September 5, 2025

Peggy S. Browne, Acting Assistant Administrator
U.S. Environmental Protection Agency, Office of Water
Washington, D.C. 20460

Submitted to cwa401@epa.gov

Re: Notice of Consultation and Coordination on Upcoming Efforts to Address Implementation Challenges Associated with Clean Water Act Section 401

Dear Acting Assistant Administrator Browne:

The National Tribal Water Council (NTWC) provides the following comments in response to the U.S. Environmental Protection Agency's (EPA) request for tribal input on what EPA termed the "regulatory uncertainty or implementation challenges" related to the Clean Water Act (CWA) Section 401 certification process as conducted pursuant to the 2023 Water Quality Certification Improvement Rule, 88 FR 66558 (September 27, 2023) (2023 Rule). EPA stated it will review feedback from the tribal consultation process, listening sessions, and written comments when deciding whether future guidelines or rulemaking are necessary. *See* EPA Consultation and Coordination Plan (July 7, 2025), at 1. The NTWC explains below why changes to the 2023 Rule are not warranted and would be ill-advised.

Introduction to NTWC's Response

Clean water is essential to tribes not just as a source of sustenance but also for cultural, medicinal, and spiritual reasons and often for commercial purposes as well; it is vital to tribes' very survival. CWA Section 401 enables tribes (and states) to protect their water quality, in furtherance of the goals of the CWA. For EPA to comply with its obligation to consult with tribes on matters having a significant tribal impact, especially one of this magnitude, EPA officials would need to meet face-to-face with tribal elected officials. Only such true engagement would allow EPA to fully understand and take into account the impacts that any weakening of CWA Section 401 could have on treaty rights, tribal communities, and tribal resources.

For example, fishing – which relies on the protection and maintenance of water quality, including through CWA Section 401 – is critical to many tribal communities for subsistence, cultural, and commercial purposes. For many tribes, sharing and eating fish is an integral part of their culture, religion, and social fabric, and it is well-documented that these tribal communities consume fish at a higher-than-average rate. Many tribes have treaty-protected rights to fish both on and off their reservations that preserve for all time their right to engage in commercial, subsistence, and ceremonial fishing. EPA must consider the impacts of any changes to the 2023 Rule on these tribes, who already may be experiencing adverse impacts from project development affecting water quality.

Instead of recognizing tribal or even national needs to protect water quality, EPA appears to have succumbed to these times of intense partisanship, which undermine prior congressional action and obstruct future action, leaving water pollution policy to the whims of seesawing administrations. EPA's focus on revising – and likely weakening – the 2023 Rule does not appear to be motivated by widespread dissatisfaction with the implementation of Section 401 by federal, state, and tribal authorities throughout the last fifty years. Rather, it characterizes the 2023 Rule as triggering "regulatory uncertainty" and "implementation challenges" with no proffered evidence supporting this allegation, and it seems focused on limiting the existing state and tribal certification authority that is congressionally mandated under the Clean Water Act. The NTWC views EPA's current initiative as a blatant attempt to support the fossil fuel industry in advancing various controversial energy projects, ultimately compromising water quality and established principles of cooperative federalism.

In its May 21, 2025 memorandum, EPA emphasizes the "specific and limited role" that states and tribes play in the CWA § 401 licensing and permitting process.[1] The memorandum expresses EPA's concern that Section 401 not be used "as a weapon to shut down projects for reasons with no basis in the statute or applicable regulations."[2] It mentions in particular "energy, critical mineral, infrastructure and development projects." As noted in the memorandum, however, these concerns stem from only a small group of stakeholders who participated in a Senate Subcommittee hearing in 2025. Nevertheless, EPA seems to have highlighted this limited stakeholder testimony to buttress its claim of regulatory uncertainty stemming from the 2023 Rule.

In the question-and-answer segment of the July 23, 2025, tribal kick-off webinar, NTWC Chairman Norton voiced his concern that EPA seems to have already decided to revise the 2023 Rule to constrain state and tribal participation in federal licensing and permitting actions through the CWA § 401 certification process. Chairman Norton explained that his concern arises both from the May 21, 2025, memorandum and from EPA's tribal consultation notice, in which, as noted

---

[1] The May 21, 2025 memorandum is available at: https://www.epa.gov/system/filies/documents/2025-05/clarification-re-application-of-cwa-401-certification_may:2025.pdf

[2] May 21, 2025 memorandum at 1.

above, EPA appears to have predetermined that regulatory uncertainty and implementation challenges with Section 401 exist. In response, however, EPA stated it had not yet made a decision and reiterated its dedication to fairly considering all tribal concerns and experiences when evaluating potential changes to the 2023 Rule.

