



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

NOV 21 2018

OFFICE OF WATER

MEMORANDUM

SUBJECT: National Water Program Policy on Use of Clean Water Act Section 308 Letters Issued to Nine or Fewer Entities to Support CWA Program Implementation

FROM: David P. Ross
Assistant Administrator

A handwritten signature in blue ink that reads "D Ross".

TO: OW Office Directors
EPA Regional Administrators
EPA Deputy Regional Administrators
EPA Regional Water Division Directors

Information requests under Clean Water Act (CWA) section 308 are one of several important tools the EPA uses to obtain necessary and appropriate information to make regulatory decisions. The attached National Water Program Policy on Use of Clean Water Act Section 308 Letters Issued to Nine or Fewer Entities to Support CWA Program Implementation addresses how and when the Office of Water and the EPA's Regional Water Divisions will use the EPA's authority under CWA section 308 to collect information from nine or fewer individuals or entities to support regulatory decision making. The goal is to obtain the required information through a collaborative process that will enhance engagement and reduce unnecessary burden to the regulated community when responding to such requests.

To ensure appropriate use of the EPA's information gathering authority, the Office of Water is implementing the attached procedures for rulemaking and other purposes not related to compliance and enforcement. These procedures require significant and early engagement with any potential recipient prior to sending a CWA section 308 letter from either the Office of Water or Regional Water Divisions. These efforts should clearly identify what information the EPA seeks and why the information is required, and should allow the recipients an opportunity to discuss issues and difficulties that may arise in providing the requested information.

Effective immediately, the Office of Water or Regional senior management review is required prior to sending CWA section 308 letters subject to this Policy. If letters are sent to more than five individuals or entities, the Principal Deputy Assistant Administrator for Water or the Deputy Regional Administrator must review and approve the letters before issuance. The appropriate Office Director in the Office of Water or the Regional Water Division Director must review and approve letters issued to five or fewer persons.

Thank you for your assistance in implementing this policy directive. If you have any questions, please contact me or Macara Lousberg, Director of the Water Policy Staff at (202) 564-5576 or lousberg.macara@epa.gov.

Attachment

cc: Susan Bodine, Assistant Administrator, OECA
Matthew Z. Leopold, General Counsel, OGC
Benita Best-Wong
Lee Forsgren
Anna Wildeman
Regional General Counsels

National Water Program Policy
Use of Clean Water Act § 308 Letters Issued to Nine or Fewer Entities
to Support CWA Program Implementation
Effective date: November 21, 2018

I. Purpose and Applicability

This policy outlines the process that the U.S. Environmental Protection Agency's Office of Water and the Regional Water Divisions will follow in approving Clean Water Act (CWA) § 308 letters in the National Water Program. To ensure careful consideration regarding the EPA's use of its information gathering authorities to support CWA program implementation, the following procedures are effective immediately and must be followed before issuance of any CWA § 308 letters to nine or fewer entities by the Office of Water and the Regional Water Divisions.

This policy does not apply to information collection requests (ICRs) that are approved by the Office of Management and Budget (OMB), or to follow-up letters requesting information from any person in the event the person has failed to provide information otherwise required by law (e.g., pollutant effluent data or information required by a National Pollutant Discharge Elimination System permit condition).

The Office of Enforcement and Compliance Assurance and the EPA Regional Enforcement Offices also issue information requests under CWA § 308 to determine compliance. This policy does not apply to CWA information requests issued by enforcement or compliance assurance staff.

This memorandum has been developed for EPA employees and is intended solely for internal management purposes. It does not create any rights, substantive or procedural, enforceable at law. The EPA may periodically revise this memorandum to make improvements and/or to reflect changes in the EPA policy. The EPA reserves the right to act at variance with this procedure. Varying from this procedure does not disqualify information obtained for any purpose.

