

swamps, marshes, bogs, and similar areas.

(2) *Adjacent* means having a continuous surface connection.

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum 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.

[88 FR 3143, Jan. 18, 2023, as amended at 88 FR 61969, Sept. 8, 2023]

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

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Subpart A—General

§ 121.1 Definitions.

As used in this part, the following terms shall have the meanings indicated:

(a) *Administrator* means the Administrator, Environmental Protection Agency (EPA).

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

(c) *Federal agency* means any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401.

(d) *Federal Indian Reservation, Indian reservation, or reservation* means all land within the limits of any Indian

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reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(e) *Indian Tribe* or *Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation.

(f) *License* or *permit* means any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United States.

(g) *Neighboring jurisdiction* means any state, or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.

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

(i) *Regional Administrator* means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(j) *Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.

§ 121.2 When certification is required.

Certification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.

§ 121.3 Scope of certification.

(a) When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, includ-

ing the activity's construction and operation.

(b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.

§ 121.4 Pre-filing meeting requests.

The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request.

§ 121.5 Request for certification.

(a) Where a project proponent is seeking certification from any certifying authority, the request for certification shall include the following minimum contents:

(1) If the request for certification is for an individual Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the Federal license or permit application submitted to the Federal agency; and

(ii) Any readily available water quality-related materials that informed the development of the application.

(2) If the request for certification is for the issuance of a general Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the draft Federal license or permit; and

(ii) Any readily available water quality-related materials that informed the development of the draft Federal license or permit.

(b) Where a project proponent is seeking certification from the Regional Administrator, if not already included in the request for certification in accordance with paragraph (a) of this section, a request for certification shall also include the following, as applicable:

(1) A description of the proposed activity, including the purpose of the

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proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

(2) The specific location of any discharge(s) that may result from the proposed activity;

(3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

(4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

(5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;

(6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

(7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

(c) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.

(d) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified in paragraph (b) of this section.

§ 121.6 Reasonable period of time.

(a) The reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in §121.5, in accordance with the certifying authority's applicable submission procedures. The certifying authority shall send written confirmation to the project proponent and Federal agency of the date that the request for certification was received.

(b) The Federal agency and the certifying authority may jointly agree in writing to the reasonable period of time for the certifying authority to act on the request for certification, provided the reasonable period of time does not exceed one year from the date that the request for certification was received. Such written agreements may establish categorical reasonable periods of time.

(c) If the Federal agency and the certifying authority do not agree in writing on the length of the reasonable period of time, the reasonable period of time shall be six months.

(d) If a longer period of time is necessary to accommodate the certifying authority's public notice procedures or force majeure events (including, but not limited to, government closure or natural disasters), upon written notification by the certifying authority to the Federal agency prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by public notice procedures or the force majeure event. In such written notification to the Federal agency, the certifying authority shall identify how much additional time is required and provide a justification for such extension. Such an extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

(e) The Federal agency and certifying authority may agree in writing to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

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§ 121.7 Certification decisions.

(a) A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

(b) A certifying authority shall act on a request for certification within the scope of certification and within the reasonable period of time.

(c) A grant of certification shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the activity will comply with water quality requirements; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(d) A grant of certification with conditions shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification with conditions;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(e) A denial of certification shall be in writing and should include the following:

(1) Identification of the decision as a denial of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why the certifying authority cannot certify that the activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(f) An express waiver shall be in writing and should include the following:

(1) Identification of the decision as an express waiver of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the certifying authority expressly waives its authority to act on the request for certification; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(g) If the certifying authority determines that no water quality requirements are applicable to the activity, the certifying authority shall grant certification.

§ 121.8 Extent of Federal agency review.

To the extent a Federal agency verifies compliance with the requirements of Clean Water Act section 401, its review is limited to whether: the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.

§ 121.9 Failure or refusal to act.

(a) The certification requirement shall be waived only if a certifying authority fails or refuses to act on a request for certification within the reasonable period of time.

(b) If the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived in accordance with § 121.8. Such notice shall satisfy the project proponent's requirement to obtain certification.

§ 121.10 Modification to a grant of certification.

(a) Provided that the Federal agency and the certifying authority agree in writing that the certifying authority

may modify a grant of certification (with or without conditions), the certifying authority may modify only the agreed-upon portions of the certification. The certifying authority is not required to obtain the Federal agency's agreement on the language of the modification.

(b) The certifying authority shall not, through a modification pursuant to paragraph (a) of this section:

(1) Revoke a grant of certification (with or without conditions); or

(2) Change a grant of certification (with or without conditions) into a denial or waiver of certification.

§ 121.11 Requirements for Indian Tribes to administer a water quality certification program.

(a) The Regional Administrator may accept and approve a Tribal application for purposes of administering a water quality certification program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 121.1(d) and (e);

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(3) The water quality certification program to be administered by the Indian Tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality certification program in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations in this chapter.

