

along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:

(i) Functions to be assessed:

(A) Contribution of flow;

(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);

(C) Retention and attenuation of floodwaters and runoff;

(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or

(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;

(ii) Factors to be considered:

(A) The distance from a water identified in paragraph (a)(1) of this section;

(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;

(C) The size, density, or number of waters that have been determined to be similarly situated;

(D) Landscape position and geomorphology; and

(E) Climatological variables such as temperature, rainfall, and snowpack.

[88 FR 3143, Jan. 18, 2023]

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

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121.16 Review and advice.

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

SOURCE: 85 FR 42284, July 13, 2020, unless otherwise noted.

### Subpart A—General

#### § 121.1 Definitions.

(a) *Administrator* means the Administrator of the Environmental Protection Agency or an authorized representative.

(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 that satisfies the requirements of § 121.5(b) or (c).

(d) *Certified project* means a proposed project that has received a certification or for which the certification requirement has been waived.

(e) *Certifying authority* means the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.

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

(g) *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.

(h) *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.

(i) *Neighboring jurisdiction* 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.

(j) *Project proponent* means the applicant for a license or permit or the entity seeking certification.

(k) *Proposed project* means the activity or facility for which the project proponent has applied for a license or permit.

(l) *Reasonable period of time* means the time period during which a certifying authority may act on a certification request, established in accordance with § 121.6 of this part.

(m) *Receipt* means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.

(n) *Water quality requirements* means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.

### Subpart B—Certification Procedures

#### § 121.2 When certification is required.

Certification is required for any license or permit that authorizes an activity that may result in a discharge.

#### § 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 Pre-filing meeting request.

(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 is not obligated to grant or respond to the pre-filing meeting request.

(c) If the certifying authority grants the pre-filing meeting request, the project proponent and the certifying authority are encouraged to discuss the nature of the proposed project and potential water quality effects. The project proponent is encouraged to provide a list of other required state, interstate, tribal, territorial, and federal authorizations and to describe the anticipated timeline for construction and operation.

(d) After receiving the pre-filing meeting request, the certifying authority is encouraged to contact the Federal agency and to identify points of contact to facilitate information sharing between the certifying authority

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and Federal agency throughout the certification process.

### § 121.5 Certification request.

(a) A certification request shall be submitted to the certifying authority and to the Federal agency concurrently.

(b) A certification request for an individual license or permit shall:

(1) Identify the project proponent(s) and a point of contact;

(2) Identify the proposed project;

(3) Identify the applicable federal license or permit;

(4) Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;

(5) Include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;

(6) Include 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;

(7) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;

(8) Contain the following statement: *'The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief';* and

(9) Contain 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.'*

(c) A certification request for issuance of a general license or permit shall:

(1) Identify the project proponent(s) and a point of contact;

(2) Identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;

(3) Include the draft or proposed general license or permit;

(4) Estimate the number of discharges expected to be authorized by

the proposed general license or permit each year;

(5) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;

(6) Contain the following statement: *'The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief';* and

(7) Contain 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.'*

### § 121.6 Establishing the reasonable period of time.

(a) The Federal agency shall establish the reasonable period of time either categorically or on a case-by-case basis. In either event, the reasonable period of time shall not exceed one year from receipt.

(b) 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 date of receipt;

(2) The applicable reasonable period of time to act on 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.

(c) In establishing the reasonable period of time, the Federal agency shall consider:

(1) The complexity of the proposed project;

(2) The nature of any potential discharge; and

(3) The potential need for additional study or evaluation of water quality effects from the discharge.

(d) The Federal agency may extend the reasonable period of time at the request of a certifying authority or a project proponent, but in no case shall the reasonable period of time exceed one year from receipt.

(1) Any request by a certifying authority or project proponent to the

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Federal agency to extend the reasonable period of time shall be in writing.

(2) If the Federal agency agrees to extend the reasonable period of time, the Federal agency shall notify the certifying authority and project proponent in writing.

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

### § 121.7 Action on a certification request.

(a) Any action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification, must be completed within the reasonable period of time, and must otherwise be in accordance with section 401 of the Clean Water Act. Alternatively, a certifying authority may expressly waive certification.

(b) If the certifying authority determines that a discharge from a proposed project will comply with water quality requirements, it may issue or waive 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) For certification conditions on an individual license or permit,

(i) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and

(ii) A citation to federal, state, or tribal law that authorizes the condition.

(2) For certification conditions on issuance of a general license or permit,

(i) A statement explaining why the condition is necessary to assure that

any discharge authorized under the general license or permit will comply with water quality requirements; and

(ii) A citation to federal, state, or tribal law that authorizes the condition.

(e) Any denial of certification shall be in writing and shall include:

(1) For denial of certification for an individual license or permit,

(i) The specific water quality requirements with which the discharge will not comply;

(ii) A statement explaining why the discharge will not comply with the identified water quality requirements; and

(iii) If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.

(2) For denial of certification for issuance of a general license or permit,

(i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;

(ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and

(iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply 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 certification.

### § 121.8 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

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§ 121.7(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.

### § 121.9 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 the certifying authority 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, including:

(i) Failure or refusal to act on a certification request within the reasonable period of time;

(ii) Failure or refusal to satisfy the requirements of § 121.7(c);

(iii) Failure or refusal to satisfy the requirements of § 121.7(e); or

(iv) Failure or refusal to comply with other procedural requirements of section 401.