II. Background

The Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501 et seq., establishes procedural requirements for agencies that want to collect information from the public. The PRA authorizes the Office of Information and Regulatory Affairs (OIRA) within OMB to oversee Federal agencies' collection of information. The PRA defines information collection that is subject to its requirements to include "answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons."¹ The PRA defines the term "persons" to include individuals and entities such as partnerships, associations, corporations, groups, and any element of a state or local government.² In addition, OMB has defined "ten or more persons" as including "any independent entities to which the initial addressee may

¹ The PRA does not apply to the collection of information during the conduct of an agency's administrative action or investigation involving potential violations by specific individuals or entities. This exemption "applies during the entire course of the investigation, audit, or action, whether before or after formal charges or complaints are filed or formal administrative action is initiated, but only after a case file or equivalent is opened with respect to a particular party." 5 C.F.R. § 1320.4(c).

² 44 U.S.C. § 3502(10).

reasonably be expected to transmit the collection during [a 12-month period], including ... separately incorporated subsidiaries and affiliates.”³ Corporations may often include several subsidiary operations within the corporate umbrella. Whether a corporation and its subsidiaries count as one person depends on that corporation’s structure. For instance, if each subsidiary is separately incorporated, then each counts as one person. If, however, each subsidiary is wholly owned by one corporation, then the information collection request is sent to one person.

This policy will help ensure that the Office of Water and the EPA Regional Water Divisions comply with the principles articulated in the PRA when issuing CWA § 308 letters for regulatory purposes, particularly to multiple entities or corporations with multiple subsidiaries or facilities. In addition, collecting information in response to a CWA § 308 letter usually requires a significant expenditure of time, financial resources, and effort by affected entities. One of the primary goals of the PRA is to minimize the burden of Federal paperwork on the public.⁴ Burden is broadly defined to include all “time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency.”⁵ This policy will help ensure that the Office of Water and the EPA Regional Water Divisions carefully exercise the broad information collection authority under the CWA by requiring the development of narrowly tailored information requests designed to obtain only the information required to make regulatory decisions while keeping in mind the time, effort, and financial resources required to provide that information to the Federal government.

III. Guidelines for Drafting CWA § 308 Letters

CWA § 308 letters should be narrowly tailored to request only the information relevant for the intended regulatory action. The letters should refrain from using language requiring “any” and “all” information in the absence of qualifiers to be clear as to the scope of what the EPA is requesting from the recipients. The letters should also avoid the overbroad, formulaic tone more commonly used in litigation discovery procedures.

When considering what information to request, the EPA should factor in the availability of information from other EPA offices and information that the Agency may already have. This may include general facility information such as ownership or geographic data, financial information, similarly broad demographic data, or extensive compliance history information.

The EPA should recognize that information requested by CWA § 308 letters may not be readily available, stored onsite, or available in formats that can be easily reproduced by the recipients. Many regulated entities do not have dedicated information management staff or document custodians, and such entities may have to pull staff from normal business operations or hire contractors to respond to CWA § 308 letters. Letters should therefore be clear that the EPA is not requiring information to be aggregated in any particular format, and that information can be submitted in its existing form. Circumstances may arise, however, when the EPA needs information in a form that is not typical for a company’s normal course of business or is not readily available. In such instances, the EPA should work with the recipient to facilitate

³ 5 C.F.R. § 1320.3(c)(4).

⁴ The “public” includes individuals, partnerships, corporations, universities, nonprofit organizations, State, local, and tribal governments and agencies, and other associations and organizations, whether foreign or domestic. See Paperwork Reduction Act (PRA) Guide – OPM.

⁵ 44 U.S.C. § 3502(2).

acquisition of the information the Agency seeks while minimizing the recipient's level of effort as much as possible.

CWA § 308 letters should establish reasonable response deadlines and extensions should be granted when feasible and appropriate. The EPA should also consider the use of phased requests to isolate or narrow the scope of information that is truly needed for regulatory purposes. In crafting the scope of a CWA § 308 letter, the EPA should also be cognizant of the length of time the Agency may need to review the response. Precision in the scope of request will reduce the burden on the recipient and the time and expense of the Agency in reviewing the requested information.

Finally, the recipient and circumstances should be considered when determining the appropriate tone for CWA § 308 letters. The type and size of the business, prior Agency interactions, the necessity for the EPA to receive the information in a timely manner, and any potential threat to human health or the environment are all factors that could influence the language and tone of the request. Although it should be clear that the information request is being issued pursuant to the EPA's statutory authority, citation to statutory penalties for failure to respond is not always necessary or appropriate. For example, it may be sufficient to indicate that the EPA is authorized to require the submission of information under CWA § 308 in an initial request to a smaller entity that has little or no experience with the EPA's regulatory authorities.

