



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
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**U.S. Environmental Protection Agency Region 2 Clean Water Act Section 401
Water Quality Certification for
Corps of Engineers CWA Section 404 Nationwide Permits Reissuance
Applicable to Indian Nations in the Buffalo and New York Corps Districts**

Background:

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers (Corps) Clean Water Act 404 Nationwide Permit (NWP) into waters of the United States that occur within applicable Indian Nation lands in the state of New York and corresponding Corps Districts¹: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

Section 401(a)(1) of the Clean Water Act (CWA) requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or Indian Nation has authority to give such certification, the U.S. Environmental Protection Agency (EPA) is the certifying authority. In this case, the Cayuga Nation, Onondaga Nation, Oneida Nation of Indians, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Seneca Nation, and Tuscarora Nation do not have the authority to provide CWA Section 401 certification for discharges occurring on applicable Indian Nation lands in New York, therefore, the EPA Region 2 is making the certification decisions for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWPs listed above.

Project Description

The Corps is proposing to re-issue its existing NWPs and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.” 85 FR 57298. For more details: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

Denied (121.7(e)(2))

On behalf of the seven federally recognized Indian Nations located within the state of New York, EPA Region 2 cannot certify that the range of discharges from potential projects authorized under the following proposed NWPs will comply with water quality requirements, as defined in 40 CFR 121.1(n).

¹ Cayuga Nation, Onondaga Nation, Oneida Nation of Indians, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Seneca Nation and Tuscarora Nation.

Therefore, CWA Section 401 water quality certification is denied for NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D and E, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the seven federally recognized tribes located within the state of New York, EPA Region 2 lacks sufficient information on sensitive resources that may exist on tribal land, potential impaired waters on tribal land, and potential cultural importance of the water resources on tribal land. Additional information on these specific subjects would be needed for EPA Region 2 to assure that the range of discharges from potential projects authorized under NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, D and E will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 2 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 2 is therefore denying certification.

If you have any questions regarding this certification denial, please contact EPA Region 2 at: Region2_CWA401@epa.gov

December 14, 2020

Javier E. Laureano, Ph.D., Director
Water Division

Date