-1-S-140  | \$ 1,902,725.00  | \$ 2,400,000.00  | \$ (497,275.00) | \$ 1,902,725.00   | \$ 2,400,000.00   | \$ (497,275.00)    | \$ (413.24)                  | \$ 19,958.40     | -20.72%      | Adjust value to reflect comparable sales               |
| 0213821   | 91-09-21 | SEK-4B-112   | \$ 1,924,230.00  | \$ 2,400,000.00  | \$ (475,770.00) | \$ 1,924,230.00   | \$ 2,400,000.00   | \$ (475,770.00)    | \$ (395.36)                  | \$ 19,958.40     | -19.82%      | Adjust value to reflect comparable sales               |
| 0136683   | 14-03-10 | SL-A-29      | \$ 947,264.00    | \$ 947,264.00    | \$ -            | \$ 566,132.00     | \$ 947,264.00     | \$ (381,132.00)    | \$ (316.72)                  | \$ 8,131.31      | -40.24%      | Change to primary residence                            |
| 0136790   | 14-03-10 | SL-A-39      | \$ 963,724.00    | \$ 963,724.00    | \$ -            | \$ 592,904.00     | \$ 963,724.00     | \$ (370,820.00)    | \$ (308.15)                  | \$ 8,272.61      | -38.48%      | Change to primary residence                            |
| 0136857   | 14-03-10 | SL-A-44      | \$ 820,165.00    | \$ 820,165.00    | \$ -            | \$ 521,074.00     | \$ 820,165.00     | \$ (299,091.00)    | \$ (248.54)                  | \$ 7,040.30      | -36.47%      | Change to primary residence                            |
| 0137707   | 14-03-10 | SL-B-125     | \$ 957,353.00    | \$ 1,130,603.00  | \$ (173,250.00) | \$ 584,502.00     | \$ 679,790.00     | \$ (95,288.00)     | \$ (79.18)                   | \$ 5,835.32      | -14.02%      | Adjust value to reflect comparable sales               |
| 0137780   | 14-03-10 | SL-B-164     | \$ 1,258,443.00  | \$ 1,328,167.00  | \$ (69,724.00)  | \$ 785,936.00     | \$ 824,284.00     | \$ (38,348.00)     | \$ (31.87)                   | \$ 7,075.65      | -4.65%       | Adjust value to reflect comparable sales               |
| 0129001   | 14-03-20 | SL-D-250     | \$ 724,413.00    | \$ 724,413.00    | \$ -            | \$ 409,627.00     | \$ 724,413.00     | \$ (314,786.00)    | \$ (261.59)                  | \$ 6,218.36      | -43.45%      | Change to primary residence                            |
| 0129464   | 14-03-20 | SL-E-297     | \$ 775,906.00    | \$ 775,906.00    | \$ -            | \$ 435,800.00     | \$ 775,906.00     | \$ (340,106.00)    | \$ (282.63)                  | \$ 6,660.38      | -43.83%      | Change to primary residence                            |
| 0131072   | 14-03-30 | SL-I-1-41    | \$ 94,000.00     | \$ 299,000.00    | \$ (205,000.00) | \$ 94,000.00      | \$ 299,000.00     | \$ (205,000.00)    | \$ (170.36)                  | \$ 2,566.62      | -68.56%      | Adjust value no utilities to lot                       |
| 0483312   | 14-03-30 | SL-I-4-16    | \$ 717,398.00    | \$ 717,398.00    | \$ -            | \$ 394,568.00     | \$ 717,398.00     | \$ (322,830.00)    | \$ (268.27)                  | \$ 3,386.98      | -45.00%      | Change to primary residence                            |
| 0194716   | 16-20-04 | SLS-102      | \$ 964,195.00    | \$ 1,061,180.00  | \$ (96,985.00)  | \$ 530,307.00     | \$ 583,649.00     | \$ (53,342.00)     | \$ (44.33)                   | \$ 4,631.84      | -9.14%       | Adjust value to reflect comparable sales               |
| 0194450   | 16-20-04 | SLS-76       | \$ 1,514,610.00  | \$ 1,514,610.00  | \$ -            | \$ 1,514,610.00   | \$ 833,036.00     | \$ 681,574.00      | \$ 566.39                    | \$ 6,610.97      | 55.00%       | Change to Non primary residence                        |
| 0399463   | 17-03-03 | SMS-3        | \$ 767,122.00    | \$ 767,122.00    | \$ -            | \$ 421,917.00     | \$ 767,122.00     | \$ (345,205.00)    | \$ (286.87)                  | \$ 5,792.54      | -45.00%      | Change to primary residence                            |
| 0185102   | 14-05-10 | SPC-A-62     | \$ 472,926.00    | \$ 575,426.00    | \$ (102,500.00) | \$ 260,109.00     | \$ 316,485.00     | \$ (56,376.00)     | \$ (46.85)                   | \$ 2,511.62      | -17.81%      | Adjust value to reflect condition of house             |
| 0399083   | 14-05-10 | SPC-AD-A-10  | \$ 1,049,829.00  | \$ 1,049,829.00  | \$ -            | \$ 577,406.00     | \$ 577,406.00     | \$ -               | \$ -                         | \$ 4,582.29      | 0.00%        | No change made   |
| 0293757   | 14-02-30 | SRG-50       | \$ 667,460.00    | \$ 667,460.00    | \$ -            | \$ 367,103.00     | \$ 667,460.00     | \$ (300,357.00)    | \$ (249.60)                  | \$ 5,296.96      | -45.00%      | Change to primary residence                            |
| 0294037   | 14-02-30 | SRG-79       | \$ 748,006.00    | \$ 748,006.00    | \$ -            | \$ 411,403.00     | \$ 748,006.00     | \$ (336,603.00)    | \$ (279.72)                  | \$ 5,936.18      | -45.00%      | Change to primary residence                            |
| 0248157   | 14-03-41 | SS-154-F-1   | \$ 145,000.00    | \$ 573,000.00    | \$ (428,000.00) | \$ 145,000.00     | \$ 573,000.00     | \$ (428,000.00)    | \$ (355.67)                  | \$ 3,612.77      | -74.69%      | Adjust value to fee appraisal ( Conservation easement) |
| 0146682   | 37-35-83 | SS-156-B     | \$ 607,605.00    | \$ 607,605.00    | \$ -            | \$ 385,482.00     | \$ 607,605.00     | \$ (222,123.00)    | \$ (184.58)                  | \$ 4,568.58      | -36.56%      | Change to primary residence                            |
| 0146690   | 37-35-83 | SS-156-C     | \$ 255,000.00    | \$ 325,000.00    | \$ (70,000.00)  | \$ 255,000.00     | \$ 325,000.00     | \$ (70,000.00)     | \$ (58.17)                   | \$ 2,443.68      | -21.54%      | Adjust value to fee appraisal ( Conservation easement) |
| 0146708   | 37-35-83 | SS-156-D     | \$ 2,278,212.00  | \$ 1,803,117.00  | \$ 475,095.00   | \$ 1,757,348.00   | \$ 1,280,131.00   | \$ 477,217.00      | \$ 396.57                    | \$ 9,625.30      | 37.28%       | Adjust value to fee appraisal ( Conservation easement) |
| 0140289   | 13-03-30 | SS-8-B       | \$ 14,685.00     | \$ 14,685.00     | \$ -            | \$ 14,685.00      | \$ 14,685.00      | \$ -               | \$ -                         | \$ 110.89        | 0.00%        | No change made   |
| 0441459   | 91-10-09 | SSLC-704     | \$ 2,650,000.00  | \$ 3,400,000.00  | \$ (750,000.00) | \$ 2,650,000.00   | \$ 3,400,000.00   | \$ (750,000.00)    | \$ (623.25)                  | \$ 29,117.60     | -22.06%      | Adjust value to reflect comparable sales               |
| 0362156   | 17-03-01 | SSS-2-317    | \$ 707,395.00    | \$ 707,395.00    | \$ -            | \$ 389,067.00     | \$ 707,395.00     | \$ (318,328.00)    | \$ (264.53)                  | \$ 5,613.89      | -45.00%      | Change to primary residence                            |
| 0386262   | 17-03-03 | SSS-4-559    | \$ 790,000.00    | \$ 862,212.00    | \$ (72,212.00)  | \$ 434,500.00     | \$ 474,217.00     | \$ (39,717.00)     | \$ (33.00)                   | \$ 3,763.39      | -8.38%       | Adjust value to reflect comparable sales               |
| 0625641   | 13-04-01 | SU-A-21      | \$ 475,310.00    | \$ 475,310.00    | \$ -            | \$ 261,420.00     | \$ 475,310.00     | \$ (213,890.00)    | \$ (177.74)                  | \$ 3,772.06      | -45.00%      | Change to primary residence                            |
| 0062848   | 13-04-01 | SU-A-50      | \$ 691,017.00    | \$ 691,017.00    | \$ -            | \$ 380,059.00     | \$ 691,017.00     | \$ (310,958.00)    | \$ (258.41)                  | \$ 5,483.91      | -45.00%      | Change to primary residence                            |
| 0063044   | 13-04-01 | SU-A-69      | \$ 502,481.00    | \$ 537,369.00    | \$ (34,888.00)  | \$ 276,364.00     | \$ 295,553.00     | \$ (19,189.00)     | \$ (15.95)                   | \$ 2,345.51      | -6.49%       | Adjust value to reflect comparable sales               |
| 0063507   | 13-04-02 | SU-B-25      | \$ 764,514.00    | \$ 764,514.00    | \$ -            | \$ 420,482.00     | \$ 764,514.00     | \$ (344,032.00)    | \$ (285.89)                  | \$ 6,067.18      | -45.00%      | Change to primary residence                            |
| 0063671   | 13-04-02 | SU-B-41      | \$ 341,940.00    | \$ 341,940.00    | \$ -            | \$ 188,067.00     | \$ 341,940.00     | \$ (153,873.00)    | \$ (127.87)                  | \$ 2,713.64      | -45.00%      | Change to primary residence                            |
| 0064067   | 13-04-03 | SU-C-29      | \$ 629,703.00    | \$ 629,703.00    | \$ -            | \$ 346,336.00     | \$ 629,703.00     | \$ (283,367.00)    | \$ (235.48)                  | \$ 4,997.32      | -45.00%      | Change to primary residence                            |
| 0065403   | 13-04-08 | SU-H-56      | \$ 622,198.00    | \$ 622,198.00    | \$ -            | \$ 342,208.00     | \$ 622,198.00     | \$ (279,990.00)    | \$ (232.67)                  | \$ 4,937.76      | -45.00%      | Change to primary residence                            |
| 0475078   | 13-04-10 | SU-J-30A-AM  | \$ 559,610.00    | \$ 559,610.00    | \$ -            | \$ 307,785.00     | \$ 559,610.00     | \$ (251,825.00)    | \$ (209.27)                  | \$ 4,441.06      | -45.00%      | Change to primary residence                            |
| 0068621   | 13-04-13 | SU-M-2-113   | \$ 599,842.00    | \$ 599,842.00    | \$ -            | \$ 329,913.00     | \$ 599,842.00     | \$ (269,929.00)    | \$ (224.31)                  | \$ 4,760.35      | -45.00%      | Change to primary residence                            |
| 0067508   | 13-04-10 | SYU-J-68     | \$ 519,371.00    | \$ 519,371.00    | \$ -            | \$ 385,654.00     | \$ 519,371.00     | \$ (133,717.00)    | \$ (111.12)                  | \$ 4,121.73      | -25.75%      | Change to primary residence                            |
| 0233456   | 13-05-00 | TL-3-A-322-A | \$ 963,802.00    | \$ 649,271.00    | \$ 314,531.00   | \$ 574,763.00     | \$ 649,271.00     | \$ (74,508.00)     | \$ (61.92)                   | \$ 4,902.65      | -11.48%      | House to 100% complete and grant Primary               |
| 0031348   | 91-01-22 | TM-A-12      | \$ 270,000.00    | \$ 270,000.00    | \$ -            | \$ 148,500.00     | \$ 270,000.00     | \$ (121,500.00)    | \$ (100.97)                  | \$ 2,245.32      | -45.00%      | Change to primary residence                            |
| 0031397   | 91-01-22 | TM-A-17      | \$ 200,000.00    | \$ 370,000.00    | \$ (170,000.00) | \$ 200,000.00     | \$ 370,000.00     | \$ (170,000.00)    | \$ (141.27)                  | \$ 3,076.92      | -45.95%      | Change to primary residence                            |
| 0031413   | 91-01-22 | TM-A-19      | \$ 200,000.00    | \$ 370,000.00    | \$ (170,000.00) | \$ 200,000.00     | \$ 370,000.00     | \$ (170,000.00)    | \$ (141.27)                  | \$ 3,076.92      | -45.95%      | Change to primary residence                            |
| 0346134   | 37-31-02 | TROV-1       | \$ 603,483.00    | \$ 603,483.00    | \$ -            | \$ 388,615.00     | \$ 603,483.00     | \$ (214,868.00)    | \$ (178.56)                  | \$ 4,547.85      | -35.60%      | Change to primary residence                            |
| 0482193   | 41-03-20 | WA-11-16A-AM | \$ 25,285.00     | \$ 45,285.00     | \$ (20,000.00)  | \$ 25,285.00      | \$ 45,285.00      | \$ (20,000.00)     | \$ (16.62)                   | \$ 330.99        | -44.16%      | Adjust value to reflect comparable sales               |
| 0480221   | 41-03-20 | WA-11-18A-AM | \$ 7,525.00      | \$ 44,025.00     | \$ (36,500.00)  | \$ 7,525.00       | \$ 44,025.00      | \$ (36,500.00)     | \$ (30.33)                   | \$ 321.78        | -82.91%      | Parcel is land locked reduce value                     |
| 0482218   | 41-03-20 | WA-11-28A-AM | \$ 160,492.00    | \$ 257,960.00    | \$ (97,468.00)  | \$ 160,492.00     | \$ 257,960.00     | \$ (97,468.00)     | \$ (81.00)                   | \$ 1,322.18      | -37.78%      | Adjust value to reflect comparable sales               |
| 0477182   | 37-34-60 | WBCS-23      | \$ 481,548.00    | \$ 481,548.00    | \$ -            | \$ 264,851.00     | \$ 481,548.00     | \$ (216,697.00)    | \$ (180.08)                  | \$ 3,735.85      | -45.00%      | Change to primary residence                            |
| 0338859   | 01-02-02 | WDS-2-2      | \$ 4,198,900.00  | \$ 4,198,900.00  | \$ -            | \$ 2,309,395.00   | \$ 4,198,900.00   | \$ (1,889,505.00)  | \$ (1,570.18)                | \$ 34,918.05     | -45.00%      | Change to primary residence                            |
| 0394654   | 18-01-04 | WHLs-9       | \$ 2,485,178.00  | \$ 2,485,178.00  | \$ -            | \$ 1,367,081.00   | \$ 2,485,178.0    |                    |                              |                  |              |  |

| Account # | RDN | Serial # | New Market Value            | Old Market Value    | MV Difference       | New Taxable Value   | Old Taxable Value   | Taxable Difference  | County Tax Dollar Difference | Old Tax Estimate | % Difference | Explanation for adjustment |
|-----------|-----|----------|-----------------------------|---------------------|---------------------|---------------------|---------------------|---------------------|------------------------------|------------------|--------------|----------------------------|
|           |     |          | <b>Totals for 8/21/2019</b> | \$ 59,929,387.00    | \$ 65,275,520.00    | \$ (5,346,133.00)   | \$ 45,381,316.00    | \$ 56,727,784.00    | \$ (11,346,468.00)           | \$ (9,428.91)    |              |                            |
|           |     |          | <b>Totals for 8/14/2019</b> | \$ 189,394,538.00   | \$ 191,034,401.00   | \$ (1,639,863.00)   | \$ 139,894,057.00   | \$ 158,411,689.00   | \$ (18,517,632.00)           | \$ (15,388.15)   |              |                            |
|           |     |          | <b>Totals for 8/7/2019</b>  | \$ 47,065,983.00    | \$ 71,216,354.00    | \$ (24,150,371.00)  | \$ 46,392,869.00    | \$ 71,711,523.00    | \$ (25,318,654.00)           | \$ (33,294.03)   |              |                            |
|           |     |          | <b>Running Total</b>        | \$ 1,554,534,420.00 | \$ 1,670,123,865.00 | \$ (115,589,445.00) | \$ 1,316,328,803.00 | \$ 1,298,950,221.00 | \$ 17,378,582.00             | \$ 2,187.37      |              |                            |

The total Market value for Summit County is \$27,147,668,388 as of 5/22/2019

The Market value decrease for 2019 is( \$ 115,589,445 ) as of 10/09/2019

The Total Taxable value for Summit County is \$21,297,930,855 as of 5/22/2019

The Taxable Value Increase for 2019 is \$ 17,378,582 as of 10/09/2019

The County Tax dollar Increase for 2019 is \$ 2,187.37 as of 10/09/2019

The county Tax dollar differences are the County General and County Municipal line rates.

# MARGARET H. OLSON COUNTY ATTORNEY

## Criminal Division

PATRICIA S. CASSELL  
Chief Prosecutor

BLAKE HILLS  
Prosecuting Attorney

RYAN P. C. STACK  
Prosecuting Attorney

IVY TELLES  
Prosecuting Attorney



## Civil Division

DAVID L. THOMAS  
Chief Deputy

JAMI R. BRACKIN  
Deputy County Attorney

HELEN E. STRACHAN  
Deputy County Attorney

Summit County Courthouse 60 N. Main P.O. Box 128 Coalville, Utah 84017  
Telephone (435) 336-3206 Facsimile (435) 336-3287  
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## STAFF REPORT

**To:** Summit County Council  
**From:** Helen Strachan, Deputy County Attorney & Phil Bondurant, Deputy Director of the  
Summit County Health Department  
**Date of Meeting:** October 9<sup>th</sup>, 2019  
**Type of Item:** Amendment to Title 2, Chapter 20 of the Summit County Code  
**Process:** Legislative

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**Recommendation:** On August 28, 2019, the Summit County Council (the “Council”) had a discussion on the proposed changes to Title 2, Chapter 20 of the Summit County Code. At that time, the Council directed staff to streamline the submittal requirements found in Section 2-20-7(C). Attached for the Council’s consideration is a new draft with those requested changes.

### Background:

*Eastern Summit County Water Conservancy Special Service District* (the “District”): In the fall of 2007, in order to tackle the issues regarding waste water treatment in Eastern Summit County, Summit County created the Eastern Summit County Sewer Advisory Committee (ESAC) made up of staff representatives from the Community Development Department, Engineering Department, Health Department, Attorney’s Office, Planning Commission, and other community members. ESAC was set up to address the growing demand for individual septic systems in Eastern Summit County. It was also set up to address the difficulties within the then-Eastern Summit County General Plan and Development Code for major developments with regard to sewer. At the time, Policy 6.2.5 of the General Plan included regulatory language that stated as follows:

*All major development shall be required to connect to municipal infrastructure or install a package sewer treatment facility that can be connected to a municipal or sewer improvement district infrastructure in the future. Summit County may consider septic systems only on large lots that comply with the minimum area requirements of the agricultural zone district, including in the AP, AG-100, and AG-160, within which the property is located.*

The Development Code further defined major development as subdivisions of six or more lots. This General Plan language was and still is consistent with Utah State's Department of Environmental Quality administrative rules, which require that a "body politic" such as a special service district "sponsor" all large underground wastewater disposal systems that are designed to handle more than 5,000 gallons per day of domestic wastewater. In 2007, the County did not have such a "body politic," separate and apart from the County itself to be a sponsoring body. Moreover, at the time, the Community Development Department had a pending application for a major subdivision, Indian Hollow an eighty-five lot subdivision (later amended to sixty-five) located off Democrat Alley, which added pressure for the County to move towards the creation of the District. The Indian Hollow subdivision was not in a position to connect to municipal sewer, leaving them with the requirement that they have a large system sponsored by a body politic.

In January of 2008, ESAC presented to the Board of County Commissioners (the "BCC") its findings and recommendations, which included the establishment of an Eastern Summit County special service district that would have management and oversight responsibilities over east side waste water facilities. The special service district would be the "body politic" necessary by Utah law to oversee larger systems for major developments. The BCC decided to move forward with the District's creation and it was established in December of 2008. The District, as it currently exists, consists of all of Eastern Summit County with the exception of the municipalities and the Promontory/South Point specially planned areas.

*District Structure:* The District's structure was codified in Title 2, Chapter 20 of the Summit County Code (*see Exhibit A, Title 2, Chapter 20, pages 1-8*). The County Council sits as the District's governing board (the "Board"). The Board has appointed the County Manager as the General Manager of the District, whose role is to govern day-to-day operations, prepare an annual budget, provide recommendations to the Board on policies/procedures/regulations, and provide a recommendation on a fee structure. Currently, the County Manager, as the General Manager, is also considered the "final approval" of wastewater systems that serve ten or fewer lots, with the Board retaining the "final approval" for all wastewater systems that serve more than 10 lots. The Board also created ESAC (essentially the same board that was created as part of the District's genesis), as an advisory board to both the Board and the General Manager. ESAC's role is to analyze existing wastewater systems and conduct an inventory of existing systems, create a process for approval of wastewater systems, and review all proposed wastewater systems. ESAC's efforts in its review of wastewater systems essentially duplicates the efforts of what is being done at the staff level in the Health Department. They are to also assist the General Manager in all of his above-described duties and make recommendations to either the General Manager or the Board on all proposed wastewater systems. ESAC is *not* considered an administrative control board under Utah's special service district act and Chapter 20, at this time, does not call for the creation of such an administrative control board. Thus, ESAC is advisory only and does not have the legal authority to govern the District like an administrative control board does.

It is not a stretch to say that the District is a skeletal district. While it is a legal entity, a dependent special service district created under the laws of the State of Utah, it is little more than that. ESAC

essentially only meets to make recommendations on proposed waste water systems, but has not actively fulfilled its other duties. Likewise, neither the Board nor the Manager have functioned beyond their roles as the approval body for proposed wastewater systems. The District has no policies, procedures, or regulations and has no fee structure. Since 2008, there has been very little need to create a full-fledged District. The County, like the Country, was in the midst of a recession and growth was stagnant in Eastern Summit County. With the exception of Indian Hollow (the proposed sixty-five lot subdivision, whose application goes back to 1998), there have been no pending applications for larger developments in Eastern Summit County. Things are beginning to change, which has led staff to the conclusion that the District needs meat on the bones.

**The Master Planned Development Process:** The County amended the Code, doing away with the specially planned area process and replacing it with a “master planned development” (“MPD”) process. The MPD process is triggered for, among other things, any subdivision resulting in four or more lots. The Community Development Department has received its first application for an MPD called “Trail Ridge,” a twenty-six lot subdivision in the Cherry Canyon area outside of Wanship. The application is in its infancy and has yet to be before the Commission, however, the developer has already approached the Summit County Health Department, wishing to install individual onsite wastewater systems on each individual lot, rather than installing a large, advanced package system. The proposed individual septic systems were denied by the Health Department and that denial was appealed to the Board of Health, who denied that appeal, favoring a package system for the development. If this MPD is approved and if, as a condition of approval an advanced system is required, the District, who has jurisdiction over this area outside of Wanship, would be the necessary “body politic” that would oversee this system. While staff understands that this project is in its infancy and there are still many moving parts, we anticipate more MPD applications in the near future.

**Staff’s Recommended Changes:** Earlier this year, Staff had a work session with the County Council to brief them on the fact that the District, as it currently exists, is not really in a position to take on private wastewater systems. We also briefed them on the fact that we will likely be receiving more and more MPD applications. Staff’s recommendation to the County Council was to make some amendments to the Title 2, Chapter 20 of the Code so that the District could be a full-fledged special service district. The County Council was not ready to go that far. Since the County Council, acting in the capacity as the Governing Body of the District, has never seen a wastewater system before them for approval, they decided that they wanted to retain control of the District and see how an application goes through the process first before making any large-scale changes to the District’s structure. What is being proposed then at this point are some minor changes to the District’ structure so that not every single application goes through the District. Here is a summary of the proposed changes to Title 2, Chapter 20. Phil Bondurant has put together a helpful flowchart that explains the process as well. It is found attached to this staff report.

## Health Department Review:

- Proposed wastewater systems that serve three or less lots/parcels will be reviewed by the Summit County Health Department. This is consistent with prior practice, however, in the past, not only would these proposed systems be reviewed by the Health Department, but ESAC would make a separate recommendation as well, thus duplicating the efforts of the Health Department. We are doing away with ESAC review for subdivisions of three lots or less.
- Proposed wastewater systems that serve four or more lots (thus triggering the MPD process) will be reviewed by the Health Department, but only if any of the proposed lot sizes are 10 acres in size or greater. The reason for this is because, with the larger lots sizes, you don't run into the same issues (i.e. septic density and private well setbacks) as it relates to individual systems.
- If the proposed development is close to public sewer and public sewer has been determined to be "reasonably available" by the Health Department then it is reviewed by the Health Department and the appropriate sewer provider. Per the Health Code, public sewer is considered "reasonably available" if the allowable sewer connection is within 300' of any part of a parcel. Or, for subdivisions, sewer is considered "reasonably available" if the distance to the allowable sewer connection is less than or equal to the calculated distance for the square footage of proposed lots multiplied by 0.0069.

## ESAC Review:

- Proposed wastewater systems that serve four or more lots (thus triggering the MPD process), but only if any of the lots sizes are less than 10 acres in size. Thereafter, depending on the number of lots (less than ten vs. ten or more), ESAC makes a recommendation to either the General Manager of the District (i.e. the County Manager) or the Governing Body of the District (i.e. the County Council).
- If the Health Department, in their sole discretion, thinks that, due to the intensity of the proposed use, it should go to ESAC, then they can send it their way.
- Also, if an applicant willingly decides to put in a community system, then it goes straight to the approving entity, and bypasses ESAC.

## ESAC Submittal:

- Initially, staff included a list of requested submittal requirement for an applicant to provide ESAC in order for ESAC to make its recommendation. That list included information such as locations of wetlands, wells, nearest connections to sewer and water, etc. The Council asked for a more streamlined requirement and the Health Department has suggested instead a reference to the Utah Rule that governs this, R317-4, which is the environmental quality rule that governs on-site wastewater systems. I've attached a copy of the pertinent portions of the rule as Exhibit B.

Staff asks that the Council review the attached and come prepared with any questions. Thank you.

SUMMIT COUNTY, UTAH ORDINANCE NO. 717-B

AN ORDINANCE AMENDING TITLTE 2, CHAPTER 20 OF THE SUMMIT COUNTY CODE  
“EASTERN SUMMIT COUNTY WATER CONSERVANCY SPECIAL SERVICE DISTRICT”

PREAMBLE

**WHEREAS**, pursuant to Utah Code Annotated, §17D-1-101 et. seq. (the “Utah Special Service District Act”), 1953, amended, the then-Summit County Board of Commissioners adopted Resolution Number 2008-11 providing a Notice of Intention to establish the Eastern Summit County Water Conservancy Special Service District (the “District”) on April 16, 2008 and Resolution Number 2008-32 creating the District on December 17, 2008; and

**WHEREAS**, the Summit County Council adopted Ordinance No. 717, the Governing Ordinance for the District on May 20, 2009 setting forth, among other things, the powers and duties of the District; and

**WHEREAS**, on February 24, 2010, the Summit County Council adopted Ordinance No. 717-A, amending Ordinance No. 717, delegating select rights, powers and authorities to the County Manager pursuant to UCA Utah Code Annotated, §17D-1-103, 17D-1-105, 17D-1-106, 17D-1-301, and 17D-1-501 et. seq.; and

**WHEREAS**, while it was anticipated that the District’s structure would include the creation of policies and procedures, an Administrative Control Board and associated fees for wastewater system approvals, in the decade or so since the District’s creation, there has been little large-scale development within Eastern Summit County; and

**WHEREAS**, in the past two years, the Eastern Summit County Development Code has been amended, requiring a Master Planned Development for any subdivision of four or more lots; and

**WHEREAS**, the Community Development Department is beginning to see more and more applications for Master Planned Developments, triggering the need to re-evaluate the District’s structure; and

**WHEREAS**, the Summit County Council, acting as the Governing Body of the District, desires to amend Title 2, Chapter 20 of the Code, which governs the District’s structure, to streamline the process of approving wastewater systems within Eastern Summit County; and

**NOW, THEREFORE**, the County Council of the County of Summit, State of Utah, ordains as follows

Section 1. Title 2, Chapter 20 of the Summit County Code is amended as depicted in Exhibit A.

**Section 2:** This Ordinance shall take effect fifteen (15) days after the date of its publication.

APPROVED, ADOPTED, AND PASSED and ordered published by the Summit County Council, this 9<sup>th</sup> day of October, 2019.

SUMMIT COUNTY COUNCIL  
SUMMIT COUNTY, UTAH

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By Council Chair

ATTEST:

SUMMIT COUNTY CLERK

Date of Publication \_\_\_\_\_, 2019.

# EXHIBIT A

**Title 2, Chapter 20**  
**EASTERN SUMMIT COUNTY WATER CONSERVANCY SPECIAL SERVICE DISTRICT**

**2-20-1: PURPOSE:**

**2-20-2: DEFINITIONS:**

**2-20-3: GOVERNING BOARD:**

**2-20-4: POWERS AND DUTIES:**

**2-20-5: GENERAL MANAGER:**

**2-20-6: SEWER ADVISORY COMMITTEE:**

**2-20-7: APPROVAL OF WASTEWATER SYSTEMS**

**2-20-78: OPERATION:**

**2-20-89: INDEMNIFICATION:**

**2-20-910: INSURANCE:**

**2-20-1011: ANNUAL REPORT:**

**2-20-1: PURPOSE:**

To provide for the public health, safety, and general welfare of the residents living within the jurisdictional boundaries of the eastern Summit County water conservancy special service ~~district~~District, the ~~district~~District is authorized to provide a system for the collection, treatment, and disposition of sewage through facilities or systems acquired or constructed for that purpose through construction, purchase, lease, contract, gift or condemnation or any combination thereof.

**2-20-2: DEFINITIONS:**

COUNTY: Summit County, Utah.

~~COUNTY COUNCIL~~COUNTY COUNCIL: The Summit ~~County council~~County Council who exercises legislative authority in the ~~county~~County.

COUNTY MANAGER: The chief executive officer of the ~~county~~County.

DISTRICT: The ~~E~~astern Summit County ~~W~~ater ~~C~~onservancy ~~S~~pecial ~~S~~ervice ~~D~~istrict.

ESAC: The ~~eastern~~Eastern Summit County ~~sewer~~Sewer ~~advisory~~Advisory ~~committee~~committee or "the ~~committee~~Committee" comprised of Summit County staff from the ~~e~~Community ~~D~~evelopment ~~D~~epartment, ~~E~~ngineering ~~D~~epartment, the ~~H~~health ~~D~~epartment, and two (2) members from the public at large.

GOVERNING BOARD: The ~~county council~~County Council of Summit County.

OWNERS: The owners of property within the boundaries of the ~~E~~astern Summit County ~~W~~ater ~~C~~onservancy ~~S~~pecial ~~S~~ervice ~~d~~istrictDistrict.

### **2-20-3: GOVERNING BOARD:**

As provided pursuant to Utah Code Annotated sections 17D-1-102(5) and 17D-1-301, the ~~district~~District is hereby governed by the ~~county council~~County Council and is considered the ~~governing board~~Governing Board of the ~~district~~District.

### **2-20-4: POWERS AND DUTIES:**

The ~~governing board~~Governing Board of the ~~district~~District hereby has all rights, powers, authority and duties to exercise all or any of the powers provided for in Utah Code Annotated sections 17D-1-103, 17D-1-105, 17D-1-106, 17D-1-301, and 17D-1-501 et seq. The ~~governing board~~Governing Board has control and supervisory authority of the ~~district~~District and may delegate such further powers and authority as provided by statute. In addition, the ~~governing board~~Governing Board shall have the following authority and duties:

- A. The board shall conduct its business according to bylaws, which it shall adopt, with the board meeting as needed to act on the business of the ~~district~~District. The bylaws may be amended from time to time by a majority vote of the board.
- B. The board shall appoint the ~~County Manager~~ as the general manager for the ~~district~~District, who shall have the duties described in section 2-20-5 of this chapter.
- C. The board shall appoint members of ESAC, on recommendation by the general manager.
- D. The board, with the guidance of the general manager and ESAC, shall adopt policies, procedures, and regulations for the ~~district~~District.

### **2-20-5: GENERAL MANAGER:**

The ~~governing board~~Governing Board hereby delegates the following powers, authorities and duties to a general manager, who shall oversee the ~~district~~District:

- A. To govern the day to day operations of the ~~district~~District;
- B. To prepare, in cooperation with the ~~governing board~~Governing Board, an annual budget for the ~~district~~District, which will conform to Utah Code Annotated section 17B-1-601 et seq., "fiscal procedures for local district" and recommend the budget so prepared to the ~~county council~~County Council. The budget shall demonstrate all proposed expenditures and the fees to be established and collected as revenue to the ~~district~~District's budget;

- C. To provide a recommendation to the board as to the operation of the ~~district~~District, including policies, procedures, and regulations for the ~~district~~District;
- D. To provide a recommendation to the ~~governing board~~Governing Board as to the establishment and collection of the fees and charges for the various wastewater management services provided to the ~~Owners~~ with the fee schedules reviewed and approved by the ~~county council~~County Council.
- ~~E. To be the "final approval" for wastewater systems that serve ten (10) or fewer lots, as that term is defined in title 11, appendix A of this code. The county council, as the governing board of the district, shall be the final approval for any and all wastewater systems that serve more than ten (10) lots. This duty shall be made a part of the policies, procedures, and regulations, once adopted, for the district as described in section 2-20-4 of this chapter.~~

#### **2-20-6: SEWER ADVISORY COMMITTEE:**

- A. Creation, Purpose, And Authority: The ~~governing board~~Governing Board hereby creates the "~~eastern~~Eastern Summit County ~~sewer~~Sewer ~~advisory~~Advisory ~~committee~~Committee", which shall act in an advisory capacity to the ~~governing board~~Governing Board and the general manager. ESAC shall generally advise the ~~governing board~~Governing Board and the general manager on wastewater issues and systems within eastern Summit County. There shall be no actual or apparent authority vested in this committee except for the authority granted herein.

#### **B. Guiding Principles For ESAC:** The following guiding principles shall exist for ESAC:

- 1. In conjunction with the Summit County ~~H~~Health ~~D~~Department and the municipalities of eastern Summit County, analyze the existing wastewater systems and conduct an inventory of existing wastewater systems.
- 2. Create an efficient process for the approval by either the general manager or the ~~governing board~~Governing Board of wastewater systems in eastern Summit County.
- 3. Jointly review all proposed wastewater systems with staff of the Summit County ~~e~~Community ~~D~~Development ~~D~~Department, ~~E~~Engineering ~~D~~Department, and ~~H~~Health ~~D~~Department, who shall address regional impacts and opportunities of wastewater systems.

#### **C. Powers And Duties:** The ~~governing board~~Governing Board hereby delegates the following powers and duties to ESAC:

- 1. To assist the general manager in governing the day to day operations of the ~~district~~District.

2. To assist the general manager with providing a recommendation to the ~~governing board~~Governing Board as to the operation of the ~~district~~District, including policies, procedures, and regulations for the ~~district~~District.
3. To assist the general manager with providing a recommendation to the ~~governing board~~Governing Board as to the establishment and collection of the fees and charges for the various wastewater management services provided to the ~~Q~~owners with the fee schedules reviewed and approved by the ~~county council~~County Council.
4. To provide a recommendation to either the general manager or the ~~governing board~~Governing Board on wastewater systems, as described in subsection 2-20-5E of this chapter.
5. To act in an advisory role to the general manager and the ~~governing board~~Governing Board or to other officials and departments in any matters pertaining to wastewater issues within eastern Summit County.
6. ESAC, through its chair, or his/her designee, shall make both an oral and written report annually to the ~~governing board~~Governing Board concerning its activities during the past year and its proposals for the coming year.
7. ESAC shall not have the power to obligate the ~~county~~County for funds and/or expenditures or incur any debt on behalf of the ~~county~~County.
8. All powers and duties prescribed and delegated herein are delegated to ESAC as a unit, and all action hereunder shall be of ESAC acting as a whole. No action of any individual committee member is authorized, except through the approval of the ~~governing board~~Governing Board.
9. ESAC shall have any other power and/or duty as prescribed and authorized by the ~~governing board~~Governing Board.

D. Membership:

1. ESAC shall consist of five (5) members who shall be appointed by the ~~governing board~~Governing Board, on the recommendation of the general manager.
2. Membership of ESAC shall be as follows:
  - a. One member from the ~~e~~Community ~~D~~Development ~~D~~Department.
  - b. One member from the ~~E~~Engineering ~~D~~Department.
  - c. One member from the ~~H~~Health ~~D~~Department.

- d. Two (2) members from the public at large.
- 3. One representative of the ~~county~~County ~~Attorney's~~ eOffice shall serve as ex officio member of ESAC, but shall have no right to vote on any matter before the committee.
- 4. ESAC may, in its discretion, add up to three (3) ex officio members, to assist with the communications and functions of the committee. Said ex officio members shall not have any voting rights.
- 5. Members of ESAC serve at the pleasure of the general manager and may be removed and replaced at any time. There are no terms limits.

E. Officers:

- 1. The voting members of ESAC shall appoint a chair and vice chair. The chair shall prepare meeting agendas and shall preside over and conduct all meetings. The chair, or his/her designee, shall act as the representative to the general manager and the ~~governing~~ board~~Governing Board~~ for all committee transactions and shall have the responsibility of presenting all proposals from ESAC to the general manager and/or the ~~governing~~ board~~Governing Board~~. The chair and vice chair shall serve a term of one year.

F. Meetings And Procedures:

- 1. ESAC shall meet as needed. A notice of the time and place of each meeting shall be given to ESAC members not less than three (3) days in advance of the meeting.
- 2. All meetings of ESAC shall comply with the Utah open meetings laws as found in section 52-4-101 et seq., Utah Code Annotated (1953), as amended.
- 3. Executive closed sessions may be scheduled whenever the chair deems such action permissible under the Utah open meetings act, and with the concurrence of the ~~county~~County attorney.
- 4. Written minutes of each open meeting shall be prepared, preserved and made available for public inspection.
- 5. A majority of the voting committee members shall constitute a quorum and the action of the majority of the members present shall be the action of the committee.
- 6. Committee members shall attend all meetings unless their absence is excused by the chairperson.

7. All recommendations shall be made at a public meeting by motion, made and seconded and by a voice vote. The motion shall be in the form of findings of fact and shall state the reason for the findings by the committee and a statement of any conditions to be attached to the action.

## **2-20-7: APPROVAL OF WASTEWATER SYSTEMS**

**A. Summit County Health Department:** The following shall be reviewed and approved, denied, or approved with conditions by the Summit County Health Department pursuant to the Summit County Health Code:

1. Proposed wastewater systems that serve proposed subdivisions or development of three (3) or less lots or parcels pursuant to Title 11, Chapter 4 Section 5 (B) of the code; or

2. Proposed wastewater systems that serve proposed subdivisions of four (4) or more lots pursuant to Title 11, Chapter 4 Section 5 (C) of the code, ~~but only if any of the proposed lot sizes are (10) acres in size or greater.~~

3. Notwithstanding Section 2-20-7 (B) below, any proposed subdivision where the Summit County Health Department has determined that public sewer is “reasonably available” as that phrase is defined by the Summit County Health Code.

