

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

DISCLAIMER: This internal document includes suggested best practices for EPA’s implementation of section 401(a)(2) of the Clean Water Act. This internal document does not provide guidance for states or tribes when they are the certifying authorities under section 401. This internal document is not a regulation, nor does it change or substitute for any applicable regulations. Thus, it does not impose legally binding requirements on the EPA, states, tribes, other federal agencies or the regulated community. This internal document neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between the discussion in this internal document and any statute or regulation, this internal document would not be controlling.

I. BACKGROUND

Clean Water Act (CWA) section 401(a)(2) requires federal licensing and permitting agencies to immediately notify EPA when they receive a license or permit application to conduct any activity which may result in any discharge into the navigable waters and a water quality certification for that license or permit from the state in which the discharge originates. 33 U.S.C. 1341(a)(2). If, within thirty days of the date of that notice, EPA in its discretion determines that the discharge “may affect. . . the quality of the waters of any other State,¹ EPA is required to notify such other State (also referred to in this document as a “neighboring jurisdiction”), the licensing or permitting agency, and the applicant. *Id.*

The neighboring jurisdiction then has sixty days from receiving EPA’s notification to determine whether the certified discharge “will affect” the quality of its waters so as to violate any of its water quality requirements, notify EPA and the licensing or permitting agency in writing of its objection to the issuance of the license or permit, and request a public hearing on its objection. *Id.* If requested, the federal licensing or permitting agency must hold a public hearing on the neighboring jurisdiction’s objection. *Id.* At the hearing, EPA is required to submit its evaluation and recommendations concerning the objection. *Id.* The federal licensing or permitting agency, based upon the recommendations of the neighboring jurisdiction, EPA, and any additional evidence presented at the hearing, shall condition the license or permit as necessary to ensure compliance with applicable water quality requirements. If the imposition of such conditions cannot ensure compliance, the federal licensing or permitting agency shall not issue the license or permit. *Id.*

II. SUGGESTED BEST PRACTICES FOR EPA’S IMPLEMENTATION OF SECTION 401(a)(2)

Federal Licensing / Permitting Agency Notification to EPA

1. **Process:** Clean Water Act section 401(a)(2) requires that the federal licensing or permitting agency, upon receipt of a section 401 water quality certification and related license or permit application, immediately notify the EPA Administrator of such certification and application. Under EPA’s CWA Section 401 Certification Rule, “immediately” means within 5 days of receiving the certification. 40 CFR 121.12(a). EPA expects that federal licensing or permitting agencies will provide notice of state or tribal certifications, even if the project itself does not have an associated “permit application.” For example, some general permits or federal projects authorized under CWA section 404 or the Rivers and Harbors Act may not require a “permit

¹ “Any other State” can be a state or a tribe with “Treatment in a Manner as a State” (TAS) status under CWA section 518(e). Amendments to the CWA after section 401 was enacted provide that tribes can seek TAS. As a result, when section 401(a)(2) uses the word “state” or “states,” this includes tribes with TAS status for section 401. Tribes with TAS for section 401 are also referred to as “authorized tribes.”

application” to be processed, but the Army Corps’ regulations nonetheless require receipt of a water quality certification before it may issue the permit. As a general matter, notice provided by the federal agency that precedes completion of a certification action would not, by itself, be sufficient to satisfy the licensing or permitting agency’s statutory and regulatory requirement to provide notice to EPA. In cases where federal agency regulations suggest otherwise, EPA should work with the federal agency to update its regulations to be consistent with the statute and the final rule and, in the meantime, adopt a mutually acceptable notification process. EPA lacks authority to compel another federal agency to act in a manner inconsistent with that agency’s regulations.

