October 16, 2019

David P. Ross, Assistant Administrator
Office of Water, U.S. Environmental Protection Agency
1200 Pennsylvania AVE., NW
Washington, DC 20460

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Re: NTWC Comments in Response to Docket ID No. EPA-HQ-OW-2019-0405 Proposed Revisions to CWA Section 401 Certification Regulations

Dear Mr. Ross,

The National Tribal Water Council (NTWC) submits the following comments opposing the U.S. Environmental Protection Agency's (EPA) proposed rule revising the Clean Water Act (CWA) § 401 certification process.[1] Furthermore, the NTWC requests that EPA initiate immediate direct government-to-government consultation with tribal nations and that the comment period be extended to allow time for EPA to meaningfully consider and address concerns raised in those consultations before finalizing any rule.

I. Background and General Comments

A. Background of CWA § 401

Executive Order 13868 required EPA to review CWA § 401 and EPA's existing certification regulations "to encourage greater investment in energy infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty." 84 Fed. Reg. at 44081-82.[2] The CWA § 401 certification process does not, however, apply only to energy infrastructure projects, such as oil and gas pipelines, which appear to be the focus of

[1] 84 Fed. Reg. 44080 (Aug. 22, 2019).

[2] 84 Fed. Reg. 44081-82.

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the President's concern. Rather, the process "appl[ies] broadly to any proposed federally licensed or permitted activity that may result in any discharge into a water of the United States," 84 Fed. Reg. at 44082. Discharges from all of these facilities and activities can have "serious and substantial" effects on the health and welfare of both tribal and non-Native communities, and, in crafting certification regulations to address these activities, EPA must balance energy and other development and construction needs with impacts on human health and the environment, in accordance with EPA's statutorily imposed mission.

EPA's obligation to consider impacts on human health and the environment is especially strong with regard to the protection of tribal communities and tribal waters. Water sources on or near tribal lands are of great importance to Native subsistence, cultures and beliefs and are integral to Native philosophies and to tribes' religious and ceremonial observances, as well as to traditional, cultural and subsistence uses of water and water-dependent resources. EPA bears a trust responsibility to protect tribal water quality, water-dependent resources and water uses through the CWA, treaties, and other fundamental principles of federal Indian law, as we have discussed in our prior comments on EPA's rule defining "Waters of the United States."

The CWA, as the primary federal statute that regulates protection of the nation's water, allows tribes to set WQS that are at least as stringent as federal criteria to protect the waters within their jurisdictions and maintain high standards of water quality. There are currently 45 tribes with EPA-approved tribal water quality standards, and one tribe with EPA-promulgated federal water quality standards. The CWA § 401 certification process is a critical element in this process. EPA has stated that "[m]any . . . tribal governments use [Section] 401 certification as one of their primary regulatory tools for protecting water quality."[3]

Tribes use § 401 certifications to ensure that their water quality standards will be met by the provisions incorporated into individual federal permits and licenses. In addition, through the certification process, tribes can participate in the permit issuance process at an early enough stage to have meaningful input. The process also gives permit applicants and federal agencies notice of these concerns and an opportunity to address them. In keeping with the spirit and principles of cooperative federalism, EPA likewise may veto permits when tribes are the permitting agencies, *see* CWA § 402(d)(2) (NPDES permits); *see also* CWA § 404(j) (dredge and fill permits).

The certification process is even more important for tribes than for states because tribes lack resources to implement their own CWA § 402 or 404 permit programs. Tribes, therefore, rely on EPA and the Army Corps of Engineers (ACE) to issue these permits, and use the certification program as a way to ensure that these permits are protective of tribal waters.

[3] U.S. Environmental Protection Agency, Clean Water Act Section 401 Water Quality Certification: A Tool for States and Tribes (2010), at 21 (citing Envtl. Law Inst., State Wetland Program Evaluation: Phase I, at 96 (2005); State Wetland Program Evaluation: Phase II, at 14 (2006)). EPA rescinded the 2010 Guidance on June 7, 2019. (EPA letter dated June 7, 2019), http://www.epa.gov/sites/production/files/2019-06/documents/letter_on_updated_cwa_401_guidance.pdf.

EPA's proposed § 401 regulation would unduly, and in a manner inconsistent with tribal authority under the CWA, restrict the CWA § 401 framework for protecting waters within tribal jurisdictions. Due to its limitations on key CWA terms, the proposed rule would impermissibly restrict a tribe's authority to review applications for federal permits for many activities and would unreasonably restrict the scope of that review. The reduced approval timeframes would also unduly limit the amount of information available to a tribe for making determinations on certification requests. These proposed revisions are contrary to express Congressional intent as stated in the CWA and confirmed by the Supreme Court, and disregard basic principles of federalism and tribal sovereignty. As explained further below, these changes would have a significant impact on tribal nations not only by limiting their role in the certification process but also by restricting the federal government's ability to protect tribal water resources and adhere to its trust responsibility.