**B. ESAC:** The following shall be reviewed and a recommendation of approval, denial, or approval with conditions provided by ESAC:

1. Proposed wastewater systems that serve proposed subdivisions of four (4) or more lots pursuant to Title 11, Chapter 4 Section 5 (C) of the code, but only if any of the proposed lot sizes are less than ten (10) acres in size.

a. For proposed wastewater systems that serve proposed subdivisions of ten (10) or less lots, ESAC shall review the application and make a recommendation on the proposed wastewater system to the General Manager of the District. The General Manager shall review the proposed wastewater system, ESAC’s recommendation and make a final decision on the application’s wastewater system. The General Manager’s decision may be appealed to the Governing Board within ten (10) business days.

b. For proposed wastewater systems that serve proposed subdivisions of eleven (11) or more lots, ESAC shall review the application and make a recommendation on the proposed wastewater system to the Governing Board of the District. The Governing Board shall review the proposed wastewater system, ESAC’s recommendation and make a final decision on the application’s wastewater system. The Governing Board’s decision may be appealed to 3<sup>rd</sup> District Court within thirty (30) calendar days.

2. Any development that, in the discretion of the Summit County Health Department, has been identified as requiring a recommendation and approval by the District due to, for example, the

intensity of the proposed uses or the proposed daily septic flows of over 5,000 gallons of water per day.

2. Notwithstanding Section 2-20-7(A), above, if an applicant, as that term is defined in Title 11, Appendix A "Definitions," desires to install a community system, that proposed wastewater system shall be reviewed and a final decision made by either the General Manager or the Governing Body of the District depending on the size of the proposed subdivision as outlined in Section (B) above.

C. ESAC Submittals: Prior to the scheduling of any development application before ESAC, the applicant shall submit to the Community Development Department sufficient information in order for ESAC to make its recommendation. The applicant may consult with Environmental Quality, Water Quality Rule 317-4, Onsite Wasterwater Systems and the Summit County Health Department, Environmental Health Division to determine what information may be beneficial to ESAC during the review of the application. However, at the discretion of ESAC, other information may be required in order for ESAC to make its recommendation.

#### **2-20-78: OPERATION:**

The ~~district~~District may utilize the services of the ~~county~~County treasurer and auditor to assist in financial matters. All collections, investments, disbursements, procurement, and other financial transactions will be managed by the ~~county~~County treasurer, who is delegated the role of ~~district~~District treasurer. The ~~governing board~~Governing Board delegates the recording and safeguarding of all minutes of meetings of the board to the ~~county~~County clerk of Summit County, who shall act as secretary of the ~~district~~District.

#### **2-20-89: INDEMNIFICATION:**

The ~~district~~District shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil or criminal, administrative or investigative, by reason of the fact that he or she is or was the general manager, a director, officer, employee, or agent of the ~~district~~District. The indemnification shall be for all expenses (including attorney fees), judgments, fines, and amount paid in settlement, actually and reasonably incurred by him or her in connection with the action, suit, or proceeding, including any appeal of the action, suit or proceeding, if he or she acted in good faith or in a manner he or she reasonably believed to be in or not opposed to the best interests of the ~~district~~District, and with respect to any criminal action or proceeding, if he or she had no reasonable cause to believe the conduct was unlawful.

Determination of any action, suit, or proceeding by judgment, order, settlement, conviction or on a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the party did not meet the applicable standard of conduct. Indemnification under this section may be paid by the ~~district~~District in advance of the final disposition of any action, suit, or

proceeding, on a preliminary determination that the director, officer, employee, or agent met the applicable standard of conduct and on receipt of an undertaking by or on behalf of the general manager, director, officer, employee, or agent to repay the amount, unless it is ultimately determined that he or she is not entitled to be indemnified by the ~~district~~District as authorized in this section.

The ~~district~~District shall also indemnify any director, officer, employee, or agent who has been successful on the merits or otherwise, in defense of any action, suit, or proceeding, or in defense of any claim, issue, or matter in the action, suit, or proceeding, against all expenses, including attorney fees, actually and reasonably incurred, without the necessity of an independent determination that the general manager, a director, officer, employee, or agent met any appropriate standard of conduct.

The indemnification provided for in this section shall continue as to any person who has ceased to be the general manager, a director, officer, employee, or agent, and shall inure to the benefit of the heirs, executors, and administrators of that person.

#### **2-20-~~9~~10: INSURANCE:**

The ~~district~~District shall have power to purchase and maintain insurance on behalf of any person who is the general manager, a director, officer, employee, or agent of the ~~district~~District against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the ~~district~~District would have authority to indemnify him or her against the liability under the provisions of this section, or under law.

#### **2-20-~~10~~11: ANNUAL REPORT:**

The ~~district~~District shall make an annual presentation to the ~~county council~~County Council of its goals, budget and activities.

**R317. Environmental Quality, Water Quality.**

**R317-4. Onsite Wastewater Systems.**

**R317-4-4. Feasibility Determination.**

4.1. General Criteria for Determining Onsite Wastewater System Feasibility.

The regulatory authority shall determine the feasibility of using an onsite wastewater system. The regulatory authority will review required information for any existing or proposed lot to determine onsite wastewater system feasibility. The required information shall be prepared at the owner's expense by, or under the supervision of, a qualified person approved by the regulatory authority.

A. General Information.

The required information shall include:

1. the county recorder's plat and parcel ID and situs address if available;

2. name and address of the property owner and person requesting feasibility; and

3. the location, type, and depth of all existing and proposed non-public water supply sources within 200 feet of the proposed onsite wastewater systems, and of all existing or proposed public water supply sources within 1,500 feet of the proposed onsite wastewater systems.

a. If the lot is located in aquifer recharge areas or areas of other particular geologic concern, the regulatory authority may require such additional information relative to ground water movement, or possible subsurface wastewater flow.

b. If the proposed onsite wastewater system is located within any drinking water source protection zone two, this zone shall be shown.

4. The location and distance to nearest sewer, owner of sewer, whether property is located within service boundary, and size of sewer.

5. Statement of proposed use if other than a single-family dwelling.

B. Soil and Site Evaluation.

1. Soil Exploration Pit and Percolation Test.

a. A minimum of one soil exploration pit shall be excavated to allow the evaluation of the soil. The soil exploration pit shall be constructed and soil log recorded as detailed in Section R317-4-14 Appendix C.

b. The regulatory authority shall have the option of requiring a percolation test in addition to the soil exploration pit.

c. The regulatory authority:

i. shall require additional soil exploration pits, percolation tests, or both where flows are greater than 1,000 gallons per day; and

ii. may require additional pits, tests, or both where:

(1) soil structure varies;

(2) limiting geologic conditions are encountered; or

(3) the regulatory authority deems it necessary.

d. The percolation test shall be conducted as detailed in Section R317-4-14 Appendix D.

e. Soil exploration pits and percolation tests shall be conducted as closely as possible to the proposed absorption system site. The regulatory authority shall have the option of inspecting the open soil exploration pits and monitoring the percolation test procedure. All soil logs and percolation

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test results shall be submitted to the regulatory authority.

f. When there is a substantial discrepancy between the percolation rate and the soil classification, it shall be resolved through additional soil exploration pits, percolation tests, or both.

g. Absorption system feasibility shall be based on Section R317-4-13 Table 5 or 6.

### 2. Wind-Blown Sand.

The extremely fine grained wind-blown sand found in some parts of Utah shall be deemed not feasible for absorption systems. This does not apply to lots that have received final local health department approval prior to the effective date of this rule.

a. Percolation test results in wind-blown sand will generally be rapid, but experience has shown that this soil has a tendency to become sealed with minute organic particles within a short period of time. For lots that have received final local health department approval prior to the effective date of this rule, systems may be constructed in such material provided it is found to be within the required range of percolation rates specified in these rules, and provided further that the required area shall be calculated on the assumption of minimum acceptable percolation rate of 60 minutes per inch for standard trenches, deep wall trenches, and seepage pits, and 40 minutes per inch for absorption beds.

### 3. Suitable Soil Depth.

For conventional systems, effective suitable soil depth shall extend at least 48 inches or more below the bottom of the dispersal system to bedrock formations, impervious strata, or excessively permeable soil. Some alternative onsite wastewater systems may have other requirements.

### 4. Ground Water Requirements.

The elevation of the anticipated maximum ground water table shall meet the separation requirements of the anticipated absorption systems. Local health departments and other local government entities may impose stricter separation requirements between absorption systems and the maximum ground water table when deemed necessary. Building lots recorded or having received final local health department approval prior to May 21, 1984 shall be subject to the ground water table separation requirements of the then Part IV of the Code of Waste Disposal Regulations dated June 21, 1967, that states "high ground water elevation shall be at least 1 foot below the bottom of absorption systems and at least 4 feet below finished grade". Notwithstanding this grandfather provision for recorded or other approved lots, the depth to ground water requirements are applicable if compelling or countervailing public health interests would necessitate application of the more stringent requirements of this regulation.

#### a. Maximum Ground Water.

Maximum ground water table shall be determined where the anticipated maximum ground water table, including irrigation induced water table, might be expected to rise closer than 48 inches to the elevation of the bottom of the onsite wastewater system. Maximum ground water table shall be determined where alternative onsite wastewater systems may be considered based on groundwater elevations. The maximum ground water table shall be determined by the following.

##### i. Regular monitoring of the ground water table, or ground water table,

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perched, in an observation well for a period of one year, or for the period of the maximum groundwater table.

(1) Previous ground water records and climatological or other information may be consulted for each site proposed for an onsite wastewater system and may be used to adjust the observed maximum ground water table elevation.

ii. Direct visual observation of the maximum ground water table in a soil exploration pit for:

(1) evidence of crystals of salt left by the maximum ground water table; or

(2) chemically reduced iron in the soil, reflected by redoxmorphic features, i.e. a mottled coloring.

(3) Previous ground water records and climatological or other information may be consulted for each site proposed for an onsite wastewater system and may be used to adjust the observed maximum ground water table elevation in determining the anticipated maximum ground water table elevation.

iii. In cases where the anticipated maximum ground water table is expected to rise to closer than 34 inches from the original ground surface and an alternative or experimental onsite wastewater system would be considered, previous ground water records and climatological or other information shall be used to adjust the observed maximum ground water table in determining the anticipated maximum ground water table.

### b. Curtain Drains.

A curtain drain or other effective ground water interceptor may be allowed as an attempt to lower the groundwater table to meet the requirements of this rule. The regulatory authority shall require that the effectiveness of such devices in lowering the ground water table be demonstrated during the season of maximum ground water table.

### 4. Ground Slope.

Absorption systems may not be placed on slopes where the addition of fluids is judged to create an unstable slope.

a. Absorption systems may be placed on slopes between 0% and 25%, inclusive.

b. Absorption systems may be placed on slopes greater than 25% but not exceeding 35% if:

i. all other requirements of this rule can be met;

ii. effluent from the proposed system will not contaminate ground water or surface water, and will not surface or move off site before it is adequately treated to protect public health and the environment;

iii. no slope will fail, and there will be no other landslide or structural failure if the system is constructed and operated adequately, even if all properties in the vicinity are developed with onsite wastewater systems; and

iv. a report is submitted by a professional engineer or professional geologist that is licensed to practice in Utah. The report shall be imprinted with the engineer's or geologist's registration seal and signature and shall include the following.

(1) Predictions and supporting information of ground water transport from the proposed system and of expected areas of ground water mounding.

(2) A slope stability analysis that shall include information about the

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geology of the site and surrounding area, soil exploration and testing, and the effects of adding effluent.

(3) The cumulative effect on slope stability of added effluent if all properties in the vicinity were developed with onsite wastewater systems.

c. Absorption systems may not be placed on slopes greater than 35%.

### 5. Other Factors Affecting Onsite Wastewater System Feasibility.

a. The locations of all rivers, streams, creeks, dry or ephemeral washes, lakes, canals, marshes, subsurface drains, natural storm water drains, lagoons, artificial impoundments, either existing or proposed, that will affect building sites, shall be provided.

b. Areas proposed for onsite wastewater systems shall comply with the setbacks in Section R317-4-13 Table 2.

c. If any part of a property lies within or abuts a flood plain area, the flood plain shall be shown within a contour line and shall be clearly labeled on the plan with the words "flood plain area".

### 6. Unsuitable.

Where soil and other site conditions are clearly unsuitable for the placement of an onsite wastewater system, there is no need for conducting soil exploration pits or percolation tests.

#### C. Lot Size.

One of the following two methods shall be used for determining minimum lot size. Determination of minimum lot size by the regulatory authority would not preempt local governments from establishing larger minimum lot sizes.

##### 1. Method 1.

The local health department having jurisdiction may determine minimum lot size. Under this method, local health departments may elect to involve other affected governmental entities and the division in making joint lot size determinations. The division will develop technical information, training programs, and provide engineering and geohydrologic assistance in making lot size determinations that will be available to local health departments upon their request. Individuals or developers requesting lot size determinations under this method will be required to submit to the local health department, at their own expense, a report that accurately takes into account at least the following factors:

- a. soil type and depth;
- b. area drainage, lot drainage, and potential for flooding;
- c. protection of surface and ground waters;
- d. setbacks from property lines, water supplies, etc.;
- e. source of culinary water;
- f. topography, geology, hydrology and ground cover;
- g. availability of public sewers;
- h. activity or land use, present and anticipated;
- i. growth patterns;
- j. individual and accumulated gross effects on water quality;
- k. reserve areas for additional subsurface dispersal;
- l. anticipated wastewater volume;
- m. climatic conditions;
- n. installation plans for wastewater system; and
- o. area to be utilized by dwelling and other structures.

2. Method 2.

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a. Whenever local health departments do not establish minimum lot sizes for single-family dwellings that will be served by onsite wastewater systems, the requirements of Section R317-4-13 Tables 1.1 and 1.2 shall be met.

b. For non-residential facilities, one-half of the buildable area of the lot must be available for the absorption system and replacement area.

i. The area required for the absorption system and replacement area may be adjusted during the permitting process.

### 4.2. Subdivision Onsite Wastewater System Feasibility Determination.

A. In addition to information in Subsection R317-4-4.1, the following information must be provided on a plat map:

1. the proposed street and lot layout with all lots consecutively numbered;

2. size and dimensions of each lot, with the minimum required area sufficient to permit the safe and effective use of an onsite wastewater system, including a replacement area for the absorption system;

3. location of all water lines;

4. location of any easements; and

5. areas proposed for wastewater dispersal, including replacement area.

B. Surface drainage systems shall be included on the plan, as naturally occurring, and as altered by roadways or any drainage, grading or improvement, installed or proposed by the developer. The details of the system shall show the surface drainage structures, whether ditches, pipes, or culverts, will in no way affect onsite wastewater systems on the property.

C. Each proposed lot shall have at least one soil exploration pit, percolation test, or both.

1. The regulatory authority may allow fewer tests based on the uniformity of prevailing soil and ground water characteristics and available percolation or soil log test data.

2. If soil conditions and surface topography indicate, a greater number of soil exploration pits or percolation tests may be required by the regulatory authority.

3. The location of all soil exploration pits and percolation test holes shall be clearly identified on the subdivision final plat and identified by a key number or letter designation.

4. The results of such soil tests, including stratified depths of soils and final percolation rates for each lot shall be recorded on or with the final plat.

5. Soil exploration pits and percolation tests shall be conducted as closely as possible to the dispersal system sites on the lots or parcels.

D. Whenever available, information from published soil studies of the area of the proposed subdivision shall be submitted for review.

E. If soil or site conditions exist in or near the project so as to complicate design and location of an onsite wastewater system, a detailed system layout shall be provided for those lots presenting the greatest design difficulty by meeting rules in Section R317-4-5.

### 4.3. Statement of Feasibility.

After review of all information, plans, and proposals, the regulatory authority shall make a written determination of feasibility stating the results of the review or the need for additional information.

A. An affirmative statement of feasibility for a subdivision does not

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imply that it will be possible to install onsite wastewater systems on all of the proposed lots, but shall mean that such onsite wastewater systems may be installed on the majority of the proposed lots in accordance with minimum state requirements and any conditions that may be imposed.

B. The regulatory authority shall establish the expiration, if any, of the statement of feasibility.

### **R317-4-5. Plan Review and Permitting.**

#### **5.1. Plan Review and Permitting.**

##### **A. Designer Certification.**

All plans and specifications shall be prepared by an individual certified in accordance with Rule R317-11.

##### **B. Domestic Wastewater.**

Plans and specifications for the construction, alteration, extension, or change of use of onsite wastewater systems that receive domestic wastewater shall be submitted to the regulatory authority.

##### **C. Non-Domestic Wastewater.**

Plans and specifications for the construction, alteration, extension, or change of use of onsite wastewater systems that receive non-domestic wastewater shall be submitted to and approved by the local health department having jurisdiction and the division.

##### **D. Construction Permit Required.**

The regulatory authority shall review said plans and specifications as to their adequacy of design for the intended purpose, and shall, if necessary, require such changes as are required by these rules. When the reviewing regulatory authority is satisfied that plans and specifications are adequate for the conditions under which a system is to be installed and used, a construction permit shall be issued to the individual making the submittal.

1. Construction may not commence until the construction permit has been issued by the regulatory authority.

##### **E. Information Required.**

Plans submitted for review shall be drawn to scale, 1" = 10', 20' or 30', or other scale as approved by the regulatory authority. Plans shall be prepared in such a manner that the contractor can read and follow them in order to install the system properly. Depending on the individual site and circumstances, or as determined by the regulatory authority, some or all of the following information may be required.

###### **1. Applicant Information.**

a. The name, current address, and telephone number of the applicant.

b. Complete address, legal description of the property, or both to be served by this onsite wastewater system.

###### **2. Onsite Wastewater System Site Plan.**

a. Submittal date of plan.

b. North arrow.

c. Lot size and dimensions.

d. Legal description of property.

e. Ground surface contours, preferably at 2 foot intervals, of both the original and proposed final grades of the property, or relative elevations using an established bench mark.

f. Location and explanation of type of dwelling or structure to be

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served by an onsite wastewater system.

i. Maximum number of bedrooms, including statement of whether a finished or unfinished basement will be provided, or if other than a single family dwelling, the number of occupants expected and the estimated gallons of wastewater generated per day.

g. Location and dimensions of paved and unpaved driveways, roadways and parking areas.

h. Location and dimensions of the essential components of the wastewater system including the replacement area for the absorption system.

i. Location of all soil exploration pits and all percolation test holes.

j. Location of building sewer and water service line to serve the building.

k. Location of easements or drainage right-of-ways affecting the property.

l. Location of all intermittent or year-round streams, ditches, watercourses, ponds, subsurface drains, etc. within 100 feet of proposed onsite wastewater system.

m. The location, type, and depth of all existing and proposed non-public water supply sources within 200 feet of onsite wastewater systems, and of all existing or proposed public water supply sources within 1500 feet of onsite wastewater systems and associated source protection zones.

n. Distance to nearest public water main and size of main.

o. Distance to nearest public sewer, size of sewer, and whether accessible by gravity.

### 3. Statement with Site Plan.

Statement indicating the source of culinary water supply, whether a well, spring, non-public or public system, its location and distances from all onsite wastewater systems within 200 feet.

### 4. Site Assessment and Soil Evaluation.

Soil Logs, Percolation Test Certificates, or both.

a. Statement with supporting evidence indicating the maximum anticipated ground water table and the flooding potential for onsite wastewater system sites.

### 5. Relative Elevations.

Show relative elevations of the following, using an established bench mark.

a. Building drain outlet.

b. The inlet and outlet inverts of any septic tanks.

c. Septic tank access cover, including height and diameter of riser, if used.

d. Pump tank inlet, if used, including height and diameter of riser.

e. The outlet invert of the distribution box, if provided, and the ends or corners of each distribution pipe lateral in the absorption system.

f. The final ground surface over the absorption system.

### 6. System Design.

Details for said site, plans, and specifications are listed in Section R317-4-6.

a. Schedule or grade, material, diameter, and minimum slope of building sewer and effluent sewer.

b. Septic tank and pump tank capacity, design, cross sections, etc.,

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materials, and dimensions. If tank is commercially manufactured, state the name and address of manufacturer.

- c. Absorption system details, including the following:
  - i. details of drop boxes or distribution boxes, if provided;
  - ii. schedule or grade, material, and diameter of distribution pipes;
  - iii. length, slope, and spacing of each absorption system component;
  - iv. maximum slope across ground surface of absorption system area;
  - v. distance of absorption system from trees, cut banks, fills, or subsurface drains; and
  - vi. cross section of absorption system showing the:
    - (1) depth and width of absorption system excavation;
    - (2) depth of distribution pipe;
    - (3) depth of filter material;
    - (4) barrier material, i.e. synthetic filter fabric, straw, etc., used to separate filter material from cover; and
    - (5) depth of cover.
- d. Pump, if provided, details as referenced in Section R317-4-14 Appendix B.

e. If an alternative system is designed, include all pertinent information to allow plan review and permitting for compliance with this rule.

### F. Plans Submitted.

1. All applicants requesting plan approval for an onsite wastewater system shall submit a sufficient number of copies of the above required information to enable the regulatory authority to retain one copy as a permanent record.

2. Applications may be rejected if proper information is not submitted.

## R317-4-6. Design Requirements.

### 6.1. System Location.

A. Onsite wastewater systems are not suitable in some areas and situations. Location and installation of each system shall be such that with reasonable maintenance, it will function in a sanitary manner and will not create a nuisance, public health hazard, or endanger the quality of any waters of the state.

B. In determining a suitable location for the system, due consideration shall be given to such factors as:

- 1. the minimum setbacks in Section R317-4-13 Table 2;
- 2. size and shape of the lot;
- 3. slope of natural and final grade;
- 4. location of existing and future water supplies;
- 5. depth of ground water and bedrock;
- 6. soil characteristics and depth;
- 7. potential flooding or storm catchment;
- 8. possible expansion of the system; and
- 9. future connection to a public sewer system.

### 6.2. Minimum Setback Distances.

All systems, including the replacement area, shall conform to the minimum setback distances in Section R317-4-13 Table 2.

### 6.3. Maximum Ground Slope.

All absorption systems, including the replacement area, shall conform to

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the ground slope requirements in Section R317-4-4.

### 6.4 Estimates of Wastewater Quantity.

#### A. Single Family Dwellings.

A minimum of 300 gallons per day, 1 or 2 bedroom, and 150 gallons per day for each additional bedroom shall be used.

#### B. Non-Residential Facilities.

The quantity of wastewater shall be determined accurately, preferably by actual measurement. Metered water supply figures for similar installations can usually be relied upon, providing the non-disposable consumption, if any, is subtracted. Where this data is not available, the minimum design flow figures in Section R317-4-13 Table 3 shall be used to make estimates of flow.

#### C. Design Capacity.

In no event shall the anticipated maximum daily wastewater flow exceed the capacity for which a system is designed.

### 6.5. Non-Domestic Effluent.

Effluent shall be treated to levels at or below the defined parameters of non-domestic effluent before being discharged into an absorption system.

#### 6.6. Building Sewer.

A. The building sewer shall have a minimum inside diameter of 4 inches and shall comply with the minimum standards in Section R317-4-13 Table 4.

1. If the sewer leaving the house is three inches, the building sewer may be three inches.

B. Building sewers shall be laid on a uniform minimum slope of not less than 1/4 inch per foot or 2.08% slope.

C. The building sewer shall have a minimum of one cleanout and cleanouts every 100 feet.

1. A cleanout is also required for each aggregate horizontal change in direction exceeding 135 degrees.

2. Ninety degree ells are not recommended.

D. Building sewers shall be separated from water service pipes in separate trenches, and by at least 10 feet horizontally, except that they may be placed in the same trench when all of the following conditions are met.

1. The bottom of the water service pipe, at all points, shall be at least 18 inches above the top of the building sewer.

2. The water service pipe shall be placed on a solid shelf excavated at one side of the common trench with a minimum clear horizontal distance of at least 18 inches from the sewer or drain line.

3. The number of joints in the water service pipe should be kept to a minimum, and the materials and joints of both the sewer and water service pipes shall be of strength and durability to prevent leakage under adverse conditions.

4. If the water service pipe crosses the building sewer, it shall be at least 18 inches above the latter within 10 feet of the crossing. Joints in water service pipes should be located at least 10 feet from such crossings.

E. Building sewer placed under driveways or other areas subjected to heavy loads shall receive special design considerations to ensure against crushing or disruption of alignment.

#### 6.7. Septic Tank.

All septic tanks shall meet the requirements of Section R317-4-14 Appendix A and be approved by the division. Septic tanks shall be constructed

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of sound, durable, watertight materials that are not subject to excessive corrosion, frost damage, or decay. They shall be designed to be watertight, and to withstand all expected physical forces.

### A. Liquid capacity.

1. A septic tank that serves a non-residential facility shall have a liquid capacity of at least 1-1/2 times the designed daily wastewater flow. In all cases the capacity shall be at least 1,000 gallons.

2. The capacity of a septic tank that serves a single family dwelling shall be based on the number of bedrooms that can be anticipated in the dwelling served, including the unfinished space available for conversion as additional bedrooms. Unfinished basements shall be counted as a minimum of one additional bedroom.

a. The minimum liquid capacity of the tank shall be 1,000 gallons for up to three bedroom homes.

b. The minimum liquid capacity of the tank shall be 1,250 gallons for four bedroom homes.

c. Two hundred fifty gallons per bedroom shall be added to the liquid capacity of the tank for each additional bedroom over four bedrooms.

3. The regulatory authority may require a larger capacity than specified in this subsection as needed for unique or unusual circumstances.

### B. Tanks in Series.

1. No tank in the series shall be smaller than 1,000 gallons.

2. The capacity of the first tank shall be at least two-thirds of the required total septic tank volume. If compartmented tanks are used, the compartment of the first tank shall have this two-thirds capacity.

3. The connecting pipes between each successive tank shall meet the slope requirements of the building sewer and shall be unrestricted except for the inlet to the first tank and the outlet for the last tank.

### C. Maximum Number of Tanks or Compartments.

The maximum number of tanks and compartments in series may not exceed three.

### D. Inlets and Outlets.

Inlet or outlet devices shall conform to the following:

1. Approved tanks with offset inlets may be used where they are warranted by constraints on septic tank location.

2. Multiple outlets from septic tanks shall be prohibited unless preauthorized by the regulatory authority.

3. A gas deflector may be added at the outlet of the tank to prevent solids from entering the outlet pipe of the tank.

### E. Effluent Screens.

All septic tanks may have an effluent screen installed at the outlet of the terminal tank. The screen shall prevent the passage of solid particles larger than a nominal 1/8 inch diameter sphere. The screen shall be easily removable for routine servicing by installing a riser to the ground surface, with an approved cover. Effluent screens are required for non-domestic wastewater systems, unless screening is achieved by some other means acceptable to the regulatory authority.

### F. Access to Tank Interior.

Adequate access to the tank shall be provided to facilitate inspection, pumping, servicing, and maintenance, and shall have no structure or other

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obstruction placed over it and shall conform to all of the following requirements.

### 1. Riser Heights.

Watertight risers are required, extending to within 6 inches of the surface of the ground when soil covering the septic tank is greater than 6 inches. Preferably, the riser should be brought up to the final grade to encourage periodic servicing and maintenance.

a. If a septic tank is located under paving or concrete, risers shall be extended up through the paving or concrete.

b. If non-domestic wastewater is generated, risers shall be extended to the final grade.

### 2. Riser Diameter.

The inside diameter of the riser shall be a minimum of 20 inches.

### 3. Riser Covers.

Riser covers shall be designed and constructed in such a manner that:

a. they cannot pass through the access openings;

b. when closed will be child-proof;

c. will prevent entrance of surface water, dirt, or other foreign materials; and

d. seal odorous gases in the tank.

### 4. Riser Construction.

The risers shall be constructed of durable, structurally sound materials that are approved by the regulatory authority and designed to withstand expected physical loads and corrosive forces.

### 5. Multiple Risers Required.

When the tank capacity exceeds 3,000 gallons, a minimum of two access risers shall be installed.

### G. Other Requirements.

Tank installation shall conform to all of the following requirements.

#### 1. Ground Water.

a. Septic tanks located in high groundwater areas shall be designed with the appropriate weighted or anti-buoyancy device to prevent flotation in accordance with the manufacturer's recommendations.

b. The building sewer inlet of the tank may not be installed at an elevation lower than the highest anticipated groundwater elevation.

i. If the tank serves a mound or packed bed alternative system and has an electronic control panel capable of detecting water intrusion, the building sewer inlet of the tank may be installed below the maximum anticipated groundwater elevation.

(1) Any component below the anticipated maximum ground water elevation shall be water tightness tested.

#### 2. Depth of Septic Tank.

The minimum depth of cover over the septic tank shall be at least 6 inches and a maximum of 48 inches at final grading. For unusual situations, the regulatory authority may allow deeper burial provided the following conditions are met.

a. The tank shall be approved by the division for the proposed depth and burial cover load.

#### b. Risers shall:

i. be installed over the access openings of the inlet and outlet baffles

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or sanitary tees; and

ii. conform to Subsection R317-4-6.7.F, except risers shall be at least 24 inches in diameter.

### 6.8. Grease Interceptor Tanks.

A grease interceptor tank or automatic grease removal device may be required by the regulatory authority to receive the drainage from fixtures and equipment with grease-laden waste. It shall be sized according to the current Plumbing Code.

#### A. Accessibility and Installation.

Tanks installed in the ground shall conform to Subsection R317-4-6.7.F for accessibility and installation, except risers are required and shall be brought to the surface of the ground. All interior compartments shall be accessible for inspecting, servicing, and pumping.

#### 6.9. Pump and Recirculation Tanks.

A. Tanks shall be constructed of sound, durable, watertight materials that are not subject to excessive corrosion, frost damage, or decay. They shall be designed to be watertight, and to withstand all expected physical forces.

B. Pump tank volume shall have a liquid capacity adequate for the minimum operating volume that includes the dead space, dosing volume, and surge capacity, and shall have the emergency operation capacity of:

1. storage capacity for the system design daily wastewater flow;
2. at least two independent power sources with appropriate wiring installed; or
3. other design considerations approved by the regulatory authority that do not increase public health risks in the event of pump failure.

#### C. Accessibility and Installation.

Tanks shall conform to Subsection R317-4-6.7.F for accessibility and installation, except risers are required and shall be brought to the surface of the ground. All interior compartments shall be accessible for inspecting, servicing, and pumping.

D. Outlets of septic tanks upstream of pump tanks shall be fitted with an effluent screen, unless a pump vault is used in a pump tank.

#### 6.10. Pump Vaults.

Pump vaults may be used when approved by the regulatory authority.

A. The vault shall be constructed of durable material and resistant to corrosion.

B. The vault shall have an easily accessible screen with 1/8 inch openings or smaller.

C. All components of the vault shall be accessible from the surface.

D. When a pump vault is used in a septic tank:

1. The tank size shall be increased by the larger of the following:
  - a. two hundred fifty gallons; or
  - b. ten percent of the required capacity of the tank.
2. At least two independent power sources with appropriate wiring, or other design considerations approved by the regulatory authority that do not increase public health risks, shall be installed.

3. The maximum drawdown within the tank shall be no more than 3 inches per dose.

#### 6.11. Pumps.

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See Section R317-4-14 Appendix B for details.

### 6.12. Sampling Ports.

When a system is required to have effluent sampling or receives non-domestic wastewater, the system shall include a sampling port at an area approved by the regulatory authority capable of sampling effluent prior to the absorption system.

### 6.13. Effluent Sewer.

A. The effluent sewer shall have a minimum inside diameter of 4 inches and shall comply with the minimum standards in Section R317-4-13 Table 4.

B. The effluent sewer shall extend at least 5 feet beyond the septic tank before entering the absorption system.

C. Effluent sewers shall be laid on a uniform minimum slope of not less than 1/4 inch per foot or 2.08% slope. When it is impractical, due to structural features or the arrangement of any building, to obtain a slope of 1/4 inch per foot, a sewer pipe of 4 inches in diameter or larger may have a slope of not less than 1/8 inch per foot or 1.04% slope when approved by the regulatory authority.

D. The effluent sewer lines shall have cleanouts at least every 100 feet.

E. Effluent sewer placed under driveways or other areas subjected to heavy loads shall receive special design considerations to ensure against crushing or disruption of alignment.

### 6.14. Absorption Systems.

#### A. System Types.

1. Absorption Trenches.
  - a. Standard Trenches.
  - b. Chambered Trenches.
  - c. Bundled Synthetic Aggregate Trenches.
2. Absorption Beds.
3. Deep Wall Trenches.
4. Seepage Pits.

#### B. General Requirements.

##### 1. Replacement Area for Absorption Systems.

Adequate and suitable land shall be reserved and kept free of permanent structures, traffic, or adverse soil modification for 100% replacement of each absorption system. If approved by the regulatory authority, the area between standard trenches or deep wall trenches may be regarded as replacement area.

a. In lieu of a replacement area, two complete absorption systems shall be installed with a diversion valve. The valve shall be accessible from the final grade. The valve should be switched at least annually.

##### 2. Protection of Absorption Systems.

The site of the initial and replacement absorption system may not be covered by asphalt, concrete, or structures, or be subject to vehicular traffic, or other activity that would adversely affect the soil, such as construction material storage, soils storage, etc. This protection applies before and after construction of the onsite wastewater system.

##### 3. Sizing Criteria for Absorption Systems.

Absorption systems shall be sized based on Section R317-4-13 Table 5 or 6.

##### 4. Design Criteria for Absorption Systems.

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Many different designs may be used in laying out absorption systems, the choice depending on the size and shape of the available areas, the capacity required, and the topography of the dispersal area.

### a. Horizontal Setbacks.

Absorption systems shall comply with the setbacks in Section R317-4-13 Table 2.

### b. Sloping Ground.

Absorption systems placed in 10% or greater sloping ground shall be designed so that there is a minimum of 10 feet of undisturbed earth measured horizontally from the bottom of the distribution line to the ground surface. This requirement does not apply to drip irrigation.

### c. Undisturbed Natural Earth.

That portion of absorption systems below the top of distribution pipes shall be in undisturbed natural earth.

### d. Tolerance.

All piping, chambers, and the bottoms of absorption system excavations shall be designed level.

### e. Distribution Pipe.

Distribution pipe for gravity-flow absorption systems shall be 4 inches in diameter and shall comply with the minimum standards in Section R317-4-13 Table 4.

i. The pipe shall be penetrated by at least two rows of round holes, each 1/2 inch in diameter, and located at approximately 6 inch intervals. The perforations should be located at about the five o'clock and seven o'clock positions on the pipe.

ii. The open ends of the pipes shall be capped.

### f. Absorption System Laterals.

Absorption system laterals should be designed to receive proportional flows of wastewater.

### g. Drain Media Protection.

Drain media shall be covered with a barrier material before being covered with earth backfill.

### h. Prohibitions.

i. In gravity-flow absorption systems with multiple distribution lines, the effluent sewer may not be in direct line with any one of the distribution pipes, except where drop boxes or distribution boxes are used.

ii. Any section of distribution pipe laid with non-perforated pipe may not be considered in determining the required absorption area.

iii. Perforated distribution pipe may not be placed under driveways or other areas subjected to heavy loads.

### i. Exceptions.

Deep wall trenches and filled seepage pits may be allowed beneath unpaved driveways on a case-by-case basis by the regulatory authority, if the top of the distribution pipe is at least 3 feet below the final ground surface.

## C. Effluent Distribution Devices.

### 1. Distribution Boxes.

Distribution boxes may be used on level or nearly level ground. They shall be watertight and constructed of durable, corrosion resistant material. They shall be designed to accommodate the inlet pipe and the necessary distribution lines.

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a. The outlet inverts of the distribution box shall be not less than 1 inch below the inlet invert.

b. Distribution boxes shall have risers brought to final grade.

### 2. Drop Boxes.

Drop boxes shall be watertight and constructed of durable, corrosion resistant material and may be used to distribute effluent within the absorption system and shall meet the following requirements:

a. Drop boxes shall be designed to accommodate the inlet pipe, an outlet pipe leading to the next drop box, except for the last drop box, and one or two distribution pipes leading to the absorption system.

b. The inlet pipe to the drop box shall be at least 1 inch higher than the outlet pipe leading to the next drop box.

c. The invert of the distribution pipes shall be 1 through 6 inches below the outlet invert. If there is more than one distribution pipe, their inverts shall be at exactly the same elevation.

d. Drop boxes shall have risers brought to final grade.

### 3. Effluent Pump to Absorption System.

a. If a pump is used to lift effluent to an absorption system, the pump tank or pump vault shall meet the requirements of Subsection R317-4-6.9 or R317-4-6.10 and the pump and controls shall meet the requirements of Section R317-4-14 Appendix B.

b. Pumping to an absorption system may not warrant any reductions to the absorption area.

### 4. Other Devices.

Tees, wyes, ells, or other distributing devices may be used as needed to permit proportional flow to the branches of the absorption system. A clean out or other means of access from the surface shall be provided for these devices.

#### D. Effluent Distribution Methods.

##### 1. Closed Loop.

In locations where the slope of the ground over the absorption system area is relatively flat, the trenches should be interconnected to produce a closed loop system and the trenches shall be installed at the same elevations.

##### 2. Non-Closed Loop.

If a non-closed loop design is used, effluent shall be proportionally distributed to each lateral.

##### 3. Serial or Sequential.

Serial or sequential distribution may be used in absorption systems designed for sloping areas, or where absorption system elevations are not equal.

a. Serial trenches shall be connected with a drop box or watertight overflow line in such a manner that a trench will be filled before the effluent flows to the next lower trench.

b. The overflow line shall be a 4-inch solid pipe with direct connections to the distribution pipes. It should be laid in a trench excavated to the exact depth required. Care must be exercised to ensure a block of undisturbed earth remains between trenches. Backfill should be carefully tamped.

##### 4. Pressure Distribution.

###### a. General Requirements.

###### i. Conformance to Applicable Requirements.

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All requirements stated elsewhere in this rule for design, setbacks, construction and installation details, performance, repairs, and abandonment shall apply.

### ii. Design Criteria.

All systems that use this method shall be designed by a person certified at Level 3 in accordance with Rule R317-11.

(1) The designer shall submit details of all system components with the necessary calculations.

(2) The designer shall provide to the local health department and to the owner operation and maintenance instructions that include the minimum inspection levels in Section R317-4-13 Table 7 for the system.

### iii. Record in the Chain of Title.

When a system utilizing pressure distribution exists on a property, notice of the existence of that system shall be recorded in the chain of title for that property.

#### b. Design.

i. Pressure distribution may be permitted on any site meeting the requirements for an onsite wastewater system if conditions in this rule can be met.

ii. Pressure distribution should be considered when:

(1) effluent pumps are used;  
(2) the flow from the dwelling or structure exceeds 3,000 gallons per day;

(3) soils are a Type 1 or have a percolation rate faster than five minutes per inch; or

(4) soils are a Type 5 or have a percolation rate slower than 60 minutes per inch.

iii. The Utah Guidance for Performance, Application, Design, Operation and Maintenance: Pressure Distribution Systems document shall be used for design requirements, along with the following:

(1) Dosing pumps, controls and alarms shall comply with Section R317-4-14 Appendix B.

(2) Pressure distribution piping.

(a) All pressure transport, manifold, lateral piping, and fittings shall meet PVC Schedule 40 standards or equivalent.

(b) The ends of lateral piping shall be constructed with sweep elbows or an equivalent method to bring the end of the pipe to final grade. The ends of the pipe shall be provided with threaded plugs, caps, or other devices acceptable to the regulatory authority to allow for access and flushing of the lateral.

#### E. Design of Absorption Systems.

i. An absorption system shall be designed to approximately follow the ground surface contours so that variation in excavation depth will be minimized. The excavations could be installed at different elevations, but the bottom of each individual excavation shall be level throughout its length.

ii. Absorption systems should be constructed as shallow as is possible to promote treatment and evapotranspiration.

iii. Observation ports may be placed to observe the infiltrative surfaces of the trenches or beds.

