



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NOV 13 2019

OFFICE OF WATER

MEMORANDUM

SUBJECT: Process for Obtaining Clean Water Act Section 401 Certification for EPA-issued NPDES Permits

FROM: David P. Ross
Assistant Administrator

A handwritten signature in blue ink, appearing to read "D. Ross", is written over the printed name of David P. Ross.

TO: Regional Administrators, Regions 1-10

CC: Regional Water Division Directors

The Environmental Protection Agency (EPA) is responsible for issuing National Pollutant Discharge Elimination System (NPDES) permits in certain portions of the country. Those permits are subject to Clean Water Act (CWA) Section 401 certification. Under CWA Section 401, a federal agency may not issue a permit or license that may result in any discharge into waters of the United States unless the state or authorized tribe where the discharge would originate certifies pursuant to CWA Section 401 that the discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the CWA or waives its opportunity to certify. In issuing a CWA Section 401 certification, the statute authorizes states and authorized tribes to include conditions in a certification that are necessary to ensure that the federally permitted activity will comply with appropriate provisions of Sections 301, 302, 306, and 307 of the CWA, and with any other appropriate requirement of state law.^{1 2} Certification conditions become a condition of the federal license or permit.³ These statutory requirements are also reflected in the EPA's regulations at 40 CFR Parts 121 and 124.⁴

The EPA's Office of Water recognizes that early collaboration between states and authorized tribes for permitting programs subject to CWA Section 401 certification can be an essential component of streamlining the issuance of permits in those programs. However, it is vital that well-intended collaboration does not result in the loss of clarity and transparency in our federal permitting process.

¹ 33 U.S.C. § 1341(d).

² CWA Section 401(a)(1) includes reference to CWA Section 303 in its list of statutory references, while Section 401(d) does not.

³ *Id.*

⁴ The EPA is currently undertaking an effort to update the agency's 40 CFR Part 121 regulations and the agency expects any modification to be consistent with the language of CWA Section 401.

For EPA-issued permits that authorize discharges into navigable waters, the Office of Water expects that the EPA's Regional water programs will follow appropriate and transparent procedures when working with states and authorized tribes to secure necessary CWA Section 401 certifications or waivers. This includes ensuring that the certifying state or authorized tribe provides a written certification to the EPA with all of the contents required by 40 CFR Parts 121 and 124, including any conditions that are necessary to assure compliance with the CWA within the applicable timeframes. All EPA-issued permits and supporting documents must clearly identify which permit conditions are based on the CWA Section 401 certification. These processes will ensure that the permittee, state/authorized tribe, and the general public clearly understand the source and legal authority for each condition in an EPA-issued permit. Additionally, if a dispute arises over the imposition or legal basis for a certain condition, all interested parties can easily identify the proper agency to engage with and the proper venue within which to seek relief.

Thank you for your efforts to streamline permitting throughout our programs, and for your dedication to clearing permitting backlogs and improving the efficiency of federal decision-making. The Office of Water asks that you reinforce these efforts to ensure transparency and accountability in the CWA Section 401 certification process for EPA-issued permits. If you have any questions regarding this directive, please contact Anna Wildeman, Principal Deputy Assistant Administrator, at (202) 564-1812.

cc: Regional Water Division Directors