Based on EPA's assurances, the NTWC is providing these responses to EPA's request for input on the six topics listed in EPA's Consultation and Coordination Plan, which are the same topics listed in EPA's simultaneous notice to the general public.[3]

NTWC's Responses to EPA's Specific Requests for Input

1. **Defining the scope of certification and of certification conditions.**

The NTWC recommends that EPA continue to adopt a broad view of the scope of certification under CWA § 401(a) by having the certifying agency consider water quality related impacts from an activity as a whole rather than limiting its consideration to a specific discharge. In the 2023 Rule, EPA explained that adopting a scope of review focused on the "activity as a whole" or "project in general" is more consistent with the purposes of the CWA than the 2020 Rule's "discharge-only" limitation. The broader scope of review also aligns more closely with the text of Section 401, its legislative history, and the principle of cooperative federalism. EPA therefore relied on the term "activity" to define the scope of review in the 2023 Rule, which it interpreted to mean the "activity in its entirety."[4]

The requirement for certification is triggered when an applicant's actions, or "activity," may result in a discharge into navigable waters (that is, a "water of the United States"). Both the CWA itself and its legislative history support a broad scope of review. For example, Section 401(a)(1) opens by stating the certification applies to "*any activity* … which may result in any discharge" (emphasis added). The EPA therefore interpreted the scope of certification to include the activity itself rather than just the discharge.[5]

Moreover, this interpretation is consistent with Supreme Court precedent, which EPA referenced in the 2023 Rule, noting that "authoritative Supreme Court precedent" supports interpreting Section 401 to extend to the "activity as a whole."[6] The definitive Supreme Court case on this issue is *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, which held that Section 401 "is most reasonably read" as authorizing the certifying authority to evaluate and place

---

[3] "Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401," 90 Fed. Reg. 29828 (July 7, 2025).

[4] 2023 Rule, 88 Fed. Reg. at 66592.

[5] 88 Fed. Reg. at 66592.

[6] *Id.*

conditions on what the Court described as the "project in general" or the "activity as a whole" to assure compliance with various provisions of the Clean Water Act and "any other appropriate requirement of State law," once the predicate existence of a discharge is satisfied.[7] EPA is in fact bound by the Supreme Court's interpretation of the statute. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Focusing on the activity as a whole makes CWA § 401 more effective in protecting water quality. This scope of certification allows tribes to holistically consider the range of possible impacts to their water resources that would be caused by the licensed or permitted project, including all potential point and nonpoint source discharges and all other activities with the potential to affect water quality (*e.g.*, construction and operation of the project or facility, which are specifically referenced in Section 401(a)(1)). The validity of any specific condition imposed by the certifying authority will depend on an analysis of all relevant facts, including state and tribal water quality requirements. *See PUD No. 1*, 511 U.S. at 711.

EPA also should continue to interpret CWA § 401(d) to require certification conditions that implement the activity-based scope of certification discussed above; any narrower interpretation would be inconsistent with the statute, as interpreted by the Supreme Court.[8] Thus, when an activity is subject to the requirements of Section 401, the certifying agency may impose conditions and limitations on the overall activity, not simply on the discharge.[9] These additional conditions must subsequently "become conditions of the resulting federal permit or license." EPA states that "the federal agency may not select among conditions when deciding which to include and which to reject."[10] Furthermore, if the federal agency opts not to accept all conditions associated with the certification, the permit or license may not be granted.[11] The EPA indicates that these

---

[7] *PUD No. 1*, 511 U.S. 700, 711-12 (1994).

[8] CWA § 401(d) states that "any certification issued under this section shall set forth any effluent limitations, *and other limitations*, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitation *and other limitations"* required under various sections of the Act, "and with *any other appropriate requirement of State law* set forth in such certification, *and shall become a condition* on any Federal license or permit subject to the provisions of this section" (emphasis added). The courts have understood the italicized terms to mean that the certifying authority is permitted to impose conditions that pertain to water resource concerns specific to the violation of its water quality standards.