(b) Requests by an Indian Tribe for administration of a water quality certification program should be submitted to the appropriate EPA Regional Administrator. The application shall in-

clude the following information, provided that where the Tribe has previously qualified for eligibility or "treatment as a state" under another EPA-administered program, the Tribe need only provide the required information that has not been submitted in a previous application:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; and

(ii) A statement by the Tribe's legal counsel or equivalent official that describes the basis for the Tribe's assertion of authority and may include copies of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality certification program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience that may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et*

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seq.), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and implementing a water quality certification program; and

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality certification program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(c) The procedure for processing a Tribe's application is as follows:

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to paragraph (b) of this section in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

(2) Except as provided in paragraph (c)(4) of this section, within 30 days after receipt of the Tribe's application, the Regional Administrator shall provide appropriate notice. The notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters;

(ii) Be provided to all appropriate governmental entities; and

(iii) Provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(3) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of paragraph (a)(3) of this section.

(4) Where, after November 27, 2023, EPA has determined that a Tribe qualifies for treatment in a similar manner as a state for the Clean Water Act section 303(c) Water Quality Standards Program, Clean Water Act section 303(d) Impaired Water Listing and Total Maximum Daily Loads Program, Clean Water Act section 402 National Pollutant Discharge Elimination System Program, or Clean Water Act section 404 Dredge and Fill Permit Program, and has provided notice and an opportunity to comment on the Tribe's assertion of authority to appropriate governmental entities as part of its review of the Tribe's prior application, no further notice to governmental entities, as described in paragraph (c)(2) of this section, shall be provided with regard to the same Tribe's application for the water quality certification program, unless the application presents to the EPA Regional Administrator different jurisdictional issues or significant new factual or legal information relevant to jurisdiction.

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, they shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the water quality certification program.

(d) An Indian Tribe may submit a Tribal application for purposes of administering only the Clean Water Act section 401(a)(2) portion of a water quality certification program.

Subpart B—Neighboring Jurisdictions

§ 121.12 Notification to the Regional Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for

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a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.

(1) The notification shall include a copy of the certification or waiver and the application for the Federal license or permit.

(2) The notification shall also contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (*e.g.*, latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification.

(b) If the Regional Administrator determines there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to Clean Water Act section 401(a)(2), the Regional Administrator may make a written request to the Federal agency that such information be provided in a timely manner for EPA's determination, and the Federal agency shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe.

(c) The Regional Administrator may enter into an agreement with a Federal agency regarding the manner of this notification process and the provision of supplemental information.

§ 121.13 Determination of effects on neighboring jurisdictions.

(a) Within 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the project may affect water quality in a neighboring jurisdiction.

(b) If the Regional Administrator determines that the discharge from the project may affect water quality in a neighboring jurisdiction, within 30 days after receiving notice in accordance with § 121.12(a), the Regional Ad-

ministrator shall notify the neighboring jurisdiction, the Federal agency, and the project proponent in accordance with paragraph (c) of this section.

(c) Notification from the Regional Administrator shall be in writing and shall include:

(1) A statement that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality;

(2) A copy of the Federal license or permit application and related certification or waiver; and

(3) A statement that the neighboring jurisdiction has 60 days after such notification to notify the Regional Administrator and the Federal agency, in writing, if 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.

(d) A Federal license or permit shall not be issued pending the conclusion of the process described in this section, and §§ 121.14 and 121.15.

§ 121.14 Objection from notified neighboring jurisdiction and request for a public hearing.

(a) If a neighboring jurisdiction notified by the Regional Administrator pursuant to § 121.13(b) determines that a discharge from the project will violate any of its water quality requirements, it shall notify the Regional Administrator and the Federal agency in accordance with paragraph (b) of this section within 60 days after receiving such notice from the Regional Administrator.

(b) Notification from the notified neighboring jurisdiction shall be in writing and shall include:

(1) A statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of

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those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on the notified neighboring jurisdiction's objection.

(c) The notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.

§ 121.15 Public hearing and Federal agency evaluation of objection.

(a) Upon a request for hearing from a notified neighboring jurisdiction in accordance with § 121.14(b), the Federal agency shall hold a public hearing on the notified neighboring jurisdiction's objection to the Federal license or permit, unless the objection is withdrawn in accordance with § 121.14(c).

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.

(c) At the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the notified neighboring jurisdiction and the Regional Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional Federal license or permit conditions may be necessary to ensure that any discharge from the project will comply with the neighboring jurisdiction's water quality requirements. If such conditions may be necessary, the Federal agency shall include them in the Federal license or permit.

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

Subpart C—Certification by the Administrator

§ 121.16 When the Administrator certifies.

(a) Certification or waiver by the Administrator is required where no state, Tribe, or interstate agency has authority to give such a certification.

(b) When acting pursuant to this section, the Administrator shall comply with the requirements of Clean Water Act section 401 and this part.

§ 121.17 Public notice and hearing.

(a) Within 20 days of the date that the request for certification was received, the Administrator shall provide public notice of the request for certification. Following such public notice, the Administrator shall provide an opportunity for public comment.

(b) If the Administrator determines that a public hearing on a request for certification is appropriate, the Administrator shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means.

Subpart D—Review and Advice

§ 121.18 Review and advice.

Upon the request of any Federal agency, certifying authority, or project proponent, the Administrator shall provide any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Subpart E—Severability

§ 121.19 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.