#### 1. Absorption Trenches.

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a. Absorption trenches shall conform to the following:

i. The minimum required effective absorption area shall be calculated using Section R317-4-13 Table 5 or 6.

ii. The effective absorption area of absorption trenches shall be calculated as the total bottom area of the excavated trench system in square feet.

iii. Minimum number of absorption trenches: 2.

iv. Maximum length of absorption trenches, not including connecting trenches: 150 feet.

v. Minimum spacing of absorption trenches from wall to wall: 7 feet.

vi. Minimum width of absorption trench excavations: 24 inches.

vii. Maximum width of absorption trench excavations: 36 inches.

viii. Minimum depth of absorption trench excavations below original, natural grade: 10 inches.

ix. Minimum depth of soil cover over the absorption trenches: 6 inches.

x. Minimum separation from the bottom of the absorption trenches to:

(1) the anticipated maximum ground water table: 24 inches; and

(2) unsuitable soil or bedrock formations: 48 inches.

b. Standard Trenches.

Standard trenches shall conform to the following:

i. Top of distribution pipe may not be installed above original, natural grade.

ii. The distribution pipe shall be centered in the absorption trench and placed the entire length of the trench.

iii. Drain media shall extend the full width and length of the trenches to a depth of at least: 12 inches.

iv. Minimum depth of drain media under the distribution pipe: 6 inches.

v. Minimum depth of drain media over the distribution pipe: 2 inches.

vi. Minimum depth of cover over the barrier material: 6 inches.

c. Chambered Trenches.

Chambered trenches shall conform to the following:

i. All chambers shall meet International Association of Plumbing and Mechanical Officials (IAPMO) Standard PS 63-2005, which is hereby incorporated into this rule by reference.

ii. The minimum required effective absorption area of chambered trenches shall be calculated:

(1) for Type A Chambers as: 36 inches; and

(2) for Type B Chambers as: 24 inches;

(3) using Section R317-4-13 Table 5 or 6 and may be reduced by: 30%.

iii. The chambered trenches shall be designed and installed in conformance with manufacturer recommendations, as modified by these rules.

iv. Type A Chambers.

(1) Minimum width of chambers: 30 inches.

(2) Maximum width of trench excavations: 36 inches.

v. Type B Chambers.

(1) Minimum width of chambers: 22 inches.

(2) Maximum width of trench excavations: 24 inches.

vi. Minimum elevation of the inlet pipe invert from the bottom of the chamber: 6 inches.

vii. All chambers shall have a splash plate under the inlet pipe or

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another design feature to avoid unnecessary channeling into the trench bottom.

viii. Inlet and outlet effluent sewer pipes shall enter and exit the chamber endplates.

ix. Minimum depth of cover over the chambers: 12 inches.

The depth of cover may be reduced to no less than 6 inches, if approved by the regulatory authority, considering the protection of absorption systems as required in Subsection R317-4-6.14.B.2, and other activities, as determined by the authority.

d. Bundled Synthetic Aggregate Trenches.

Bundled synthetic aggregate trenches shall conform to the following.

i. All synthetic aggregate bundles shall meet IAPMO Standards for the General, Testing and Marking and Identification of the guide criteria for Bundled Expanded Polystyrene Synthetic Aggregate Units.

ii. The effective absorption area of bundled synthetic aggregate trenches shall be calculated as the total bundle length times the total bundle width in square feet.

iii. The bundled synthetic aggregate trenches shall be designed and installed in conformance with manufacturer recommendations, as modified by these rules.

iv. Only 12-inch diameter bundles are approved in this rule.

(1) For bundles with perforated pipe the minimum depth of synthetic aggregate under pipe: 6 inches.

v. Width of trenches.

(1) When designed for a 3 foot wide trench, three bundles are laid parallel to each other with the middle bundle containing perforated pipe.

(2) When designed for a 2 foot wide trench, two bundles are placed on the bottom, with one bundle containing perforated pipe.

vi. Minimum depth of cover over the bundles: 12 inches.

The depth of cover may be reduced to no less than 6 inches, if approved by the regulatory authority, considering the protection of absorption systems as required in Subsection R317-4-6.14.B.2, and other activities, as determined by the authority.

2. Absorption Beds.

Absorption beds shall conform to the requirements applicable to absorption trenches, except for the following.

a. The minimum required effective absorption area shall be calculated using Section R317-4-13 Table 5 or 6.

b. The effective absorption area of absorption beds shall be considered as the total bottom area of the excavated bed system in square feet.

c. Absorption beds may be built over naturally existing soil types per Section R317-4-13 Table 5 or 6.

d. The bottom of the entire absorption bed shall be level.

e. The distribution pipes or chambers shall be interconnected to produce a closed loop distribution system.

f. Minimum number of laterals in an absorption bed: 2.

g. Maximum length of laterals in an absorption bed: 150 feet.

h. Maximum distance between laterals: 6 feet.

i. Minimum distance between laterals and sidewalls: 1 foot.

j. Maximum distance between laterals and sidewalls: 3 feet.

k. Minimum distance between absorption beds: 7 feet.

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1. Minimum depth of an absorption bed excavation from original, natural grade: 10 inches.
  - m. Absorption beds with drain media:
    - i. Minimum depth of drain media under distribution pipe: 6 inches.
    - ii. Minimum depth of drain media over distribution pipe: 2 inches.
    - iii. Minimum depth of cover over the barrier material: 6 inches.
  - n. Absorption beds with chambers:
    - i. Chambers shall be installed with sides touching, no separation allowed.
      - ii. All chambers shall be connected in a closed loop distribution system.
      - iii. The outlet side of the chamber runs shall be connected through the bottom port of the end plates.
    - iv. No absorption area reduction factor shall be given for using chambers in absorption beds.
  - v. Minimum depth of cover over the chambers: 12 inches.
3. Deep Wall Trenches.

Deep wall trenches shall conform to the following:

  - a. The minimum required effective absorption area shall be calculated using Section R317-4-13 Table 5 or 6.
  - b. The effective absorption area of deep wall trenches shall be calculated using the total trench vertical sidewall area below the distribution pipe. The bottom area and any highly restrictive or impervious strata or bedrock formations may not be considered in determining the effective sidewall absorption area.
  - c. If percolation tests are used, they shall be conducted in accordance with Section R317-4-14 Appendix D and in the most restrictive soil horizon.
  - d. Maximum length of trenches: 150 feet.
  - i. Does not include connecting trenches.
  - e. Minimum spacing of trenches from wall to wall: 12 feet, or three times the depth of the media under the distribution pipe, whichever is the larger distance.
  - f. Vertical depth of trenches.
    - i. Minimum effective sidewalls: 2 feet.
    - ii. Maximum effective sidewalls: 10 feet.
    - iii. Calculate using only suitable soil formation.
  - g. Minimum width of trench excavations: 24 inches.
  - h. Minimum separation from the bottom of deep wall trench to:
    - i. the anticipated maximum ground water table: 48 inches;
    - ii. unsuitable soil or bedrock formations: 48 inches.
  - i. Drain media shall cover the coarse drain media to permit leveling of the distribution pipe and shall extend the full width and length of the trenches.
    - i. Minimum depth of drain media: 12 inches.
    - ii. Minimum depth of drain media under the distribution pipe: 6 inches.
    - iii. Minimum depth of drain media over the distribution pipe: 2 inches.
    - j. Minimum depth of cover over the barrier material: 6 inches.
    - k. The distribution pipe shall be centered in the trench and placed the entire length of the trench.
  - l. Setback to property lines: 10 feet.
4. Seepage Pits.

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Seepage pits shall be considered as modified deep wall trenches and shall conform to the requirements applicable to deep wall trenches, except for the following:

a. The effective absorption area of seepage pits shall be calculated using the total pit vertical sidewall area below the distribution pipe. The bottom area and any highly restrictive or impervious strata or bedrock formations may not be considered in determining the effective sidewall absorption area.

b. Minimum diameter of pits: 3 feet.

c. Vertical depth of pits.

i. Minimum effective sidewalls: 4 feet.

ii. Maximum effective sidewalls: 10 feet.

iii. Calculate using only suitable soil formation.

d. Filled Seepage Pits.

i. In pits filled with coarse drain media, the perforated distribution pipe shall run across each pit. A layer of drain media shall be used for leveling the distribution pipe.

ii. The entire pit shall be completely filled with coarse drain media to at least the top of any permeable soil formation to be calculated as effective sidewall absorption area.

e. Hollow-Lined Seepage Pits.

i. For hollow-lined pits, the inlet pipe shall extend horizontally at least 1 foot into the pit.

ii. The annular space between the lining and excavation wall shall be filled with crushed rock or gravel ranging from 3/4 through 6 inches in diameter and free of fines, sand, clay or organic material. The maximum fines in the gravel shall be 2% by weight passing through a US Standard #10 mesh or 2.0 millimeter sieve.

iii. Minimum width of annular space between lining and sidewall: 12 inches.

iv. Minimum thickness of reinforced perforated concrete liner: 2-1/2 inches.

v. Minimum thickness of reinforced concrete top: 6 inches.

vi. Minimum depth of drain media in pit bottom: 6 inches.

vii. Minimum depth of cover over seepage pit top: 6 inches.

viii. A reinforced concrete top shall be provided.

(1) When the cover over the seepage pit top exceeds 6 inches, risers shall conform to Subsection R317-4-6.7.F for accessibility.

### 6.15. Alternative Systems.

#### A. System Types.

1. At-Grade.

2. Mounds.

3. Packed Bed Media.

a. Intermittent Sand Filters.

b. Recirculating Sand Filters.

c. Recirculating Gravel Filters.

d. Textile Filters.

e. Peat Filters.

4. Sand Lined Trenches.

#### B. General Requirements.

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1. Conformance to Applicable Requirements.

All requirements stated elsewhere in this rule for design, setbacks, construction and installation details, performance, repairs and abandonment shall apply unless stated differently for a given alternative system.

2. Sizing Criteria for Alternative Systems.

Absorption area shall be sized based on Section R317-4-13 Table 5 or 6 except as specified in this section.

3. Design Criteria for Alternative Systems.

All alternative systems shall be designed by a person certified at Level 3 in accordance with Rule R317-11.

a. The designer shall submit details of all system components with the necessary calculations.

b. The designer shall provide to the local health department and to the owner operation and maintenance instructions that include the minimum inspection levels in Section R317-4-13 Table 7 for the system.

4. Record in the Chain of Title.

When an alternative system exists on a property, notice of the existence of that system shall be recorded in the chain of title for that property.

C. Design of Alternative Systems.

1. At-Grade Systems.

Absorption trenches and absorption beds may be used in at-grade systems. At-grade systems shall conform to the requirements applicable to absorption trenches and absorption beds, except for the following:

a. Horizontal setbacks in Section R317-4-13 Table 2 are measured from edge of trench sidewall, except at property lines, where the toe of the final cover shall be 5 feet or greater in separation distance to a property line.

b. Minimum number of observations ports provided within absorption area:

2.

i. The ports shall be installed to the depth of the trench or bed.

c. Depth of absorption excavations below natural grade: 0-10 inches.

d. Minimum cover over the absorption area: 6 inches.

e. Maximum slope of natural ground surface: 4%.

f. The maximum side slope for above ground fill shall be four horizontal to one vertical: 25% slope.

g. Where final contours are above the natural ground surface, the cover shall extend from the center of the wastewater system at the same general top elevation for a minimum of 10 feet in all directions beyond the limits of the absorption area perimeter, before beginning the side slope.

2. Mound Systems.

Mound systems shall conform to the following:

a. The design shall generally be based on the Wisconsin Mound Soil Absorption System: Siting, Design and Construction Manual, January 2000 published by the University of Wisconsin-Madison Small-Scale Waste Management Project, with the following exceptions.

i. The minimum separation distance between the natural ground surface and the anticipated maximum ground water table: 12 inches.

ii. Mound systems may be built over naturally existing soil types per Section R317-4-13 Table 5 or 6 provided the minimum depth of suitable soil is:

(1) between the natural ground surface and bedrock formations or

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unsuitable soils: 36 inches; or

(2) above soils that have a percolation rate faster than one minute per inch: 24 inches.

iii. The minimum depth of sand media over natural soil: 12 inches.

iv. The maximum slope of natural ground surface: 25 %.

v. The separation distances in Section R317-4-13 Table 2 are measured from the toe of the final cover.

vi. The effluent loading rate at the sand media to natural soil interface shall be calculated using Section R317-4-13 Table 5 or 6.

vii. The effluent entering a mound system shall be at levels at or below the defined parameters of non-domestic effluent.

viii. The minimum thickness of aggregate media around the distribution pipes of the absorption system shall be the sum of 6 inches below the distribution pipe, the diameter of the distribution pipe and 2 inches above the distribution pipe or 10 inches, whichever is larger.

ix. The cover may not be less than 6 inches in thickness, and shall provide protection against erosion, frost, storm water infiltration and support vegetative growth and aeration of distribution cell.

x. A minimum of three observation ports shall be located within the mound at each end and the center of the distribution cell.

(1) At least one port shall be installed at the gravel-sand interface, and one port at the sand-soil interface.

b. Mounds shall use pressure distribution.

i. The Utah Guidance for Performance, Application, Design, Operation and Maintenance: Pressure Distribution Systems document and Subsection R317-4-6.14.D.4 shall be used for design requirements.

(1) See Section R317-4-14 Appendix B for pump and control requirements.

3. Packed Bed Media Systems.

Packed bed media systems shall conform to the following:

a. System Design Criteria.

i. Wastewater Design Flows.

(1) For single-family dwellings the design shall be based on a minimum of 300 gallons per day for two bedrooms and 100 gallons per day for each additional bedroom.

(2) All other flow estimates shall be based on Subsection R317-4-6.4.

(3) Special design considerations shall be given for non-domestic effluent.

ii. Effluent Distribution.

Effluent shall be uniformly distributed over the filter media using pressure distribution.

b. Absorption System Requirements.

Absorption systems shall conform to the following:

i. Siting Conditions.

Packed bed media absorption systems may be sited under the following conditions:

(1) The minimum separation distance between the natural ground surface and the anticipated maximum ground water table: 12 inches.

(2) Packed bed media absorption systems may be built over naturally existing soil types per Section R317-4-13 Table 5 or 6 provided the minimum depth of suitable soils:

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(a) above soils that have a percolation rate faster than one minute per inch: 24 inches; and

(b) between the natural ground surface and bedrock formations or unsuitable soils: 36 inches; or

(c) between the natural ground surface and bedrock formations or unsuitable soils: 18 inches based on an evaluation of infiltration rate and hydrogeology from a professional geologist or engineer that is certified at the appropriate level to perform onsite wastewater system design and having sufficient experience in geotechnical engineering based on:

- (i) type, extent of fractures, presence of bedding planes, angle of dip;
- (ii) hydrogeology of surrounding area; and

(iii) cumulative effect of all existing and future systems within the area for any localized mounding or surfacing that may create a public health hazard or nuisance, description of methods used to determine infiltration rate and evaluations of surfacing or mounding conditions.

(3) A non-chemical disinfection unit, capable of meeting laboratory testing parameters in Table 7.3, and a maintenance schedule consistent to Section R317-4-13 Tables 7.1 and 7.3, shall be used in excessively permeable soils.

(4) Conformance with the minimum setback distances in Section R317-4-13 Table 2, except for the following that require a minimum of 50 feet of separation:

- (a) watercourses, lakes, ponds, reservoirs;
- (b) non-culinary springs or wells;
- (c) foundation drains, curtain drains; or
- (d) non-public culinary grouted wells, constructed as required by Title R309.

### ii. Sizing Criteria.

The minimum required effective absorption area shall be calculated using Section R317-4-13 Table 5 or 6 and may be reduced by: 30%.

(1) The use of chambered trenches with a packed bed media system may not receive additional reductions as allowed in Subsection R317-4-6.14.E.1.c.

### iii. Separation from Ground Water Table.

The bottom of the absorption system shall have a vertical separation distance of at least 12 inches from the anticipated maximum ground water table.

### iv. Observation Ports.

A minimum of two observation ports shall be provided within the absorption area.

### v. Drip Irrigation.

Drip irrigation absorption may be used for packed bed media absorption system effluent dispersal based on type of soil and drip irrigation manufacturer's recommendations.

(1) Materials shall be specifically designed and manufactured for onsite wastewater applications.

(2) Non-absorption components shall be installed per Section R317-4-6 and Section R317-4-13 Table 2.

### c. Intermittent Sand Filter Systems.

#### i. Media.

Either sand media or sand fill as described below may be used.

- (1) Minimum depth of sand media: 24 inches.

Exhibit B

- (2) Minimum depth of sand fill: 24 inches.
- (a) Effective size: 0.35-0.5 millimeter.
- (b) Uniformity coefficient: less than 4.0.
- (c) Maximum fines passing through #200 sieve: 1%.
- ii. Maximum application rate per day per square foot of media surface area:
  - (1) Sand media: 1.0 gallons.
  - (2) Sand fill: 1.2 gallons.
  - iii. Maximum dose volume through any given orifice for each dosing: 2 gallons.
  - iv. Effluent entering an intermittent sand filter shall be at levels at or below the defined parameters of non-domestic effluent.
- c. Recirculating Sand Filter (RSF) Systems.
- i. Media.
  - (1) Minimum depth of washed sand: 24 inches.
  - (2) Effective size: 1.5-2.5 millimeter.
  - (3) Uniformity coefficient: less than 3.0.
  - (4) Maximum fines passing through #50 sieve: 1%.
- ii. Maximum application rate per day per square foot of media surface area: 5 gallons.
- d. Recirculating Gravel Filter (RGF) Systems.
- i. Media.
  - (1) Minimum depth of washed gravel: 36 inches.
  - (2) Effective size: 2.5-5.0 millimeter.
  - (3) Uniformity Coefficient: less than 2.0.
  - (4) Maximum fines passing through #16 sieve: 1%.
- ii. Maximum application rate per day per square foot of media surface area: 15 gallons.
- e. Textile Filter Systems.
  - i. Media shall be geotextile, AdvanTex, or an approved equal.
  - ii. Maximum application rate per day per square foot of media surface area: 30 gallons.
- f. Peat Filter Systems.
  - i. Minimum depth of peat media: 24 inches.
  - ii. Maximum application rate per day per square foot of media surface area: 5 gallons.

4. Sand Lined Trench Systems.

Sand lined trench systems shall conform to the following:

- a. Siting Conditions.
  - i. The minimum depth of suitable soil or saprolite between the sand media in trenches and the anticipated maximum ground water table: 12 inches.
  - ii. Sand lined trench systems may be built over naturally existing:
    - (1) soil types 1 through 4; or
    - (2) soils or saprolite with a percolation rate between 1 and 60 minutes per inch.
  - iii. The minimum depth of suitable soil or saprolite is:
    - (1) between the sand media in trenches and bedrock formations or unsuitable soils: 36 inches; or
    - (2) above soils or saprolite that have a percolation rate faster than one minute per inch: 24 inches.

Exhibit B

c. Trench Requirements.

Sand lined trenches shall conform to the requirements applicable to absorption trenches except for the following:

i. Trenches in Suitable Soil.

The minimum required effective absorption area shall be calculated using Section R317-4-13 Table 5 or 6.

ii. Trenches in Saprolite.

The minimum required effective absorption area shall be based on percolation rate using Section R317-4-13 Table 5.

(1) This rate shall be determined by conducting percolation tests. The soil shall be allowed to swell not less than 24 hours or more than 30 hours.

iii. The use of chambered trenches with a sand media system may not receive additional reductions as allowed in Subsection R317-4-6.14.E.1.c.

iv. Width of absorption trench excavations: 36 inches.

v. The entire trench sidewall shall be installed in natural ground. At-Grade system designs are not allowed.

vi. Minimum depth of sand media: 24 inches.

vii. Sand lined trenches with drain media.

(1) Minimum depth of drain media under the pressure lateral distribution pipe: 6 inches.

(2) Minimum depth of drain media over pressure lateral distribution pipe: 2 inches.

(3) Minimum depth of soil cover or saprolite over drain media: 6 inches.

viii. Sand lined trenches with Type A chambers.

(1) Minimum depth of soil cover or saprolite over chambers: 12 inches.

ix. Minimum number of observation ports per trench: 1.

c. Effluent Distribution.

Effluent shall be uniformly distributed over the sand media using pressure distribution.

i. Design shall generally be based on the Utah Guidance for Performance, Application, Design, Operation and Maintenance: Pressure Distribution Systems document.



## STAFF REPORT

To: Summit County Council  
From: Janna Young, Deputy County Manager  
Date of Meeting: October 9, 2019  
Type of Item: EPA Proposed Rule re Section 401 of the Clean Water Act,  
"Updated Regulations on Water Quality Certifications"  
Process: Regular Session

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### **Requested Council Action**

Approve comments in opposition to specific provisions of the U.S. Environmental Protection Agency's (EPA) proposed rule and authorize submittal of those comments to the Federal Register.

### **Introduction**

On August 8, 2019, the EPA issued a proposed rule, "Updated Regulations on Water Quality Certifications," for public comment that seeks to clarify: (a) the decisional time period for the review and issuance of Section 401 Certifications under the Clean Water Act (CWA); and (b) limit the review to matters contained within the CWA.

The new rule is related to the state's role in certifying that a project requiring a federal permit under the CWA will comply with state water quality standards. The new rule is largely in response to the use of the Section 401 water quality certification requirement by some states to, in the opinion of the Administration, unduly delay and in some cases, bring to a halt energy infrastructure projects for reasons often not related to water quality (such as climate change and endangered species).

Section 401 of the CWA gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed infrastructure projects that may affect navigable waters within their borders.

In April, 2019, President Trump issued Executive Order 13868 (attached), "Promoting Energy Infrastructure and Economic Growth," and directed the Administration to take action to accelerate and promote the construction of pipelines and other energy infrastructure. EPA is proposing this rule in response to President Trump's executive order. EPA was directed to first revise guidance on the CWA Section 401 certification process and then to propose new rules to implement CWA Section 401 by August 8, 2019. Under the executive order, the EPA is scheduled to finalize this rule in May 2020.

### **Background**

This issue was first brought to Summit County's attention by Squire Patton Boggs (SPB), a law and government affairs consulting firm whom Summit County retained to

help with issues before the Environmental Protection Agency (EPA) concerning the Florence Gillmor land acquisition. SPB characterized the proposed rule as one that would largely restrict states' ability to block pipelines, coal terminals and other projects that may pose environmental concerns, essentially limiting states' usage of Section 401 of the Clean Water Act (CWA) in objecting to such projects within their borders. Other legal firms which Staff researched made similar conclusions as SPB.

However, the Summit County Attorney's Office reads the proposed rule differently, opining that the clarifications offered in the proposed rule limiting the criteria used in the evaluation of Section 401 Certifications to issues directly related to water quality, and placing a time limit on Section 401 Certifications is both legally prudent and reasonable as the overall authority to issue Section 401 Certifications under the CWA is delegated to state entities by the EPA, such as the Utah Department of Environmental Quality (DEQ).

Where the County Attorney's Office has concerns is the penalty the proposed rule places on the failure to adhere to the time limitation outlined in Section 121.7. Regulations that contain a time deadline wherein failure to meet the deadline results in approval of the application, in this case a waiver of the certification requirement, is unreasonable and greatly undermines local authority.

### **Summary of the Proposed Rule**

EPA's proposal largely mirrors the Section 401 guidance which was issued by the EPA on June 7, 2019. The proposed rule and guidance make several clarifications and changes to what had been the traditional Section 401 water quality certification process:

1. **Time Frames.** The CWA limits a state's period for a request for water quality certification to a "reasonable" period of time, not to exceed one year. EPA makes clear that the timeframe for review begins upon the receipt by the state of a request for certification, not upon receipt of a "complete" application. Further, EPA states that not all projects require a full year for review and that the measure of a "reasonable" time frame for review will be dependent upon the type of project and the complexity of the project. Following the lead of EPA, the Army Corps of Engineers announced that the "reasonable" time for states to review a request for water quality certification for dredge and fill permits (Section 404 of the CWA) would be sixty (60) days, not a year. Failure to act upon a request within that time frame would result in a waiver of the certification requirement.
2. **Federal Oversight.** Under prior process and procedure, a denial of a state water quality certification by the state would have to be appealed by the project proponent to the applicable Court of Appeals. The proposed rule would allow the federal licensing/permitting agency to review whether the state denial or approval of a water quality certification with conditions was reasonable and would allow for federal review of those state decisions potentially placing the onus upon the states to file a legal challenge should the federal agency determine that the

denial of the certification was not reasonable and constituted a waiver or that conditions were not in adherence with the Act.

3. **Scope of Review.** EPA attempts to limit the scope of review of a water quality certification by the state strictly to the issue of water quality and whether the project will comply with water quality standards. Attempts by states to expand the scope of review to include issues such as climate change, endangered species, or other issues will not be acceptable. Reviews of these issues may be relevant with regard to other permits/authorizations, but not the Section 401 water quality certification.

The proposed rule is attached. More information about the CWA Section 401 certification process, can be found at: <https://www.epa.gov/cwa-401>.

### **Public Comment Opportunities**

The proposed rule was published in the Federal Register on August 16, 2019, initiating a 60-day public comment period, which ends October 15, 2019.

The EPA held a public hearing and several listening sessions on the proposed rule on September 5 and 6, 2019 at the Salt Lake City Public Library.

### **Summit County's Interest in this Issue**

Summit County is home to the headwaters of five major watersheds that supply critical drinking and irrigation water to Summit County and downstream communities on the Wasatch Front. As such, the County takes its stewardship responsibilities over these waters very seriously. In order to do this effectively, the County must have the ability to issue local regulations specific to the health, safety and welfare of our community. As such, the County opposes and actively works against any effort that either directly or as an unintended consequence, limits, undermines, pre-empt or usurps the County's ability to enact local ordinances governing land use within the County.

### **Recommendation**

EPA's proposed rule does not directly apply to Summit County's land use regulations, or, for that matter, to local government regulations at all. Additionally, Utah's DEQ was not one of the state entities that delayed Section 401 certifications based on issues outside of the CWA, which this rule seeks to eliminate.

However, should Summit County agree with SPB and other firms' reading of the proposed rule that it restricts the state's ability to block pipelines, coal terminals and other infrastructure projects that may threaten clean water as a way to accelerate pipeline development and construction, then the County may wish to weigh in and provide comments opposing the proposed rule.

In those comments, the County may want to consider focusing on the provisions in Section 121.7 that automatically waive state water quality standards for infrastructure projects if the state fails to act within the 60-day timeframe, and the provisions that limit the scope of review of a water quality certification.

Staff has drafted comments to the proposed rule (see attached) for the Council to review and consider for submittal to the Federal Register for the public record.

# Executive Order 13868 on Promoting Energy Infrastructure and Economic Growth

## ENERGY & ENVIRONMENT

Issued on: April 10, 2019

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By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Purpose.** The United States is blessed with plentiful energy resources, including abundant supplies of coal, oil, and natural gas. Producers in America have demonstrated a remarkable ability to harness innovation and to cost-effectively unlock new energy supplies, making our country a dominant energy force. In fact, last year the United States surpassed production records set nearly 5 decades ago and is in all likelihood now the largest producer of crude oil in the world. We are also the world's leading producer of natural gas, and we became a net exporter in 2017 for the first time since 1957. The United States will continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future.

These robust energy supplies present the United States with tremendous economic opportunities. To fully realize this economic potential, however, the United States needs infrastructure capable of safely and efficiently transporting these plentiful resources to end users. Without it, energy costs will rise and the national energy market will be stifled; job growth will be hampered; and the manufacturing and geopolitical advantages of the United States will erode. To enable the timely construction of the infrastructure needed to move our energy resources through domestic and international commerce, the Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment. Enhancing our Nation's energy infrastructure, including facilities for the transmission, distribution, storage, and processing of energy resources, will ensure that our Nation's vast reserves of these resources can reach vital markets. Doing so will also help families and businesses in States with energy constraints to access affordable and reliable domestic energy resources. By promoting the development of new energy infrastructure, the United States will make energy more affordable, while safeguarding the environment and advancing our Nation's economic and geopolitical advantages.

**Sec. 2. Policy.** It is the policy of the United States to promote private investment in the Nation's energy infrastructure through:

(a) efficient permitting processes and procedures that employ a single point of accountability, avoid duplicative and redundant studies and reviews, and establish clear and reasonable timetables;

- (b) regulations that reflect best practices and best-available technologies;
- (c) timely action on infrastructure projects that advance America's interests and ability to participate in global energy markets;
- (d) increased regulatory certainty regarding the development of new energy infrastructure;
- (e) effective stewardship of America's natural resources; and
- (f) support for American ingenuity, the free market, and capitalism.

Sec. 3. Water Quality Certifications. Section 401 of the Clean Water Act (33 U.S.C. 1341) provides that States and authorized tribes have a direct role in Federal permitting and licensing processes to ensure that activities subject to Federal permitting requirements comply with established water quality requirements. Outdated Federal guidance and regulations regarding section 401 of the Clean Water Act, however, are causing confusion and uncertainty and are hindering the development of energy infrastructure.

(a) The Administrator of the Environmental Protection Agency (EPA) shall consult with States, tribes, and relevant executive departments and agencies (agencies) in reviewing section 401 of the Clean Water Act and EPA's related regulations and guidance to determine whether any provisions thereof should be clarified to be consistent with the policies described in section 2 of this order. This review shall include examination of the existing interim guidance entitled, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (Section 401 Interim Guidance). This review shall also take into account federalism considerations underlying section 401 of the Clean Water Act and shall focus on:

- (i) the need to promote timely Federal-State cooperation and collaboration;
- (ii) the appropriate scope of water quality reviews;
- (iii) types of conditions that may be appropriate to include in a certification;
- (iv) expectations for reasonable review times for various types of certification requests; and
- (v) the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.

(b) Upon completion of the consultation and review process described in subsection (a) of this section, but no later than 60 days after the date of this order, the Administrator of the EPA shall:

- (i) as appropriate and consistent with applicable law, issue new guidance to States and authorized tribes to supersede the Section 401 Interim Guidance to clarify, at minimum, the items set forth in subsection (a) of this section; and

(ii) issue guidance to agencies, consistent with the policies outlined in section 2 of this order, to address the items set forth in subsection (a) of this section.

(c) Upon completion of the consultation and review process described in subsection (a) of this section, but no later than 120 days after the date of this order, the Administrator of the EPA shall review EPA's regulations implementing section 401 of the Clean Water Act for consistency with the policies set forth in section 2 of this order and shall publish for notice and comment proposed rules revising such regulations, as appropriate and consistent with law. The Administrator of the EPA shall finalize such rules no later than 13 months after the date of this order.

(d) Upon completion of the processes described in subsection (b) of this section, the Administrator of the EPA shall lead an interagency review, in coordination with the head of each agency that issues permits or licenses subject to the certification requirements of section 401 of the Clean Water Act (401 Implementing Agencies), of existing Federal guidance and regulations for consistency with EPA guidance and rulemaking. Within 90 days of completion of the processes described in subsection (b) of this section, the heads of the 401 Implementing Agencies shall update their respective agencies' guidance. Within 90 days of completion of the processes described in subsection (c) of this section, if necessary, the heads of each 401 Implementing Agency shall initiate a rulemaking to ensure their respective agencies' regulations are consistent with the rulemaking described in subsection (c) of this section and with the policies set forth in section 2 of this order.

Sec. 4. Safety Regulations. (a) The Department of Transportation's safety regulations for Liquefied Natural Gas (LNG) facilities, found in 49 CFR Part 193 (Part 193), apply uniformly to small-scale peakshaving, satellite, temporary, and mobile facilities, as well as to large-scale import and export terminals. Driven by abundant supplies of domestic natural gas, new LNG export terminals are in various stages of development, and these modern, large-scale liquefaction facilities bear little resemblance to the small peakshaving facilities common during the original drafting of Part 193 nearly 40 years ago. To achieve the policies set forth in subsection 2(b) of this order, the Secretary of Transportation shall initiate a rulemaking to update Part 193 and shall finalize such rulemaking no later than 13 months after the date of this order. In developing the proposed regulations, the Secretary of Transportation shall use risk-based standards to the maximum extent practicable.

(b) In the United States, LNG may be transported by truck and, with approval by the Federal Railroad Administration, by rail in United Nations portable tanks, but Department of Transportation regulations do not authorize LNG transport in rail tank cars. The Secretary of Transportation shall propose for notice and comment a rule, no later than 100 days after the date of this order, that would treat LNG the same as other cryogenic liquids and permit LNG to be transported in approved rail tank cars. The Secretary shall finalize such rulemaking no later than 13 months after the date of this order.

Sec. 5. Environment, Social, and Governance Issues; Proxy Firms; and Financing Energy Projects Through the United States Capital Markets. (a) The majority of financing in the United States is conducted through its capital markets. The United States capital markets are the deepest and most liquid in the world. They benefit from decades of sound regulation grounded in

disclosure of information that, under an objective standard, is material to investors and owners seeking to make sound investment decisions or to understand current and projected business. As the Supreme Court held in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), information is “material” if “there is a substantial likelihood that a reasonable shareholder would consider it important.” Furthermore, the United States capital markets have thrived under the principle that companies owe a fiduciary duty to their shareholders to strive to maximize shareholder return, consistent with the long-term growth of a company.

(b) To advance the principles of objective materiality and fiduciary duty, and to achieve the policies set forth in subsections 2(c), (d), and (f) of this order, the Secretary of Labor shall, within 180 days of the date of this order, complete a review of available data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) in order to identify whether there are discernible trends with respect to such plans’ investments in the energy sector. Within 180 days of the date of this order, the Secretary shall provide an update to the Assistant to the President for Economic Policy on any discernible trends in energy investments by such plans. The Secretary of Labor shall also, within 180 days of the date of this order, complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets.

Sec. 6. Rights-of-Way Renewals or Reauthorizations. The Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce approve rights-of-way for energy infrastructure through lands owned by or within the jurisdiction or control of the United States. Energy infrastructure rights-of-way grants, leases, permits, and agreements routinely include sunset provisions. Operating facilities in expired rights-of-way creates legal and operational uncertainties for owners and operators of energy infrastructure. To achieve the policies set forth in section 2 of this order, the Secretaries of the Interior, Agriculture, and Commerce shall:

- (a) develop a master agreement for energy infrastructure rights-of-way renewals or reauthorizations; and
- (b) within 1 year of the date of this order, initiate renewal or reauthorization processes for all expired energy rights-of-way grants, leases, permits, and agreements, as determined to be appropriate by the applicable Secretary and to the extent permitted by law.

Sec. 7. Reports on the Barriers to a National Energy Market. (a) Within 180 days of the date of this order, the Secretary of Transportation, in consultation with the Secretary of Energy, shall submit a report to the President, through the Assistant to the President for Economic Policy, regarding the economic and other effects caused by the inability to transport sufficient quantities of natural gas and other domestic energy resources to the States in New England and, as the Secretary of Transportation deems appropriate, to States in other regions of the Nation. This report shall assess whether, and to what extent, State, local, tribal, or territorial actions have contributed to such effects.

(b) Within 180 days of the date of this order, the Secretary of Energy, in consultation with the Secretary of Transportation, shall submit a report to the President, through the Assistant to the President for Economic Policy, regarding the economic and other effects caused by limitations on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States. This report shall assess whether, and to what extent, State, local, tribal, or territorial actions have contributed to such effects.

Sec. 8. Report on Intergovernmental Assistance. State and local governments play a vital role in supporting energy infrastructure development through various transportation, housing, and workforce initiatives, and through other policies and expenditures. The Federal Government is, in many cases, well positioned to provide intergovernmental assistance to State and local governments. To achieve the policies set forth in section 2 of this order, the heads of agencies shall review existing authorities related to the transportation and development of domestically produced energy resources and, within 30 days of the date of this order, report to the Director of the Office of Management and Budget and the Assistant to the President for Economic Policy on how those authorities can be most efficiently and effectively used to advance the policies set forth in this order.

Sec. 9. Report on Economic Growth of the Appalachian Region. Within 180 days of the date of this order, the Secretary of Energy, in consultation with the heads of other agencies, as appropriate, shall submit a report to the President, through the Assistant to the President for Economic Policy, describing opportunities, through the Federal Government or otherwise, to promote economic growth of the Appalachian region, including growth of petrochemical and other industries. This report also shall assess methods for diversifying the Appalachian economy and promoting workforce development.

Sec. 10. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or  
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

COUNTY COUNCIL



Roger Armstrong – Chair  
Doug Clyde – Vice Chair  
Christopher F. Robinson  
Kim Carson  
Glenn Wright

October 9, 2019

Attention: Ms. Lauren Kasperek  
Office of Water  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Re: Summit County's (Utah) Comments on EPA's Proposed Rule: "Updating Regulations on Water Quality Certification" (Docket ID No. EPA-HQ-OW-2019-0405)

Dear Administrator Wheeler:

This letter serves as official comments from the Summit County (Utah) Council on the Environmental Protection Agency's (EPA) proposed rule, "Updating Regulations on Water Quality Certification" (Docket ID No. EPA-HQ-OW-2019-0405). We appreciate the opportunity to explain our interest in this issue and express the serious concerns we have with the proposed rule. We believe a consequence of the updated rule would be to restrict states' ability to block pipelines, coal terminals and other infrastructure projects that may threaten clean water as a way to accelerate pipeline development and construction.

Summit County is home to the headwaters of five major watersheds that supply essential drinking and irrigation water to the County and many downstream communities in the Salt Lake valley. The Summit County Council, as the governing body of the County, is responsible for the stewardship of these water sources for the health, safety and welfare of Summit County citizens.

The Weber River watershed, as an example, which starts in Summit County and flows westerly into the Great Salt Lake, encompasses nearly 2,500 square miles and includes approximately 968 miles of perennial streams and 1,254 miles of intermittent streams. The flows of the Weber River and its tributaries are highly regulated by seven major reservoirs. It is estimated that about 70 percent of the total precipitation within the watershed on average is consumed by over 2 million people who are serviced by this water source.

Due to Summit County's interest in the navigable waters located within its boundaries, we are concerned about any action or effort by the state or federal government that limits or pre-empts local regulatory authority over these waters.

Specifically, we have concerns about the following provisions in the proposed rule:

**Section 121.7.** This provision requires a state entity to act upon a Section 401 Certification application within 60 days. Failure to act upon a request within this timeframe results in the waiver of the certification requirement. This creates a huge burden on the state and an uneven playing field between the state and the applicant. This penalty does not take into account the myriad reasons why a response could be delayed, which is often caused by the applicant – their inability to provide a complete application, or their lack of response to requests for information in order for the local entity to process their application. This penalty is unreasonable. Furthermore, granting the certification automatically greatly undermines local decision-making and has the potential to harm local water sources.

**Scope of Review.** The proposed rule attempts to limit the scope of review of a water quality certification by the state strictly to the issue of water quality and whether the project will comply with water quality standards. As a result, attempts by states to expand the scope of review to include issues such as climate change, endangered species, or other pertinent issues will be prohibited in Section 401 water quality certification determinations. However, established case law has authorized the expansion of the scope of review for states under Section 401 to issues outside water quality. Not only does this pose a legal conflict for states, but it also limits state regulatory authority for health, safety and welfare of citizens.

While Summit County supports energy development and acknowledges the positive economic impact it brings to rural communities in particular, EPA's proposed rule erodes long-standing regulations that were put into place to protect critical bodies of water. The potential consequences of the changes proposed by the rule are so severe, we encourage the EPA to reconsider the updates made to Section 121.7, specifically removing the automatic waiver, and the scope of review provisions in order to reinstate local regulatory and decision-making authority regarding energy projects that have the potential to significantly harm or permanently destroy local water sources.

Thank you for your consideration of our concerns.

