

Overview of the EPA's Clean Water Act Section 401(a)(2) Evaluation and Recommendations on Bad River Band of Lake Superior Chippewa's Objection to the Issuance of St. Paul District Corps Minor Discharges and Utility Regional General Permits

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Although portions of this presentation are paraphrased from EPA's Evaluation and Recommendations document where useful to add clarity, the Evaluation and Recommendations document itself is the definitive statement of the Agency's evaluation and recommendations on Bad River's CWA Section 401(a)(2) objection. To the extent this presentation could be construed as in conflict with the Evaluation and Recommendations document, the Evaluation and Recommendations document controls and should be used for purposes of understanding the basis of EPA's evaluation and recommendations.



Summary of the EPA's Presentation Today

- Overview of the EPA's evaluation and conclusion
- The Clean Water Act (CWA) Section 401(a)(2) process
- What the EPA's evaluation includes
 - Analysis of the Bad River Band's objection
 - Analysis of supporting documentation from state/federal agencies
- The EPA's prior CWA Section 404 recommendations

What CWA Section 401(a)(2) Provides

- This section of the CWA provides a process for “neighboring jurisdictions” (which include states and tribes that have received “treatment in a similar manner as a state” for section 401) to participate in the federal licensing or permitting process where the EPA determines that a discharge from an activity that is subject to CWA Section 401 certification from another jurisdiction “may affect” their water quality.
- A federal licensing or permitting agency must “immediately” notify the EPA when it receives a license or permit application together with a CWA Section 401 certification, after which the EPA has 30 days from receipt of the notice to determine whether a discharge from the licensed or permitted activity “may affect” the water quality of a neighboring jurisdiction and, if so, to notify that neighboring jurisdiction, the licensing or permitting agency, and the project applicant.
- Following the EPA’s notification, the neighboring jurisdiction has 60 days to determine whether the discharge will affect its water quality so as to violate its water quality requirements, and, if so, object in writing to the issuance of the license or permit and request that the licensing or permitting agency conduct a hearing on its objection.
- At the hearing, the EPA must submit to the licensing or permitting agency an evaluation and recommendations regarding the objection of the neighboring jurisdiction.

History of this 401(a)(2) action regarding the Regional General Permits

- On December 15, 2022, the EPA made a “may affect” determination and notified the Band and the Corps, which initiated a 60-day time period during which the Band had an opportunity to notify the Regional Administrator and the Corps whether the discharges will affect the quality of its waters so as to violate the Band's water quality requirements.
- On February 13, 2023, the Band notified the EPA and the Corps that:
 - Discharges related to the proposed RGPs would affect the quality of the Band’s waters and violate its downstream water quality requirements,
 - They objected to issuance of the permit, and
 - They requested the Corps hold a public hearing
- On November 28, 2023, the Band withdrew its objections to six of the eight RGPs based on the Corps’ proposed modifications to the RGPs; however, the Band maintained their objection to the Minor Discharges and Utility RGPs.

Overview of the EPA's Evaluation and Recommendations

- The EPA's task for this hearing is to submit to the Corps its evaluation and recommendations regarding the Bad River Band's objection to the issuance of the CWA Section 404 Minor Discharges and Utility Regional General Permits RGPs.
- The EPA's evaluation is based on its independent evaluation of the record, including the Band's objection, the Minor Discharges and Utility RGPs and other supporting documentation from the Corps, Wisconsin Department of Natural Resources 401 Water Quality Certification, and publicly available surface water data.
- The EPA's evaluation concludes that the information in the record does not demonstrate that discharges from projects under the Minor Discharges and Utility RGPs will affect the quality of the Band's waters so as to violate any water quality requirements.
- The EPA reiterates its prior public comments on the RGPs under CWA 404 for Corps consideration.

Key Information Considered by the EPA in Preparing the Evaluation & Recommendations:

- The Band's objection letter providing its "will violate" determination and supporting documents;
- The WDNR's 401 Water Quality Certification for the Minor Discharges and Utility RGPs and supporting documents;
- The Corps' Record of Decision, Final RGPs, historic permit data, and other supporting documents;
- Publicly available surface water data;
- The EPA's CWA Section 404 comments on the proposed RGPs;
- Additional information the EPA received from the Corps and the Band during the CWA Section 401(a)(2) process

Key Water Quality Concerns Raised by the Bad River Band:

- Antidegradation Requirements
- Narrative Water Quality Standards
- Designated Uses
- Numeric Standards
- Utility RGP requirements, processes and procedures
- RGP Language for Tribal Coordination & minimal adverse effects on Tribal rights
- Tribal Treaty Rights

The EPA's Conclusions

- The EPA concludes that the information in the record does not demonstrate that discharges from projects under the Minor Discharges and Utility RGPs will affect the quality of the Band's waters so as to violate any of its water quality requirements.
- The EPA recognizes that the variety of activities eligible for coverage under the Minor Discharges and Utility RGPs and the extent of environmental settings in which those actions may occur presents uncertainty.
- The EPA evaluated each of the Band's claims alongside the conditions in the RGPs and WDNR's 401 water quality certification.
 - One example is WDNR's 401 condition related to areas of special natural resource interest.
- The EPA wishes to reiterate its prior CWA Section 404 public comments on the RGPs from September 28, 2022 for the Corps to consider because many of EPA's prior comments are responsive to the concerns raised by the Band in its objections, which have only been partly addressed or not addressed through the RGP conditions and/or the WDNR certification conditions.

The EPA's Prior Recommendations

- Pre-construction notification for Minor Discharges RGP
- Impact Thresholds and Eligibility Restrictions for the Utility RGP
- Impact Threshold Revisions for "single and complete projects" under the Utility RGP
- Exclusions when a project may cause "more than minimal" adverse effects on tribal rights
- Additional pre-construction notification requirements for specified Aquatic Resources for both the Minor Discharges and Utility RGPs

The EPA's Prior Recommendations (con't)

Adding a PCN requirement for Minor Discharges RGP

- PCN triggered using listing of aquatic resources consistent with other RGPs

Impact Thresholds & Eligibility Restrictions for the Utility RGP

- Establishing thresholds based on waterbody crossings
- PCN requirements for new pipeline projects based on specified criteria

Impact Thresholds revisions for "single and complete projects" under the Utility RGP

- Revise impact threshold to be applicable to an entire project

Exclusions when a project may cause "more than minimal" adverse effects on Tribal rights

- Initiate an established coordination process with affected Tribe when PCN is triggered

Additional PCN requirement for specified Aquatic Resources

- All wild rice marshes regardless of state designation, stream/river riffle/pool complexes, spawning areas during spawning season, waterways shared with another state or Tribe

Thank you!