[9] EPA 2010 Section 401 Handbook, at 10 (quoting *PUD No. 1*, 511 U.S. at 712). The 2010 Handbook is available at https://19january2017snapshot.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf.

[10] EPA 2010 Handbook, at 10 (citing *Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 110-11 (2d Cir 1997)).

[11] *Id.*

considerations may encompass a wide range, provided they are pertinent to water quality.[12] In sum, the scope for the purpose of including conditions in a certification and the scope of review for purposes of whether to grant certification are the same.[13]

The NTWC recommends that EPA continue to interpret the scope of certification explained in the 2023 Rule, which remains consistent with the "activity as a whole" approach EPA has followed for most of the past several decades.[14] This interpretation also implements the principle of cooperative federalism outlined in Section 401 and the CWA as a whole by allowing states and tribes to more effectively protect their waters in the context of federally authorized projects.

2. Defining "Water Quality Requirements."

The NTWC also supports the definition of "water quality requirements" in the 2023 Rule. Section 401(d) requires that the discharge at issue meet "any other appropriate requirement of State law." The 2023 Rule therefore interprets "water quality requirements" as including requirements with any relationship to water quality, consistent with the statutory language and similar to EPA's long-standing guidance.[15]

EPA's decision to define "water quality requirements" broadly to include "any limitation, standard, or other requirement under the provisions enumerated in Section 401(a)(1), any federal and state laws or regulations implementing the enumerated provisions, and any other water-quality related requirement of state or tribal law regardless of whether they apply to point or nonpoint source discharges" was based on the text of Section 401(d), the purpose of the CWA, and its legislative history, and it is consistent with the Supreme Court's holding in *PUD No. 1*.[16] As EPA explained in the preamble to the proposed Water Quality Certification Improvement Rule, Congress originally thought to limit the scope of Section 401(d) but ultimately, "consistent with Congress's objective to empower states to protect their waters from pollution, Congress 'expanded' the scope of Section 401(d) 'to also require compliance with any other appropriate requirement of State law which is set forth in the certification.'"[17] Notably, in *PUD No.1* the Court held that a state may condition Section 401 certification "upon *any* limitations necessary to ensure

---

[12] *See also PUD No. 1*., 511 U.S. at 712).

[13] 88 Fed. Reg. at 66605.

[14] *See, e.g.,* EPA Handbook, "Wetlands and 401 Certification" (April 1989) (1989 Handbook), at 25-26.

[15] *See, e.g.,* 1989 EPA Handbook at 26.

[16] 87 Fed. Reg. 35318, 35347 (June 9, 2022) (Proposed CWA Section 401 Water Quality Certification Improvement Rule).

[17] *Id.*, citing S. Rep. No. 92–1236, at 138 (1972) (Conf. Rep.).

compliance with state water quality standards or any other appropriate requirement of state law" (emphasis added), including protection of designated uses.

Certifying authorities must evaluate a wide range of water quality impacts, including a project's potential effects on designated uses, such as those related to recreation and other water activities. Various court rulings have aided EPA in assessing possible water quality effects on state and tribal standards. For example, the Tenth Circuit upheld EPA's decision to enforce Isleta Pueblo standards that were based on a ceremonial use requirement.[18] The court determined that EPA is authorized to issue a National Pollutant Discharge Elimination System permit that, in accordance with the tribe's water quality standards, protects ceremonial water use.[19] Citing this case, EPA's 2010 Handbook instructed state agencies that "protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard."[20]

For all these reasons, the NTWC recommends that EPA retain its 2023 definition of "water quality requirements." This definition allows certifying authorities to determine when an activity's impact on water quality is sufficient to warrant imposing a condition on a certification, based on all relevant and appropriate requirements of state or tribal law.

3. **Any data or information on how EPA should consider whether a neighboring jurisdiction's water quality may be affected by discharge for purposes of Section 401(a)(2).**

Given the range of federal licenses and permits subject to CWA § 401(a)(2) and the variability within projects, each "may affect" determination will be fact-dependent, based on the specific circumstances at play. It is therefore impossible to develop set "parameters" for EPA to consider when making these determinations.[21] Rather, the factors influencing each determination will vary, based on the specific context.