Sincerely,

Roger Armstrong, Chair  
Summit County Council

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 121**

**[EPA-HQ-OW-2019-0405; FRL-9997-82-OW]**

**RIN 2040-AF86**

**Updating Regulations on Water Quality Certification**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to states (and tribes that have been approved for “treatment as a state” status) to review for compliance with appropriate federal, state, and tribal water quality requirements any proposed activity that requires a federal license or permit and may result in a discharge to waters of the United States. This proposal is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.

**DATES:** Comments must be received on or before *[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** Submit your comments, identified by Docket ID No. **EPA-HQ-OW-2019-0405**, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

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

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- H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- J. National Technology Transfer and Advancement Act
- K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

## **I. General Information**

### *A. How can I get copies of this document and related information?*

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2019-0405. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the “**Federal Register**” listings at <https://www.regulations.gov>. An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <https://www.regulations.gov> to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket,

and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

*B. Under what legal authority is this proposed rule issued?*

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including section 401 and 501(a).

*C. How should I submit comments?*

Throughout this document, the EPA solicits comment on a number of issues related to the proposed rulemaking. Comments on this proposed rulemaking should be submitted to Docket ID No. EPA-HQ-OW-2019-0405 at <https://www.regulations.gov> per the online instructions for submitting comments and the information provided in ADDRESSES, above.

As discussed in section II.C in this preamble, this proposed rule is the outgrowth of extensive outreach efforts, including requests for recommendations, and the EPA has taken recommendations received into account in developing this proposal. In developing a final rule, the EPA will be considering comments submitted on this proposal. Persons who wish to provide views or recommendations on this proposal and have them considered as part of this rulemaking process must provide comments to the EPA as part of this comment process. To facilitate the processing of comments, commenters are encouraged to organize their comments in a manner that corresponds to the outline of this proposal.

## **II. Background**

#### A. Executive Summary

Congress enacted section 401 of the CWA to provide states and authorized tribes with an important tool to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies. Under section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States<sup>1</sup>, unless the state or authorized tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with existing water quality requirements or waives the certification requirement. As described in greater detail below, section 401 envisions a robust state and tribal role in the federal licensing or permitting process where local authority may otherwise be preempted by federal law, but places limitations on how that role may be implemented to maintain an efficient process, consistent with the overall cooperative federalism construct established by the CWA as explained below in section II.F.1 in this preamble.

The plain language of section 401 provides that a state or authorized tribe must act on a section 401 certification request within a reasonable period of time, which shall not exceed one year.<sup>2</sup> Section 401 does not guarantee a state or tribe a full year to act on a certification request. The statute only grants as much time as is reasonable, and federal licensing or permitting

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<sup>1</sup> The CWA, including section 401, uses “navigable waters”, defined as “waters of the United States, including territorial seas.” 33 U.S.C. 1362(7). This proposal uses “waters of the United States” throughout. The EPA is currently in the process of revising the definition of waters of the United States via rulemaking and expects the final definition of the term to control in all CWA contexts.

<sup>2</sup> “If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. 1341(a)(1); *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

agencies, in their discretion, may establish a period of time shorter than one year if the federal licensing and permitting agencies determine that a shorter period is “reasonable.” 33 U.S.C. 1341(a)(1). The CWA provides that the timeline for action on a section 401 certification begins “upon receipt” of a certification request. *Id.* If a state or tribe does not grant, grant with conditions, deny, or expressly waive the section 401 certification within a reasonable time period as determined by the federal licensing and permitting agencies, section 401 authorizes the federal licensing and permitting agencies to find that the state or tribe waived the section 401 certification requirement and issue the federal license or permit. *Id.* at 1341; 40 CFR 121.16(b). If the certification requirement has been waived and the federal license or permit is issued, any subsequent action by a state or tribe to grant, grant with condition, or deny section 401 certification has no legal force or effect.

Section 401 authorizes states and tribes to certify that a discharge to waters of the United States that may result from a proposed activity will comply with certain enumerated sections of the CWA, including the effluent limitations and standards of performance for new and existing discharge sources (sections 301, 302 and 306 of the CWA), water quality standards and implementation plans (section 303), and toxic pretreatment effluent standards (section 307). When granting a section 401 certification, states and tribes are directed by CWA section 401(d) to include conditions, including “effluent limitations<sup>3</sup> and other limitations, and monitoring requirements” that are necessary to assure that the applicant for a federal license or permit will

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<sup>3</sup> This proposal does not interpret “effluent limitations” to be synonymous with “effluent limitation guidelines”, the pollution control technology-based limits developed under section 304, 306, and 307 of the CWA, but also does interpret the term to include, for example, water quality based effluent limits required under sections 301 and 303.

comply with applicable provisions of CWA sections 301, 302, 306 and 307, and with “any other appropriate requirement of State law.”

As the agency charged with administering the CWA<sup>4</sup>, the EPA is responsible for developing a common framework for certifying authorities to follow when completing section 401 certifications. *See* 33 U.S.C. 1251(d), 1361(a). In 1971, the EPA promulgated at 40 CFR part 121 a common framework for implementing the certification provisions pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948 (FWCPA), but the EPA never updated that framework to reflect the 1972 amendments to the FWCPA (commonly known as the Clean Water Act or CWA), which created section 401. Over the last several years, litigation over the section 401 certifications for several high-profile infrastructure projects have highlighted the need for the EPA to update its regulations to provide a common framework for consistency with CWA section 401 and to give project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty.

In April 2019, the President issued Executive Order 13868 titled *Promoting Energy Infrastructure and Economic Growth*, which directed the EPA to engage with states, tribes, and federal agencies and update the Agency’s outdated guidance and regulations, including the existing certification framework. Consistent with Executive Order 13868 and the modern CWA, this proposal provides an updated common framework that is consistent with the modern CWA and which seeks to increase predictability and timeliness.

*B. Executive Order 13868: Promoting Energy Infrastructure and Economic Growth*

On April 10, 2019, the President issued Executive Order 13868 titled *Promoting Energy Infrastructure and Economic Growth*. Its purpose is to encourage greater investment in energy

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<sup>4</sup> The EPA co-administers section 404 with the Corps.

infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty. The Executive Order identifies the EPA's outdated federal guidance and regulations as one source of confusion and uncertainty hindering the development of energy infrastructure. As noted above, the EPA's current certification regulations (codified at 40 CFR part 121) have not been updated since they were promulgated in 1971, pursuant to section 21(b) of the FWPRA. Additionally, at the time the Executive Order was issued, the EPA's only guidance to the public on section 401 implementation was an interim handbook titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, which had not been updated since it was released in 2010 and therefore no longer reflected the current case law interpreting CWA section 401.

The Executive Order directed the EPA to review CWA section 401 and the EPA's existing certification regulations and interim guidance, issue new guidance to states, tribes, and federal agencies within 60 days of the Order, and propose new section 401 regulations within 120 days of the Order. The Executive Order also directed the EPA to consult with states, tribes, and relevant federal agencies while reviewing its existing guidance and regulations to identify areas that would benefit from greater clarity.

As part of its review, the Executive Order directed the EPA to take into account the federalism considerations underlying section 401 and to focus its attention on the appropriate scope of water quality reviews and conditions, the scope of information needed to act on a certification request in reasonable period of time, and expectations for certification review times. Section 3.a. of Executive Order 13868 *Promoting Energy Infrastructure and Economic Growth*. Following the release of the EPA's new guidance document, the Executive Order directed the EPA to lead an interagency review of all existing federal regulations and guidance pertaining to section 401 to ensure

consistency with the EPA's new guidance and rulemaking efforts. The Executive Order directs all federal agencies to update their existing section 401 guidance within 90 days after publication of the EPA's new guidance documents. Additionally, the Executive Order directs other federal agencies to initiate rulemaking, if necessary, within 90 days of the completion of the EPA's rulemaking, to ensure their own CWA section 401 regulations are consistent with the EPA's new rules and with the Executive Order's policy goals. Although the Executive Order focuses on section 401's impact on the energy sector, section 401 applies broadly to any proposed federally licensed or permitted activity that may result in any discharge into a water of the United States. Therefore, updates to the EPA's existing certification regulations and guidance are relevant to all water quality certifications.

Additional information on the EPA's state and tribal engagement is discussed in section II.C in this preamble, and additional information on the EPA's updated guidance document is discussed in section II.D in this preamble.

#### *C. Pre-proposal Stakeholder Engagement*

Prior to the release of Executive Order 13868 *Promoting Energy Infrastructure and Economic Growth*, the Agency's 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions announced that the Agency was considering, as a long-term action, the issuance of a notice soliciting public comment on whether the section 401 certification process would benefit from a rulemaking to promote nationwide consistency and regulatory certainty for states, authorized tribes, and stakeholders. While the Agency has decided to issue this proposal instead of the notice, that entry was the first indication to the public of the Agency's interest in revising its section 401 certification process.

On August 6, 2018, the Agency sent a letter to the Environmental Council of the States, the Association of Clean Water Administrators, the Association of State Wetlands Managers, the National Tribal Water Council, and the National Tribal Caucus indicating the Agency's interest in engaging on potential clarifications to the section 401 process. The Agency discussed section 401 at several association meetings and calls in Fall 2018 and Spring 2019 and received correspondence from several stakeholders between Fall 2018 and Spring 2019. Early stakeholder feedback received prior to the issuance of the Executive Order, as well as presentations given between Fall 2018 and Spring 2019, may be found in the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855).

Following the release of the Executive Order, the EPA continued its effort to engage with states and tribes on how to increase clarity in the section 401 certification process, including creating a new website to provide information on section 401 and notifying state environmental commissioners and tribal environmental directors of a two-part webinar series for states and tribes. *See www.epa.gov/cwa-401.* The first webinar was held on April 17, 2019, and discussed the Executive Order, the EPA's next steps, and solicited feedback from states and tribes consistent with the Executive Order. Shortly thereafter, the EPA initiated formal consultation efforts with states and tribes regarding provisions that require clarification within section 401 of the CWA and related federal regulations and guidance. Consultation occurred from April 24, 2019 through May 24, 2019, and the EPA opened a docket for pre-proposal recommendations during this time period (Docket ID No. EPA-HQ-OW-2018-0855). On May 7, 2019 and May 15, 2019, the EPA held tribal informational webinars, and on May 8, 2019, the EPA held an informational webinar for both states and tribes. See section V in this preamble for further details on the Agency's federalism and tribal consultations. Questions and recommendations from the

webinar attendees are available in the pre-proposal docket (Docket ID No. EPA-HQ-OW-2018-0855).

During the consultation period, the EPA participated in phone calls and in-person meetings with inter-governmental and tribal associations including the National Governor's Association and National Tribal Water Council. The EPA also attended the EPA Region 9 Regional Tribal Operations Committee meeting on May 22, 2019, to solicit recommendations for the proposed rule. The EPA engaged with federal agencies that issue permits or licenses subject to section 401, including the United States Department of Agriculture, Federal Energy Regulatory Commission, Army Corps of Engineers, Alcohol and Tobacco Tax and Trade Bureau, and Nuclear Regulatory Commission through several meetings and phone calls to gain additional feedback from federal partners.

At the webinars and meetings, the EPA provided a presentation and sought input on areas of section 401 that may require updating or benefit from clarification, including timeframe, scope of certification review, and coordination among certifying authorities, federal licensing or permitting agencies, and project proponents. The EPA requested input on issues and process improvements that the EPA might consider for a future rule. Participant recommendations from webinars, meetings, and the docket represent a diverse range of interests, positions and suggestions. Several themes emerged throughout this process, including support for ongoing state and tribal engagement, support for retention of state and tribal authority, and suggestions for process improvements for CWA section 401 water quality certifications.

Tribes provided several specific recommendations regarding the proposed rulemaking. First, some tribes requested the EPA better clarify its responsibilities under CWA section 401(a)(2). These tribes expressed the importance of considering impacts to neighboring jurisdictions during

the section 401 certification process. Tribes also emphasized that section 401 certification decision-making should not be prolonged such that section 401 certifications delay implementation of updated water quality standards. Tribes also requested that any changes to the section 401 certification process should maintain tribal authority and sovereignty. Finally, tribes emphasized the importance of meaningful consultation and engagement throughout the rulemaking process.

The EPA received several specific recommendations regarding process improvements for section 401 certifications. First, states, cross-cutting state organizations, and industry groups expressed support for pre-application meetings and information-sharing among project proponents, certifying authorities, and federal licensing and permitting agencies. Additionally, state officials, tribal officials, and cross-cutting state organizations cited deficient certification applications as a primary cause for delays in the certification decision-making process. Permit applicants suggested the lack of clear state processes and prolonged information requests contributed significantly to the delay in the 401 certification process. The Agency was also made aware of relatively low staffing availability in many state and tribal 401 certification programs. Stakeholders suggested that pre-application meetings as well as explicit state processes and checklists could increase the quality of certification applications.

Additionally, state and tribal officials as well as cross-cutting state organizations cautioned the Agency against mandating a specific reasonable period of time (e.g., 60 days) that would apply to all types of projects. These recommendations encouraged the EPA to maintain the authority of federal licensing and permitting agencies to determine the appropriate reasonable period of time.

Finally, the EPA received pre-proposal recommendations covering a wide variety of viewpoints on the certifying authority's scope of certification review. The EPA considered all of this information and stakeholder input, including all 72 recommendations submitted to the docket during development of this proposed rule, and feedback received prior to the initiation of and during the formal consultation period.

*D. Guidance Document*

Pursuant to Executive Order 13868, the Agency released updated section 401 guidance on June 7, 2019, available at <https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes>. Coincident with the release of the new guidance, EPA rescinded the 2010 document titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* ("Interim Handbook"). The 2010 Interim Handbook had not been updated or revised since its release in 2010, and therefore no longer reflected the current case law interpreting CWA section 401, nor had it been finalized.

The updated guidance provides information and recommendations for implementing the substantive and procedural requirements of section 401, consistent with the areas of focus in the Executive Order. More specifically, the guidance focuses on aspects of the certification process, including the timeline for review and decision-making and the appropriate scope of review and conditions. Additionally, the guidance provides recommendations for how federal licensing and permitting agencies, states, and tribes can better coordinate to improve the section 401 certification process. The emphasis on early coordination and collaboration to increase process efficiency aligns with other agency directives under Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, or simply, the "One Federal Decision" policy. For major infrastructure

projects, the One Federal Decision policy directs federal agencies to use a single, coordinated process for compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and emphasizes advance coordination to streamline federal permitting actions.

The new guidance is not a regulation, nor does it change or substitute for any applicable regulations. Therefore, it does not impose legally binding requirements on the EPA, states, tribes, other federal agencies, or the regulated community. The EPA expects its final regulation, once promulgated, will provide the clarity and regulatory certainty expected by the Executive Order and additional guidance will not be necessary to implement section 401. The Agency therefore requests comment on 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.

*E. Effect on Existing Federal, State, and Tribal Regulations*

Section 3.d. of Executive Order 13868 provides that, within 90 days after the EPA issues its final section 401 regulations, “if necessary, the heads of each 401 implementing Agency shall initiate a rulemaking to ensure that their respective agencies’ regulations are consistent with” EPA’s final section 401 regulations and “the policies set forth in section 2 of [the Executive Order].” According to the Executive Order, these subsequent federal agency rulemaking efforts will follow an EPA-led interagency review and examination of existing federal guidance and regulations “for consistency with EPA guidance and regulations.” As the EPA understands the Executive Order, the other federal agencies that issue permits or licenses subject to the certification requirements of section 401 are expected to ensure that regulations governing their own processing, disposition, and enforcement of section 401 certifications are consistent with the EPA’s final regulations and the policies articulated in section 2 of the Executive Order. The EPA

plans to review its own National Pollutant Discharge Elimination System (NPDES) regulations to ensure its program certification regulations are also consistent with the Agency's final regulations under this proposal. The EPA will be working with its fellow section 401 implementing agencies to accomplish this goal.

The EPA recommends that states and authorized tribes update, as necessary, their own CWA section 401 regulations to provide procedural and substantive requirements that are consistent with those the EPA eventually promulgates. Regulatory consistency across both federal and state governments with respect to issues like timing, waiver, and scope of section 401 reviews and conditions will substantially contribute towards ensuring that section 401 is implemented in an efficient, effective, transparent, and nationally consistent manner and will reduce the likelihood of protracted litigation over these issues.

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.

#### *F. Legal Background*

This proposal initiates the EPA's first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401. The Agency's existing certification regulations at 40 CFR part 121 pre-date the 1972 CWA amendments. This proposal therefore provides the EPA's first holistic analysis of the statutory text, legislative history, and relevant case law informing the implementation of the CWA section 401 program by the Agency and our federal, state, and tribal partners. The proposal, while focused on the relevant statutory provisions and case law interpreting those provisions, is informed by policy considerations where necessary to address certain ambiguities in the statutory text. The following sections

describe the basic operational construct and history of the modern CWA, how section 401 fits within that construct, and certain core administrative legal principles that guide agency decision-making in this context. This legal background is intended to inform the public's review of the proposed regulation by summarizing the legal framework for the proposal.

## 1. The Clean Water Act

Congress amended the CWA<sup>5</sup> in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the U.S. Army Corps of Engineers (Corps) under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse "into any navigable water of the United States,<sup>6</sup> or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required states to develop water

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<sup>5</sup> The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977). For ease of reference, the Agency will generally refer to the FWPCA in this notice as the CWA or the Act.

<sup>6</sup> The term "navigable water of the United States" is a term of art used to refer to waters subject to federal jurisdiction under the RHA. *See, e.g.*, 33 CFR 329.1. The term is not synonymous with the phrase "waters of the United States" under the CWA, *see id.*, and the general term "navigable waters" has different meanings depending on the context of the statute in which it is used. *See, e.g.*, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

quality standards, and authorized the federal government to bring enforcement actions to abate water pollution.

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

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

Congress established several key policies that direct the work of the Agency to effectuate those goals. For example, Congress declared as a national policy “that the discharge of toxic

pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.” *Id.* at 1251(a)(3)-(7).

Congress provided a major role for the states in implementing the CWA, balancing the traditional power of states to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources . . . .” *Id.* at 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that “[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.* at 1370.<sup>7</sup> Congress also pledged to provide technical support and financial aid to the States “in connection with the prevention, reduction, and elimination of pollution.” *Id.* at 1251(b).

To carry out these policies, Congress broadly defined “pollution” to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,”

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<sup>7</sup> 33 U.S.C. 1370 also prohibits authorized states from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

*id.* at 1362(19), to parallel the broad objective of the Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the nation’s waters generally. *See, e.g., id.* at 1256(a) (authorizing the EPA to issue “grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution”); *see also* 84 FR 4154, 4157 (Feb. 14, 2019) (discussing non-regulatory program provisions); 83 FR 32227, 32232 (July 12, 2018) (same).

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

1342, 1344. Congress therefore hoped to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by addressing pollution of all waters via non-regulatory means and federally regulating the discharge of pollutants to the subset of waters identified as "navigable waters."<sup>8</sup>

Within the regulatory programs established by the Act, two principal components focus on "achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards," and the development of the NPDES permitting program that imposes specific discharge limitations for regulated entities. *EPA v. State Water Resources Control Bd.*, 426 U.S. at 204. Together these components provide a framework for the Agency to focus on reducing or eliminating discharges while creating accountability for each entity that discharges into a waterbody, facilitating greater enforcement and overall achievement of the CWA water quality goals. *Id.*; see *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (observing that 1972 amendments "largely supplanted" earlier version of CWA "by replacing water quality standards with point source effluent limitations").

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<sup>8</sup> Fundamental principles of statutory interpretation support the Agency's recognition of a distinction between "nation's waters" and "navigable waters." As the Supreme Court has observed, "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (recognizing the canon of statutory construction against superfluity). Further, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); see also *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]") (citation omitted). The non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State and local partnerships to control pollution in the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutants into the navigable waters. For further discussion, see 83 FR at 32232 and 84 FR at 4157.

Under this statutory scheme, the states<sup>9</sup> are authorized to assume program authority for issuing section 402 and 404 permits within their borders, subject to certain limitations. 33 U.S.C. 1342(b), 1344(g). States are also responsible for developing water quality standards for “waters of the United States” within their borders and reporting on the condition of those waters to the EPA every two years. *Id.* at 1313, 1315. States must develop total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to the EPA for approval. *Id.* at 1313(d). And, central to this proposed rule, states under CWA section 401 have authority to grant, grant with conditions, deny, or waive water quality certifications for every federal license or permit issued within their borders that may result in a discharge to waters of the United States. *Id.* at 1341. These same regulatory authorities can be assumed by Indian tribes under section 518 of the CWA, which authorizes the EPA to treat eligible tribes with reservations in a similar manner to states (referred to as “treatment as states” or TAS) for a variety of purposes, including administering the principal CWA regulatory programs. *Id.* at 1377(e). In addition, states and tribes retain authority to protect and manage the use of those waters that are not waters of the United States under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a).

In enacting section 401, Congress recognized that where states and tribes do not have direct permitting authority (either under a section 402 or 404 program authorization or where Congress has preempted a regulatory field, e.g., under the Federal Power Act), they may still play a valuable role in protecting water quality of federally regulated waters within their borders in collaboration with federal agencies. Under section 401, a federal agency may not issue a license

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<sup>9</sup> The CWA defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3).

or permit for an activity that may result in a discharge to waters of the United States, unless the appropriate certification authority provides a section 401 certification or waives its ability to do so. The authority to certify a federal license or permit lies with the agency (the certifying authority) that has jurisdiction over the discharge location to the receiving waters of the United States. *Id.* at 1341(a)(1). Examples of federal licenses or permits potentially subject to section 401 certification include, but are not limited to, CWA section 402 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits issued by the Corps, hydropower and pipeline licenses issued by Federal Energy Regulatory Commission (FERC), and RHA sections 9 and 10 permits issued by the Corps.

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

Perhaps with the exception of section 401,<sup>10</sup> the EPA has developed comprehensive, modern regulatory programs designed to ensure that the CWA is fully implemented as Congress intended. This includes pursuing the overall “objective” of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” *id.* at 1251(a), while implementing the specific “policy” directives from Congress to, among other things, “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” *Id.* at 1251(b); *see also Webster’s II, New Riverside University Dictionary* (1994) (defining “policy” as a “plan or course of action, as of a government[,] designed to influence and determine decisions and actions;” an “objective” is “something worked toward or aspired to: Goal”). The Agency therefore recognizes a distinction between the specific word choices of Congress, including the need to develop regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress. For further discussion of these principles, see 83 FR at 32237 and 84 FR at 4168-69.

Congress’ authority to regulate navigable waters, including those subject to CWA section 401 water quality certification, derives from its power to regulate the “channels of interstate commerce” under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the “channels of interstate commerce” as one of three areas of congressional authority under the Commerce Clause). The Supreme Court explained in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that the term “navigable” indicates “what Congress had in mind as its

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<sup>10</sup> As noted in section II.F in this preamble, the EPA’s existing certification regulations were promulgated prior to the 1972 CWA Amendments and have not been updated to reflect the current statutory text.

authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that “Congress intended to exert anything more than its commerce power over navigation.” *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended “to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985); *see also SWANCC*, 531 U.S. at 167.

The classical understanding of the term navigable was first articulated by the Supreme Court in *The Daniel Ball*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Over the years, this traditional test has been expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress’ authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See*

*Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (“Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.”). The Supreme Court also had clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries. *See Utah v. United States*, 403 U.S. 9, 11 (1971). Congress therefore intended to assert federal regulatory authority over more than just waters traditionally understood as navigable and rooted that authority in “its commerce power over navigation.” *SWANCC*, 531 U.S. at 168 n.3.

The EPA recognizes and respects the primary responsibilities and rights of states to regulate their land and water resources, as envisioned by the CWA. *See* 33 U.S.C. 1251(b), 1370. The oft-quoted objective of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” *id.* at 1251(a), must be implemented in a manner consistent with Congress’ policy directives. The Supreme Court long ago recognized the distinction between waters subject to federal authority, traditionally understood as navigable, and those waters “subject to the control of the States.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564-65 (1870). Over a century later, the Supreme Court in *SWANCC* reaffirmed the state’s “traditional and primary power over land and water use.” 531 U.S. at 174. Ensuring that states retain authority over their land and water resources helps carry out the overall objective of the CWA and ensures that the agency is giving full effect and consideration to the entire structure and function of the Act. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (citation omitted); *see also Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality opinion) (“[C]lean water is not the *only* purpose of

the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).” (original emphasis).

In summary, Congress relied on its authority under the Commerce Clause when it enacted the CWA and intended to assert federal authority over more than just waters traditionally understood as navigable, but it limited the exercise of that authority to “its commerce power over navigation.” *SWANCC*, 531 U.S. at 168 n.3. In doing so, Congress specifically sought to avoid “federal encroachment upon a traditional state power.” *Id.* at 173. The Court in *SWANCC* found that “[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .’” *Id.* at 174 (quoting 33 U.S.C. 1251(b)). The Court found no clear statement from Congress that it had intended to permit federal encroachment on traditional state power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id.* That is because the Supreme Court has instructed that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *Id.* at 172. The Court has further stated that this is particularly true “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173; *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“this plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers

under our constitutional scheme, powers with which Congress does not readily interfere"). This means that the executive branch's authority under the CWA, while broad, is not unlimited, and the waters to which CWA regulatory programs apply must necessarily respect those limits. For further discussion of these principles, see 84 FR at 4165 and 83 FR at 32234.

In some cases, CWA section 401 denials have been challenged on grounds that the denial improperly interfered with interstate commerce. *See, e.g., Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-5005, Complaint at ¶¶206-210; ¶¶224-248 (W.D. Wash. Filed Jan. 8, 2018) (alleging State's denial of section 401 certification violated the dormant commerce clause and dormant foreign commerce clause). In *Lake Carriers Association v. EPA*, 652 F.3d 1 (D.C. Cir. 2011), a court of appeals found that the section 401 statutory scheme of delegation to states itself does not create an impermissible burden on interstate commerce; however actions taken by states pursuant to section 401 are not insulated from dormant commerce clause challenges. 652 F.3d at 10 ("If [petitioners] believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state's courts. If [petitioners] believe that a particular state's law imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court."). Accordingly, EPA seeks comment on whether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce.

## 2. The EPA's Role in Implementing Section 401

The EPA, as the federal agency charged with administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401.<sup>11</sup> In addition to administering the statute and promulgating implementing regulations, the Agency has several other roles under section 401.

The EPA acts as the section 401 certification authority under two circumstances. First, the EPA will certify on behalf of a state or tribe where the jurisdiction in which the discharge will originate does not itself have certification authority. 33 U.S.C. 1341(a)(1). In practice, this results in the EPA certifying on behalf of the many tribes that do not have TAS authority for section 401. Second, the EPA will act as the certifying authority where the discharge would originate on lands of exclusive federal jurisdiction.<sup>12</sup>

The EPA also coordinates the opportunity for neighboring jurisdictions to raise concerns and recommendations where their water quality may be affected by a discharge subject to section 401 certification. *Id.* at 1341(a)(2). Although section 401 certification authority lies with the jurisdiction where the discharge originates, a neighboring jurisdiction whose water quality is potentially affected by the discharge may have an opportunity to raise concerns. Where the EPA Administrator determines that a discharge subject to section 401 “may affect” the water quality

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<sup>11</sup> See 33 U.S.C. 1251(d), 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *California Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *American Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d. Cir. 1997).

<sup>12</sup> The federal government may obtain exclusive federal jurisdiction over lands in multiple ways, including where the federal government purchases lands with state consent consistent with article 1, section 8, clause 17 of the U.S. Constitution, where a state chooses to cede jurisdiction to the federal government, and where the federal government reserved jurisdiction upon granting statehood. See *Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895). Examples of lands of exclusive federal jurisdiction include Denali National Park.

of a neighboring jurisdiction, the EPA is required to notify that other jurisdiction. *Id.* If the neighboring jurisdiction determines that the discharge “will affect” the quality of its waters in violation of any water quality requirement of that jurisdiction, it may notify the EPA and the federal licensing or permitting agency of its objection to the license or permit. *Id.* It may also request a hearing on its objection with the federal licensing or permitting agency. At the hearing, the EPA will submit its evaluation and recommendations. The federal agency will consider the jurisdiction’s and the EPA’s recommendations, and any additional evidence presented at the hearing. The federal agency “shall condition such license or permit in such manner as may be necessary to insure compliance with the applicable water quality requirements” of the neighboring jurisdiction. *Id.* If the conditions cannot ensure compliance, the federal agency may not issue the license or permit.

The EPA also must provide technical assistance for section 401 certifications upon the request of any federal or state agency, or project proponent. *Id.* at 1341(b). Technical assistance might include provision of any relevant information on applicable effluent limitations, standards, regulations, requirements, or water quality criteria.

Finally, the EPA is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. The EPA’s current water quality certification regulations were promulgated in 1971,<sup>13</sup> prior to the 1972 amendments that enacted CWA section 401.

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<sup>13</sup> The EPA’s existing water quality certification regulations are found at 40 CFR part 121, 36 FR 22487 (November 25, 1971). The EPA has also promulgated regulations addressing how 401 certification applies to the CWA section 402 NPDES program, found at 40 CFR 124.53, 124.54, 124.55; 48 FR 14264 (April 1, 1983). This proposed rule does not address the NPDES regulations, and the Agency will make any necessary conforming regulatory changes in a subsequent rulemaking.

The EPA's 1971 regulations were designed to implement an earlier version of the certification requirement that was included in the pre-1972 version of the FWPCA. The legislative history reveals Congress added the certification requirement to "recognize[] the responsibility of Federal agencies to protect water quality whenever their activities affect public waterways." S. Rep. No. 91-351, at 3 (1969). "In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered." *Id.* As an example, the legislative history discusses the Atomic Energy Commission's failure to consider the impact of thermal pollution on receiving waters when evaluating "site selection, construction, and design or operation of nuclear powerplants." *Id.*

Prior to 1972, the certification provision required states to certify that "such *activity* will be conducted in a manner which will not violate applicable *water quality standards*." Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970) (emphasis added). As described above, the 1972 amendments restructured the CWA and created a framework for compliance with effluent limitations that would be established in discharge permits issued pursuant to the new federal permitting program.

The 1972 amendments retained the pre-existing water quality certification requirements but modified the requirements to be consistent with the overall restructuring of the CWA so that a water quality certification would assure that the "*discharge will comply*" with effluent limitations and other enumerated regulatory provisions of the Act, and with "any other appropriate requirement" of state or tribal law. 33 U.S.C. 1341(a), (d) (emphasis added). Because the EPA's existing certification regulations were promulgated prior to the 1972 CWA amendments, they contain language from the pre-1972 FWCPA that Congress changed in those amendments. In contrast to the language in CWA section 401, the EPA's existing certification regulations direct

authorities to certify that there is “*reasonable assurance that the activity* will be conducted in a manner which will not violate applicable water quality standards.” 40 CFR 121.2(a)(2)-(3) (emphasis added). These outdated provisions have caused confusion for states, tribes, stakeholders, and courts reviewing section 401 certifications, and a primary goal for this proposal is to update and clarify the Agency’s regulations to ensure that they are consistent with the CWA.

### 3. The EPA’s Existing Certification Regulations

The EPA’s existing certification regulations require certifying authorities to act on a certification request within a “reasonable period of time.” 40 CFR 121.16(b). The regulations provide that the federal licensing or permitting agency determines what constitutes a “reasonable period,” and that the period shall generally be six months but in any event shall not exceed one year. *Id.*

The existing certification regulations also provide that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on a request for certification; and second, when the federal licensing or permitting agency sends written notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id.* at 121.16(a)-(b). Once waiver occurs, certification is not required, and the federal license or permit may be issued. 33 U.S.C. 1341(a).

When the EPA is the certifying authority, the existing certification regulations at 40 CFR part 121 establish different requirements, including specific information to be included in a certification request and additional procedures. When the EPA is providing certification, the

project proponent must submit to the EPA Regional Administrator the name and address of the project proponent, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge will begin and end, and a description of the methods to be used to monitor the quality and characteristics of the discharge.

40 CFR 121.22. Once the request is submitted to the EPA, the Regional Administrator must provide public notice of the request and an opportunity to comment, specifically stating that “all interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determines that such a hearing is necessary or appropriate.” *Id.* at 121.23. If, after consideration of relevant information, the Regional Administrator determines that there is “reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,” the Regional Administrator shall issue the certification.<sup>14</sup> *Id.* at 121.24.

The existing certification regulations identify a number of requirements that all certifying authorities must include in a section 401 certification. *Id.* at 121.2. For example, a section 401 certification shall include the name and address of the project proponent. *Id.* at 121.2(a)(2). The certification shall also include a statement that the certifying authority examined the application made by the project proponent to the federal licensing or permitting agency and bases its certification upon an evaluation of the application materials which are relevant to water quality

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<sup>14</sup> Use of the terms “reasonable assurance” and “activity” in this operative provision of the EPA’s existing certification regulation is an artifact of the pre-1972 statutory language and those terms are not used in the operative provision of CWA section 401. See Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970).

considerations or that it examined other information sufficient to permit the certifying authority to make a statement that there is a “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” *Id.* at 121.2(a)(2)-(3). The certification shall state “any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity,” and other information the certifying authority deems appropriate.<sup>15</sup> *Id.* at 121.2(a)(4)-(5).

The existing certification regulations at 40 CFR part 121 also establish a process for the EPA to provide neighboring jurisdictions with an opportunity to comment on a certification that is similar to that provided in the modern CWA section 401(a)(2). Under the existing certification regulations, the Regional Administrator is required to review the federal license or permit application, the certification, and any supplemental information provided to the EPA by the federal licensing or permitting agency, and if the Regional Administrator determines there is “reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,” the Regional Administrator is required to notify each affected state within thirty days of receipt of the application materials and certification. *Id.* at 121.13. If the documents provided are insufficient to make the determination, the Regional Administrator may request any supplemental information “as may be required to make the determination.” *Id.* at 121.12. In cases where the federal licensing or permitting agency holds a public hearing on the objection raised by a neighboring jurisdiction, notice of such objection shall be forwarded to the Regional Administrator by the licensing or permitting agency no later than 30 days prior to the hearing. *Id.* at 121.15. At the hearing the Regional

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<sup>15</sup> The term “desirable” is also not used in CWA section 401.

Administrator shall submit an evaluation and “recommendations as to whether and under what conditions the license or permit should be issued.” *Id.* at 121.15.

The existing certification regulations establish that the Regional Administrator “may, and upon request shall” provide federal licensing and permitting agencies, certifying authorities, and project proponents with information regarding water quality standards, status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id.* at 121.30.

Finally, the existing certification regulations establish an oversight role for the EPA when a certifying authority modifies a prior certification. The regulation provides for a certifying authority to modify its certification “in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and *the Regional Administrator.*” *Id.* at 121.2(b) (emphasis added).

As noted throughout this preamble, the EPA’s existing certification regulations were promulgated prior to the 1972 CWA amendments and they do not reflect the current statutory language in section 401. In addition, the EPA’s existing certification regulations at 40 CFR part 121 do not address some important procedural and substantive components of section 401 certification review and action. This proposal is intended to modernize the EPA’s regulations, align them with the current text and structure of the CWA, and provide additional regulatory procedures that the Agency believes will help promote consistent implementation of section 401 and streamline federal license and permit processes, consistent with the objectives of the Executive Order.

#### 4. Judicial Interpretations of Section 401

During the 47 years since its passage, the federal courts on numerous occasions have interpreted key provisions of section 401. The United States Supreme Court has twice addressed questions related to the scope and triggering mechanism of section 401, and lower courts have also addressed certain elements of section 401 certifications. This section summarizes the U.S. Supreme Court decisions and major lower court decisions.

a. U.S. Supreme Court Decisions

i. P.U.D. No. 1 of Jefferson County

In 1994, the Supreme Court reviewed a water quality certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. *See PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). This particular decision, though narrow in its holding, has been read by other courts as well as the EPA and some states and tribes to significantly broaden the scope of section 401 beyond its plain language meaning.

The principal dispute adjudicated in *PUD No. 1* was whether a state or tribe may require a minimum stream flow as a condition in a certification issued under section 401. In this case, the project proponent identified two potential discharges from its proposed hydroelectric facility: “the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.” *Id* at 711. The project proponent argued that the minimum stream flow condition was unrelated to these discharges and therefore beyond the scope of the state’s authority under section 401. *Id.*

The Court analyzed sections 401(a) and 401(d); specifically it analyzed the use of different terms in those sections of the statute to inform the scope of a section 401 certification. Section 401(a) requires the certifying authority to certify that the *discharge* from a proposed federally

licensed or permitted project will comply with enumerated CWA provisions, and section 401(d) allows the certifying authority to include conditions to assure that the *applicant* will comply with enumerated CWA provisions and “other appropriate state law requirements.” The Court concluded that, consistent with the EPA’s implementing regulations, section 401(d) “is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”<sup>16</sup> *Id.* at 712. The Court cited the EPA’s certification regulations at 40 CFR 121.2(a)(3) with approval and quoted the EPA’s guidance titled Wetlands and 401 Certification, and stated that “EPA’s conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401 and is entitled to deference.” *Id.* (citing EPA, *Wetlands and 401 Certification* 23 (April 1989)).

The Court was careful to note that a state’s authority to condition a certification “is not unbounded” and that states “can only ensure that the project complies with ‘any applicable effluent limitations and other limitations, under [33 U.S.C. 1311, 1312]’ or certain other provisions of the Act, ‘and with any other appropriate requirement of State Law.’” *Id.* The Court concluded that “state water quality standards adopted pursuant to § 303 are among the ‘other limitations’ with which a State may ensure compliance through the § 401 certification process” and noted that its view “is consistent with EPA’s view of the statute,” again citing the EPA’s regulations and guidance. *Id.* at 713.

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<sup>16</sup> The Court apparently failed to identify or understand that the EPA’s regulations were promulgated prior to the 1972 CWA amendments and that the exact provision the Court was analyzing contained outdated terminology, including the term “activity” from the pre-1972 versions of the Act.

Although this decision has been interpreted by some to broadly expand state authority under section 401—beyond assessing water quality impacts from the discharge and allowing conditions beyond the enumerated CWA provisions—the Court did not stray from the bedrock principles that a section 401 certification must address water quality and that appropriate conditions include those necessary to assure compliance with the state’s water quality standards. Indeed, referring to the section 401 language allowing certification conditions based on “any other appropriate requirements of state law,” the Court explicitly declined to speculate “on what additional state laws, *if any*, might be incorporated by this language. But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are appropriate requirements of state law.” *Id.* (emphasis added).

On the scope of section 401, the dissenting opinion would have declined to adopt the interpretation suggested by the EPA’s regulations and guidance and instead analyzed the statutory section as a whole, attempting to harmonize sections 401(a) and (d). The dissent first noted that, if the Court’s conclusion that states can impose conditions unrelated to discharges is correct, “Congress’ careful focus on discharges in § 401(a)(1)—the provision that describes the scope and function of the certification process—was wasted effort,” and that the Court’s conclusion “effectively eliminates the constraints of § 401(a)(1).” *Id.* at 726. The dissent then “easily reconciled” the two provisions by concluding that, “it is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while section 401(d) permits a State to place conditions on a certification to ensure compliance of ‘the applicant,’ those conditions must still be related to discharges.” *Id.* at 726-27. The dissent further noted that each of the CWA provisions enumerated in section 401 “describes discharge-related limitations” and therefore the

plain language of section 401(d) supports the conclusion that certification conditions must address water quality concerns from the discharge, not the proposed activity as a whole. *Id.* at 727. Finally, the dissent applied the principle *ejusdem generis* in its analysis and concluded that because “other appropriate requirements of state law” is included in a list of more specific discharge-related CWA provisions, that the “appropriate” requirements are “most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions.” *Id.* at 728.