2. **Regional Email Box:** Each EPA Region’s 401 and 402 programs are responsible for maintaining an electronic mailbox to receive CWA section 401(a)(2) notifications from federal licensing and permitting agencies for proposed projects within the EPA Region’s geographic boundaries. To facilitate the email notification process, EPA will maintain on its website, and provide to federal licensing or permitting agencies, a list of the states and tribes within the geographic boundaries of their respective EPA Regions and a contact list of EPA regional personnel. EPA Headquarters will retain access to the EPA regional email boxes in order to gather data on the CWA section 401(a)(2) process.
3. **Local Agreements:** To help streamline the notification process, consistent with the CWA, an EPA Region and a federal licensing or permitting agency may choose to develop a local agreement with procedures that address how they intend to process CWA section 401(a)(2) notifications. Local agreements may be used to establish the mechanism for providing notifications between agencies (e.g., email, website notification) and the types of information the federal licensing or permitting agency will provide EPA with its notification. For example, a local agreement could indicate that the EPA Region agrees to receive notification of water quality certifications in the form of an email with a brief summary of the certified project (such as type of license or permit, project name and type, location). A local agreement could also provide for regular meetings between agencies, for example, on a monthly or quarterly basis, to discuss proposed projects or license or permit applications that may require certification. If a local agreement is developed with field offices of other federal licensing or permitting agencies, the EPA Region should ensure that the local agreement is consistent with CWA section 401(a)(2) and the CWA Section 401 Certification Rule, and provide the draft agreement to EPA Office of Water’s Office of Wetlands, Oceans and Watersheds for Headquarters review and concurrence.

EPA’s CWA Section 401(a)(2) Review Process for Certifications

1. **“May Affect” Determination:** CWA section 401(a)(2) provides that EPA has thirty days after receipt of notification from the federal licensing or permitting agency to exercise its discretion to evaluate whether the certified activity “may affect” the quality of the waters in another state. If the EPA Region evaluates a certified project and determines that the water quality of a neighboring jurisdiction may be affected, EPA must notify the potentially affected jurisdiction, the federal licensing or permitting agency, and the project proponent. A template “may affect” letter is enclosed with this memorandum as Attachment A. EPA need not wait the full thirty days to provide such notice but may notify the required parties any time after it has determined the discharge may affect the neighboring jurisdiction. If EPA does not provide this notice within

thirty days of receiving notification from the federal licensing or permitting agency, the federal agency may proceed with processing the license or permit. EPA may also notify the licensing or permitting agency any time after receipt of notification that EPA will not issue a “may affect” notification to a neighboring jurisdiction. The federal license or permit should not be issued until the section 401(a)(2) process is completed.

Based on past experience with CWA section 401(a)(2), EPA does not anticipate that most federal agency 401(a)(2) notifications will involve discharges that may affect the quality of the waters of a neighboring jurisdiction. However, the following screening process for EPA Regions to apply upon receipt of a section 401(a)(2) notice may help ensure consistent implementation of Section 401(a)(2).

2. **Screening Process:** EPA Regions should focus primarily on the location of the discharge with respect to any neighboring jurisdiction and whether the discharge “may affect” the water quality of that jurisdiction. In making that assessment, EPA Regions should consider the water quality requirements of that neighboring jurisdiction.
 - a. **Location of the Discharge and Proximity to Other Jurisdictions:** EPA Regions should ask whether the jurisdictional water into which the project would discharge, or a downstream jurisdictional tributary, flows through multiple jurisdictions (such as the Mississippi River or the Columbia River). If the answer is “yes,” the Region should consider the distance between the discharge location and the nearest downstream state or authorized tribal border. Finally, the Region should consider whether the discharge may affect the quality of the neighboring jurisdiction’s water quality. For example, does the discharge cause or contribute to water quality degradation or impact or impair the designated use(s) of another state’s water(s)?
 - b. **Neighboring Jurisdiction Water Quality Requirements:** EPA Regions should ask whether the potentially affected neighboring jurisdictions have different water quality requirements, including water quality standards, than the state or authorized tribe that issued the certification for the federal license or permit, and whether these requirements are more or less stringent? For example, could the neighboring jurisdiction’s designated uses for the portion of the waterway within its border be impaired by the certified discharge? Is the portion of the waterway within the neighboring jurisdiction’s border included on that state’s CWA section 303(d) impaired waters list, or is there a TMDL established for a segment in the neighboring jurisdiction?