(b) A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to satisfy the requirements of § 121.7(d).

(c) If the certifying authority fails or refuses to act, as provided in this section, the Federal agency shall provide written notice to the Administrator, certifying authority, and project proponent that waiver of the certification requirement or condition has occurred. This notice must be in writing and include the notice that the Federal agency provided to the certifying authority pursuant to § 121.6(b).

(d) A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain certification.

(e) Upon issuance of a written notice of waiver, the Federal agency may issue the license or permit.

### § 121.10 Incorporation of certification conditions into the license or permit.

(a) All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.

(b) The license or permit must clearly identify any certification conditions.

### § 121.11 Enforcement of and compliance with certification conditions.

(a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the facility or activity for the purpose of determining whether the discharge from the certified project will violate the certification.

(b) If the certifying authority, after an inspection pursuant to subsection (a), 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—Other Jurisdictions

### § 121.12 Determination of effects on neighboring jurisdictions.

(a) A Federal agency shall within 5 days notify the Administrator when it receives a license or permit application and the related certification.

(b) Within 30 days after the Administrator receives notice in accordance with § 121.12(a), 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, within 30 days after receiving notice in accordance with § 121.12(a), shall notify that neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent. The federal license or permit may not

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be issued pending the conclusion of the processes in this paragraph.

(1) Notification from the Administrator shall: Be in writing, be dated, and identify the materials provided by the Federal agency. The notification shall inform the 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, to object to the issuance of the federal license or permit, and to request a public hearing from the Federal agency.

(2) Notification of objection and request for a hearing from the neighboring jurisdiction shall: Be in writing; identify the receiving waters it determined will be affected by the discharge; and identify the specific water quality requirements it determines will be violated by the certified project.

(3) If the neighboring jurisdiction requests a hearing in accordance with §121.12(c)(2), the Federal agency shall hold a public hearing on the neighboring jurisdiction's objection to the license or permit.

(i) The Federal agency shall provide the hearing notice to the Administrator at least 30 days before the hearing takes place.

(ii) At the hearing, the Administrator shall submit to the Federal agency his or her evaluation and recommendation(s) concerning the objection.

(iii) 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 whether additional certification conditions are necessary to assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements.

(iv) If additional certification conditions cannot assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements, the Federal agency shall not issue the license or permit.

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### Subpart D—Certification by the Administrator

#### § 121.13 When the Administrator certifies.

(a) Certification by the Administrator that the discharge from a proposed project will comply with water quality requirements is 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 Clean Water Act section 401 and 40 CFR part 121.

#### § 121.14 Request for additional information.

(a) If necessary, the Administrator may request additional information from the project proponent, provided that the initial request is made within 30 days of receipt.

(b) The Administrator shall request only additional information that is within the scope of certification and is directly related to the discharge from the proposed project and its potential effect on receiving waters.

(c) The Administrator shall request only information that can be collected or generated within the reasonable period of time.

(d) In any request for additional information, the Administrator shall include a deadline for the project proponent to respond.

(1) The project proponent shall comply with the deadline established by the Administrator.

(2) The deadline must allow sufficient time for the Administrator to review the additional information and to act on the certification request within the reasonable period of time.

(e) Failure of a project proponent to timely provide the Administrator with additional information does not extend the reasonable period of time or prevent the Administrator from taking action on a certification request.

#### § 121.15 Notice and hearing.

(a) Within 20 days of receipt, the Administrator shall provide appropriate public notice of receipt, including to parties known to be interested in the

proposed project or in the receiving waters into which the discharge may occur.

(b) If the Administrator in his or her discretion determines that a public hearing is appropriate or necessary, the EPA 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 the hearing.

**Subpart E—Consultations**

**§ 121.16 Review and advice.**

The Administrator may, and upon request shall, provide Federal agencies, certifying authorities, and project proponents with relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements.

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

**Subpart A—Definitions and General Program Requirements**

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- 122.1 Purpose and scope.
- 122.2 Definitions.
- 122.3 Exclusions.
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- 122.21 Application for a permit (applicable to State programs, see §123.25).
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- 122.25 Aquaculture projects (applicable to State NPDES programs, see §123.25).
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- 122.38 Public notification requirements for CSO discharges to the Great Lakes Basin.

**Subpart C—Permit Conditions**

- 122.41 Conditions applicable to all permits (applicable to State programs, see §123.25).
- 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see §123.25).
- 122.43 Establishing permit conditions (applicable to State programs, see §123.25).
- 122.44 Establishing limitations, standards and other permit conditions (applicable to State NPDES programs, see §123.25).
- 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see §123.25).
- 122.46 Duration of permits (applicable to State programs, see §123.25).
- 122.47 Schedules of compliance.
- 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see §123.25).
- 122.49 Considerations under Federal law.
- 122.50 Disposal of pollutants into wells, into publicly owned treatment works or by land application (applicable to State NPDES programs, see §123.25).

**Subpart D—Transfer, Modification, Revocation and Reissuance, and Termination of Permits**

- 122.61 Transfer of permits (applicable to State programs, see §123.25).