In the 2023 Rule, EPA declined to identify such factors in advance due to the fact-specific nature of these determinations, but stressed instead EPA's discretion to look at various factors.[22] EPA suggested various factors that it might consider, including "the neighboring jurisdiction's views on the effect of a discharge from the project on its water quality," but did not require any particular

---

[18] *City of Albuquerque v. Browner*, 97 F. 3d 415, 427 (10th Cir. 1996).

[19] *Id.* at 423, 427.

[20] 2010 Handbook, at 21.

[21] 90 Fed. Reg. at 29,829.

[22] 88 Fed. Reg. at 66,644.

set of factors.[23] The NTWC supports this approach and requests that tribal factors also be considered when a tribe is the neighboring jurisdiction.

"May affect" determinations regarding tribes must include cultural and subsistence uses of water and water-quality-dependent resources.[24] For example, Anishinaabe Tribes depend on wild rice, or "manoomin," not only for food but as part of their cultural identity, and manoomin in turn depends on unpolluted water. In fact, the White Earth Band of Ojibwe enacted a tribal statute that recognizes and protects the rights of manoomin to flourish.[25] As another example, many tribes across the country have subsistence fishing rights that also depend on preserving and protecting water quality. Similarly, many Alaska Native Villages have educational rights to take certain quantities of fish that again are dependent on protecting water quality.

Finally, it must be recognized that many tribes have treaty rights to water-quality-dependent resources in areas outside the boundaries of their formal reservations, many of which have been confirmed by the Supreme Court and other federal courts.[26] Tribes' treaty rights must be recognized when EPA conducts its "may affect" determinations for tribes that are neighboring jurisdictions under Section 401(a)(2).

4. Any data or information on establishing categorical determinations under Section 401(a)(2).

EPA is requesting data or information regarding specific types of activities or waterbodies, or regional or other circumstances that may assist the agency in establishing a categorical determination for potential exemption from project review by neighboring jurisdictions under Section 401(a)(2).

The NTWC agrees with and supports the assessment of Earthjustice and the Native American Rights Fund (NARF) that EPA is not authorized to establish categorial determinations for

---

[23] *Id.*

[24] *See, e.g., Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7th Cir.2009) (recognizing that a tribe's "cultural and religious traditions…often require the use of pure natural resources derived from a clean environment.").

[25] *See, e.g.,* Great Lakes Fish and Wildlife Commission, A Guide to Understanding Ojibwe Treaty Rights (2018), available at http://www.glifwc.org/publications/pdf/2018TreatyRights.pdf; MN DNR, Main Treaties Page, available at https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html.

[26] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, et al.*, 526 U.S. 172 (1999) (confirming off-reservation usufructuary rights under the 1837 Treaty); *Lac Courte Oreilles v. Voigt*, 700 F. 2d 341 (7th Cir. 1983), cert. denied 464 U.S. 805 (1983); *Lac Courte Oreilles v. State of Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991); *Fond du Lac v. Carlson*, Case No. 5-92-159 (D. Minn. March 18, 1996) (unpublished opinion); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); *United States v. Michigan*, 520 F. Supp. 207 (W.D. Mich. 1981).

exemption from Section 401(a)(2).[27] In particular, Section 401(a)(2) on its face does not provide EPA with such authority. Earthjustice and NARF highlight that Congress could have empowered EPA to create categorical exclusions yet opted not to do so. EPA has discretion to determine whether an activity "may affect" a neighboring jurisdiction, but it is still required to make that determination; it cannot simply exempt entire categories of activities from Section 401(a)(2).

Moreover, given the fact-specific nature of the "may affect" determination, it is not feasible for EPA to create across-the-board exemptions for certain projects in a way that would lead to accurate "may affect" determinations. As EPA explained in the 2023 Rule, "may affect" determinations are intrinsically dependent on specific facts and can vary based on a range of factors.[28] The EPA previously concluded that it would be inappropriate to adopt an exhaustive list of factors for making "may affect" determinations, for this reason, which equally contradicts the feasibility of creating categorical exclusions from Section 401(a)(2).