IV. Approval Process for Issuing CWA § 308 Letters

Collecting information from the regulated community should proceed in an atmosphere of mutual respect with the goal of building positive relationships with recipients. If it is determined that information may be required from the regulated community to support the EPA's regulatory actions, regulatory staff should prepare an initial scoping outline of the information that may be required along with a list of potential recipients. Regulatory staff should then obtain initial concurrence from senior management prior to initiating the information collection process.

CWA § 308 letters intended for five or fewer persons must be reviewed and approved by the appropriate Office Director in the Office of Water or by the respective Water Division Director in the EPA Regional offices. CWA § 308 letters intended for more than five persons must be reviewed and approved by the Principal Deputy Assistant Administrator (PDAA) for the Office of Water, or by the relevant Deputy Regional Administrator (DRA).

Upon receipt of initial concurrence, and prior to submitting a CWA § 308 letter, regulatory staff should engage with the potential recipient(s) to discuss the information request, review the scoping outline, and attempt to collaborate on a reasonable strategy for the EPA to obtain the required information. Regulatory staff should seek feedback on the scoping outline, be receptive to suggested alternatives for obtaining the information, and consider concerns and challenges articulated by the potential recipient. For information requests intended to be submitted to multiple entities, regulatory staff are encouraged to develop strategies for coordinating early discussions with the intended recipients, such as scheduling joint meetings or conference calls, or by working with common trade associations or similar representation to develop streamlined information collection strategies that satisfy the regulatory needs of the Agency while minimizing burden to the regulated community. These coordinating efforts may not substitute, however, for specific engagement with each intended recipient prior to formal submission of a CWA § 308 letter.

In the event early dialogue and collaboration fails to result in submission of the required information, regulatory staff should confer with immediate management to discuss why the collaboration was unsuccessful. If it is determined that a CWA § 308 letter may be needed, a draft letter should be generated in accordance with guidelines articulated above. To promote further engagement and dialogue, the draft letter should be shared with the intended recipient before it is finalized and formally issued. Sharing a draft letter with the potential recipient provides another opportunity to clarify the terms of the request and discuss the level of effort that may be involved in producing the requested information. Sharing a copy of the draft letter may also resolve stalled negotiations without the need for more formal action.

If efforts under the previous steps have been unsuccessful in gaining the required information, or an intended recipient refuses to engage in good faith discussions, a CWA § 308 letter may be finalized and issued subject to senior management review and approval. Written concurrence of the PDAA, DRA, Office of Water Office Director, or Water Division Director, as appropriate, is required before transmittal of the final letter to the target recipient.

CWA § 308 letters should be used only as a last resort in the event collaboration with the potential recipient is not productive or fails to provide the information required, or when specifically requested by the recipient. Through the policy changes outlined above, receipt of a CWA § 308 letter should not come as a surprise to any recipient.

V. Summary

CWA § 308 letters are an important tool in implementing the EPA's regulatory programs. When issued, however, these letters have the potential to impose a significant burden on the regulated community. This policy therefore outlines a process that is intended to ensure the EPA can obtain information necessary to implement its regulatory programs while minimizing the burden to produce that information, consistent with the principles articulated in the PRA. In summary, this policy requires the EPA to take the following steps as it considers issuing a CWA § 308 letter.

1. The EPA must develop a narrowly tailored initial scoping outline and a list of potential recipients.
2. Senior management must provide concurrence before an information collection request may be initiated under CWA § 308.
3. The EPA must engage with the regulated community early in the process to discuss the EPA's information needs and effective and efficient strategies for providing that information to the Agency.
4. Only after failed early engagement, the EPA may prepare an initial draft of the CWA § 308 letter to share with the potential recipient and to promote further engagement and dialogue.
5. If further engagement and dialogue fail to yield cooperative information sharing, the EPA may prepare a formal information request; however, senior management must approve the letter prior to issuance.

Through this process, the EPA intends to reduce reliance on formal CWA § 308 letters and the potential burdens imposed on both the EPA and the regulated community through issuance of those letters, while increasing collaboration and positive engagement with the Agency's regulatory partners.