The dissent also took issue with the Court’s reliance, at least in part, on the EPA’s regulations and its application of *Chevron* deference in this case without first identifying ambiguity in the statute and, where the government apparently did not seek deference on an interpretation of section 401(d). *Id.* The dissent noted that there was no EPA interpretation directly addressing the language in sections 401(a) and (d), and that the only existing EPA regulation that addresses conditions “speaks exclusively in terms of limiting discharges.”<sup>17</sup> *Id.* (citing 40 CFR 121.2(a)(4)).

The *PUD No. 1* decision addressed two other scope-related elements of section 401: whether certification conditions may be designed to address impacts to designated uses, and whether conditions related to minimum stream flows are appropriate under section 401. First, the Court

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<sup>17</sup> The EPA’s amicus brief filed in this case did not grapple with the language in 401(a) and (d) at all, but primarily argued that the proposed project had two distinct discharges (which were undisputed) and that “both discharges could reasonably be said to cause a violation of the State’s water quality standards,” including the designated uses and antidegradation components. Brief for the United States as Amicus Curiae Supporting Affirmance, at 12 n. 2 (Dec. 1993) (“It is therefore unnecessary to determine in this case whether Congress intended by the use of the term “applicant,” rather than “discharge” in section 401(d) to grant States a broader power to condition certifications under Section 401(d) than to deny them under Section 401(a) and, if so, whether there are limitations on the States’ authority to impose such conditions.” The EPA’s amicus brief also did not inform the Court that the Agency’s implementing regulations included language from the prior version of the Act.

conducted a plain language analysis of the CWA and concluded that, “under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *Id.* at 715. This means a section 401 certification may appropriately include conditions to require compliance with designated uses, which pursuant to the CWA, are a component of a water quality standard. *Id.* Second, the Court acknowledged that the Federal Power Act (FPA) empowers FERC “to issue licenses for projects ‘necessary or convenient … for the development, transmission, and utilization of power across, along, from, or in any of the streams … over which Congress has jurisdiction,’” and that the FPA “requires FERC to consider a project’s effect on fish and wildlife.” *Id.* at 722. Although the Court had previously rejected a state’s minimum stream flow requirement that conflicted with a stream flow requirement in a FERC license, the Court found no similar conflict in this case because FERC had not yet issued the hydropower license. *Id.* Given the breadth of federal permits that CWA section 401 applies to, the Court declined to assert a broad limitation on stream flow conditions in certifications but concluded they may be appropriate if necessary to enforce a state’s water quality standard, including designated uses. *Id.* at 723.

ii. S.D. Warren

In 2006, the Court revisited section 401 in connection with the State of Maine’s water quality certification of FERC license renewals for five hydroelectric dams on the Presumpscot River. *S.D. Warren Co. v. Maine Board of Environmental Protection et al.*, 547 U.S. 370 (2006) (*S.D. Warren*). The issue presented in *S.D. Warren* was whether operation of a dam may result in a “discharge” into the waters of the United States, triggering the need for a section 401 certification, even if the discharge did not add any pollutants. The Court analyzed the use of different terms—“discharge” and “discharge of pollutants”—within the CWA, how those terms

are defined and how they are used in CWA sections 401 and 402. The Court noted that section 402 expressly uses the term “discharge of pollutants” and requires permits for such discharges; and that section 401, by contrast, provides a tool for states to maintain water quality within their jurisdiction and uses the term “discharge” which is not independently defined in the Act.<sup>18</sup> Finding no specific definition of the term “discharge” in the statute, the Court turned to its common dictionary meaning: a “flowing or issuing out” and concluded that the term is “presumably broader” than “discharge of a pollutant.” *Id.* at 375-76.

The Court held that operating a dam “does raise the potential for a discharge” and, therefore, section 401 is triggered. *Id.* at 373. In so holding, the Court observed that, “[t]he alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines,” and such changes in a river “fall within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the State’s concerns.” *Id.* at 385-86. The Court concluded by observing that “[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution.” *Id.* at 386. This sentence when read in isolation could be interpreted as broadening the scope of section 401 to allow certifying authorities to consider potential environmental impacts from a proposed federally licensed or permitted project beyond water quality. However, the Court followed that sentence with a quote from Senator Muskie’s floor statement during the enactment of section 401:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of *water quality standard[s]*. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with *water quality*

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<sup>18</sup> The Court noted that the Act provides, that “the term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 547 U.S. at 375 (quoting 33 U.S.C. 1362(16)).

*standards*. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of *water quality requirements*.

*Id.* (emphasis added). The Court then stated, “These are the *very reasons* that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ by imposing conditions on federal licenses for activities that may result in a discharge.” *Id.* (emphasis added). Read in context, the Court’s statement about a state’s authority to address a “broad range of pollution” under section 401 does not suggest that an “appropriate requirement of State law” means anything other than water quality requirements or that a state’s or tribe’s action on a certification request can be focused on anything other than compliance with appropriate water quality requirements.

#### b. Circuit Court Decisions

Over the years, federal appellate courts have also addressed important aspects of section 401, including the timing for certifying authorities to act on a request and the scope of authority of federal agencies other than the EPA to make determinations on section 401 certifications. This section highlights a few of the most significant issues concerning section 401 and the most often cited decisions but does not cover the universe of lower federal court or state court case law. The Agency intends for this proposed rule, if finalized, to provide consistency and certainty where there may currently be conflicting or unclear but locally binding legal precedent.

Recent case law has provided insight concerning the timing and waiver provisions of section 401. In 2018, the Second Circuit addressed the question of when the statutory review clock begins. *N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018). Considering Millennium Pipeline Company’s certification request, the court disagreed with the State of New York and held that the statutory time limit is *not* triggered when a state determines

that a request for certification is “complete,” but that the “plain language of Section 401 outlines a bright-line rule regarding the beginning of review,” and that the clock begins upon “receipt of such request” by the certifying authority. *Id.* Otherwise, the court noted that states could “blur this bright-line into a subjective standard, dictating that applications are complete only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.” *Id.* at 456.

The D.C. Circuit has also recently analyzed the statutory timeline for review of a certification and held that, consistent with the plain language of CWA section 401(a)(1), “while a full year is the absolute maximum, [the statute] does not preclude a finding of waiver prior to the passage of a full year.” *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). The court also noted that the EPA—“the agency charged with administering the CWA”—has regulations that allow it to find that a state has waived certification of an NPDES permit application after only six months. *Id.*

In *Hoopa Valley Tribe*, the D.C. Circuit also held that “the withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review.” *Id.* at 1101. The court found that the project proponent and the certifying authorities (California and Oregon) had improperly entered into an agreement whereby the “very same” request for state certification of its relicensing application was automatically withdrawn-and resubmitted every year by operation of “the same one-page letter,” submitted to the states before the statute’s one-year waiver deadline. *Id.* at 1104. The court observed that “[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry” because the statute’s text “is clear” that failure or refusal to act on a request for certification within a reasonable period of

time, not to exceed one year, waives the state's ability to certify.<sup>19</sup> *Id.* at 1103. The court found that, pursuant to the unlawful withdrawal-and resubmission "scheme," the states had not yet rendered a certification decision "more than a decade" after the initial request was submitted to the states. *Id.* at 1104. The court declined to "resolve the legitimacy" of an alternative arrangement whereby an applicant may actually submit a new request in place of the old one. *Id.* Nor did it determine "how different a request must be to constitute a 'new request' such that it restarts the one-year clock." *Id.* On the facts before it, the court found that "California's and Oregon's deliberate and contractual idleness" defied the statute's one-year limitation and "usurp[ed] FERC's control over whether and when a federal license will issue." *Id.*

Another important area of case law deals with the scope of authority and deference provided to federal agencies other than the EPA in addressing issues arising under section 401. Many other federal agencies, including FERC and the Corps, routinely issue licenses and permits that require section 401 certifications and are responsible for enforcing state certification conditions that are incorporated into federal licenses and permits. However, because the EPA has been charged by Congress with administering the CWA, some courts have concluded that those other federal agencies are not entitled to deference on their interpretations of section 401. *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2002); *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1133-34 (9th Cir. 2002); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d. Cir. 1997). Other courts have concluded that FERC has an affirmative obligation to determine

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<sup>19</sup> Two decisions from the Second Circuit Court of Appeals recently acknowledged that project proponents have withdrawn and resubmitted certification requests to extend the reasonable time period for a state to review. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 456; *Constitution Pipeline v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 94 (2d Cir. 2018). However, in neither case did the court consider the merits or opine on the legality of such an arrangement.

whether a certifying authority has complied with requirements related to a section 401 certification. *See City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (FERC had an obligation to “obtain some minimal confirmation of such compliance.”); *see also Keating v. FERC*, 927 F.2d 616, 622-623, 625 (D.C. Cir. 1991) (while federal agency may not question propriety of state certification before license has issued, “FERC must at least decide whether the state’s assertion of revocation satisfies section 401(a)(3)’s predicate requirements.”).

In an important determination of procedural authorities, the Second Circuit affirmed that FERC—as the licensing agency—“may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period.” *Am. Rivers, Inc.*, 129 F.3d at 110-111. This holding is consistent with and supported by the implied statutory authority of a federal agency to establish the “reasonable period of time (which shall not exceed one year)” in the first place. 33 U.S.C. 1341(a)(1).

Case law also highlights the potential enforcement challenges that federal agencies face with section 401 certification conditions included in federal licenses and permits. Federal agencies have been admonished not to “second guess” a state’s water quality certification or its conditions, *see, e.g., City of Tacoma*, 460 F.3d at 67; *Am. Rivers Inc.*, 129 F.3d at 107; *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (“FERC may not alter or reject conditions imposed by the states through section 401 certificates.”), even where the federal agency has attempted to impose conditions that are more stringent than the state’s condition. *See Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 648 (4th Cir. 2018) (“the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality”); *see also Lake Carriers’ Association v.*

*EPA*, 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that petitioners’ request for additional notice and comment procedure on state certification conditions would have been futile because “the petitioners have failed to establish that EPA can alter or reject state certification conditions. . . .” But the court also observed, “[n]otably, the petitioners never argued that the certifications failed to ‘compl[y] with the terms of section 401,’ . . . by overstepping traditional bounds of state authority to regulate interstate commerce” (citing *City of Tacoma*, 460 F.3d at 67) and the court “therefore need not consider whether EPA has authority to reject state conditions under such circumstances.”)). But in *Snoqualmie Indian Tribe v. FERC*, the Ninth Circuit upheld FERC’s inclusion of minimum flow requirements greater than those specified in the State of Washington’s certification as long as they “do not conflict with or weaken the protections provided by the [State] certification.” 545 F.3d 1207, 1219 (9th Cir. 2008). In that case, FERC had added license conditions increasing the minimum flows specified in the state’s certification in order to “produce a great amount of mist” which it determined would “augment the Tribe’s religious experience,” one of the water’s designated uses. *Id.*; *see also* cases discussed at section III.F in this preamble affirming a role for federal agencies to confirm whether certifications comply with the requirements of section 401.

This proposal is intended to provide clarity to certifying authorities, federal agencies, and project proponents, as it addresses comprehensively and for the first time some competing case law and attempts to clarify the scope of conditions that may be included in a certification and the federal agencies’ role in the certification process.

## 5. Administrative Law Principles

To understand the full context and legal basis for this proposal, it is useful to understand some key governing principles of administrative law. In general, administrative agencies can

only exercise authority provided by Congress, and courts must enforce unambiguous terms that clearly express congressional intent. However, when Congress delegates authority to administrative agencies, it sometimes enacts ambiguous statutory provisions. To carry out their congressionally authorized missions, agencies, including the EPA, must often interpret ambiguous statutory terms. However, they must do so consistent with congressional intent. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), the Supreme Court concluded that courts have a limited role when reviewing agency interpretations of ambiguous statutory terms. In such cases, reviewing courts defer to an agency's interpretation of ambiguous terms if the agency's interpretation is reasonable. Under *Chevron*, federal agencies—not federal courts—are charged in the first instance with resolving statutory ambiguities to implement delegated authority from Congress.

The Supreme Court has described the *Chevron* analysis as a “two-step” process. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). At step one, the reviewing court determines whether Congress has “directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. If the statute is silent or ambiguous, the reviewing court proceeds to the second step, where the court must defer to the agency's “reasonable” interpretation. *Id.* at 844.

*Chevron* deference relies on the straightforward principle that, “when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.” *Encino Motorcars*, 136 S. Ct. at 2125 (citing *Chevron*, 467 U.S. at 843–44). Indeed, courts have applied *Chevron* deference to an agency's statutory interpretation “when it appears that Congress

delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”

*Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

In *Chevron*, the Supreme Court reviewed the EPA’s interpretation of statutory language from the Clean Air Act Amendments of 1977. Congress amended the Clean Air Act to impose requirements on states that had not achieved the national air quality standards promulgated by the EPA. States that had not attained the established air standards had to implement a permit program that would regulate “new or modified major stationary sources” of air pollution. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977). The EPA promulgated regulations defining a “stationary source” as the entire plant where pollutant-producing structures may be located. The EPA, therefore, treated numerous pollution-producing structures collectively as a single “stationary source,” even if those structures were part of the same larger facility or complex. *See* 40 CFR 51.18(j)(1)(i)-(ii) (1983). Under the EPA’s regulation, a facility could modify or construct new pollution-emitting structures as long as the stationary source—the facility as a whole—did not increase its pollution emissions.

The Natural Resources Defense Council (NRDC) opposed the EPA’s definition of “stationary source” and filed a challenge to the Agency’s regulations. The D.C. Circuit agreed with the NRDC and set aside the EPA’s regulations. The D.C. Circuit acknowledged that the Clean Air Act “does not explicitly define what Congress envisioned as a ‘stationary source,’ to which the permit program . . . should apply” and also concluded that Congress had not clearly addressed the issue in the legislative history. *NRDC v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982). Without clear text or intent from Congress, the D.C. Circuit looked to the purposes of the

program to guide the court’s interpretation. *Id.* at 726. According to the court, Congress sought to improve air quality when it amended the Clean Air Act, and the EPA’s definition of “stationary source” merely promoted the maintenance of current air quality standards.

In a unanimous decision, the Supreme Court reversed, finding that the D.C. Circuit committed a “basic legal error” by adopting “a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that decision.” *Chevron*, 467 U.S. at 842. The Court explained that it is not the judiciary’s place to establish a controlling interpretation of a statute delegating authority to an agency, but, rather, it is the agency’s job to “fill any gap left, implicitly or explicitly, by Congress.” *Id.* at 843. When Congress expressly delegates to an administrative agency the authority to interpret a statute through regulation, courts cannot substitute their own interpretation of the statute when the agency has provided a reasonable construction of the statute. *See id.* at 843-44.

During the rulemaking process, the EPA had explained that Congress had not fully addressed the definition of “source” in the amendments to the Clean Air Act or in the legislative history. *Id.* at 858. The Supreme Court agreed, concluding that “the language of [the statute] simply does not compel any given interpretation of the term ‘source.’” *Id.* at 860. And the legislative history associated with the amendments was “silent on the precise issue.” *Id.* at 862.

In its proposed and final rulemaking, the EPA noted that adopting an individualized equipment definition of “source” could disincentivize the modernization of plants, if industry had to go through the permitting process to create changes. *Id.* at 858. The EPA believed that adopting a plant-wide definition of “source” could result in reduced pollution emissions. *Id.* Considering the Clean Air Act’s competing objectives of permitting economic growth and reducing pollution emissions, the Supreme Court stated that “the plantwide definition is fully

consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well.” *Id.* at 863. The Court upheld the EPA’s definition of the term “stationary source,” explaining that “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.” *Id.* at 865.<sup>20</sup>

Even if a court has ruled on the interpretation of a statute, the “court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005) (emphasis added). Put another way, *Brand X* held that “a court’s choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation.” *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). This principle stems from *Chevron* itself, which “established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever

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<sup>20</sup> For other instructive applications of *Chevron*’s interpretative principles, see *Entergy Corp. v. Riverkeeper, Inc.* 556 U.S. 208, 222-223 (2009) (statutory silence interpreted as “nothing more than a refusal to tie the agency’s hands”); *Zuni Pub. School Dist. v Dep’t of Edu.* 550 U.S. 81, 89-94 (2007) (court considered whether agency’s interpretation was reasonable in light of the “plain language of the statute” as well as the statute’s “background and basic purposes”); *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471 (4th Cir. 2011) (“statutory construction ... is a holistic endeavor”).

degree of discretion the ambiguity allows.”” *Brand X*, 545 U.S. at 982 (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)). Indeed, even the “initial agency interpretation is not instantly carved in stone.” *Chevron*, 467 U.S. at 863.

In *Brand X*, the Federal Communications Commission (FCC or Commission) interpreted the scope of the Communications Act of 1934, which subjects providers of “telecommunications service” to mandatory common-carrier regulations. *Brand X*, 545 U.S. at 977–78. *Brand X* Internet Services challenged the FCC’s interpretation, and the Ninth Circuit concluded that the Commission could not permissibly construe the Communications Act the way that it did based on the Court’s earlier precedent. *Id.* at 979–80. The Supreme Court granted certiorari and reversed. The Supreme Court upheld the FCC’s interpretation of the Communications Act by applying *Chevron*’s two-step analysis. The Court found that the relevant statutory provisions failed to unambiguously foreclose the Commission’s interpretation, while other provisions were silent. The FCC had “discretion to fill the consequent statutory gap,” and its construction was reasonable. *Id.* at 997.

The entire “point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agencies.” *Id.* at 981 (quoting *Smiley*, 517 U.S. at 742). The Supreme Court emphasized that courts cannot override an agency’s interpretation of an ambiguous statute based on judicial precedent. *Id.* at 982. Instead, as a “better rule,” a reviewing court only can rely on precedent that interprets a statute at “*Chevron* step one.” *Id.* “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.” *Id.* at 982–83. A contrary rule produces anomalous results because the controlling interpretation would then turn on whether a court or the agency interprets the statutory provision

first. *See id.* at 983. Congress delegated authority to agencies to interpret statutes and that authority “does not depend on the order in which the judicial and administrative constructions occur.” *Id.* Agencies have the authority to revise “unwise judicial constructions of ambiguous statutes.” *Id.*

#### 6. Legal Construct for the Proposed Rule

As the preceding summary of the statutory, regulatory and judicial history demonstrates, the most challenging aspects of section 401 concern the scope of review and action on a certification request, and the amount of time available for a certifying authority to act. The Agency is proposing a regulation that would clarify these aspects and provide additional regulatory certainty for states, tribes, federal agencies, and project proponents. This subsection summarizes some of the core legal principles that inform this proposal, and the following section (section III) describes how the Agency is applying those legal principles to support the proposed regulation.

##### a. Scope of Certification

The EPA has for the first time conducted a holistic analysis of the text, structure, and history of CWA section 401. As a result of that analysis, the EPA proposes to interpret the scope of section 401 as protecting the quality of waters of the United States from point source discharges associated with federally licensed or permitted activities by requiring compliance with the CWA and EPA-approved state and tribal CWA regulatory program provisions.

Since at least 1973, the EPA has issued memoranda and guidance documents and filed briefs in various court cases addressing section 401. Only a handful of these documents address the scope of section 401, and they were not the product of a holistic examination of the statute or its legislative history and, as a result, included little explanation for the Agency’s interpretations. For example, in 1989, the EPA issued a guidance document asserting that a section 401

certification could broadly address “all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation. . . .” EPA, *Wetlands and 401 Certification* 23 (April 1989). The EPA’s only explanation for this assertion is a reference to section 401(a)(3), which provides that a certification for a construction permit may also be used for an operating permit that requires certification. The guidance does not provide any analysis to support its assertion that a certification could address all potential impacts from the “proposed activity” as opposed to the discharge. Several years later, the United States filed an amicus brief on behalf of the EPA in the *PUD No. 1* case. The EPA’s brief asserted that petitioners were “mistaken” in their contention that the minimum flow condition is outside the scope of section 401 because it does not address a discharge, but the brief provided no analysis to support this position. The EPA’s brief also did not offer an affirmative interpretation to harmonize the different language in sections 401(a) and 401(d). More than a decade later, the EPA’s amicus brief in the *S.D. Warren* case simply adopted the Supreme Court’s analysis in *PUD No. 1* that once section 401 is triggered by a discharge, a certification can broadly cover impacts from the entire activity. Finally, in 2010 the EPA issued its now-rescinded Interim Handbook which included a number of recommendations on scope, timing, and other issues, none of which were supported with robust analysis or interpretation of the Act.

This proposed rulemaking marks the first time that the EPA has undertaken a holistic review of the text of section 401 in the larger context of the structure and legislative history of the 1972 Act and earlier federal water protection statutes and the first time the Agency has subjected its analysis to public notice and comment. The proposed regulation is informed by this holistic review and presents a framework that EPA considers to be most consistent with congressional

intent. The Agency solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification.

i. Water Quality

The EPA proposes to conclude that the scope of a section 401 review or action must be limited to considerations of water quality. The Congressional purpose of the CWA is to protect and maintain water quality, and there is no suggestion in either the plain language or structure of the statute that Congress envisioned section 401 to authorize action beyond that which is necessary to address water quality directly. Indeed, as described in greater detail above, the 1972 amendments to the CWA resulted in the enactment of a comprehensive scheme designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into waters of the United States specifically.

The EPA is aware that certifying authorities may have previously interpreted the scope of section 401 in a way that resulted in the incorporation of non-water quality related considerations into their certification review process. For example, certifying authorities have included conditions not related directly to water quality in section 401 certifications, including requiring construction of biking and hiking trails, requiring one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and creating public access for fishing along waters of the United States. Certifying authorities have also attempted to address all potential impacts from the operation or subsequent use of products generated by a proposed federally licensed or permitted project that may be identified in an environmental impact statement or environmental

assessment, prepared pursuant to the NEPA or a state law equivalent. This includes, for example, consideration of impacts associated with air emissions and transportation effects.

The Agency proposes to conclude that expanding the scope of section 401 to include consideration of effects and the imposition of conditions unrelated to water quality would, at a minimum, invoke the outer limits of power Congress delegated under the CWA. There is nothing in the text of the statute or its legislative history that signals that Congress intended to impose federal regulations on anything more than water quality-related impacts to waters of the United States. Indeed, Congress knows how to craft statutes to require consideration of multi-media effects, *see 42 U.S.C. 4321 et seq.* (NEPA), and has enacted specific statutes addressing impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act), by way of example.<sup>21</sup> Subsequent congressional action directly addressing a particular subject is relevant to determining whether a previously adopted statute reaches that subject matter. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000) (determining that “actions by Congress over the past 35 years” that addressed tobacco directly, when “taken together,” “preclude[d] an interpretation” that a previously adopted statute, the Food, Drug, and Cosmetic Act, “grant[ed] the FDA jurisdiction to regulate tobacco products.”).

If Congress intended section 401 of the CWA to authorize consideration or the imposition of certification conditions based on air quality concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts, it would have provided a ~~clear~~ statement to that effect. Neither the CWA nor section 401 contain any such clear statement. In fact, Congress

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<sup>21</sup> *See, e.g.*, 42 U.S.C. 7401 *et seq.* (Clean Air Act); 42 U.S.C. 6901 *et seq.* (Resource Conservation and Recovery Act); 16 U.S.C. 1531 *et seq.* (Endangered Species Act); and 16 U.S.C. 470 *et seq.* (National Historic Preservation Act).

specifically contemplated a broader policy direction in the 1972 amendments that would have authorized the EPA to address impacts to land, air and water through implementation of the CWA, but it was rejected.<sup>22</sup> Agencies must avoid interpretations of the statutes they implement to avoid pressing the envelope of constitutional validity absent a clear statement from Congress to do so. *See SWANCC*, 531 U.S. at 172-73; *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). That includes interpretations of the statute that would provide states, tribes and the EPA the ability to regulate interstate commerce beyond the four corners of the CWA. *See* discussion *supra* at section II.F.1 in this preamble. The Agency proposes to conclude that inclusion of the phrase “other appropriate requirements of state law” in section 401(d) lacks that clear direction from Congress.<sup>23</sup>

Pursuant to the plain language of section 401, when a state or authorized tribe (and in some cases, the EPA) issues a certification, it has determined that the discharge to waters of the United States from a proposed federally licensed or permitted activity will comply with applicable effluent limitations for new and existing sources (CWA sections 301, 302 and 306), water quality standards and implementation plans (section 303), toxic pretreatment effluent standards (section 307), and other “appropriate requirements” of state or tribal law. 33 U.S.C. 1341(a)(1), (d). The enumerated CWA provisions identify requirements to ensure that

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<sup>22</sup> As Congress drafted the 1972 CWA amendments, the House bill (H.R. 11896) included section 101(g) within its “Declaration of Goals and Policy” providing, “(g) In the implementation of this Act, agencies responsible therefor shall consider all potential impacts relating to the water, *land, and air* to insure that other significant environmental degradation and damage to the health and welfare of man does not result.” H.R. 11896, 92nd Cong. (1971). Section 101(g) of the House bill was “eliminated” at conference, and the Act was ultimately passed with no federal policy, goal or directive to address non-water quality impacts through the CWA. S. Rep. 92-1236, at 100 (1972) (Conf. Rep.).

<sup>23</sup> The Agency also proposes to conclude that the use of the term “applicant” in 401(d) creates ambiguity in the statute. See section II.F.6.a.ii in this preamble for discussion on the use of the term “applicant” in section 401(d).

discharges of pollutants do not degrade water quality,<sup>24</sup> and specifically referenced throughout section 401 is the requirement to ensure compliance with “applicable effluent limitations” and “water quality requirements,” underscoring the focused intent of this provision on the protection of water quality from discharges.<sup>25</sup> *See* 33 U.S.C. 1341(a), (b), (d). The legislative history for the Act provides further support for the EPA’s interpretation, as it frequently notes the focus of the section is on assuring compliance with water quality requirements and water quality standards and the elimination of any discharges of pollutants. *See e.g.*, S. Rep. No. 92-414, at 69 (1971).

The CWA does not define what is an “appropriate requirement” of state law that should be considered as part of a section 401 review, and the Agency acknowledges the need to respect the clear policy direction from Congress to recognize and preserve state authority over land and water resources within their borders. *See* 33 U.S.C. 1251(b). Indeed, the Agency must avoid interpretations of the CWA that infringe on traditional state land use planning authority. *See SWANCC*, 531 U.S. at 172-73; *Will*, 491 U.S. at 65. One potential interpretation of this clause in section 401(d) could be to authorize the imposition of conditions or veto authority over a federal

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<sup>24</sup> For example, section 306 defines the standard of performance for new sources of discharges as “a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.” 33 U.S.C. 1316(a)(1). Section 303 notes that new or revised state water quality standards “[s]hall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.” *Id.* at 1313(c)(2)(A).

<sup>25</sup> The term “effluent limit” is defined as, “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance[.]” 33 U.S.C. 1362(11); and the CWA requires that “water quality standards” developed by states and tribes “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” *Id.* at 1313(c)(2)(A).

license or permit based on non-water quality related impacts if those requirements are based on existing state law. But such an interpretation could authorize the EPA as a certifying authority to push the constitutional envelope of its delegated authority into regulatory arenas more appropriately reserved to the states, “powers with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461 (describing the “plain statement rule”).

More importantly, the Agency does not believe that Congress intended the phrase “any other appropriate requirements of State law” to be read so broadly. Instead, the principle *ejusdem generis* helps to inform the appropriate interpretation of the text. Under this principle, where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. *See Washington State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383-85 (2003). Here, the general term “appropriate requirement” follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States. Given the text, structure, purpose, and legislative history of the CWA and section 401, the EPA proposes to interpret “appropriate requirements” for section 401 certification review to include those provisions of state or tribal law that are EPA-approved CWA regulatory programs that control discharges, including provisions that are more stringent than federal law. *See* S. Rep. No. 92-414, at 69 (1971) (“In addition, this provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under the Act, shall ~~through~~ certification become conditions on any Federal license or permit.”). In this respect, the EPA agrees with the logic of Justice Thomas’s dissent in *PUD No. 1*, wherein he concludes that “the general reference to ‘appropriate’ requirements of state law is most reasonably construed to extend only to provisions that, like other provisions in the list,

impose discharge-related restrictions.” *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting). The CWA provisions that regulate point source discharges to waters of the United States, and those discharge-related restrictions referenced in Justice Thomas’s dissent, are the “regulatory provisions of the CWA.” When states or tribes enact CWA regulatory provisions as part of a state or tribal program, including those designed to implement the section 402 and 404 permit programs and those that are more stringent than federal requirements, those provisions require EPA approval before they become effective for CWA purposes. Because the EPA interprets “appropriate requirements” to mean the regulatory provisions of the CWA, it follows that those would necessarily be EPA-approved provisions. The EPA requests comment on whether this interpretation is a reasonable and appropriate reading of the statute and related legal authorities.

ii. Activity versus Discharge

Based on the text, structure, and legislative history of the CWA, the EPA proposes to conclude that a certifying authority’s review and action under section 401 must be limited to water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project. Section 401(a) explicitly provides that the certifying authority, described as “the State in which the *discharge* originates or will originate,” must certify that “any such *discharge* will comply with the applicable provisions of sections 301, 302, 303, 306 and 307 of this Act” (emphasis added). The plain language of section 401(a) therefore directs authorities to certify that the discharge resulting from the proposed federally licensed or permitted project will comply with the CWA. Section 401(d) uses different language and allows the certifying authority to include conditions “to assure that *any applicant*<sup>26</sup> for a Federal license or permit will

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<sup>26</sup> As a matter of practice, the Corps seeks state certification for “its own discharges of dredged or fill material”, “[a]lthough the Corps does not process and issue permits for its own activities.” 33 CFR 336.1(a)(1).

comply” (emphasis added) with applicable provisions of the CWA and other appropriate requirements of state or tribal law. The use of this different term in section 401(d) creates ambiguity and has been interpreted as broadening the scope of section 401(a) beyond consideration of water quality impacts from the “discharge” which triggers the certification requirement, to allow certification conditions that address water quality impacts from any aspect of the construction or operation of the activity as a whole. *See PUD No. 1*, 511 U.S. at 712.

The ordinary meaning of the word “applicant” is “[o]ne who applies, as for a job or admission.” *See Webster’s II, New Riverside University Dictionary* (1994). In section 401(d), this term is used to describe the person or entity that applied for the federal license or permit that requires a certification. The use of this term in section 401(d) is consistent with the text of the CWA, which uses the term “applicant” throughout to describe an individual or entity that has applied for a grant, a permit, or some other authorization.<sup>27</sup> Importantly, the term is also used in section 401(a) to identify the person responsible for obtaining the certification: “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State ....” Broadly interpreting the use of “applicant” in section 401(d) to authorize certification conditions that are unrelated to the discharge would expand section 401 beyond the scope of federal regulatory authority integrated throughout the core regulatory provisions of the modern CWA—

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<sup>27</sup> *See e.g.*, 33 U.S.C. 1311 (“An application for an alternative requirement under this subsection shall not stay the applicant’s obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.”); *id.* at 1344 (“Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.”)

the ability to regulate discharges to waters of the United States. The Agency is not aware of any other instance that the term “applicant” (or permittee or owner or operator) as used in the CWA has been interpreted to significantly expand the jurisdictional scope or meaning of the statute and believes a better interpretation would be to align its meaning with its plain language roots.

The Agency therefore proposes to interpret the use of the term “applicant” in section 401(d), consistent with its use in section 401(a) and other areas of the CWA, as identifying the person or entity responsible for obtaining and complying with the certification and any associated conditions. Throughout the CWA, the term “applicant” is used to identify the person or entity responsible for compliance with the federal regulatory provisions of the CWA, all of which remain focused on controlling discharges of pollutants to waters of the United States.<sup>28</sup> The legislative history of section 401, discussed below, provides additional support for this interpretation.

Section 401 was updated as part of the 1972 CWA amendments to reflect the restructuring of the Act, as described in section II.F.1 in this preamble. Two important phrases were modified between the 1970 and the 1972 versions of section 401 that help inform what Congress intended with the 1972 amendments. First, the 1970 version provided that an authority must certify “that such *activity* . . . will not violate water quality standards.” Pub. L. No. 91-224 § 21(b)(1) (emphasis added). The 1972 version was modified to require an authority to certify “that any such *discharge* shall comply with the applicable provisions of [the CWA].” 33 U.S.C. 1341(a) (emphasis added). On its face, this modification makes the 1972 version of section 401 consistent with the overall framework of the amended statutory regime, which focuses on

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<sup>28</sup> For example, section 404 provides that after an applicant requests a permit, the Corps “may issue [a] permit[], after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. 1344(a).

eliminating discharges and attaining water quality standards.

Second, the 1972 version included section 401(d) for the first time, which authorizes conditions to be imposed on a certification “to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification ....”*Id.* at 1341(d). This new section also requires such conditions to be included in the federal license or permit.

Together, these provisions: focus section 401 on discharges that may affect water quality; enumerate newly-created federal regulatory programs with which section 401 mandates compliance; and require that water-quality related certification conditions be included in federal licenses and permits and thereby become federally enforceable. The legislative history describing these changes supports a conclusion that they were made intentionally and with the purpose of making the new section 401 consistent with the new framework of the Act. Indeed, the 1971 Senate Report provides that section 401 was “amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” S. Rep. No. 92-414, at 69 (1971).

The EPA previously analyzed the modifications made to section 401 between the 1970 and 1972 Acts. *See* Memorandum from Catherine A. Winer, Attorney, EPA Office of General Counsel, to David K. Sabock, North Carolina Department of Natural Resources (November 12, 1985).<sup>29</sup> In its analysis, the EPA characterized the legislative history quoted above as “not very

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<sup>29</sup> Available at <https://www.epa.gov/sites/production/files/2015-01/documents/standards-marinas-memo.pdf>.

explicit,” and characterized the new section 401 language as “not altogether clear.” *Id.* Based on this analysis, the EPA found at that time that “the overall purpose of section 401 is clearly ‘to assure that Federal licensing or permitting agencies cannot override water quality requirements’” and that “section 401 may reasonably be read as retaining its original scope, that is, allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a ‘discharge’ in the narrow sense.” *Id.* (citing S. Rep. No. 92-414, at 69 (1971)).

The EPA has now performed a holistic analysis of the text and structure of the CWA, the language of section 401, and the amendments made between 1970 and 1972. Based on this review, the EPA now proposes to adopt the reasonable interpretation that the 1972 version of section 401 made specific changes to ensure that *discharges* were controlled and in compliance with the modern CWA regulatory programs, and appropriate requirements of state law implementing the same. For the reasons noted above in section II.F.1 in this preamble, identifying and regulating discharges, as opposed to managing ambient water quality, promotes accountability and enforcement of the Act in a way that the 1970 and earlier versions did not. The EPA also observes that, had Congress intended the 1972 amendments to retain the original scope concerning the “activity,” it could have easily crafted section 401(d) to authorize certification conditions to assure that “the activity” would comply with the specified CWA provisions, but it did not. Instead Congress used the term “applicant” which, based upon its plain ordinary meaning, identifies the person seeking the certification and the related ~~federal~~ license or permit. When Congress enacted the 1972 CWA amendments, it used the term “discharge” to frame the scope of the certification requirement under the Act. As a result, the Agency now considers a more natural interpretation of the 1972 amendments to be that Congress rejected the

idea that the scope of a certifying authority's review or its conditions should be defined by the term "activity." Congress specifically did not carry forward the term "activity" in the operative phrase in section 401(a) and did not incorporate it into the new provision authorizing certification conditions in section 401(d). Under basic canons of statutory construction, the EPA begins with the presumption that Congress chose its words intentionally. *See, e.g., Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). This is also consistent with the dissent in *PUD No. 1*, wherein Justice Thomas concluded that "[i]t is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant'[,] those conditions must still be related to discharges." *PUD No. 1*, 511 U.S. at 726-27 (Thomas, J., dissenting). The EPA proposes to conclude that this interpretation is a reasonable and appropriate reading of the statute and related legal authorities and seeks public comment on this proposed interpretation.

As described in detail in section II.F.4.a.i in this preamble, the Supreme Court in *PUD No. 1* considered the scope of a state's authority to condition a section 401 certification and concluded that, once the 401(a) "discharge to navigable water" triggers the requirement for certification, section 401(d) authorizes a certifying authority to impose conditions on "the applicant," meaning the activity as a whole and not just the discharge. In its discussion of the CWA, the Supreme Court relied on its own interpretation of the scope of section 401 and did not analyze section 401 at "Chevron step one" or rely on "the unambiguous terms" of the CWA to support its reading of section 401. *Brand X*, 545 U.S. at 982. Instead, the Court "reasonably read" section 401(d) "as authorizing additional conditions and limitations on the activity as a whole once the threshold

condition, the existence of a discharge, is satisfied.” *PUD No. 1*, 511 U.S. at 712 (emphasis added).

To support what it considered to be a reasonable reading of section 401(d), the Court looked at the EPA’s certification regulations at 40 CFR 121.2(a)(3) and related guidance at that time, but did not have before it the EPA’s interpretation of how section 401(a) and 401(d) could be harmonized. *Id.* In fact, the Court either was not aware of or did not mention that the EPA regulations in place at that time predated the 1972 CWA amendments and therefore contained outdated terminology implementing what was functionally a different statute. As described above, the EPA’s existing certification regulations are consistent with the text of the pre-1972 CWA, and they require a state to certify that the “activity” will comply with the Act. The 1972 CWA amendments changed this language to require a state to certify that the “discharge” will comply with the Act.

Based in part on what the EPA now recognizes was infirm footing, the Court found that “EPA’s conclusion that activities—not merely discharges—must comply with state water quality standards is a *reasonable interpretation* of § 401 and is entitled to deference.” *Id.* (emphasis added). As amicus curiae, the federal government did not seek *Chevron* “deference for the EPA’s regulation in [the *PUD No. 1* case]” or for EPA’s interpretation of section 401. *Id.* at 729 (Thomas, J., dissenting). In fact, the EPA’s amicus brief did not analyze or interpret the different language in sections 401(a) and 401(d) and instead asserted that it was unnecessary to harmonize the provisions to resolve the dispute. *See Brief for the United States as Amicus Curiae Supporting Affirmance*, at 12 n. 2. The EPA’s amicus brief asked the Court to analyze the two undisputed discharges from the proposed federally licensed project and determine whether they would cause violations of the state’s water quality standards.

Given the circumstances of the *PUD No. 1* litigation, and the fact that the Supreme Court did not analyze section 401 under *Chevron* Step 1 or rely on unambiguous terms in the CWA to support its own reasonable reading of the statute, *PUD No. 1* does not foreclose the Agency’s proposed interpretation of section 401 in this document. *See Brand X*, 545 U.S. at 982–83. The Supreme Court’s “choice of one reasonable reading” of section 401 does not prevent the EPA “from later adopting a different reasonable interpretation.”<sup>30</sup> *Eurodif S.A.*, 555 U.S. at 315. An agency may engage in “a formal adjudication or notice-and-comment rulemaking” to articulate its interpretation of an ambiguous statute. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). When it does, courts apply “*Chevron*-style” deference to the agency’s interpretation. *Id.* That is exactly what the EPA is doing in this proposal. EPA has for the first time, holistically interpreted the text of section 401(a) and (d) to support this proposed update to the EPA’s existing certification regulations while ensuring consistency with the plain language of the 1972 CWA. The Agency solicits comment on its proposed interpretation of the CWA and the prevailing case law as discussed above in section II.F.1 and II.F.4 in this preamble.