Any decision by an EPA Region to issue a “may affect” determination must be supported by data or documentation that demonstrates the certified discharge may, in fact, have an effect on the quality of the waters of a neighboring jurisdiction.

Neighboring Jurisdiction Response to a CWA Section 401(a)(2) Notice

1. **Neighboring Jurisdiction’s Role:** If EPA has exercised its discretion and made a “may affect” determination, the neighboring jurisdiction has sixty days after receipt of EPA’s “may affect” notice to consider whether the certified discharge “will affect” the quality of its waters so as to violate any of that state’s water quality requirements. If the neighboring jurisdiction determines that the certified discharge “will affect” such waters, it must notify EPA and the federal licensing

or permitting agency in writing, within the sixty-day window, of its objection to the issuance of such license or permit and request a public hearing on such objection.

2. **Hearing Request:** If the neighboring jurisdiction requests a hearing on its objection, the federal licensing or permitting agency must hold the hearing. CWA section 401(a)(2) requires EPA to submit at the hearing an “evaluation and recommendations with respect to any such objection to the licensing or permitting agency.” Based on the recommendations of the neighboring jurisdiction, EPA’s evaluation and recommendations, and any additional evidence presented at the hearing, the federal licensing or permitting agency must condition the license or permit “in such manner as may be necessary to insure compliance with applicable water quality requirements.” *Id.*

ATTACHMENT A

“May Affect” Notification Template: The following “may affect” notification template is based on the requirements of section 401(a)(2), EPA’s 401 Rule, and language used in past regional CWA section 401(a)(2) “may affect” notification letters. It is important that the letter clearly indicate that the EPA Regional Administrator, or his/her delegate, has, in this specific instance, chosen to exercise EPA’s discretionary authority to evaluate a particular certified project and, having made a “may affect” determination, is notifying a neighboring state or authorized tribe (i.e., a tribe with TAS for CWA section 401) of the potential for the certified discharge to affect the quality of its waters. As explained above, EPA is not required to evaluate every certification issued by a state or authorized tribe about which it receives section 401(a)(2) notice, and EPA is not required to make “may affect” determinations. Importantly, EPA’s “may affect” notification is not a determination that the certified project “will affect” the quality of the waters in neighboring jurisdictions but only that there “may” be such effect. If EPA sends a “may affect” notification, it is then the neighboring jurisdiction’s role to evaluate whether the certified project “will affect” the quality of its waters so as to violate any water quality requirements in that state.

On [Date], the U.S. Environmental Protection Agency (EPA) Region [1-10] received notice from [Name of federal licensing or permitting agency] of the following application for a federal license or permit and water quality certification under Clean Water Act (CWA) § 401(a). The certification was issued by [Name of certifying state or tribe] for a proposed [Type of license or permit, such as CWA § 404 Individual Permit] to be issued by the [Name of federal licensing or permitting agency reviewing the license/permit application] for [Applicant Name] project located in [county and state or tribal reservation name]. Following receipt of such notice, EPA has exercised its discretionary authority under CWA § 401(a)(2) to review that project and is notifying you that EPA has determined that a discharge associated with this proposed project may affect the quality of waters within your jurisdiction, potentially including [Name of the water(s)].

To assist in your evaluation of the potential impacts of this project on the quality of your waters, I am attaching relevant documents that EPA has received regarding the project. Pursuant to CWA § 401(a)(2), if you determine that the discharge associated with this certified project “will affect” the quality of your waters so as to violate any of your water quality requirements, you may, within sixty days after receipt of this notification, notify [Name of federal licensing or permitting agency, with address] and EPA in writing that you object to the issuance of the license or permit, and request that the [Name of federal licensing or permitting agency] hold a public hearing on your objection.

If you have any questions about this project or notification, EPA’s “may affect” determination, or your rights and obligations under CWA section 401(a)(2), please contact [Name, address, phone number of EPA Regional POC.]

[Signature of Delegated Authority]