



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF WATER

**MEMORANDUM**

**SUBJECT:** CWA Section 401 NPDES Implementation

**FROM:** Anna Wildeman  
Acting Assistant Administrator

**TO:** Water Division Directors  
Regions 1 – 10

This memorandum serves as a follow-up to the Office of Water’s November 2019 memorandum entitled “Process for Obtaining Clean Water Act Section 401 Certification for EPA-issued NPDES Permits” (November 2019 Memo). In July, the Agency updated the CWA Section 401 certification regulations at 40 C.F.R. Part 121. 85 Fed. Reg. 42210 (July 13, 2020) (“2020 rule”).

The purpose of this memo is to provide the Regional water offices with best practices for requesting and receiving Clean Water Act (CWA) Section 401 certifications for EPA-issued National Pollutant Discharge Elimination System (NPDES) permits consistent with the CWA and applicable regulations. This will assist the Regions in streamlining and maximizing efficiencies in this critical step of the NPDES permit issuance process, which will ultimately increase clarity and transparency in federal NPDES permitting.

EPA’s updated Part 121 certification regulations became effective on September 11, 2020. EPA also has existing regulations, promulgated at 40 C.F.R. Part 124, addressing how 401 certification applies to the CWA section 402 NPDES program. This memo clarifies that the Agency’s goal is to give effect to both regulations—Part 121 and Part 124—to the extent possible. Where the two regulations do not conflict and can be read harmoniously, EPA staff is expected to comply with both. In the limited circumstances where a conflict exists between the two regulations, EPA staff should apply the more specific Part 124 procedures.

This memo addresses some of the more significant procedural aspects of CWA Section 401 certification that appear in the Part 121 or Part 124 regulations. For questions on issues not addressed in this memorandum regarding the interplay between the Part 121 regulations and Part 124 regulations, please reach out to the Office of Water.

## Requesting Certification for an EPA-Issued NPDES Permit

**Project Proponent:** For NPDES permits issued by EPA, the Part 124 regulations establish that EPA is to request certification from states or tribes. This is somewhat unique, as other federal license and permit programs generally require the applicant or the project proponent to request certification.

The Part 124 regulations provide two processes for EPA to request certification from states and tribes: at the time the permit application is received, and at the time the draft permit is prepared by EPA. 40 C.F.R. § 124.53. In both cases, when EPA is requesting and receiving certification for individual and general NPDES permits, EPA falls within the definition of a “project proponent” under the 2020 rule and is responsible for fulfilling the obligations of a project proponent under Part 121 insofar as they supplement EPA’s requirements under the Part 124 regulations. *See* 40 C.F.R. § 121.1(j) (defining “project proponent”).

**Pre-filing meetings:** Part 124 does not contain any procedure or provision for pre-filing coordination. However, as a “project proponent” under the 2020 rule, EPA is responsible for requesting a pre-filing meeting and submitting a certification request to the appropriate state or tribal certifying authority. *See* 40 C.F.R. § 121.4. A pre-filing meeting request must be submitted to the certifying authority *at least* 30 days prior to the date EPA plans to submit the certification request. *See id.* § 121.4(a). As described in the November 2019 Memo, the Office of Water recognizes that early collaboration between EPA and the certifying authority can be an important component of streamlining the process for NPDES permit issuance. Although states and tribes are not obligated to respond to or grant the request, the pre-filing meeting request provides advance notification to the certifying authority that a certification request may be forthcoming and therefore promotes early coordination, even when the certifying authority does not hold a pre-filing meeting. It is recommended that EPA submit the pre-filing meeting request in writing, both to provide transparency for interested stakeholders and to ensure proper documentation is available to be submitted with the certification request. Consistent with Part 121, Regions may submit the certification request 30 days after submitting the pre-filing meeting request. *See id.*

**Certification requests:** Parts 124 and 121 both include requirements for a certification request. Section 124.53(c) requires that a certification request include the draft permit. Section 121.5 includes an enumerated list of documents and information that must be included in a certification request for an individual license or permit and another similar list for general licenses or permits. Pursuant to section 121.5, a certification request must include all components to start the reasonable period of time within which a certifying authority must act on a certification request. The certification request provisions in Part 124 and 121 are not in conflict, but rather are complementary and EPA should comply with both.

For individual permits, a certification request must include specific information, much of which is likely to be included in a draft permit. *See* 40 C.F.R. § 121.5(b). For instance, the draft permit will identify the proposed project, the applicable federal permit, the location and nature of any potential discharge, the location of receiving waters, and a description of the measures planned to manage/control and monitor the discharge(s). Therefore, as long as the Region’s certification request includes the draft permit, there may be no need to separately provide this information to the certifying authority. Section 121.5(b)(6) of the 2020 rule requires project proponents to identify other authorizations, including approvals and denials, for the project by other federal, interstate, tribal, state, territorial, and local agencies. Although EPA is the “project proponent” for purposes of requesting and receiving certification for EPA-issued NPDES permits, the Agency may not have this information available to it. Regions should make every effort to obtain this information from the permittee and provide it as part of a certification request.