5. **Any data or information on stakeholder experiences with the 2023 Rule, including certification procedures, the 401(a)(2) process, and the scope of certification.**

The 2023 Rule provided several features intended to shorten and clarify the certification process both for tribes and for permittees. For example, the 2023 Rule includes a pre-certification process where permittees can meet with state or tribal regulators and obtain feedback about their regulatory concerns, allowing permittees to address those concerns in their final applications. Similarly, the 2023 Rule provides guidelines for determining the "reasonable time" necessary to process a certification request and for starting the clock on the statute's one-year limitation for action. These provisions have worked well for the tribes that have engaged with them.

6. **Any data or information from stakeholders about the application of treatment in a similar manner as a state solely for Section 401.**

The 2023 Rule contains provisions that allow tribes to obtain treatment as a state (TAS) solely for the purpose of participating as a neighboring jurisdiction under Section 401(a)(2) without the need to first acquire a federally approved water quality standards program. Participation under Section 401(a)(2) does not involve regulatory authority; instead, it gives tribes the opportunity to provide feedback regarding impacts on their water quality, which in turn assists the federal licensing or permitting agency in making informed decisions. 88 Federal Register 66,653-54. This provision is helpful for tribes that want a say in decisions about impacts to their water resources but have limited resources to develop and implement a water quality standards program.

---

[27] *See* Comments of Earthjustice, Native American Rights Fund, *et al.* on Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401, 90 Fed. Reg. 29,828 (July 7, 2025), submitted August 6, 2025.

[28] 88 Fed. Reg. at 66,645.

Since implementation of the 2023 Rule, we are aware of only one application being submitted to EPA using this TAS procedure. The tribe's application is currently being evaluated, and it has requested that its name and location remain confidential until public notification is issued. Nonetheless, the tribe shared its application experience with the NTWC, conveyed its support for the Section 401(a)(2) TAS procedure, and emphasized the importance of this TAS opportunity in allowing tribes to protect their jurisdictional waterways.

In this instance, the tribe initiated its Section 401(a)(2) TAS application process by asking the Clean Water Program Project Officer to organize a virtual meeting to outline the steps of the process and address questions from the tribe's legal counsel concerning the format of the application and the approval procedure. The tribe prepared a Section 401(a)(2) application narrative in accordance with the Project Officer's advice, and the narrative was subsequently evaluated by EPA Regional officials who offered feedback on its substance and completeness. The tribe's legal counsel finalized the application, and the Tribal Council granted approval for its submission. The tribe found this process to be extremely beneficial, aiding them in compiling and drafting a comprehensive application package.

The tribal applicant stated that tribes in its region have small land bases because of past termination efforts by state and federal agencies, and that a great deal of water quality-related impacts on the tribe's resources occur upstream of its reservation. The tribe stressed the importance of the Section 401(a)(2) process on the tribe's ability to develop its capacity for water quality protection and to allow it to meet with representatives from neighboring jurisdictions as equals in resource management. Approval of the tribe's Section 401(a)(2) TAS will allow the tribe's resource managers to collaborate with regional agency staff to integrate Tribal Uses and Ecological Knowledge for effective resource management decisions.

The NTWC recommends that this TAS opportunity remain available. As the example shows, it is an important avenue for tribes with limited land holdings and resources to participate in the protection of their water quality. The NTWC is hopeful that the current tribal applicant will obtain TAS for this provision and provide an example for other tribes who may want to pursue TAS for Section 401(a)(2).

Conclusion.

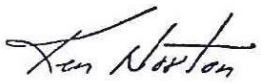
For all the reasons discussed above, EPA should find that no changes to the 2023 Rule are needed. The 2023 Rule maintains the role of states and authorized tribes under CWA § 401 in the protection of water resources. It enables states and tribes to establish procedures that reflect their water protection values and make those requirements enforceable.

At this point in time, it is both premature and unwarranted to pursue additional rulemaking under CWA § 401. The 2023 Rule preserves the regime of cooperative federalism that is a basis of the Clean Water Act. For tribes in particular, it helps protect tribal treaty rights and provides the means for protecting rivers and streams from off-reservation discharges, ensuring tribal survival. The 2023 Rule must be kept in place to allow tribes that are facing adverse impacts from federal

projects the opportunity to express their needs and concerns and have them considered in the certification process.

The NTWC appreciates the opportunity to share feedback with the EPA regarding the 2023 Rule, which tribes have found to be working well to protect their lands and resources for the survival of future generations.

Sincerely,



Ken Norton, Chair
National Tribal Water Council

Cc: Holly Galavotti, EPA Office of Water