The Agency also solicits comment on an alternate interpretation of the text of section 401(d) suggested by language in the *PUD No. 1* majority opinion. At page 712, the Court observes that, “[a]lthough 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded.” (emphasis added). The Court does not define the precise limits of State authority under section 401(d). However, the Court goes on to say that “[t]he State can only

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<sup>30</sup> The EPA is not proposing to modify or alter the Agency’s longstanding interpretation of the Act that was confirmed by the Court in *PUD No. 1* that “a water quality standard must ‘consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses’” and that “a project that does not comply with the designated use of the water does not comply with the applicable water quality standards.” 511 U.S. at 714–15 (emphasis in original).

ensure that the project complies with ‘any applicable effluent limitations and other limitations, under [33 U.S.C. 1311, 1312]’ or certain other provisions of the Act, ‘and with any other appropriate requirement of State law.’ 33 U.S.C. 1341(d).” In the previous discussion, we explained why the most reasonable interpretation of the “bounds” set by the statutory text is that it limits the imposition of effluent limitations, limitations, and other certification conditions to “the discharge,” and not “the activity as a whole.” However, EPA is also seeking comment on an alternate interpretation of the text that would allow imposition of effluent limitations and other similar conditions that address the water quality-related effects of “the activity as a whole,” and not just “the discharge,” provided such effluent limitations and other conditions are based on “water quality requirements” as defined in this proposal.

iii. Discharges from Point Sources to Waters of the United States

Based on the text, structure and purpose of the Act, the history of the 1972 CWA amendments, and supporting case law, the EPA proposes to conclude that a certifying authority’s review and action under section 401 is limited to water quality impacts to waters of the United States resulting from a potential *point source* discharge associated with a proposed federally licensed or permitted project. The text of section 401(a) clearly specifies that certification is required to “conduct any activity . . . which may result in any discharge into the *navigable waters*” (emphasis added). Prior interpretations extending section 401 applicability beyond such waters conflict with and would render meaningless the plain language of the statute. And although the statute does not define with specificity the meaning of the unqualified term *discharge*, interpreting section 401 to cover all discharges without qualification would undercut the bedrock structure of the CWA regulatory programs which are focused on addressing *point source* discharges to waters of the United States. CWA section 502(14) defines

point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”<sup>31</sup>

As described in section II.F.1 in this preamble, the CWA is structured such that the federal government provides assistance, technical support, and grant money to assist states in managing *all* of the nation’s waters. By contrast, the federal regulatory provisions, including CWA sections 402 and 404, apply only to *point source* discharges to waters of the United States. 33 U.S.C. 1362(7). Section 401 is the first section of Title IV of the CWA, titled Permits and Licenses, and it requires water quality-related certification conditions to be legally binding and federally enforceable conditions of federal licenses and permits. *Id.* at 1341(d). Similar to the section 402 and 404 permit programs, section 401 is a core regulatory provision of the CWA. Accordingly, the scope of its application is most appropriately interpreted, consistent with the other federal regulatory programs, as addressing point source discharges to waters of the United States.

The EPA is not aware of any court decisions that have directly addressed the scope of waters covered by section 401; however, in *Oregon Natural Desert Association v. Dombeck*, the Ninth Circuit relied on the text and structure of section 401 to interpret the meaning of “discharge.” In that case, a citizen’s organization challenged a decision by the U.S. Forest Service to issue a permit to graze cattle on federal lands without first obtaining a section 401 certification from the state of Oregon. 172 F.3d 1092. The government argued that a certification was not needed

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<sup>31</sup> In the section 404 context, point source includes bulldozers, mechanized land clearing equipment, dredging equipment, and the like. *See, e.g., Avoyelles Sportsman’s League, Inc. v. March*, 715 F.2d 897, 922 (5th Cir. 1983).

because the “unqualified” term “discharge”—as used in CWA section 401—is “limited to point sources but includes both polluting and nonpolluting releases.” *Id.* at 1096. Finding that the 1972 amendments to the CWA “overhauled the regulation of water quality,” the court said that “[d]irect federal regulation [under the CWA] now focuses on reducing the level of effluent that flows from point sources.” *Id.* The court stated that the word “discharge” as used consistently in the CWA refers to the release of effluent from a point source. *Id.* at 1098. The court found that cattle—even if they wade in a stream—are not point sources. *Id.* at 1098-99. Accordingly, the court held that certification under section 401 was not required. *Id.* at 1099.

The EPA previously suggested that the scope of section 401 may extend to non-point discharges to non-waters of the United States once the requirement for the section 401 certification is triggered. Specifically, in the EPA’s now-withdrawn 2010 Interim Handbook the Agency included the following paragraphs,

The scope of waters of the U.S. protected under the CWA includes traditionally navigable waters and also extends to include territorial seas, tributaries to navigable waters, adjacent wetlands, and other waters. Since §401 certification only applies where there may be a discharge into waters of the U.S., how states or tribes designate their own waters does not determine whether §401 certification is required. Note, however, that once §401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it is an aquatic resource addressed by “other appropriate provisions of state [or tribal] law.”

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Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S. The Ninth Circuit Court of Appeals ruled that the discharge must be from a point source, and agencies in other jurisdictions have generally adopted the requirement. Once these thresholds are met, the scope of analysis and potential conditions can be quite broad. As the U.S. Supreme Court has held, once §401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.

EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, 5, 26 (2010) (citations omitted). To support the first referenced paragraph on the scope of waters, the Interim Handbook cited to section 401(d), presumably referring to the use of the term “applicant” rather than “discharge” used in section 401(a).<sup>32</sup> To support the second paragraph on the scope of discharges, the Interim Handbook cited to the *PUD No. 1* and *S.D. Warren Co.* Supreme Court decisions. It appears that both paragraphs from the Agency’s 2010 Interim Handbook relied on the *PUD No. 1* Court’s interpretation of the ambiguity created by the different language in sections 401(a) and 401(d).<sup>33</sup>

For many of the same reasons that the Agency proposes to avoid interpreting the word “applicant” in section 401(d) as broadening the scope of certification beyond the discharge itself, the Agency also proposes to decline to interpret section 401(d) as broadening the scope of waters and the types of discharges to which the CWA federal regulatory programs apply. Were the Agency to interpret the use in section 401(d) of the term “applicant” instead of the term “discharge” as authorizing the federal government to implement and enforce CWA conditions on non-waters of the United States, that single word (“applicant”) would effectively broaden the scope of the federal regulatory programs enacted by the 1972 CWA amendments beyond the

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<sup>32</sup> Interim Handbook, at 5 n. 23. Tellingly, footnote 23 of the Interim Handbook also states, “Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, ‘Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.’” In other words, in this footnote the EPA was advising states that, while section 401(d) could perhaps be interpreted to expand the scope of federal regulatory and enforcement authority beyond navigable waters (but without citation to any case law to support that proposition), the Army Corps of Engineers may reject a certification in its entirety that is outside the statutory authority provided by the CWA.

<sup>33</sup> The *S.D. Warren* decision did not analyze or adopt the *PUD No. 1* Court’s analysis of section 401(a) and 401(d).

limits that Congress intended. Such an interpretation could permit the application of the CWA's regulatory programs, including section 401 certification conditions that are enforced by federal agencies, to land and water resources more appropriately subject to traditional state land use planning authority. *See, e.g., SWANCC*, 531 U.S. at 172-73.

As described in section II.F.4.a.i in this preamble and pursuant to its authority to reasonably interpret ambiguous statutes to fill gaps left by Congress, the EPA is proposing to interpret section 401 differently than the Supreme Court did in *PUD No. 1*. The Court's prior interpretation of sections 401(a) and 401(d) was not based on the plain unambiguous text of the statute, but rather was based on the Court's own reasonable interpretation (see section II.F.4.a.i in this preamble). The EPA's proposed interpretation is also based on a reasonable interpretation of the text, structure and legislative history of section 401 and the Agency's current proposal is not foreclosed by the Court's prior interpretation. *See Brand X*, 545 U.S. at 982.

For the reasons above, the EPA proposes to conclude that section 401 is a regulatory provision that creates federally enforceable requirements and its application must therefore be limited to point source discharges to waters of the United States. This proposed interpretation is consistent with the text and structure of the CWA as well as the principal purpose of this rulemaking, i.e., to ensure that the EPA's regulations (including those defining a section 401 certification's scope) are consistent with the current CWA. The Agency solicits comment on this revised interpretation of the CWA and associated case law discussed in this section.

**b. Timeline for Section 401 Certification Analysis**

Based on the language of the CWA and relevant case law, the EPA proposes to conclude that a certifying authority must act on a section 401 certification within a reasonable period of time,

which shall not exceed one year and that there is no tolling provision to stop the clock at any time. The Agency requests comment on this plain language interpretation of the statute.

The text of section 401 expressly states that a certifying authority must act on a section 401 certification request within a reasonable period of time, which shall not exceed one year.<sup>33</sup> U.S.C. 1341(a)(1). Importantly, the CWA does not guarantee that a certifying authority may take a full year to act on a section 401 certification request. The certifying authority may be subject to a shorter period of time, provided it is reasonable. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (“Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the [EPA]—the agency charged with administering the CWA—generally finds a state’s waiver after only six months. *See* 40 CFR 121.16.”). The CWA’s legislative history indicates that inclusion of a maximum period of time was to “insure that sheer inactivity by the [certifying agency] will not frustrate the Federal application.” H.R. Rep. No. 92-911, at 122 (1972).

The timeline for action on a section 401 certification begins upon receipt of a certification request. *Id.* The CWA does not specify any legal requirements for what constitutes a request or otherwise define the term. The EPA has long recommended that a project proponent requiring federal licenses or permits subject to section 401 certification hold early discussions with both the certifying authority and the federal agency, to better understand the certification process and potential data needs.

The CWA does not contain provisions for pausing or delaying the timeline for any reason, including to request or receive additional information from a project proponent. If the certifying authority has not acted on a request for certification within the reasonable time period, the certification requirement will be waived by the federal licensing and permitting agencies. For

further discussion, see section III.F in this preamble. The proposed revisions to the EPA's regulations in this proposal are intended to provide greater clarity and certainty and address some of the delays and confusion associated with the timing elements of the section 401 certification process.

### **III. Proposed Rule**

This proposed rule is intended to make the Agency's regulations consistent with the current text of CWA section 401, increase efficiencies, and clarify aspects of CWA section 401 that have been unclear or subject to differing legal interpretations in the past. The Agency proposes these revisions to replace the entirety of the existing certification regulations at 40 CFR part 121. The following sections explain the Agency's rationale for the proposed rule and provides detailed explanation and analysis for the substantive changes that the Agency is proposing.

The EPA's existing certification regulations were issued almost 50 years ago in 1971, when the Agency was newly formed and the CWA had not yet been amended to include the material revisions to section 401.<sup>34</sup> In modernizing 40 CFR part 121, this proposal recognizes and responds to the changes to the CWA that occurred after the current regulations were finalized, especially the 1972 and 1977 amendments to the CWA.

Updating the existing certification regulations to clarify expectations, timelines, and deliverables also increases efficiencies. Some aspects of the existing regulations have been implemented differently by different authorities, likely because the scope and timing of review are not clearly addressed by the EPA's existing certification regulations. While the EPA

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<sup>34</sup> See 36 Fed. Reg. 22487, Nov. 25, 1971, redesignated at 37 Fed. Reg. 21441, Oct. 11, 1972, further redesignated at 44 Fed. Reg. 32899, June 7, 1979; Reorganization Plan No. 3 of 1970 (creating the EPA), 84 Stat. 2086, effective Dec. 2, 1970.

recognizes that states and tribes have broad authority to implement state and tribal law to protect their water quality, *see* 33 U.S.C. 1251(b), section 401 is a federal regulatory program that contains explicit limitations on when and how states and tribes may exercise this particular authority. Modernizing and clarifying the EPA's regulations will help states, tribes, federal agencies, and project proponents know what is required and what to expect during a section 401 certification process, thereby reducing regulatory uncertainty. The Agency requests comment on all aspects of this effort to modernize and clarify its section 401 regulations, including any specific suggestions on how any of the proposed definitions or other requirements might be modified to implement Congress' intent in enacting section 401.

The EPA's existing certification regulations at 40 CFR part 121 do not fully address the public notice requirements called for under CWA 1341(a)(1). 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). Such mechanisms could focus on how and when the certifying authority is notified of potential certification requests and what information may be necessary for the certifying authority to act on a request. If the EPA were to include such additional procedures in its final regulations, they could be the same as or similar to the procedures currently proposed to apply when EPA is the certifying authority (see proposed sections 121.12 and 121.13). 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.

*A. When Section 401 Certification is Required*

The EPA proposes that the requirement for a section 401 certification is triggered based on the potential for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States.<sup>35</sup> This proposal is consistent with the Agency's longstanding interpretation and is not intended to alter the scope of applicability established in the CWA. Consistent with section 401(a)(1), the EPA is proposing that:

Any applicant for a license or permit to conduct any activity which may result in a discharge shall provide the Federal agency a certification from the certifying authority in accordance with this part.

Based on the text of the statute, the EPA proposes that section 401 is triggered by the potential for a discharge to occur, rather than an actual discharge. This is different from other parts of the Act<sup>36</sup> and is intended to provide certifying authorities with a broad opportunity to review proposed federally licensed or permitted projects that may result in a discharge to waters of the United States within their borders. This proposal does not identify a process for certifying

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<sup>35</sup> State or tribal implementation of a license or permit program in lieu of the federal program, such as a CWA section 402 permit issued by an authorized state, does not federalize the resulting permits or licenses and therefore does not trigger section 401 certification. This is supported by the legislative history of CWA section 401 which noted that “since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.” H.R. Rep. No. 92-911, at 127 (1972). The legislative history of the CWA amendments of 1977, discussing state assumption of section 404, also noted that “[t]he conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority.” H.R. Rep. No. 95-830, at 104 (1977).

<sup>36</sup> See e.g., *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (Interpreting section 402 in the context of CAFOs, courts said the CWA gives EPA jurisdiction to require permits for only actual discharges).

authorities or project proponents to determine whether a federally licensed or permitted project has a potential or actual discharge. However, the EPA observes that if a certifying authority or project proponent determines after the certification process is triggered that there is no actual discharge from the proposed federally licensed or permitted project and no potential for a discharge, there is no longer a need to request certification. 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. 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. 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. This request is intended to solicit mechanisms for project proponents to generate a record for themselves that no 401 certification was required; this is not intended to propose a process for project proponents to seek or require concurrence from the certifying authority.

The EPA also proposes that section 401 is triggered by a potential discharge into a water of the United States. 33 U.S.C. 1341(a)(1), 1362(7). Potential discharges into state or tribal waters that are not waters of the United States do not trigger the requirement to obtain section 401 certification. *Id.* at 1342(a)(1). This interpretation flows from the plain text of the statute, is supported by the legislative history, and is consistent with other CWA regulatory program requirements that are triggered by discharges into waters of the United States, not state or tribal waters. *Id.*; *see also* H.R. Rep. No. 92-911, at 124 (1972) (“It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into

*navigable waters.”) (emphasis added); see also* section II.F.6.a.iii for discussion on discharges to waters of the United States.

Unlike other CWA regulatory programs, however, the EPA proposes that section 401 be triggered by any unqualified discharge, rather than by a discharge of pollutants. This interpretation is consistent with the text of the statute and with U.S. Supreme Court precedent. In *S.D. Warren*, the Court considered whether discharges from a dam were sufficient to trigger section 401, even if those discharges did not add pollutants to waters of the United States. Because section 401 uses the term *discharge* but the Act does not specifically define the term,<sup>37</sup> the Court applied its ordinary dictionary meaning, “flowing or issuing out.” *S.D. Warren Co. v. Maine Bd. of Envtl. Prot. et al.*, 547 U.S. 370, 376 (2006). The Court concluded that Congress intended this term to be broader than the term *discharge of pollutants* that is used in other provisions of the Act, like section 402. *See e.g.*, 33 U.S.C. 1342, 1344; *S.D. Warren Co.*, 547 U.S. at 380-81. For further discussion on *S.D. Warren* see section II.F.4.a.ii and for further discussion on discharges see section II.F.6.a.ii-iii in this preamble. The Court held that discharges from the dam trigger section 401 because “reading § 401 to give ‘discharge’ its common and ordinary meaning preserves the state authority apparently intended.” *S.D. Warren Co.*, 547 U.S. at 387. The EPA’s interpretation in support of this proposal is therefore consistent with the Court’s conclusion.

Finally, the EPA proposes that to trigger section 401, a discharge must be from a point source. This is consistent with case law from the Ninth Circuit, which concluded that the word “discharge” as used consistently throughout the CWA refers to the release of effluent from a

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<sup>37</sup> The Act provides, “The term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” 33 U.S.C. 1362(16)

point source, and that use is also appropriate for section 401. *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1099. Because this proposed interpretation is consistent with the structure of the Act and with the other CWA regulatory programs (see section II.F above), the EPA adopted the Ninth Circuit's interpretation and has consistently implemented that interpretation of section 401.<sup>38</sup>

The CWA does not list specific federal licenses and permits that are subject to section 401 certification requirements, instead providing that section 401 applies when *any activity that requires a federal license or permit* may result in a discharge into waters of the United States. The most common examples of licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits for the discharge of dredged or fill material, RHA sections 9 and 10 permits issued by the Corps, and hydropower and interstate natural gas pipeline licenses issued by FERC. 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.

#### *B. Certification Request/Receipt*

Under this proposal, to initiate an action under section 401, a project proponent must submit a certification request to a certifying authority. The statute limits the time for a certifying authority to act on a request as follows:

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

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<sup>38</sup> See, e.g., *Briefs of the United States in ONDA v. Dombeck*, Nos. 97-3506, 97-35112, 97-35115 (9th Cir. 1997) and *ONDA v. USFS*, No. 08-35205 (9th Cir. 2008).

shall be waived with respect to such Federal application.

33 U.S.C. 1341(a)(1) (emphasis added). Although the plain language of the Act requires the reasonable period of time to begin upon receipt of a certification request, the statute does not define those terms. Because they are not defined and their precise meaning is ambiguous, these terms are susceptible to different interpretations, which have resulted in inefficiencies in the certification process, individual certification decisions that have extended beyond the statutory reasonable period of time, and regulatory uncertainty and litigation. See section II.F in this preamble. Given the number of certification requests submitted each year<sup>39</sup> and the statutory requirement that those requests be acted on within a reasonable period of time not to exceed one year, it is important that the certifying authorities, project proponents, and federal agencies have a clear understanding of what the terms “request” and “receipt” mean.

The CWA does not address (and therefore is ambiguous regarding) whether a certification request must be in writing, must be signed and dated, or if it must contain specific kinds of information. The EPA’s prior section 401 guidance (the now-withdrawn 2010 Interim Handbook) indicated that the timeline for action begins upon receipt of a “complete application,” as determined by the certifying authority, even though section 401 does not use the term “complete application” or prescribe what an “application” would require. The reference by the EPA to a “complete application” without explaining what an “application” must include has led to subjective determinations about the sufficiency of certification request submittals. This in turn has caused uncertainty about when the statutory reasonable period of time begins to run. Certification request requirements vary from state to state (e.g., location maps and topographical maps versus latitude/longitude or GPS locations). For example, some states have open-ended and

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<sup>39</sup> See Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking at XX.

broad submittal requirements (e.g., “all information concerning water resource impacts”) which create the potential for certifying authorities to conclude (sometimes repeatedly) that a submittal is incomplete. Additionally, if a certifying authority requires additional information to be submitted before it will review and act on a certification request, it may be unclear whether the certifying authority considers the request to be “complete” and whether the statutory clock has started to run. Further, differences in the contents of a request or required supporting materials can create special challenges for project proponents and federal agencies working on large interstate projects that require certification from multiple states.

The CWA also does not define the term “receipt,” which has led to different states, tribes, and project proponents, as well as different courts, using different definitions. “Receipt of the request” has been used alternately to mean receipt by the certifying authority of the request in whatever form it was submitted by the project proponent, or receipt of a “complete application” as determined by the certifying authority (see section II.F in this preamble). The statute also does not specify how requests are to be “received” by the certifying authority—whether by mail, by electronic submission, or some other means.

As the Agency charged with administering the CWA, the EPA is authorized to interpret through rulemaking undefined terms, including those associated with CWA section 401 certifications. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). To address the particular challenges identified above, the EPA is proposing to define “certification request” and “receipt,” which Congress left undefined and ambiguous. By establishing uniform definitions for “certification request” and “receipt,” EPA hopes to eliminate confusion about when the statutory reasonable period of time begins and ends. *See id.* at 843.

Consistent with the text of the CWA, the EPA is proposing that the statutory timeline for certification review starts upon receipt by the certifying authority of a “certification request,” rather than the receipt of a “complete application” or “complete request” as determined by the certifying authority. To increase consistency, the EPA’s proposed definition of “certification request” includes an enumerated list of documents and information that must be included in a certification request:

*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 location and type 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 timeframe.’*

The EPA anticipates that a certification request that contains each of these components will provide the certifying authority with sufficient notice and information to allow it to begin to evaluate and act on the request in a timely manner. 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. The EPA acknowledges that not all proposed projects may be subject to monitoring or treatment for a discharge (e.g., section 404 dredge or fill permits rarely allow for a treatment

option). 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. The EPA also acknowledges that some certifying authorities may charge a fee to process certification requests. The Agency solicits comment on whether it should include “any applicable fees” in the definition of certification request. 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. 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.

The EPA intends that the term “*certification request*” means only written requests for certification. In addition, EPA intends that any written request for certification include the specific information identified in the definition. Providing this new definition is intended to ensure that the certifying authority and the project proponent understand what is required to start the statutory reasonable time period. The proposed requirement that a request include 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 timeframe.*”—is intended to remove any potential ambiguity on the part of the certifying authority about whether the written request before it is, in fact, a “request for certification” that triggers the statutory timeline. 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.

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) KMZ/KML (Google Earth)

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

Many states and tribes have established their own requirements for section 401 certification request submittals, which may be different from or more extensive than the proposed “certification request” requirements listed above. The EPA recommends that, following establishment of final EPA regulations defining “certification request” and “receipt,” certifying authorities update their existing section 401 certification regulations to ensure consistency with the EPA’s regulations. Additionally, the EPA encourages certifying authorities to work with neighboring jurisdictions to develop regulations that are consistent from state to state. This may

be particularly useful for interstate projects, like pipelines and transmission lines, requiring certification in more than one state.

In some cases, federal agencies may be project proponents for purposes of section 401, for both individual projects and activities and for general federal licenses or permits (e.g., Corps general permits). 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 non-federal agency project proponents. Specifically, the Agency requests comments on an alternative approach for federal agencies that issue general federal license or permits whereby “certification request for a general permit or license” would mean a written, signed, and dated communication from a Federal agency to the appropriate certifying authority that:

- (1) identifies the Federal agency and a point of contact;
- (2) identifies the proposed categories of activities to be authorized by general permit for which general certification is requested;
- (3) includes the proposed general permit;
- (4) estimates the number of discharges expected to be authorized by the proposed general permit or license each year;
- (5) includes a general description of the methods and means used or proposed to monitor the discharge and the equipment or measures employed or planned for the treatment or control of the discharge;
- (6) identifies the reasonable period of time for the certification request; and

(7) contains the following statement: *'The federal agency hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'*

The statutory reasonable period of time for a certifying authority to act on a certification request begins upon “receipt of such request.” The EPA is proposing to define the term “receipt” as follows:

*Receipt* means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.

The EPA understands that some certifying authorities have established general procedures for project proponents to follow when seeking state or tribal licenses or permits and encourages the use of consistent procedures for all submittals, including section 401 certification requests. The proposed requirement that certification requests be documented as received “in accordance with applicable submission procedures” is intended to recognize that some certifying authorities may require hard copy paper submittals and some may require or allow electronic submittals. If the certifying authority accepts hard copy paper submittals, EPA recommends that the project proponents submitting a hard copy request send the request via certified mail (or similar means) to confirm receipt of the section 401 certification request. If the certifying authority allows for electronic submittals, EPA recommends that the project proponent set up an electronic process to confirm receipt of the request. The EPA recommends that project proponents retain a copy of any written or electronic confirmation of submission or receipt for their records. The Agency solicits comment on whether these new definitions will provide sufficient clarity and regulatory certainty or if additional procedures or requirements may be necessary, and if so, what those procedures or requirements might be.

#### *C. Certification Actions*

Consistent with the text of the CWA, the EPA proposes that a certifying authority may take four potential actions pursuant to its section 401 authority: it may grant certification, grant with conditions, deny, or waive its opportunity to provide a certification. These actions are reflected in § 121.5 of the proposed regulatory text.

Granting a section 401 certification demonstrates that the authority has concluded that the discharge to waters of the United States from the proposed activity will be consistent with the listed CWA provisions and appropriate state or tribal water quality requirements (as defined at § 121.1(p) of this proposal). Granting certification allows the federal agency to proceed with processing the application for the license or permit.

If the certifying authority determines that the discharge from a proposed activity would be consistent with applicable water quality requirements only if certain conditions are met, the authority may include such conditions in its certification. Any conditions must be necessary to assure compliance with water quality requirements. The EPA proposes that water quality related conditions that meet the requirements in this proposed rule and that are placed on a section 401 certification must become conditions of the resulting federal license or permit if it is issued. 33 U.S.C. 1341(d).

A certifying authority may choose to deny certification if it is unable to certify that the proposed activity would be consistent with applicable water quality requirements. If a certification is denied, the federal agency may not issue a license or permit for the proposed activity. *Id.* at 1341(a).

Finally, a certifying authority may waive the requirement for a certification in two different ways. First, the certifying authority may waive expressly by issuing a statement that it is waiving the requirement. Second, the certifying authority may implicitly waive by failing or refusing to

act in accordance with section 401. *Id.* As discussed throughout this preamble, a certifying authority has a reasonable period of time, not to exceed one year, to complete its section 401 certification analysis. If the authority fails or refuses to act within that reasonable period, the certification requirement will be deemed waived by the federal licensing or permitting agency.

*Id.* Where section 401 certification has been waived—expressly or implicitly—the federal agency may issue the license or permit. *Id.* This proposal is consistent with the Agency’s longstanding interpretation of what actions may be taken in response to a certification request. The EPA solicits comment on this interpretation and continued approach in this proposed rule.

#### *D. Appropriate Scope for Section 401 Certification Review*

Section 401 of the CWA provides states and tribes with additional authority to protect water quality within their jurisdictions that complements the other regulatory programs and the nonregulatory grant and planning programs established by the CWA. CWA section 401(a) does so by authorizing states and tribes to certify that a potential discharge to waters of the United States that may result from a proposed activity will comply with applicable provisions of certain enumerated sections of the CWA, including effluent limitations and standards of performance for new and existing sources (sections 301, 302, and 306 of the CWA), water quality standards and implementation plans (section 303), and toxic pretreatment effluent standards (section 307). 33 U.S.C. 1341(a)(1). When granting a section 401 certification, states and tribes are authorized by CWA section 401(d) to include conditions, including effluent limitations, other limitations and monitoring requirements that are necessary to assure that the applicant for a federal license or permit will comply with appropriate provisions of CWA sections 301, 302, 306, and 307, and with any other appropriate requirement of state law. *Id.* at 1341(d). In addition to the specific enumerated sections of the CWA referenced throughout section 401, the focus of section 401(a)

on the compliance of “any such discharge,” and the substance of the enumerated CWA sections in section 401(d), e.g., to ensure compliance with “effluent limitations” under sections 301 and 302 and any “effluent standard” under section 307, underscore that Congress intended this provision to focus on the protection of water quality.

Although the text, structure, and legislative history of the CWA (including the name of the statute itself—the Clean Water Act) clearly demonstrate that section 401 of the CWA is intended to focus on addressing *water quality* impacts from discharges from federally licensed or permitted projects, there continues to be some confusion and uncertainty over the precise scope of a certifying authority’s review under section 401 and the scope of appropriate conditions that may be included in a certification (see section II.F in this preamble). This proposal is intended to provide clarity on these issues.

Section 401 contains several important undefined terms that, individually and collectively, can be interpreted in varying ways to place boundaries on the scope of a certifying authority’s review and authority. Discerning the meaning, both individually and in context, of terms like “discharge,” “activity,” “applicant,” “other limitations,” and “any other appropriate requirements of State law” with respect to a state or tribe’s certification authority without clear regulatory guidance, presents a challenge to project proponents, certifying authorities, federal agencies, and the courts. The challenge is exacerbated by the fact that nowhere in section 401 did Congress provide a single, clear, and unambiguous definition of the section’s scope, a gap the Agency is proposing to remedy in this proposal. *See Chevron*, 467 U.S. at 843-44.

The phrase “any other appropriate requirement of State law” in section 401(d) is illustrative of this ambiguity. Congress did not intend that the scope of a certifying entity’s authority to impose conditions to be unbounded. *PUD No. 1 of Jefferson County and City of Tacoma v.*

*Washington Department of Ecology*, 511 U.S. 700, 712 (1994). Presumably, that is why Congress added the modifier “appropriate” in the phrase “any other appropriate requirements of State law.” In this context, the exact meaning of “appropriate” and how it modifies the preceding term “any other” or the following phrase “requirements of State law” are important, but undefined by Congress. The Agency, as the federal entity charged with administering the CWA, has authority under *Chevron* and its progeny to address these ambiguities through notice and comment rulemaking.

To provide needed clarity regarding the scope of a certifying entity’s authority to grant and condition a certification, the EPA is proposing a clear and concise statement of the scope of certification, as well as clear regulatory definitions for the terms “certification,” “condition,” “discharge,” and “water quality requirement.”

As explained in section II.F.6.a.iii in this preamble, based on the text and structure of the Act, as well as the history of modifications between the 1970 version and the 1972 amendments, the EPA has concluded that section 401 is best interpreted as protecting water quality from federally licensed or permitted activities with point source discharges to waters of the United States by requiring compliance with the CWA as well as EPA-approved state and tribal CWA regulatory programs. This proposal includes for the first time a well-defined scope for section 401 certification that reflects the EPA’s holistic interpretation of the statutory language, which is based on the text and structure of the Act. As the Agency charged with administering the CWA, the EPA is authorized to interpret by rulemaking the appropriate scope for a CWA section 401 certification. 33 U.S.C. 1361(a). The EPA proposes to establish the “scope of certification” as follows:

The *scope of a Clean Water Act section 401 certification* is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality

requirements.

The proposed scope of certification is consistent with the plain language of section 401 and is intended to provide clarity to certifying authorities, federal agencies, and project proponents about the extent of environmental review that is expected, the type of information that may reasonably be needed to review a certification request, and the scope of conditions that are appropriate for inclusion in a water quality certification.

The proposed scope of certification differs from the EPA's existing regulations, which require a certification to include a statement that, "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." See 40 CFR 121.2(a)(3). The "reasonable assurance" language in the EPA's existing regulations is an artifact from the pre-1972 version of the statute which provided that the certifying authority would certify "that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards." Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970). The proposed scope could be considered more stringent than the EPA's existing certification regulations because, consistent with the 1972 CWA amendments, it requires certifying authorities to conclude that a discharge "will comply" with water quality requirements (as defined at § 121.1(p) of this proposal), rather than providing "reasonable assurance."

Section 401 is triggered by a proposed federally licensed or permitted project that may result in any *discharge* into waters of the United States. The term "discharge" is not defined in section 401, and the only definition in the CWA provides that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. 1362(16). Consistent with the analysis above concerning the scope of section 401 and the need

to provide greater clarity, the Agency is proposing to define the term “discharge” as follows:

*Discharge* for purposes of this part means a discharge from a point source into navigable waters.

The Agency solicits comment on whether this definition is necessary, whether it provides appropriate clarification, or whether the EPA’s proposed regulations would be sufficiently clear without including this new definition. The Agency also solicits comment on whether an alternate definition of “discharge” may provide greater clarity and regulatory certainty.

Section 401(d) requires a certification to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA], and with any other appropriate requirement of State law” and that these requirements “shall become a *condition* on any Federal license or permit subject to the provisions of this section” (emphasis added). As described in section II.F.6.a.i in this preamble, the EPA interprets “appropriate requirement of state law” to mean applicable provisions of those EPA-approved state and tribal CWA regulatory programs (e.g., state water quality standards, NPDES program provisions). To provide greater clarity, the EPA proposes to define the term “water quality requirements” as follows:

*Water quality requirements* means applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.

The term “water quality requirements” appears throughout section 401, but it is not defined in the statute. The EPA’s interpretation of this term and the proposed definition are intended to align section 401 program implementation with the text of the statute, which specifically

identifies those provisions of the Act enumerated in the proposed definition. The term “EPA-approved state or tribal CWA regulatory programs” in the proposed definition is intended to include those state or tribal provisions of law that are more stringent than federal law, as authorized in 33 U.S.C. 1370. The legislative history supports the interpretation in this proposal. *See S. Rep. No. 92-414, at 69 (1971)* (“In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit.”). The CWA provisions that regulate point source discharges to waters of the United States are the “regulatory provisions of the CWA.” When states or tribes enact CWA regulatory provisions as part of a state or tribal program, including those designed to implement the section 402 and 404 permit programs and those that are more stringent than federal requirements, those provisions require EPA approval before they become effective for CWA purposes. Because the EPA interprets “appropriate requirements” to mean the “regulatory provisions of the CWA,” it follows that those would necessarily be EPA-approved provisions.

The EPA solicits comment on whether this proposed definition is clear and specific enough to provide regulatory certainty for certifying authorities and project proponents. The EPA also solicits comment on whether additional specificity should be added to the proposed definition, for example that the term *does not* include non-water quality related state or local laws. In an alternate approach, the EPA may consider defining the term “appropriate requirement of State law” to provide additional clarity concerning the scope of section 401. Under this alternate approach, the EPA solicits comment on whether that term should be defined similar to or more broadly or narrowly than “EPA-approved state or tribal Clean Water Act regulatory program provisions” as proposed in this rulemaking.

The scope of certification established in this proposal also informs the scope of conditions that may be included in a certification. The statute does not define “condition,” but several appellate courts have analyzed the plain language of the CWA and concluded that the Act “leaves no room for interpretation” and that “state conditions *must* be” included in the federal license or permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645 (4th Cir. 2018) (emphasis in original); *see also U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (recognizing the “unequivocal” and “mandatory” language of section 1341(d)); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) (collecting cases); *FERC*, 952 F.2d at 548 (“FERC may not alter or reject conditions imposed by the states through section 401 certificates.”). The EPA is not proposing to modify this plain language interpretation of the CWA concerning the inclusion of certification conditions in federal licenses and permits. However, the EPA is proposing to define the term “condition” to address ambiguity in the statute and provide clarity and regulatory certainty. *See Chevron*, 467 U.S. at 843-44.

Although the structure and content of section 401(d) provide helpful context for what should be included as conditions in a federal license or permit, the CWA does not define that operative term. Because this term is not defined in the statute, its meaning has been susceptible to different interpretations. For example, the EPA understands some certifying authorities have included conditions in a certification that have nothing to do with effluent limitations, monitoring requirements, water quality, or even the CWA. Such requirements were perhaps based on other non-water quality related federal statutory or regulatory programs, concerns about environmental media other than water, or they might have been related to state laws, policies, or guidance that make decisions or recommendations unrelated to the regulation of point source

discharges to waters of the United States. As the Agency charged with administering the CWA, the EPA is authorized to interpret by rulemaking what the term “condition” means in the context of a CWA section 401 certification. Under the *Chevron* doctrine, courts presume “that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.” *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 315 (2014). Congressional silence is read “as a delegation of authority to EPA to select from among reasonable options.” *EPA v. EME Homer City Generation*, 572 U.S. 489, 515 (2014).

The EPA recognizes that the majority of certification actions reflect an appropriately limited interpretation of the purpose and scope of section 401. However, the Agency is also aware that some certifications have included conditions that may be unrelated to water quality, including requirements for biking and hiking trails to be constructed, one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and public access for fishing and other activities along waters of the United States. The EPA is also aware of certification conditions that purport to require project proponents to address pollutants that are not discharged from the construction or operation of a federally licensed or permitted project. Using the certification process to yield facility improvements or payments from project proponents that are unrelated to water quality impacts from the proposed federally licensed or permitted project is inconsistent with the authority provided by Congress. During pre-proposal stakeholder engagement, the EPA also heard from federal agencies that, because several court decisions have concluded that they do not have authority to “review and reject the substance of a state certification or the conditions contained therein,” *Am. Rivers, Inc.*, 129 F.3d at 106, non-water quality conditions are often

included in federal licenses and permits. Once included in the federal license or permit, federal agencies have found it challenging to implement and enforce these non-water quality related conditions. The Agency solicits comment on other examples of certification conditions that may have been unrelated to water quality.

This proposal includes three elements designed to address the issues described above. First, the proposal defines the term “condition” as follows:

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

As described above, the lack of a statutory definition for the term “condition,” despite its central use in section 401(d), creates ambiguity and uncertainty over the types of conditions that may be included in a certification. *See Chevron*, 467 U.S. at 843-44. For example, does section 401(d) authorize certifying authorities to include any kind of limitation or requirement in a certification? Or is it more limited, and if so, how limited?

As used in section 401(d), the term is most logically read to refer to those “effluent limitations and other limitations, and monitoring requirements necessary to assure” compliance with certain enumerated provisions of the CWA and with “any other appropriate requirements of State law.” The statute mandates that these kinds of limitations and monitoring requirements “shall become a condition” on a federal license or permit subject to section 401. Thus, based on the plain language of the statute for these limitations or requirements to become a license or permit “condition” through operation of section 401(d), they must be of a certain character. That is, they must be necessary to assure compliance with water quality requirements (as defined at § 121.1(p) of this proposal). That is why EPA’s proposed definition of “condition” would require that it be a limitation or requirement within the statute’s “scope of certification.” If it purports to

require something beyond the appropriate scope of section 401, the limitation or requirement offered by the certifying authority would not be a “condition” as that term is used in section 401(d).

Providing a clear definition of “condition” addresses the ambiguity in section 401 and provides regulatory certainty to certifying authorities, project proponents, and federal agencies. Although this would be a new provision in the EPA’s regulations, the Agency presumes that the majority of certification conditions included by states and tribes are consistent with the authority granted by Congress. The EPA expects this proposed definition, however, to provide much needed clarity to federal agencies and regulatory certainty to project proponents that have been subjected to delays and project denials as a result of the lack of regulatory certainty in this area.

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.

The EPA intends this provision to require citation to specific state or tribal law or CWA provision that authorizes the condition, and that citations to CWA section 401 or other general authorization or policy provisions in federal, state or tribal law would be insufficient to satisfy the proposed requirement. These proposed requirements are intended to ensure that any limitation or requirement added to a certification is within the “scope of certification” and is, thus, a true section 401(d) “condition.”

These proposed requirements might create new obligations for some certifying authorities,

but the EPA anticipates that the value of including this information in every certification, in terms of transparency and regulatory certainty, will far outweigh the minimal additional administrative burden of including this information in a certification. Stakeholders in pre-proposal engagement expressed concern that federal agencies do not enforce the certification conditions incorporated in their federal licenses or permits. Providing a citation to the legal authority underpinning a federally enforceable permit condition is one way to address these concerns. In fact, federal agencies during pre-proposal engagement acknowledged that this information will help them understand how best to implement and enforce certification conditions. In addition, including this information in each certification will provide transparency for the overall certification process and allow the project proponent to understand the legal authority that the certifying authority is relying on to require the condition. This information will help the project proponent assess whether the condition is within the statute's lawful scope and what recourse it might have to challenge or appeal it. Overall, the EPA believes that the benefits of providing this information will significantly outweigh any additional administrative burden that certifying authorities may incur because of these new requirements. The Agency solicits comment on the proposed information needed to support each condition, particularly on the utility of such information for the certification process. In an alternate approach, the Agency may define the third requirement as "a statement of whether and to what extent a more or less stringent condition could satisfy applicable water quality requirements," or remove the third requirement altogether. The Agency also requests comment on these alternate approaches.