For general permits, both Section 124.53(c) and Section 121.5(c) require the draft general permit be included in a certification request. Other substantive information required by 40 C.F.R. § 121.5(c) (the project proponent, a point of contact, and the proposed categories of activities to be authorized) would be identified in the draft NPDES general permit; therefore, so long as the Region’s certification request includes the draft general permit, there may be no need to separately provide this information as part of the certification request. The 2020 rule does require certification requests for general permits to include an estimate of the number of discharges expected to be authorized by the permit each year. *See Id.* § 121.5(c). To be consistent with the 2020 rule, Regions should provide certifying authorities with information developed to support the general permit, including relevant portions of an economic analysis or other record material that provides the Agency’s best estimate of the number of discharges that may be authorized each year under the general permit.

All certification requests must include documentation that EPA submitted a pre-filing meeting request to the certifying authority. *See Id.* § 121.5(b)(7)&(c)(5).

**Reasonable period of time:** The 2020 rule specifies that the federal permitting agency establishes the “reasonable period of time” for state/tribal certification. 40 C.F.R. § 121.6. For EPA-issued NPDES permits the requirements at 40 C.F.R. § 124.53(c)(3) and § 124.53(d) provide the framework for determining the reasonable period of time and communicating with the certifying authority. Pursuant to these provisions, the certification request must clearly articulate the reasonable period of time, not to exceed 60 days, in which certification on the draft permit must be received. EPA’s regulations also require that a certification request include a statement that the certifying authority will be deemed to have waived its right to certify unless exercised within that time period. 40 C.F.R. § 124.53(c)(3). These regulatory requirements provide clarity and certainty to the certifying authority, the permittee, and interested parties about the specified reasonable period of time for certification. Regions must continue to comply with these provisions and should also specify the date on which the reasonable period of time ends, which would be both consistent with the requirements of 40 C.F.R. § 121.6(b) and a means of ensuring clarity.

The Part 124 regulations also allow for a longer reasonable period of time if the Regional Administrator finds that “unusual circumstances” warrant a reasonable period of time longer than 60 days. 40 C.F.R. § 124.53(c)(3). Importantly, even in “unusual circumstances,” the reasonable period of time may not exceed one year under CWA Section 401(a)(1). *See also* 40 C.F.R. § 121.6(d). The request and EPA’s determination of any extensions must be in writing. *See* 40 C.F.R. § 121.6(d). To help ensure that the certification program is being implemented consistently on a national basis, if a certifying authority requests an extension of the reasonable period of time, EPA recommends that Regions provide the Office of Water with the request and accompanying rationale prior to granting or denying the request. EPA recommends that the request and determination be documented in the record for the permit. If the reasonable period of time has expired and no certification is received, the waiver of the right to certify should also be documented by EPA in the record for the permit to provide transparency for the permittee and the general public. Additionally, in cases where the reasonable period of time has expired and no certification has been received, the 2020 rule requires EPA to promptly notify the certifying authority and the permit applicant that waiver has occurred. *See Id.* § 121.9(c).

### EPA as the Certifying Authority

When a tribe does not have Treatment as a State (TAS) for CWA Section 401 or Section 402 NPDES permits issued for discharges to Tribal waters, EPA is the certifying authority for the NPDES permit as well as the federal agency issuing the permit. In such cases the Regions must provide or waive

certification before the permit may be issued. *See Id.* § 121.7. When a Region certifies an EPA-issued NPDES permit, the certification action must comply with the requirements in Part 121. When taking a certification action, EPA Regions should use the certification templates for Section 401 certification for 402 permits (see attachments). It is recommended that documentation of the final certification action be included in the permit fact sheet or statement of basis, or in a memo to the file.

#### Implementation of Section 401(a)(2) of the CWA

To comply with CWA Section 401(a)(2) for EPA-issued and/or EPA-certified NPDES permits, EPA Regions should follow the same protocols as are recommended for any other federal license or permit, as discussed in the document titled “Best Practices for EPA’s Implementation of Clean Water Act Section 401(a)(2).”

#### Incorporation of Certification Conditions into the Final NPDES Permit

When a timely certification is received, and the certification and any conditions comply with the procedural requirements in Part 124 and Part 121, the conditions must be incorporated into the final permit before it is issued. *See* 40 C.F.R. § 124.55(a)(2); *see also* 40 C.F.R. § 121.10(a). EPA’s longstanding Part 124 regulations require that, for each more stringent condition that a certifying authority seeks to impose, the certifying authority must provide a citation to the CWA or state law references upon which that condition is based. *Id.* This is generally consistent with the 2020 rule, which requires a citation to support all conditions included in a certification. *See* 40 C.F.R. § 121.7(d). If a certification includes conditions without the required citations, the state will be considered to have waived its right to certify with respect to that condition, and the condition will not be incorporated into the final permit. 40 C.F.R. § 124.53(e)(2). This is also generally consistent with the 2020 rule. *See* 40 C.F.R. § 121.9(b). The procedural requirements for certifications and conditions in Part 124 and Part 121 are generally not in conflict, but rather are complementary and EPA should generally comply with both.

As outlined in the November 2019 Memo (attached), it is recommended that the final NPDES permit and its supporting documentation clearly identify which permit provisions are based on a water quality certification. For example, the permit provision that incorporates the certification condition could have an asterisk with a footnote stating that the condition was included because it is a condition of the Section 401 certification.

#### Attachments:

Memorandum from David Ross to Regional Administrators, *Process for Obtaining Clean Water Act Section 401 Certification for EPA-issued NPDES Permits*, November 13, 2019.

“Best Practices for EPA’s Implementation of Clean Water Act Section 401(a)(2)”

“Example of a Grant of Certification Without Conditions when EPA is the Certifying Authority (for 402 permits)”