Third, this proposal would specifically provide federal agencies the ability to determine whether certification conditions meet the new regulatory definition for condition, and whether the state or tribe has provided the information required for each condition. If a condition satisfies

these requirements, under this proposal it would have to be included in the federal license or permit; if a condition does not satisfy these requirements, it may not be included in the federal license or permit. See section III.J in this preamble for more discussion on the federal licensing or permitting agency’s enforcement responsibility and discretion. The EPA expects that the proposed requirements are clear and specific enough that a federal agency would not need to have water quality expertise to determine if a certification condition meets the proposed requirements.<sup>40</sup> The Agency solicits comment on whether the proposed requirements for conditions need to be further refined to allow federal agencies other than the EPA to appropriately determine compliance. Although this review function may be new to some federal agencies, it is consistent with the EPA’s own longstanding practice under its NPDES regulations implementing section 401 that allow the EPA to make such determinations under certain circumstances. *See* 40 CFR 124.53(e).

This proposal would require other federal agencies to review and determine whether certification conditions are within the “scope” articulated in the proposed implementing regulations. This is consistent with the principle that federal agencies have the authority to reject certifications or conditions that are inconsistent with the requirements and limitations of section 401 itself. In *City of Tacoma, Washington v. FERC*, the Court of Appeals for the D.C. Circuit noted that “[i]f the question regarding the state’s section 401 certification is not the application of state water quality standards, but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: ‘No

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<sup>40</sup> Additionally, section 401 provides that federal agencies may request EPA advice on “any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria” and compliance methods. 33 U.S.C. 1341(b).

license or permit shall be granted until the certification required by this section has been obtained or has been waived.”” 460 F.3d 53, 67-68 (D.C. Cir. 2006) (citing 33 U.S.C. 1341(a)(1)). The court went on to explain that even though the federal licensing or permitting agency did not need to “inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] to at least confirm that the state has facially satisfied the express requirements of section 401.” *Id.* at 68. This proposal provides that, if a federal agency determines that a certifying authority included a condition in a certification that is beyond the scope of certification, as defined in the proposed regulation, or that the state has not provided the specific information necessary to support each condition, that condition may not be included in the federal license or permit and it does not become federally enforceable.

As noted above, the EPA is not proposing to modify prior case law interpreting the plain language of the CWA to require certification conditions to be included in federal licenses and permits. *See, e.g., City of Tacoma*, 460 F.3d at 67; *Am. Rivers Inc.*, 129 F.3d at 107; *FERC*, 952 F.2d at 548; *Sierra Club*, 909 F.3d at 645. The EPA is proposing to maintain that requirement for conditions that are consistent with section 401 and necessary to assure compliance with the Act and with other appropriate requirements of state law. The statute does not define the term “condition” and the EPA proposes to fill the gap left by Congress and define the term to address ambiguity in the statute and provide clarity and regulatory certainty. *See Chevron*, 467 U.S. at 843-44.

This proposal would also provide federal agencies an opportunity to allow a certifying authority to remedy a condition that the federal agency determines exceeds or conflicts with the scope of section 401 authority under certain circumstances. If a federal agency determines that a condition does not satisfy the proposed requirements for a condition and the reasonable period of

time has not yet expired, this proposal would allow the federal agency to notify the certifying authority and provide an opportunity to remedy the defective condition, either by modifying the condition to conform to the scope of certification, or by providing the information required in the proposed regulation. A federal agency would not be required to provide this opportunity to the certifying authority, but if it does, this proposal nonetheless would require the certifying authority to provide the corrected condition or required information within the original reasonable period of time, which shall not exceed one year from receipt. Under this proposal, any federal agency determination on whether to allow a certifying authority to remedy a deficient condition would have to occur within the original reasonable period of time. Under this proposal, if the certifying authority fails to remedy the deficiencies within the reasonable period of time, the condition would not be included in the federal license or permit. Deficient conditions do not invalidate the entire certification, nor do they invalidate the remaining conditions in the certification. The EPA solicits comment on whether the regulatory text should clarify that deficient conditions do not invalidate the entire certification or the remaining conditions. 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. 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.

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. This is consistent with the statutory language in sections 401(a) and 401(d) and is supported by the legislative history. *See S. Rep. No. 92-414*, at 69 (1971) (providing that authorities must certify that “any such discharge will comply with [CWA] Sections 301 and 302” and that section 401 was “amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants”), 41 (describing CWA section 301 as prohibiting the discharge of any pollutant except as permitted under CWA sections 301, 302, 306, 307 or 402, and identifying point sources of pollution as the regulatory target), 46 (describing CWA section 302 to authorize water quality based effluent limits “for the affected point sources at a level which can reasonably be expected to contribute to the attainment or maintenance of such a standard of water quality”). 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.

The EPA solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification. The EPA solicits comment on the extent to which project proponents have received non-water quality related conditions in certifications. 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. In particular, the EPA solicits comment on what it means for a certification or its conditions to be “related to water quality” and how direct that relationship to

water quality must be to properly define a certification or condition as within the appropriate scope of section 401.

In addition, the 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. 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. The EPA also solicits comment on its interpretation of sections 401(a) and 401(d) as limiting the scope of state and tribal section 401 review and conditions to impacts from potential “discharges,” or whether the state or tribe may also consider a different and broader universe of impacts, such as impacts from the licensed project or activity as a whole, or some other universe of potential impacts to water quality. 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.

Pre-proposal recommendations identified concerns with certain types of conditions that have created regulatory uncertainty for project proponents, including conditions that extend the effective date of a certification out beyond the reasonable period of time and conditions that authorize certifications to be re-opened. To better understand these concerns, the Agency 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.

The EPA is also 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.

#### *E. Timeframe for Certification Analysis and Decision*

The EPA proposes to reaffirm that CWA section 401 requires certifying authorities to act on a request for certification within a reasonable period of time, which shall not exceed one year. By establishing an absolute outer bound of one year following receipt of a certification request, Congress signaled that certifying authorities have the expertise and ability to evaluate potential

water quality impacts from even the most complex proposals within a reasonable period of time after receipt of a request, and in all cases within one year. The CWA also provides that if a certifying authority fails or refuses to act within that reasonable period of time, the certification requirement is waived; however, the CWA does not define the term “*fails or refuses to act*.” This proposal provides additional clarity on what is a “reasonable period,” how the period of time is established, and for the first time defines the term “*fails or refuses to act*” to provide additional clarity and regulatory certainty.

Section 401 does not include a tolling provision. Therefore, the period of time to act on a certification request does not pause or stop for any reason once the certification request has been received. One recent court decision held that withdrawing and resubmitting the same section 401 request for the purpose of circumventing the one-year statutory deadline does not restart the reasonable period of time. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (*Hoopa Valley*). The EPA agrees with the *Hoopa Valley* court that “Section 401’s text is clear” that one year is the absolute maximum time permitted for a certification, and that the statute “does not preclude a finding of waiver prior to the passage of a full year.” *Id.* at 1103-04. The court noted that, “[b]y shelving water quality certifications, the states usurp FERC’s control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmittal scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to regulate such matters.” *Id.* at 1104. The court further observed that the legislative history supports its interpretation of the statute’s plain language because, “Congress intended Section 401 to curb a *state*’s ‘dalliance or unreasonable delay.’” *Id.* at 1104-05 (emphasis in original).

The *Hoopa Valley* case raised another important issue: perpetual delay of relicensing efforts (in that case for more than a decade) delays the implementation and enforcement of water quality requirements that have been updated and made more stringent in the years or decades since the last relicensing process.<sup>41</sup> *See id.* at 1101. This concern was also raised in stakeholder recommendations received during the pre-proposal outreach period. One stakeholder specifically cited the delays in the *Hoopa Valley* case as a “concrete example of how the § 401 certification process was being manipulated by a state certification agency to delay implementation of effective water quality controls and enhancement measures” and that “allowing the § 401 certification process to be used to achieve further delays in the re-licensing process is in turn an abuse of the certification process.” Letter from National Tribal Water Council to David P. Ross, Assistant Administrator of the Office of Water, EPA (Mar. 1, 2019).

Given the *Hoopa Valley* court’s plain language analysis of the statute and the potential water quality impacts from allowing certification decisions to be delayed, and the Agency’s agreement with that analysis, EPA is proposing to amend the Agency’s regulations in a manner consistent with the *Hoopa Valley* holding as follows:

The certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time.

The Agency proposes this clear statement to reflect the plain language of section 401, which as described above, is supported by legislative history. The Agency expects this clarification will

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<sup>41</sup> This is a concern shared by the EPA. The Agency has recently taken steps to promote its own compliance with CWA deadlines, including acting on state and tribal water quality standard submittals, because prior delays have created a significant backlog of state submittals awaiting EPA action. Memorandum from David P. Ross to Regional Administrators (June 3, 2019). These delays and backlogs prevent states and tribes from timely implementing and enforcing updated programs and standards that could otherwise be improving water quality.

reduce delays and help ensure that section 401 certification requests are processed within the reasonable period of time established by the federal agency, and at most, within one year from receipt of the request. The Agency understands that in cases where the certifying authority and project proponent are working collaboratively and in good faith, it may be desirable to allow the certification process to extend beyond the reasonable period of time and beyond the one-year statutory deadline. 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.

During the pre-proposal recommendation period, stakeholders also expressed concern about the effect of potentially limited certification review timeframes on state and tribal resources. The Agency has similar concerns regarding its own resources. This proposal therefore would establish a pre-filing meeting process *when the EPA is the certifying authority* to ensure that the Agency receives early notification of anticipated projects and can discuss its information needs with the project proponent (see section III.G in this preamble). This pre-filing meeting process is intended to occur before the statutory timeframe begins. 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. The EPA also solicits comment on whether the Agency has the authority to propose similar requirements on state and tribal certifying authorities through this rulemaking. The Agency also heard concerns from certifying authorities on staffing challenges, agency priorities, and the need for additional federal funding to support timely action on certification requests. To better understand these concerns, the Agency 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.

The EPA recognizes that federal agencies are uniquely positioned to promote pre-application coordination among federal agencies, certifying authorities, and project proponents to harmonize project planning activities and promote timely action on certification requests. For instance, early coordination between the certifying authority and the federal agency could decrease duplication of materials that need to be prepared and submitted by the project proponent. The EPA encourages federal agencies to notify certifying authorities as early as possible about potential projects that may require a section 401 certification. Additionally, the EPA encourages federal agencies to respond timely to requests from certifying authorities for information concerning the proposed federal license or permit, and to provide technical and procedural assistance to certifying authorities and project proponents upon request and to the extent consistent with agency regulations and procedures. The Agency 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.

The EPA also proposes to reaffirm that the federal agencies determine the reasonable period of time for a certifying authority to act on a certification request. Some existing federal agency regulations specify a reasonable period of time that applies across all permit types. For instance, FERC's regulations at 18 CFR 5.23(b)(2) provide that “[a] certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.” Similarly, the Corps regulations at 33 CFR

325.2(b)(1)(ii) state that “[a] waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act.” Executive Order 13868 directed these agencies to update their existing regulations to promote consistency across the federal government upon completion of the EPA’s current rulemaking to modernize its certification regulations.

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.

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).

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. For example, the EPA could establish that section 401 certifications for CWA section 404 permits that disturb a certain acreage threshold must be completed in a prescribed period of time. As another example, the EPA could establish that for interstate pipelines that will cross a certain number of states or transport a certain volume of material, certification must be completed within a specific period of time. The EPA understands that the federal agencies that implement their own permitting programs are experts in those areas, however, the Agency also understands that establishing a

clear national framework for section 401 certifications may help create efficiencies in the process and therefore provide greater regulatory certainty.

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). 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.

This proposal also intends to clarify the process by which federal agencies and certifying authorities communicate regarding the reasonable period of time. A clear understanding of the reasonable period of time will prevent certifying authorities from inadvertently waiving their opportunity to certify a request and will provide regulatory certainty to the project proponent. 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 understands that this process may create additional administrative burdens on federal agencies, given the number of section

401 certification requests that are submitted each year. However, the Agency expects that the benefit of clarity and transparency that this additional process will provide for all parties involved in a section 401 certification process will outweigh any potential additional burden. The EPA also expects the federal agencies will quickly routinize this process, using forms, electronic notifications or other tools to minimize the potential administrative burden associated with providing written notice of the reasonable period of time. 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. 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. The EPA solicits comment on whether this alternate approach would provide greater efficiency and transparency in the certification process, or if there are concerns with this approach.

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. For example, FERC has promulgated regulations for hydropower projects that require the license or permit applicant to file with FERC either a copy of the certification, a copy of the request for certification, including proof of the date that the certifying authority received the request, or evidence of waiver. 18 CFR 4.34(b)(5)(i). In its permitting processes, FERC allows certifying authorities to take the full year provided in section 401, and its regulations clearly state, “A certifying agency is deemed to have waived the certification requirements . . . if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.” 18 CFR 4.34(b)(5)(iii). 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.

The EPA also proposes to clarify that section 401 does not prohibit a federal agency from modifying an established reasonable period of time, provided the modified time period is reasonable and does not exceed one year from receipt. The EPA does not expect periods of time to be modified frequently, but this proposal is intended to provide federal agencies with additional flexibility for unique circumstances that may reasonably require a longer period of time than was originally established. In such cases, the modified time period would be communicated in writing to the certifying authority and the project proponent to ensure all parties are aware of the change. In all cases, the reasonable period of time would not exceed one year from the original receipt of the certification request.

To ensure that the section 401 certification process does not unreasonably delay the federal licensing and permitting processes, the plain language of section 401(a)(1) provides that the requirement to obtain a certification is waived when a certifying authority “fails or refuses to act” on a request for certification, within a reasonable period of time (which shall not exceed one year).<sup>133</sup> U.S.C. 1341(a)(1). The Act does not define the term “fails or refuses to act.” This term is ambiguous and the lack of a statutory definition has resulted in different interpretations of when the period of time for review expires and inefficiencies in the certification process. It has also resulted in significant regulatory uncertainty and litigation. See section II.F in ~~this preamble~~. As the Agency charged with administering the CWA, the EPA is authorized to interpret by rulemaking what these terms mean in the context of a request for a CWA section 401 certification. See *Chevron*, 467 U.S. at 843-44.

The phrase “fails or refuses to act” lends itself to at least two interpretations. One interpretation of the “fails or refuses to act” language in section 401 is that a certifying authority took no action, or refused to take any action, on a section 401 certification request within the reasonable period of time. Such lack of action would be understood as triggering a waiver. Alternatively, when read in the larger context of the section, “fails or refuses to act” could also mean that—while the certifying authority took some action in response to the request—the action it took was outside the statute’s permissible scope and thus the certifying authority failed or refused to act in a way Congress intended, and that such failure amounts to a failure or refusal to act, triggering a waiver. To resolve this ambiguity, under this proposed definition, if a certifying authority either takes no action at all within the reasonable period of time, or acts outside the scope of certification, as defined in this proposal, the federal agency may determine that waiver has occurred and issue the federal license or permit. Accordingly, this proposal includes the following definition:

*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.

A certifying authority actually fails or refuses to grant or deny certification when it states its intention unambiguously in writing or takes no action within the reasonable period of time. A certifying agency constructively fails or refuses to grant or deny certification when it acts outside the scope of certification as defined in the proposed rule.

The EPA expects that for the majority of circumstances where states and tribes issue section 401 certifications, this new definition will have little practical implication because they will have acted on certification requests within the scope of CWA section 401. However, the EPA is aware of circumstances where some states have denied certifications on grounds that are unrelated to

water quality requirements and that are beyond the scope of CWA section 401.<sup>42</sup> The EPA’s existing certification regulations at 40 CFR part 121 are silent on this point and thus when a certifying authority acts beyond the scope of authority granted by Congress in section 401, the project proponent has two options: (1) walk away from the proposed federally licensed or permitted project because certification has been denied, or (2) challenge the certification denial in court. Under this proposal, the Agency intends to clarify that a denial based on factors outside the scope of authority under section 401 amounts to a “fail[ure] or refus[al] to act.” The burden is thus placed on the certifying authority to act within the proper scope of authority granted by Congress, or otherwise risk having the certification denial being set aside by the federal agency. If that were to happen, under this proposal, a certifying authority that disagrees that its action was outside the scope of section 401 could consider its options for legal or administrative review against the federal agency for issuing the license or permit without considering its certification denial. The EPA intends that this proposed definition of “fails or refuses to act” will encourage certifying authorities to act within the scope of certification and promote timely and CWA-consistent action on certification requests. As discussed in section III.D in this preamble, an entire certification is not considered waived if a certifying authority grants certification with deficient conditions. In those circumstances, the deficient conditions are addressed by the federal agency but the remainder of the certification remains in place.

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<sup>42</sup> See Letter from Thomas Berkman, Deputy Commissioner and General Counsel, New York State Department of Environmental Conservation, to Georgia Carter, Vice President and General Counsel, Millennium Pipeline Company, and John Zimmer, Pipeline/LNG Market Director, TRC Environmental Corp. (Aug. 30, 2017) (denying 401 certification because “FERC failed to consider or quantify the effects of downstream [greenhouse gas emissions] in its environmental review of the Project”).

Alternatively, the Agency seeks comment on an approach that would not define “*fails or refuses to act*” as a separate term. In the event the Agency pursues that alternate approach, the Agency solicits comment on other tools or mechanisms to encourage certifying authorities to act timely and within the scope of certification, consistent with the text of the CWA as defined in this proposal.

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.

#### *F. Contents and Effect of a Certification*

The CWA does not define the term “certification” or offer a definitive list of its contents or elements. Accordingly, the EPA under section 501(a) may reasonably interpret the statute to add content to that term. *See* 33 U.S.C. 1251(d); 33 U.S.C. 1361(a); *Chevron*, 467 U.S. at 843-44.

While the EPA's existing regulations at 40 CFR 121.2(a) identify certification requirements that might have made sense in 1971, in this proposal the EPA seeks to update those requirements and also address more fully the effects of certification decisions. Among other things, the EPA is proposing that any action on a certification request be in writing and clearly state whether the certifying authority has chosen to grant, grant with conditions, or deny certification. The EPA is also proposing that any express waiver of the certification requirement by the certifying authority also be in writing.

In circumstances where certification is granted, with or without conditions, the EPA is proposing that the written certification include a statement that the discharge from the proposed federally licensed or permitted project will comply with applicable water quality requirements, as defined at § 121.1(p) of this proposal. Where the certifying authority has granted without conditions, the federal agency could continue processing the license or permit in accordance with its implementing regulations. Where the certifying authority is granting certification with conditions, the federal agency could continue processing the license or permit and would include those conditions as terms in the federal license or permit. Under the proposal, the certification would include specific supporting information for each condition that will be included in the certification, including at a minimum: a statement explaining why the condition is necessary to assure that the discharge resulting from the proposed federally licensed or permitted project will comply with applicable water quality requirements; a citation to federal, state, or tribal law that authorizes the condition; and a statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements. See section III.D in this preamble for information about the scope of appropriate conditions and for information about how conditions could be written to ensure enforceability by federal agencies.

CWA section 401(a)(1) provides that “[n]o license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.”<sup>33</sup> U.S.C. 1341(a)(1). In circumstances where certification is denied, the EPA is proposing that the written notification include the reasons for denial, including the specific water quality requirements with which the proposed federally licensed or permitted project will not comply, a statement explaining why the proposed project will not comply with the identified water quality requirements, and the specific data, information, or project modifications, if any, that would be needed for the certifying authority to determine that the discharge will comply with water quality requirements. In circumstances where a certifying authority is unable to certify that a discharge will comply with the Act, EPA is proposing that the certifying authority may deny certification or waive the requirement for certification. The EPA notes that there may be multiple reasons why a certifying authority may be unable to certify, including a lack of resources for reviewing the certification request, other more pressing priority work that the agency must attend to, or because the information provided to the agency demonstrates that the discharge will not comply with the Act. Under the former circumstances, waiver may be appropriate and under the latter circumstance, denial would be appropriate. The statute does not prevent a project proponent from reapplying for a section 401 certification if the original request is denied, and this proposal reaffirms the ability of a project proponent to submit a new certification request. In the event that a denial is issued, the EPA recommends that the project proponent discuss with the certifying authority whether project plans could be altered to meet applicable water quality requirements upon submittal of a new request for certification.

Where a federal agency determines that a certifying authority’s denial satisfied the requirements of section 401, the EPA proposes that the federal agency provide written

notification to the certifying authority and the project proponent that the denial was consistent with section 401 and that the license or permit will not be granted. A project proponent may explore its options to challenge a denial in court, or alternatively, it may submit a new request for certification that addresses the water quality issues identified in the denial in addition to the other requirements for a request for certification, as discussed in section III.B in this preamble.

Where a federal agency determines that a certifying authority's denial failed to meet the requirements of section 401, the EPA proposes that the federal agency provide written notification to the certifying authority and the project proponent and indicate which provision(s) of section 401 the certifying authority failed to meet. If the federal agency receives the certifying authority's certification decision prior to the end of the reasonable period of time, the federal agency may provide the certifying authority an opportunity to remedy the deficiencies within the remaining period of time. In such circumstances, if the certifying authority does not provide an updated certification decision by the end of the reasonable period of time, under the proposal the federal agency would treat the certification in a similar manner as waiver. 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.

EPA's proposed regulations at sections 121.6 (Effect of denial of certification), 121.7 (Waiver), and 121.8 (Incorporation of conditions in the license or permit) contemplate that the licensing or permitting agency would review and make appropriate determinations about the adequacy of certain aspects of a 401 certification. Establishing such a role for federal licensing or permitting agencies is a reasonable interpretation of the CWA. In *City of Tacoma, Washington v.*

FERC, the Court of Appeals for the D.C. Circuit noted that “[i]f the question regarding the state’s section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: ‘No license or permit shall be granted until the certification *required by this section* has been obtained or has been waived.’” 460 F.3d at 67-68 (citing 33 U.S.C. 1341(a)(1)) (emphasis in original). The court went on to explain that even though the federal agency did not need to “inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] to at least to confirm that the state has facially satisfied the express requirements of section 401.” *Id.* at 68; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (“had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago, decommissioning of the Project might very well be underway”); *Airport Communities Coalition v. Graves*, 280 F. Supp.2d 1207, 1217 (W.D. Wash. 2003) (holding that the Army Corps had discretion not to incorporate untimely certification conditions).<sup>43</sup>

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<sup>43</sup> Cases like *Sierra Club*, 909 F.3d at 645; *Snoqualmie Indian Tribe*, 545 F.3d at 1218; and *FERC*, 952 F.2d at 548 are not to the contrary. These cases do not stand for the proposition that licensing agencies have no role to play in reviewing and implementing state or tribal certifications. Although the courts’ language is at times strong (e.g., “FERC may not alter or reject conditions”), a closer reading shows that these holdings are more nuanced. In *Sierra Club*, the court faulted FERC for replacing a state certification condition with a different, alternative condition *FERC thought was more protective*. In *Snoqualmie*, the court allowed FERC to require additional license conditions *that did not conflict with or weaken* the protections provided by the state’s certificate. In *FERC*, the court upheld FERC’s hydroelectric facility license, observing that “we have no reason to doubt that any *valid* conditions imposed by West Virginia in its section 401 certificates must and will be respected by the Commission.” (Emphasis added). Even *American Rivers*, 129 F.3d at 110-111, recognized that FERC “may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period.” To the extent any of these cases arguably stand for the proposition that

In circumstances where certification is waived, under this proposal, the federal agency may continue processing the license or permit in accordance with its implementing regulations. As discussed in section III.E and section III.F in this preamble, under this proposal a certifying authority may waive its opportunity to certify, either expressly by issuing a statement that it is waiving its opportunity to certify or by failing or refusing to act within the reasonable period of time and in accordance with section 401.

The EPA's existing certification regulations recognize the role of the federal agency to determine whether a waiver has occurred. 40 CFR 121.16(b); *see also Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d at 700-701 (acknowledging that a project proponent can ask the federal agency to determine whether a waiver has occurred). As discussed in section III.E in this preamble, the federal agency also determines the reasonable period of time for a certifying authority to act on a request for certification. The EPA proposes to reaffirm that it is the federal agency that also determines whether a waiver has occurred.

The EPA is also proposing to clarify the procedures for a federal agency to notify a certifying authority that a waiver has occurred. If the certifying authority fails or refuses to act before the date specified by the federal agency, as explained in section III.E in this preamble, the federal agency would be required to communicate to the certifying authority and project proponent in writing that waiver has occurred. The communication would also include the original notification from the federal agency to the certifying authority of the reasonable period of time.

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licensing agencies lack the authority or discretion to make appropriate determinations regarding the adequacy of certain aspects of a state's or authorized tribe's certification, EPA disagrees.

As discussed in section III.E in this preamble, the practice of withdrawing and resubmitting the same request for certification does not pause or reset the clock for purposes of determining whether a waiver has occurred. In *Hoopa Valley Tribe*, the Court of Appeals for the D.C. Circuit held that waiver occurred where the applicant and certifying authority coordinated to repeatedly resubmit the same certification request for over a decade. 913 F.3d 1099.

This proposal reaffirms the ability of a state to expressly or affirmatively waive the requirement to obtain a section 401 certification. Although the statute does not explicitly provide for express or affirmative waiver, such waivers are consistent with the certification authority's ability to waive through failure or refusal to act. An express or affirmative decision to waive certification does not provide the certifying authority's determination of whether or not the section 401 certification request will comply with the Act. Instead, an express or affirmative waiver indicates that the certifying authority has chosen not to act on a certification request. *See EDF v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) (“We do not interpret [the Act] to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation.”). Additionally, express or affirmative waiver enables the federal agency to proceed with processing an application where the certifying authority has stated it does not intend to act, thereby avoiding the need to wait for the reasonable period of time to lapse.

The Agency solicits comments on whether the proposed approach appropriately captures the scope of authority for granting, conditioning, waiving, and denying a section 401 certification, and whether the proposed approach also effectively addresses those circumstances where certification is sought for general permits issued by the federal agencies (e.g., 33 U.S.C. 1344(e)).

#### *G. Certification by the Administrator*

Section 401(a)(1) of the CWA provides that “[i]n any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.” 33 U.S.C. 1341(a)(1). Currently, all states have authority to implement section 401 certification programs. However, there are two scenarios where the EPA acts as the certifying authority: (1) on behalf of federally recognized Indian tribes that have not received TAS for section 401, and (2) on lands of exclusive federal jurisdiction, such as Denali National Park. As discussed in section II.F.1 in this preamble, tribes may obtain TAS authorization for purposes of issuing CWA section 401 certifications. If a tribe does not obtain TAS for section 401 certifications, the EPA is responsible to act as the certifying authority for projects proposed on tribal land. The Agency solicits comment on whether additional information on the TAS process for section 401 certifications would be helpful and how the Agency could best communicate that information to the public.

The federal government may obtain exclusive federal jurisdiction in multiple ways, including where the federal government purchases land with state consent consistent with article 1, section 8, clause 17 of the U.S. Constitution; where a state chooses to cede jurisdiction to the federal government; and where the federal government reserved jurisdiction upon granting statehood.

*See Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895). For example, the federal government retained exclusive jurisdiction over Denali National Park in Alaska’s Statehood Act. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Considering the potential for jurisdictional overlap between certifying authorities at certain project sites (e.g.,

boundary between tribal land and a state), the Agency encourages project proponents to engage in pre-application communications with certifying authorities and federal agencies to ensure project proponents submit a request for certification to the appropriate certifying authority.

The EPA's existing certification regulations discuss circumstances where the Administrator certifies instead of a state, tribe, or interstate authority. The Agency proposes to modernize and clarify these regulations, and withdraw the text in 40 CFR 121.21 in its entirety and replace it with the following text:

Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements will be required where no state, tribe, or interstate agency has authority to give such a certification.

In circumstances where the EPA is the certifying authority and the water body impacted by the proposed discharge does not have any applicable water quality standards, the EPA's existing regulation provides the EPA with an advisory role. 40 CFR 121.24. The statute does not explicitly provide for this advisory role, and therefore this proposal does not include a similar provision. However, the Agency believes that this advisory role may not be inconsistent with the Agency's technical advisory role provided at 33 U.S.C. 1341(b). In an alternate approach, the Agency may reaffirm the Agency's advisory role when it certifies for water bodies without water quality requirements. The Agency solicits comment on its interpretation of the EPA's advisory role under Section 401 and the utility of maintaining such a role for the EPA.

This proposal includes three procedural requirements that would apply when the Administrator is the certifying authority: clarified public notice procedures, a pre-filing meeting process, and specific timelines and requirements for the EPA to request additional information to support a certification request. Each of these is discussed below and would be contained in proposed sections 121.11 through 121.13.

### *1. Public Notice Procedure*

Section 401 requires a certifying authority to provide procedures for public notice, and a public hearing where necessary, on a certification request. The courts have held that this includes a requirement for public notice itself. *City of Tacoma*, 460 F.3d at 68. As discussed above in section III.B in this preamble, the timeframe for making a certification decision begins upon receipt of request, and not when the public notice is issued. The existing regulations at 40 CFR part 121.23 describe the EPA's procedures for public notice after receiving a request for certification.

The EPA proposes to update these regulations to provide greater clarity to project proponents, federal agencies, and other interested parties on the EPA's procedures for public notice when it is acting as the certifying authority. Under the proposal, the Agency would provide appropriate public notice within 20 days of receipt of a certification request to parties known to be interested, such as tribal, state, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations. 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.

When acting as a certifying authority, the EPA is subject to the same timeframes and section 401 certification requirements as other certifying authorities. 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.

### *2. Pre-filing Meeting Procedure*

This proposal also includes for the first time a requirement that the project proponent request a pre-filing meeting with the EPA when the Agency is the certifying authority. The Agency solicits comment regarding whether the term “request” as used in the statute is broad enough to include an implied requirement that, as part of the submission of a request for certification, a project proponent also provide the certifying authority with advance notice that a request is imminent. The fact that the statute requires the certifying authority to act on a request within a relatively short time (no longer than one year and possibly much less) or else waive, provides some justification in this context to interpret the term “request for certification” to also include a pre-filing meeting process.

In order to facilitate early engagement and coordination, and using its discretion to interpret the term “request” as applied to its own certification procedures, the EPA is proposing a regulatory requirement for a 30-day pre-filing meeting process. Under this proposal, a project proponent would be required to request in writing a pre-filing meeting with EPA as the certifying authority at least 30 days before submitting a certification request. As proposed, the EPA would be required to promptly accommodate the meeting request or respond in writing that such a meeting is not necessary. This proposed pre-filing meeting process would give the EPA the option to meet with project proponents before a certification request is received to learn more about a proposed federally licensed or permitted project. Alternatively, the EPA would have the option to decline the meeting request. The EPA expects to take advantage of this proposed pre-filing meeting process for larger or more complex projects and may choose to decline the request for more routine and less complex projects.

The EPA is proposing to require this pre-filing meeting process to trigger early communication with the EPA about important aspects of section 401 certification requests *before*

the project proponent submits its certification request. The period prior to submitting a certification request provides an opportunity for the project proponent to verify whether a section 401 certification is required and for the EPA to identify potential information, in addition to the request requirements proposed in this rule, that may be necessary to evaluate the certification request. This will be particularly important if the EPA anticipates requesting additional information from the project proponent.

Pre-filing meetings could be particularly helpful for complex projects. In all cases, the EPA recommends that preliminary discussions between the project proponent and the EPA begin well before submittal of a certification request. Early engagement and coordination, including participation in a pre-filing meeting or other pre-filing procedures, may also help increase the quality of application materials and reduce the need for the EPA to request additional information during the CWA section 401 review period. For further discussion, see section III.E in this preamble.

Many states and tribes have indicated how valuable pre-filing communication between the project proponent and the certifying authority can be. The Association of Clean Water Administrators also reports that many states either require or encourage pre-filing meetings with project proponents and observes that many states work with project proponents through early engagement to ensure project proponents are aware of the state's information needs. During pre-proposal outreach for this rulemaking, stakeholders identified and recommended specific opportunities for early coordination among the project proponent, certifying authority, and relevant federal agencies. For instance, some stakeholders encouraged pre-filing meetings, and others encouraged early information sharing between federal agencies and certifying authorities.

The EPA's existing section 401 certification regulations do not address pre-filing consultation with the EPA or any other certifying authority. However, other federal agencies provide for pre-filing discussions in their regulations. For example, FERC regulations provide that “[b]efore it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies. . . .” 18 CFR 5.1(d)(1). Additionally, the Corps regulations state “[t]he district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the district engineer or the regulatory staff element to request pre-application consultation.” 33 CFR 325.1(b).

The Agency encourages states and tribes to engage in early communications with project proponents and federal agencies, including participation in pre-filing meetings that federal agencies may require for their licensing or permitting processes, as these meetings may provide significant advance notice and additional information about proposed federally licensed or permitted projects and upcoming or future certification requests. However, this proposal would only require a pre-filing meeting process when the EPA is the certifying authority. The EPA received recommendations from many states and tribes during the pre-proposal process that additional pre-filing procedures would be valuable for them as well, and the EPA would like to be responsive to these comments. 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-

filings 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. If such pre-filing meeting process were mandatory, the EPA also solicits comment on the regulatory effect of a project proponent or certifying authority failing to participate in this process.

### *3. Requests for Additional Information*

The definition of a certification request in this proposal identifies the information that project proponents would be required to provide to certifying authorities when they submit a request for certification. However, in some cases, the EPA and other certifying authorities may conclude that additional information is necessary to determine that the proposed activity will comply with water quality requirements (as defined at § 121.1(p) of this proposal). Section 401 does not expressly address the issue of whether and under what conditions a certifying authority may request additional information to review and act on a certification request. Given the importance of this issue, it is reasonable and consistent with the CWA's statutory framework that EPA when acting as a certifying authority be afforded the opportunity to seek additional information necessary to do its job. However, consistent with the statute's firm timeline, it is also reasonable to assume that Congress intended there to be some appropriate limits placed on the timing and nature of such requests. This proposal fills the statutory gap and provides a structure for the EPA as the certifying authority to request additional information and for project proponents to timely respond. The structure in this proposal includes procedural processes and timeframes for action

and is intended to provide transparency and regulatory certainty for the EPA and project proponents.

Certifying authorities like the EPA need relevant information as early as possible to review and act on section 401 certification requests within the reasonable period of time. As discussed earlier, the proposed pre-filing meeting process is intended to ensure that the EPA has an opportunity to engage with the project proponent early, learn about the proposed federally licensed or permitted project, and consider what information might be needed from the project proponent to act on a certification request. 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.

The EPA is also proposing that the Agency would only request additional information that can be collected or generated within the established reasonable period of time. Under this proposal, in any request for additional information, the EPA would include a deadline for the project proponent to respond. The deadline must be required to allow sufficient time for the Agency to review the additional information and act on the certification request within the established reasonable period of time. The EPA is proposing that project proponents would be required to submit requested information by the EPA's deadline. If the project proponent fails to submit the requested information, the EPA may conclude that it does not have sufficient information to certify that the discharge will comply with applicable water quality requirements.

The EPA may also use its expertise to evaluate the potential risk associated with the remaining information or data gap and consider issuing timely certification with conditions to address those potential risks. The EPA expects these proposed procedures to provide clarity and regulatory certainty to the EPA and project proponents.

This proposal is intended to address concerns that the EPA heard from stakeholders during the pre-proposal period concerning the desire for pre-filing procedure and additional information requests. The EPA recognizes the advantages of working cooperatively with project proponents to secure the information needed to conduct an informed review of a certification request. This proposal provides additional procedures to assure the EPA will have an opportunity to request additional information to make informed and timely decisions on certification requests.

This proposal is also intended to address other issues that have caused delays in certifications and project development and that have resulted in protracted litigation. For example, the Agency is aware that some certifying authorities have requested “additional information” in the form of multi-year environmental investigations and studies, including completion of a NEPA review, before the authority would begin review of the certification request.<sup>44,45</sup> Consistent with the plain

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<sup>44</sup> See e.g., *Exelon Generation Co. v. Grumbles*, 2019 WL 1429530 (D.D.C. 2019) (describing how the State of Maryland’s request for a multi-year sediment study resulted in Exelon withdrawing and resubmitting its certification request multiple times to prevent waiver while the company completed the study).

<sup>45</sup> Some stakeholders have suggested that it may be challenging for a state to act on a certification request without the benefit of review under NEPA or a similar state authority. See e.g., Cal. Pub. Res. Code Section 21000 *et seq.*; Wash. Rev. Code Section 43.21C.150. Consistent with the EPA’s June 7, 2019 guidance, the EPA recommends that certifying authorities not delay action on a certification request until a NEPA review is complete. The environmental review required by NEPA has a broader scope than that required by section 401. For example, the NEPA review evaluates potential impacts to all environmental media, as well as potential impacts from alternative proposals that may not be the subject of a federal license or permit application. By comparison, a section 401 certification review is far more narrow and is focused on assessing potential water quality impacts from the proposed federally licensed or permitted project. Additionally, the NEPA process has historically taken more than one year to

language of section 401, under this proposal such requests from the EPA would not be authorized because they would extend the statutory reasonable period of time, which is not to exceed one year. This proposal provides clarity that, while additional information requests may be a necessary part of the certification process, such requests may not result in extending the period of time beyond which the CWA requires the EPA to act.

The EPA is aware that some states have regulations addressing timeframes within which states must request additional information after the receipt of a request for certification. For instance, the California Code of Regulations states that, “Upon receipt of an application, it shall be reviewed by the certifying agency to determine if it is complete. If the application is incomplete, the applicant shall be notified in writing no later than 30 days after receipt of the application, of any additional information or action needed.” Cal. Code Regs. tit. 23, 3835(a). The EPA also notes that some state regulations may require the completion of certain processes, studies or other regulatory milestones before it will consider a certification request. Although the CWA does provide flexibility for certifying authorities to follow their own administrative processes, particularly for public notice and comment, *see* 33 U.S.C. 1341(a), these processes cannot be implemented in such a manner to violate the plain language of the CWA. The Act requires the timeline for review to begin upon receipt of a certification request and requires certifications to be processed within a reasonable period of time, not to exceed one year.

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complete and waiting for a NEPA process to conclude may result in waiver of the certification requirement for failure to act within a reasonable period of time. To the extent that state or tribal implementing regulations require a NEPA review to be completed as part of a section 401 certification review, the EPA encourages certifying authorities to update those regulations to incorporate deadlines consistent with the reasonable period of time established under the CWA, or decouple the NEPA review from the section 401 process to ensure timely action on section 401 certification requests.

A number of stakeholders submitted recommendations to the pre-proposal docket that the EPA propose procedural requirements for certifying authorities' requests for additional information. Some stakeholders recommended certifying authorities be required to request additional information within 90 days of receipt, and that project proponents must be required to respond within 60 days. The EPA appreciates these recommendations but notes that those timelines would not be workable if the federal agency establishes the reasonable period of time as, for example, 60 days from receipt.<sup>46</sup> The EPA understands that providing only 30 days from receipt for the EPA to request additional information may seem short but the proposed pre-filing meeting process is a way for the Agency to understand more about the proposed federally licensed or permitted project before the certification request is submitted. 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. 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.

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. 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.

#### *H. Determination of Effect on Neighboring Jurisdictions*

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<sup>46</sup> The Army Corps' existing federal regulations require certifications to be completed within 60 days unless circumstances require more or less time. 33 CFR 325.2(b)(1)(ii).

Section 401(a)(2) provides a mechanism for the EPA to coordinate input from states and authorized tribes where the EPA has determined the discharge from a proposed federally licensed or permitted project subject to section 401 may affect the quality of their waters. The EPA’s existing pre-1972 certification regulations establish procedural requirements for this process but require updating to align with the modern CWA section 401 and establish additional clarity. Additionally, pre-proposal stakeholder input identified section 401(a)(2) as an area of the regulations in need of procedural clarification.

This proposal affirms the EPA’s interpretation that section 401(a)(2) establishes a discretionary authority for the Agency to determine if a water quality certification and related federal license or permit may impact the water quality in a neighboring jurisdiction. Where the Agency in its discretion has determined that the certified license or permit “may affect” the quality of water in any other state or authorized tribal jurisdiction, the Act requires the EPA to coordinate input from the affected jurisdictions and make recommendations to the federal agency.

This proposal modifies the EPA’s existing certification regulations to mirror the CWA in describing EPA’s procedural duties regarding neighboring jurisdictions. The statute provides that, following notice of a section 401 certification, the Administrator shall within 30 days notify a potentially affected downstream state or authorized tribe “[w]henever such a discharge *may affect, as determined by the Administrator, the quality of the waters of any other State.*”<sup>33</sup> U.S.C. 1341(a)(2) (emphasis added). Because the EPA’s duty to notify is only triggered when the EPA has made a determination that a discharge “may affect” a downstream state or tribe, the section 401(a)(2) notification requirement is contingent. It is not a duty that applies to EPA with respect to all certifications and licenses, rather it applies where—at its discretion—EPA has

determined that the discharge in question “may affect” a neighboring jurisdiction’s waters. This proposal provides updated language to increase clarity regarding EPA’s discretionary determination.

The EPA also proposes to clarify the section 401(a)(2) notification process in this proposal, as such procedures are not described in sufficient detail in the existing regulations. If the EPA in its discretion determines that a neighboring jurisdiction may be affected by a discharge from a federally licensed or permitted project, the EPA must notify the affected jurisdiction, certifying authority, and federal agency within 30 days of receiving the notice of the certification request from the federal agency. If the EPA in its discretion does not determine that the discharge may affect neighboring waters, the EPA would not provide section 401(a)(2) notice.

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

proposed regulation further clarifies that the federal agency may not issue the license or permit pending the conclusion of the determination of effects on a neighboring jurisdiction. 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.

#### *I. EPA’s Role in Review and Advice*

This proposal reaffirms the EPA’s important role in providing advice and assistance. Section 40 CFR 121.30 of the existing regulations specifically highlight the EPA’s role in assisting federal agencies as they assess project compliance with conditions of a license or permit. Although this proposal aims to provide greater clarity on section 401 implementation, the Agency recognizes its role in providing advice and assistance as needed. For example, the EPA proposes to change the term “water quality standards”—as currently appearing in 40 CFR 121.30—to “water quality requirements” in 121.15(a) to align its regulations with the scope of review and the scope of conditions specified in section III.D in this preamble. This change is not intended to preclude federal agencies from seeking support in interpreting applicable water quality standards or requirements and evaluating the appropriate scope of review and conditions for particular projects and certification.

The EPA also proposes to clarify that federal agencies, certifying authorities, and project proponents may seek the EPA’s technical expertise at any point during the section 401 water quality certification process. Additionally, the EPA proposes that a certifying authority, federal agency, or project proponent may request assistance from the Administrator to evaluate whether a certification condition is intended to address potential water quality impacts caused by the discharge from a proposed federally licensed or permitted project into waters of the United States. See section III.D in this preamble for further discussion on the appropriate scope of

certification conditions. The Agency solicits comment on whether this proposal is tailored for the EPA to provide appropriate technical assistance to certifying authorities, federal agencies and project proponents, or if the EPA should offer or provide assistance in other specific or additional circumstances.

*J. Enforcement*

The CWA expressly notes that all certification conditions “shall become a condition on any Federal license or permit” subject to section 401. 33 U.S.C. 1341(d); *see also Am. Rivers*, 129 F.3d at 111 (“The CWA . . . expressly requir[es] [federal agencies] to incorporate into its licenses state-imposed-water-quality-conditions.”). However, the EPA’s existing certification regulations do not discuss the federal agency’s responsibility to enforce such conditions after they are incorporated into the permit. 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. 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. 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.

The Agency notes that section 401 does not provide an independent regulatory enforcement role for certifying authorities for conditions included in federal licenses or permits. The role of the certifying authority is to review the proposed project and either grant certification, grant with

conditions, deny, or waive certification. 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.

Enforcement plays an essential role in maintaining robust compliance with section 401 certification conditions and a critical part of any strong enforcement program is the appropriate use of enforcement discretion. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”). Enforcement programs exercise discretion and make careful and informed choices about where to conduct investigations, identifying the most serious violations and reserving limited enforcement resources for the cases that can make the most difference. *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001). It is important for enforcement programs to retain their enforcement discretion because federal agencies are in the best position to (1) determine whether the action is likely to succeed, (2) assess whether the enforcement action requested fits the agency’s policies, and (3) determine whether they have enough resources to undertake the action. See *Heckler*, 470 U.S. at 831. Further, federal agencies’ decisions not to enforce generally are not subject to judicial review, because they involve balancing several factors. *Id.* These factors include “whether a violation has occurred, … whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular action requested best fits the federal agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Id.*

Section 401(a)(4) and the EPA's existing regulations at 40 CFR part 121.26 through 121.28 describe circumstances where the certifying authority may inspect a facility that has received certification prior to operation<sup>47</sup> and notify the federal agency to determine if the facility will comply with applicable water quality requirements. 33 U.S.C. 1341(a)(4). The Agency proposes to update these regulations to reflect the scope of certification review under the modern CWA in the proposed regulations at § 121.9 (see section III.D in this preamble). Additionally, consistent with section 401, the EPA proposes to expand this inspection function to all certifying authorities and clarify the process by which certifying authorities should notify the federal agency and project proponent of any concerns.

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.

#### *K. Modifications*

Section 401 does not provide an express oversight role for the EPA with respect to the issuance or modification of individual water quality certifications by certifying authorities, other than the requirement that the EPA provide technical assistance under section 401(b) and the

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<sup>47</sup> The Agency notes that operation may include implementation of a certified project.

limited role the EPA is expected to play for ensuring the protection of other states' waters under section 401(a)(2). However, the 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.

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

#### **IV. Economic Analysis**

Pursuant to Executive Orders 12866 and 13563, the Agency conducted an economic analysis to better understand the potential effects of this proposal on certifying authorities and project proponents. While the economic analysis is informative in the rulemaking context, the EPA is

not relying on the analysis as a basis for this proposed rule. *See, e.g., Nat'l. Assn. of Homebuilders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012). The analysis is contained and described more fully in the document *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*. A copy of this document is available in the docket for this action.

Section 401 certification decisions have varying effects on certifying authorities and project proponents. The Economic Analysis provides a qualitative analysis of the current and proposed section 401 certification process to make the best use of limited information to assess the potential impacts of this proposed rule on project proponents and certifying authorities. Using the current practice as the baseline, the document assesses the potential impacts to certifying authorities and project proponents from the proposed revisions to the section 401 certification process. In particular, the Economic Analysis focuses on the proposed revisions to the time period for review, the scope of review, and the proposed process requirements applicable when the EPA is the certifying authority. The Economic Analysis explores these changes in more detail through four case studies.

This proposal will help certifying authorities, federal agencies, and project proponents understand what is required and expected during the section 401 certification process, thereby reducing regulatory uncertainty. The Economic Analysis concludes that improved clarity on the scope and reasonable period of time for certification review may make the certification process more efficient for project proponents and certifying authorities.

The Agency solicits comments on all aspects of the analysis, including assumptions made and information used, and requests any data that may assist the Agency in evaluating and characterizing the potential impacts of the proposed revisions to the section 401 certification process. The Agency also solicits comment on the utility of using case studies to inform the

Agency's analysis, the utility of the specific case studies selected, and if there are other examples that could also serve as informative case studies.

## **V. Statutory and Executive Order Reviews**

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

### *A. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this proposed rule is expected to be a deregulatory action. Although the proposed revisions in certain circumstances may limit the authority of some states and tribes relative to current practice, the Agency believes the net effect of the proposal on the certification process will likely be deregulatory.

See *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking* for further discussion about the potential effects of this rule.

### *B. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the Agency prepared an analysis of potential costs and benefits associated with this action. This analysis is contained in the document *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, which is available in the docket and briefly summarized in section IV in this preamble. Because of the limitations in data availability and uncertainty in the way in which certifying authorities and project proponents may respond following a change in the section 401 certification process, the potential effects of the proposed rule are discussed qualitatively. While economic analyses are

informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this proposed action.

*C. Paperwork Reduction Act*

The information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2603.02 (OMB Control No. XXXX).

The information collected under section 401 is used by the certifying authorities for reviewing proposed projects for potential water quality impacts from discharges from an activity that requires a federal license or permit, and by the EPA to evaluate potential effects on downstream or neighboring states and tribes. Except for when the EPA evaluates potential downstream impacts and acts as a certifying authority, information collected under section 401 is not directly collected by or managed by the EPA. The primary collection of information is performed by other federal agencies and states and tribes acting as certifying authorities. Information collected directly by the EPA under section 401 in support of the section 402 program is already captured under existing EPA ICR No. 0229.22 (OMB Control No. 2040).

The revisions in the proposed rule clarify the information project proponents must provide to request a section 401 certification, introduce a preliminary meeting requirement for project proponents where the EPA acts as the certifying authority. The proposed revisions also remove information requirements in the certification modification and 401(a)(2) contexts and provide additional transparency by identifying information necessary to support certification actions. The

EPA expects these proposed revisions to provide greater clarity on section 401 requirements, reduce the overall preparation time spent by a project proponent on certification requests, and reduce the review time for certifying authorities. The EPA solicits comment on whether there are ways it can increase clarity, reduce the burden, or improve the quality or utility of the collection of information in general.

In the interest of transparency and public understanding, the EPA has provided here relevant portions of the burden assessment associated with the EPA's existing certification regulations. The EPA does not expect any measurable change in information collection burden associated with the proposed changes.

Respondents/affected entities: Project proponents, state and tribal reviewers (certifying authorities)

Respondent's obligation to respond: required to obtain 401 certification

Estimated number of respondents: 41,000 per year

Frequency of response: per federal application

Total estimated burden: 328,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$ 18,000,000 (per year)

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

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using

the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to OIRA\_submission@omb.eop.gov, Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than [insert date 30 days after publication in the Federal Register]. The EPA will respond to any ICR-related comments in the final rule."

*D. Regulatory Flexibility Act*

The Agency certifies that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. Section 401 requires federal license or permit project applicants to request certification from the certifying authority. This action will provide project applicants with greater clarity and certainty on the contents of and procedures for a request for certification.

The Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, requires Federal agencies to consider the impact of their regulatory proposals on small entities, to analyze alternatives that minimize those impacts, and to make their analyses available for public comments. The RFA addresses three types of small entities: small businesses, small nonprofits, and small government jurisdictions.

These entities have the following definitions under the RFA: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (see 13 CFR 121.201); (2) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its fields; or (3) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000.

The RFA describes the regulatory flexibility analyses and procedures that must be completed by federal agencies unless they certify that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. This certification must be supported by a statement of factual basis, such as addressing the number of small entities affected by the proposed action, expected cost impacts on these entities, and evaluation of the economic impacts.

These revisions to section 401 do not establish any new requirements directly applicable to regulated entities. This rule may impact states and authorized tribes that implement section 401 in the form of administrative burden and cost. States and tribes are not small entities under the RFA. As such, this rule will not result in impacts to small entities.

#### *E. Unfunded Mandates Reform Act*

This proposed rule does not contain an unfunded mandate of \$100 million or more as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. The proposed rule does not contain regulatory requirements that significantly or uniquely affect small governments.

#### *F. Executive Order 13132: Federalism*

The Agency consulted with state and local government officials, or their representative national organizations, during the development of this action as required under the terms of Executive Order 13132 (64 FR 43255, August 10, 1999). On April 24, 2019, the Agency initiated a 30-day Federalism consultation period prior to proposing this rule to allow for meaningful input from state and local governments. The kickoff Federalism consultation meeting occurred on April 23, 2019; attendees included intergovernmental associations and other associations representing state and local governments. Organizations in attendance included: National Governors' Association, U.S. Conference of Mayors, National Conference of State Legislatures, the Environmental Council of States, National League of Cities, Council of State Governments, National Association of Counties, National Association of Towns and Townships, Association of Clean Water Administrators, Western States Water Council, Conference of Western Attorneys' General, Association of State Wetland Managers, and Western Governors' Association. Additionally, one in-person meeting was held with the National Governors' Association on May 7, 2019. The Agency also held an informational webinar for states and tribes on May 8, 2019. At the webinars and meetings, the EPA provided a presentation and sought input on areas of section 401 that may require clarification, including timeframe, scope of certification review, and coordination among project proponents, certifying authorities, and federal licensing or permitting agencies. See section II.C in this preamble for more information on outreach with states prior to federalism consultation. Letters and webinar attendee feedback received by the agency before and during Federalism consultation may be found on the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855). These webinars, meetings, and letters provided a wide and diverse range of interests, positions, and

recommendations to the Agency. See section II.C in this preamble for a summary of recommendations.

This action may change how states administer the section 401 program. Under the technical requirements of Executive Order 13132, the Agency has determined that this proposed rule may not have federalism implications, but believe that the requirements of the Executive Order have been satisfied in any event.

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

The Agency consulted with tribal officials during the development of this action to permit meaningful and timely tribal input, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes. The EPA initiated a tribal consultation and coordination process before proposing this rule by sending a “Notification of Consultation and Coordination” letter dated April 22, 2019, to all 573 Federally recognized tribes. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The Agency held two identical webinars on this action for tribal representatives on May 7 and May 15, 2019. The Agency also presented on this action at the Region 9 Regional Tribal Operations Committee Spring meeting on May 22, 2019. Additionally, tribes were invited to two webinars for states, Tribes, and local governments on April 17, 2019 and May 8, 2019. Tribes and tribal organizations sent 14 pre-proposal recommendation letters to the agency as part of the consultation process. All tribal and tribal organization letters and webinar feedback may be found on the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2018-0855). The Agency met with three Tribes at the staff-level. See the section II.C on “Pre-proposal engagement” for a summary of recommendations.

This action may change how tribes with TAS for section 401 administer the section 401 program, but will not have an administrative impact on tribes for whom EPA certifies on their behalf. The proposal will not impose substantial direct compliance costs on federally recognized tribal governments nor preempt tribal law.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

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

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

*J. National Technology Transfer and Advancement Act*

This proposed rule does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The human health or environmental risks addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority populations, low income populations, and/or indigenous populations, as specified in Executive Order 12898 (59 FR 7629, February 11, 1994).

**List of Subjects in 40 CFR part 121**

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

Updating Regulations on Water Quality Certification (page 149 of 163)

Dated: AUG - 8 2019.

A handwritten signature in black ink, appearing to read "Andrew Wheeler", is written over a horizontal line.

Andrew R. Wheeler,

Administrator.

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

1. Revise part 121 to read as follows:

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

### **Section Contents**

#### **Subpart A—General**

##### **§ 121.1 Definitions**

#### **Subpart B—Certification Procedures**

##### **§ 121.2 When certification is required**

##### **§ 121.3 Scope of certification**

##### **§ 121.4 Establishing the reasonable period of time**

##### **§ 121.5 Action on a certification request**

##### **§ 121.6 Effect of denial of certification**

##### **§ 121.7 Waiver**

##### **§ 121.8 Incorporation of conditions into the license or permit**

##### **§ 121.9 Enforcement and compliance of certification conditions**

#### **Subpart C—Determination of Effect on Other States**

##### **§ 121.10 Determination of effects on neighboring jurisdictions**

#### **Subpart D—Certification by the Administrator**

##### **§ 121.11 When the Administrator certifies**

##### **§ 121.12 Pre-request procedures**

##### **§ 121.13 Request for additional information**

##### **§ 121.14 Notice and hearing**

#### **Subpart E—Consultations**

##### **§ 121.15 Review and advice**

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

## **Subpart A—General**

### **§ 121.1 Definitions.**

(a) *Administrator* means the Administrator of the Environmental Protection Agency or the appropriate Regional Administrator to whom the Administrator has delegated Clean Water Act section 401 authority.

(b) *Certification* means a water quality certification issued in accordance with Clean Water Act section 401 and this part.

(c) *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 location and type 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 401 certification request within the applicable reasonable period of time.*’

- (d) *Certified project* means a proposed project that has received a Clean Water Act section 401 certification or for which the certification requirement has been waived.
- (e) *Certifying authority* means the agency designated by law to certify compliance with applicable water quality requirements in accordance with Clean Water Act section 401.
- (f) *Condition* means a specific requirement included in a certification that is within the scope of certification.
- (g) *Discharge* for purposes of this part means a discharge from a point source into navigable waters.
- (h) *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.
- (i) *Federal agency* means any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401.
- (j) *License or permit* means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in a discharge.
- (k) *Neighboring jurisdictions* means any other state or authorized tribe whose water quality the Administrator determines may be affected by a discharge for which a certification is granted pursuant to Clean Water Act section 401 and this part.
- (l) *Project proponent* means the applicant for a license or permit.
- (m) *Proposed project* means the activity or facility for which the project proponent has applied for a license or permit.
- (n) *Reasonable period of time* means the time period during which a certifying authority may act on a certification request, established in accordance with § 121.4.

- (o) *Receipt* means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.
- (p) *Water quality requirements* means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.

## **Subpart B—Certification Procedures**

### **§ 121.2 When certification is required.**

Any applicant for a license or permit to conduct any activity which may result in a discharge shall provide the Federal agency a certification from the certifying authority in accordance with this part.

### **§ 121.3 Scope of certification.**

The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.

### **§ 121.4 Establishing the reasonable period of time.**

- (a) The Federal agency shall establish the reasonable period of time categorically or on a case by case basis, which shall not exceed one year from receipt.
- (b) Upon submittal of a certification request, the project proponent shall contact the Federal agency in writing to provide notice of the certification request.
- (c) Within 15 days of receiving notice of the certification request from the project proponent, the Federal agency shall provide, in writing, the following information to the certifying authority:
  - (1) The applicable reasonable period of time to act on the certification request;

- (2) The date of receipt of the certification request; and
- (3) The date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.

(d) In establishing the reasonable period of time, Federal agencies shall 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.

(e) The Federal agency may modify an established reasonable period of time, but in no case shall it exceed one year from receipt.

- (1) Any request by a certifying authority or project proponent to the Federal agency to extend the reasonable period of time shall be in writing.
- (2) If the Federal agency agrees to modify the reasonable period of time, it shall notify the certifying authority and project proponent in writing.

(f) The certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time.

#### **§ 121.5 Action on a certification request.**

(a) Any action to grant, grant with conditions, or deny a certification request must be within the scope of certification and completed within the established reasonable period of time. Alternatively, a certifying authority may expressly waive the certification requirement.

(b) If the certifying authority determines that the discharge from a proposed project will comply with water quality requirements it may issue a certification. If the certifying authority cannot

certify that the discharge from a proposed project will comply with water quality requirements, it may deny or waive certification.

- (c) Any grant of certification shall be in writing and shall include a statement that the discharge from the proposed project will comply with water quality requirements.
- (d) Any grant of certification with conditions shall be in writing and shall for each condition include, at a minimum:
  - (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.
- (e) Any denial of certification shall be in writing and shall include:
  - (1) The specific water quality requirements with which the proposed project will not comply;
  - (2) A statement explaining why the proposed project will not comply with the identified water quality requirements; and
  - (3) The specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements.
- (f) If the certifying authority determines that no water quality requirements are applicable to the waters receiving the discharge from the proposed project, the certifying authority shall grant or waive certification.

#### **§ 121.6 Effect of denial of certification.**

- (a) A certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part.
- (b) Where a Federal agency determines that a certifying authority's denial satisfies the requirements of Clean Water Act section 401 and §§121.3 and 121.5(e), the Federal agency must provide written notice of such determination to the certifying authority and project proponent, and the license or permit shall not be granted.
- (c) Where a Federal agency determines that a certifying authority's denial did not satisfy the requirements of Clean Water Act section 401 §§121.3 and 121.5(e), the Federal agency must provide written notice of such determination to the certifying authority and indicate which provision(s) of Clean Water Act section 401 and this part the certifying authority failed to satisfy.
  - (1) If the Federal agency receives the certifying authority's certification decision prior to the end of the reasonable period of time, the Federal agency may offer the certifying authority the opportunity to remedy the identified deficiencies in the remaining period of time.
  - (2) If the certifying authority does not provide a certification decision that satisfies the requirements of Clean Water Act section 401 and this part by the end of the reasonable period of time, the Federal agency shall treat the certification in a similar manner as waiver.

#### **§ 121.7 Waiver.**

- (a) The certification requirement for a license or permit shall be waived upon:

- (1) Written notification from the certifying authority to the project proponent and the Federal agency that it expressly waives its authority to act on a certification request;
  - or
- (2) The certifying authority's failure or refusal to act on a certification request.

(b) If the certifying authority fails or refuses to act, the Federal agency shall provide written notice to the Administrator, certifying agency, and project proponent that waiver has occurred. This notice must be in writing and include the notice that the Federal agency provided to the certifying authority pursuant to §121.4(c).

(c) A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain a certification.

(d) Upon issuance of a written notice of waiver, the Federal agency may issue the license or permit.

**§ 121.8 Incorporation of conditions into the license or permit.**

(a) All conditions that satisfy the definition of § 121.1(f) and meet the requirements of § 121.5(d) of this part shall be incorporated into the license or permit and shall be federally enforceable.

(1) If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f) of this part and meet the requirements of § 121.5(d) of this part, such condition shall not be incorporated into the license or permit. The Federal agency must provide written notice of such determination to the certifying authority and indicate which conditions are deficient and why they do not satisfy provisions of this part.

(2) If the Federal agency receives a certification with conditions that do not satisfy the definition of § 121.1(f) and the requirements of § 121.5(d) prior to the end of the reasonable period of time, the Federal agency may notify the certifying authority and provide an opportunity in the remaining period of time for the certifying authority to remedy the deficient conditions. If the certifying authority does not remedy the deficient conditions by the end of the reasonable period of time, the Federal agency shall not incorporate them in the license or permit.

(b) The license or permit must clearly identify any conditions that are based on the certification.

**§ 121.9 Enforcement and compliance of certification conditions.**

(a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the proposed discharge location for the purpose of determining if the discharge from the certified project will comply with the certification.

(b) If the certifying authority, after an inspection, determines that the discharge from the certified project will violate the certification, the certifying authority shall notify the project proponent and the Federal agency in writing, and recommend remedial measures necessary to bring the certified project into compliance with the certification.

(c) The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.

**Subpart C—Determination of Effect on Other States**

**§ 121.10 Determination of effects on neighboring jurisdictions.**

(a) Upon receipt of a federal license or permit application and the related certification, the Federal agency shall notify the Administrator.

(b) Within 30 days of receipt of the notice provided by the Federal agency, the Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction. In making this determination and in accordance with applicable law, the Administrator may request copies of the certification and the federal license or permit application.

(c) If the Administrator determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator shall notify the affected neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent, and the federal license or permit may not be issued pending the conclusion of the processes in this paragraph and paragraph (d) of this section.

(1) Notification from the Administrator shall be in writing, dated, identify the materials provided by the Federal agency, and inform the affected neighboring jurisdiction that it has 60 days to notify the Administrator and the Federal agency, in writing, whether it has determined that the discharge will violate any of its water quality requirements, object to the issuance of the federal license or permit, and request a public hearing from the Federal agency.

(2) Notification of objection from the neighboring jurisdiction shall be in writing, shall identify the receiving waters it determined will be affected by the discharge and the specific water quality requirements it determines will be violated by the certified project, and state whether the neighboring jurisdiction requests a hearing.

(d) If the affected neighboring jurisdiction requests a hearing in accordance with this paragraph, the Federal agency shall hold a public hearing on the affected neighboring jurisdiction's objection to the license or permit.

- (1) The Federal agency shall provide the hearing notice to the Administrator at least 30 days before the hearing takes place.
- (2) At the hearing, the Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.
- (3) The Federal agency shall consider recommendations from the neighboring jurisdiction and the Administrator, and any additional evidence presented to the Federal agency at the hearing and determine if additional conditions are necessary to assure that the discharge from the certified project will comply with water quality requirements.
- (4) If additional conditions cannot assure that the discharge from the certified project will comply with water quality requirements, the Federal agency shall not issue the license or permit.

#### **Subpart D—Certification by the Administrator**

##### **§ 121.11 When the Administrator certifies.**

- (a) Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements will be required where no state, tribe, or interstate agency has authority to give such a certification.
- (b) In taking action pursuant to this paragraph, the Administrator shall comply with the requirements of the Clean Water Act section 401 and this part.
- (c) For purposes of this subpart, the certifying authority is the Administrator.

##### **§ 121.12 Pre-request procedures.**

- (a) At least 30 days prior to submitting a certification request, the project proponent shall request a pre-filing meeting with the certifying authority.
- (b) The certifying authority shall timely grant the pre-filing meeting request or provide written notice to the project proponent that a pre-filing meeting is not necessary.
- (c) At the pre-filing meeting, the project proponent and the certifying authority shall discuss the nature of the proposed project and potential water quality effects. The project proponent shall provide a list of applicable state and federal licenses and permits and describe the anticipated timeline for construction and operation.
- (d) After the pre-filing meeting, the certifying authority shall contact the Federal agency and identify points of contact at each agency to facilitate information sharing throughout the certification process.

#### **§ 121.13 Request for additional information.**

- (a) The certifying authority shall have 30 days from receipt to request additional information from the project proponent.
- (b) The certifying authority shall only request additional information that is within the scope of certification and directly related to the discharge from the proposed project and its potential effect on the receiving waters.
- (c) The certifying authority shall only request information that can be collected or generated within the established reasonable period of time.
- (d) In any request for additional information, a certifying authority shall include a deadline for the project proponent to respond.
  - (1) Project proponents shall comply with deadlines established by the certifying authority.

(2) The deadline must allow sufficient time for the certifying authority to review the additional information and act on the certification request within the established reasonable period of time.

(e) Failure of a project proponent to timely provide the certifying authority with additional information does not modify the established reasonable period of time.

**§ 121.14 Notice and hearing.**

(a) Within 20 days of receipt of a certification request, the Administrator shall provide appropriate public notice of receipt of such request, including to parties known to be interested in the proposed project or the receiving waters into which the discharge may occur, such as tribal, state, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations.

(b) If the Administrator in his or her discretion determines that a public hearing is appropriate or necessary, the agency shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony in person or by other means at a public hearing

**Subpart E—Consultations**

**§ 121.15 Review and advice.**

(a) The Administrator may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases

and in specific circumstances concerning a discharge from a proposed project or a certified project.

(b) A certifying authority, Federal agency, or project proponent may request assistance from the Administrator to evaluate whether a condition is intended to address water quality effects from the discharge.



To: Summit County Council

From: Brian Hanton, District Director  
Megan Suhadolc, District Administrator

Date: October 4, 2019

Re: Intent to Increase 2020 Property Taxes

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In the early 1990s, the Snyderville Basin was caught up in what was referred to as a community recreation “crisis.” It developed over a period of time due to a combination of factors, which included tremendous residential growth in the Snyderville Basin, few planning tools to provide for public recreation facilities, and a lack of funding. To address the situation, the Snyderville Basin Special Recreation District (“District”) asked voters in 1995 to decide if they wanted to issue \$7.5 million in general obligation bonds for acquisition of land and construction of facilities and to levy a .0006 tax rate for operation and maintenance expenses. In a 3 to 1 vote, residents of the District approved the bond and tax levy and so began the development of the District we have today. Since then, District voters have approved another four general obligation bonds authorizing an additional \$66 million for parks, trails, recreation facilities, and recreational open space. Of these improvements, approximately 84% are non-revenue generating amenities which rely on the District’s operations and maintenance property tax levy to operate.

The last truth in taxation increase the District implemented was in 2004. At that time, District operations included 1 community park, 80 miles of trail, 66 acres of open space, and 19 full-time equivalent employees. Fifteen years later, the District now operates three community parks, 172 miles of trail, 2,200 acres of open space, owns 94 acres of land for park and recreation facility development, and has 52 full-time equivalent employees. The District has responsibly managed the additional operations within budget to the best of its ability, but has come to recognize the need for additional revenue to keep up with the demands of the active and growing community. With this increase in property tax revenue, the District will be able to maintain its current assets, replace aging assets, and prepare for future capital investments. Without additional revenue, the level of service the Snyderville Basin residents have come to expect and enjoy will decline.

The next steps to satisfy the requirements of Utah Code Section 59-2-919 are below, which will then enable the District to levy a tax rate that exceeds the certified tax rate.

**October 25, 2019:** Parcel specific notices detailing the impact of the proposed increase and the date, time, and place of the public hearing will be mailed to residents.

**November 20, 2019:** The District will notify the public with a newspaper advertisement in the Park Record and post on the Utah public notice website.

**November 27, 2019:** The District will notify the public with a second newspaper advertisement in the Park Record.

**December 4, 2019:** The District will hold a public hearing at 6:00pm, as part of the Summit County Council meeting, on the proposed property tax increase. A second public hearing will be held afterwards on the District's proposed 2020 budgets. Following each public hearing, the County Council may adopt resolutions accepting the property tax increase and the 2020 budgets.

Following this memo is a presentation explaining the District's intent to increase 2020 property taxes in the amount of \$2,379,231, which is a 72% increase in property tax revenue.

# Proposed 2020 Property Tax Increase

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**BASIN**  
RECREATION



The Snyderville Basin Special Recreation District intends to increase property taxes in the amount of \$2,379,231, which is a 72% increase. The purpose of the increase is to maintain current District assets, replace aging assets, and prepare for future capital investments.

This equates to an additional \$12.82 in property taxes per \$100,000 in market value.



# Why?

Without the increase:

- The capital replacement fund will be depleted by 2021
- The capital projects fund will be depleted by 2022
- Service levels the community has come to expect and enjoy will decline

- The last time the District went through truth in taxation was 2004.
- Since then, voters have authorized \$45 million in general obligation bonds. \$37 million of which was for trails, trailheads, and recreational open space.
- Trails and open space amenities are non-revenue generating items that require property tax revenue to maintain and operate.



# 15 Years of Growth

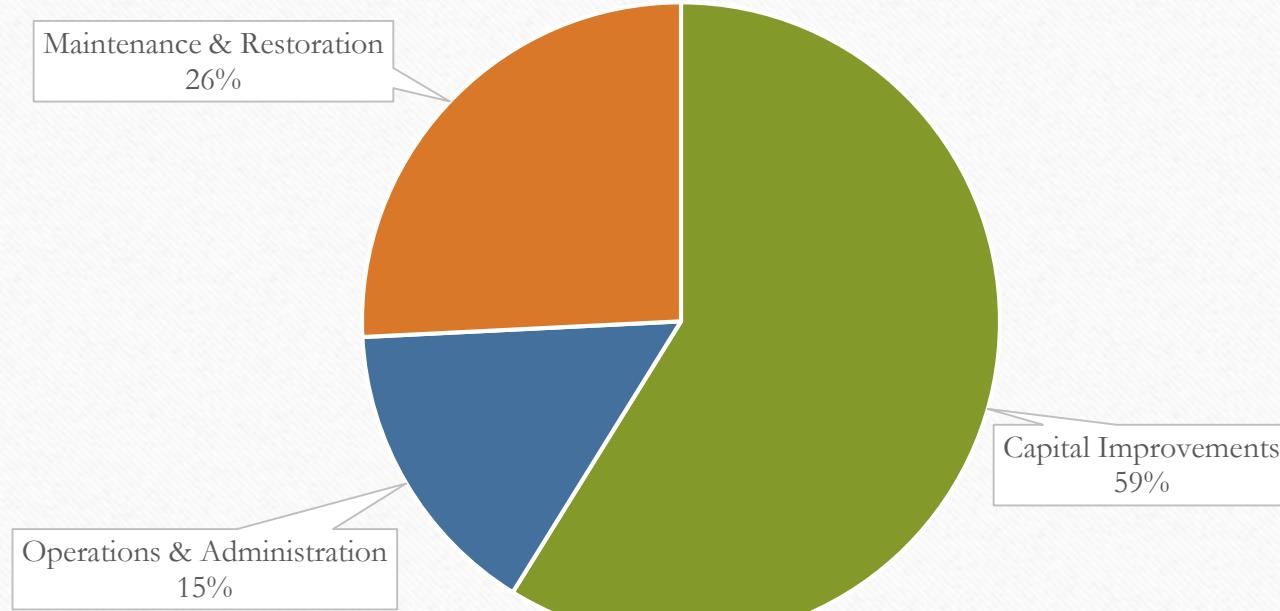
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Over the past 15 years, the District has added the following amenities  
(non-revenue generating amenities shown in red):

- 2,134 Acres of Recreational Open Space
- 92 Miles of Trail
- 17 Trailheads
- 12 Pavilions
- 8 Pickleball Courts
- 6 Tennis Courts
- 4 Multi-Purpose Fields
- 4 Dog Parks
- 3 Playgrounds
- 3 Fitness Class Areas
- 1 Basketball Court
- 1 Bike Park
- 1 Skate Park
- 1 Disc Golf Course
- 1 Gymnasium
- 1 Lap Pool
- 1 Splash Pad

# What will the additional revenue be used for?

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# Maintenance and Restoration

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- All the new amenities and assets added over the past 15 years have a cost to maintain, yet most do not produce revenue.
- Maintaining and restoring open space costs between \$200 to \$1,500 per acre, annually, depending on the property landscape and location. Assuming \$200 per acre, that is \$440,000 per year. The current annual budget is \$61,000.
- Maintenance of the District's trails and parking lots is necessary to prolong their life and prevent premature replacement costs.

# Operations and Administration

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- Staffing levels must increase to support the growing maintenance requirements of the District to ensure that facilities are safe and fully operational.
- The need for consultants has risen to assist with specialties required for proper open space management.
- The need for additional enforcement of regulations, along with education of trail and park use rules, has increased due to the growth of the District.

# Capital Replacement

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The District's assets are aging. \$4.6 million in replacement needs have been identified between 2020 and 2026.

Critical upcoming needs include:

- Playground replacement at Willow Creek Park - \$600,000
- Artificial turf field replacement at Matt Knoop Park - \$250,000
- Asphalt trail section replacement in Newpark and Trailside - \$210,000
- Indoor track replacement at the Fieldhouse - \$110,000

# Capital Projects

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- Community survey results show the residents want MORE of what we are providing, which costs money. Without pursuing another bond, the District must add to its Capital fund balance to allow for additional parks and trails development.
- Trailheads and trail development on Discovery and Gillmor/Triangle properties are estimated to cost \$2.4 million over the next three years.
- The District is constantly evaluating how to best serve all areas of the service area.

# DESIRED FACILITY IMPROVEMENTS

Residents would like to see more courts, swimming facilities and field space, especially those accessible in the winter.

Q

*What improvements, if any, would you like to see made to the [recreational facilities] in the Snyderville Basin or Park City area?*

MORE  
HOURS USE TRAILS ONLY ANOTHER  
WATER AREA FIELDS AVAILABILITY POOL  
SWIM TURF NETS LINES LANES YEAR  
PARK LARGER KIDS LIMITED SPORTS LIKE  
SPACE OUTDOOR OPEN TEAMS SOCCER PLAY  
BASIN FIELD HIGH PEOPLE LAP MAKE  
COURTS NEED ACCESS TIMES NEEDS LEISURE PICKLEBALL  
ONE WINTER ROUND  
TENNIS AREAS DESIGNATED  
INDOOR AVAILABLE

## Revenue-Neutral Tax Rate Formula

$$\frac{\text{Property Tax Revenue}}{\text{Taxable Property Value}} = \text{Tax Rate}$$

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New growth is the only way to increase property tax revenue without going through the truth in taxation process.

Revenue generated from new growth cannot sustain the expanding operations and future growth of the District.

# The District's Tax Rate

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- In 1995, residents approved a maximum property tax levy of .0006 to fund the operation of District facilities and programs.
- The tax rate has been decreasing since 2012.

The 2019 tax rate is:

**.000367 O & M**

.000434 Debt Service

.000801 Total Tax Rate

## Estimation of Proposed 2020 Tax Increase for Operations and Maintenance

| Average Market Value | Taxable Value (55%) | Current Year Tax Rate | Tax This Year | Estimated Tax Rate Next Year | Estimated Tax Next Year |
|----------------------|---------------------|-----------------------|---------------|------------------------------|-------------------------|
| \$793,000            | \$436,150           | 0.000367              | \$160.07      | 0.0006                       | \$261.69                |

The estimated increase on the average primary residence within the District is \$101.62 per year or **\$8.47 per month**.

This is a 64% increase to the property tax rate.

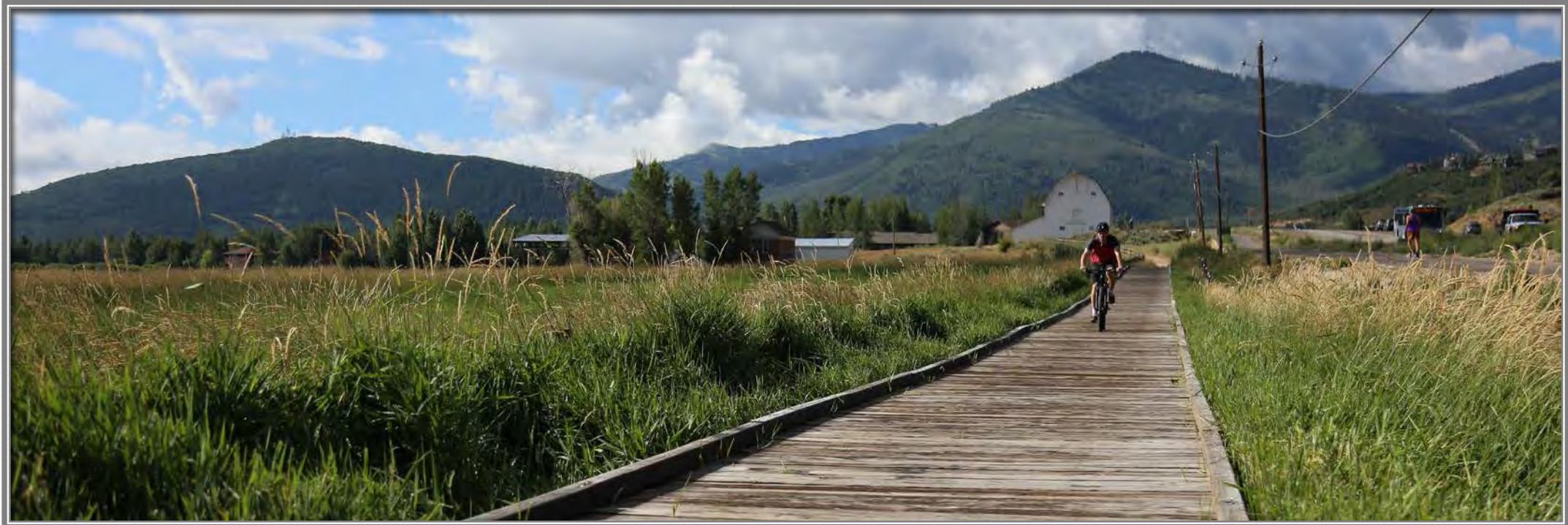
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## PUBLIC HEARING

Wednesday, December 4, 2019

Sheldon Richins Building

6:00 PM



Raising property taxes will allow the District to maintain current facilities and amenities at a level the community has come to expect, as well as prepare for future growth.



## What's Your Vision for Park City's Future?

Join us for a community conversation as part of the Park City Vision 2020 project, and share your ideas and perspective on future scenarios for Park City. This engaging, 90-minute Visioning Session will be a great opportunity to connect with your neighbors and learn more about trends and issues that may impact the future of our community. Learn more about Park City Vision 2020 [here](#).

**Wednesday, October 9  
6:00-7:30 p.m.  
Park City Christian Center (1283 Deer Valley Drive)**

*\*Carpooling or taking Park City Transit to the event is encouraged.*

*Pursuant to the Americans with Disabilities Act, individuals needing special accommodations during the event should contact Linda Jager at 435.615.5189 or [linda.jager@parkcity.org](mailto:linda.jager@parkcity.org) at least 24 hours prior to the event.*

For more information, contact:  
[linda.jager@parkcity.org](mailto:linda.jager@parkcity.org)  
435.615.5189