B. The Federal Government Has A Legal and Moral Obligation to Protect Tribal Waters and Water-Dependent Resources

1. The Federal Trust Responsibility

The United States has a general trust responsibility to protect tribal lands, assets and resources, and these include the water that flows over and through tribal lands and the natural resources that depend on that water. As described above, tribes are dependent on these waters and natural resources for sustenance, both physical and spiritual. These waters may also sustain tribal forests, agricultural practices, and other natural resource-based enterprises and programs for tribal communities. The courts have long recognized the federal trust responsibility, as has Congress and many federal agencies, including EPA.[4] To the extent that these proposed changes to the 401 certification process mean that tribes will no longer have sufficient input over permitted activities that can harm tribal water quality and violate tribal water quality standards necessary to protect tribal lands, assets, resources and communities, these proposed changes undermine the trust responsibility that the United States owes to tribes.

2. Tribal Treaty Rights

The United States, including the EPA, has specific legal responsibilities to protect tribal treaty rights that are dependent on water. These treaty rights include rights to fish, hunt, and gather, as well as the attendant water rights necessary to protect the habitat supporting these treaty rights.[5]

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[4] *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (United States has a "moral obligation of the highest responsibility and trust"); American Indian Policy Review Commission (1973) (U.S. trust responsibilities include protection and proper management of Indian resources, properties and assets); American Indian Agricultural Resource Management Act, 25 U.S.C. 3701(2) ("The Congress finds and declares that . . . the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes"); National Indian Forest Resource Management Act, 25 U.S.C. 3101(2) (" The Congress finds and declares that . . . the United States has a trust responsibility toward Indian forest lands."); EPA Indian Policy at 3 (recognizing federal trust responsibility)..

[5] *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty rights to fish necessarily require sufficient water to maintain plants and fisheries).

Treaty rights are property rights that require federal protection.[6] As with the general trust responsibility to protect tribal lands and resources, the courts have consistently admonished the United States to protect these rights.[7] Subsistence living and maintaining cultural practices, through the exercise of treaty rights, are how modern tribal members preserve links to their ancestral generations. Yet fundamentally, the ability to exercise those treaty rights is completely dependent upon clean water and healthy ecosystems. Treaty rights, environmental health, and tribal culture are all interconnected.

3. Reserved Water Rights

Federal reserved water rights attach when a reservation is established for the benefit of an Indian tribe.[8] Typically, waters that are appurtenant or adjacent to the reservation are the sources of water that satisfy these reserved water rights. There is no distinction in federal Indian water law as to whether these water courses are perennial, ephemeral, intermittent, or connected to navigable waters. Regardless of the type of water flow, and whether those reserved rights have been confirmed through settlement or adjudication, tribes' reserved water rights and the waters that satisfy those rights are trust assets subject to federal protection and jurisdiction.[9] For tribes that have settled or adjudicated their water rights, the United States has a confirmed trust responsibility and legal obligation to protect the waters subject to those rights.[10]

4. Environmental Justice

[6] *Washington v. Washington State Comm. Passenger Fishing Vessel Assn*, 443 U.S. 658 (1979); *Menominee Indian Tribe v. U.S.*, 391 U.S. 404 (1968).

[7] *Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *N.W. Sea Foods, Inc. v. U.S. Army Corp of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996) (ACE has a fiduciary duty to the treaty tribe that requires the agency to consider and protect tribal treaty rights).

[8] *United States v. Winters*, 207 U.S. 564 (1908).

[9] Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 F.R. 9223 (1990); *see also* Ak-Chin Water Rights Settlement Act, P.L. 95-328 (July 28, 1978) ("The Congress hereby declares that it is the policy of Congress to resolve . . . the claims of the Ak-Chin Indian community for water based upon failure of the United States to meet its trust responsibility to the Indian people.").

[10] *See* Fallon Paiute Shoshone Indian Water Rights Settlement Act, P.L. 101-618, Sec. 103(a) (Nov. 16, 1990) ("Title to all lands, water rights and related property interests acquired . . . shall be held in trust by the United States for the Tribes as part of the Reservation."); Arizona Water Rights Settlement Act, P.L. 108-451, Title II, Sec. 204(a)(2) ("The water rights and resources described in the Gila River agreement shall be held in trust by the United States on behalf of the Community and the allottees as described in this section."); Claims Resolution Act of 2010, P.L. 111-291, Title V, Sec. 504(a) ("Those rights to which the [Taos] Pueblo is entitled under the Partial Final Decree shall be held in trust by the United States on behalf of the [Taos] Pueblo and shall not be subject to forfeiture, abandonment, or permanent alienation.").

EPA's proposed revisions to the 401 certification rule will disproportionately impact tribal governments and tribal members across the country. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," mandates that EPA, ACE, and all federal agencies "make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations in the United States[.]"

Due to a lack of resources, tribal governments rely to a much greater extent than states on EPA's water pollution prevention programs to maintain and protect water quality on tribal lands. Fewer than 10% of tribal governments have their own water quality standards, and none have NPDES programs. Even tribes with water quality standards, therefore, rely on EPA and ACE and their permitting programs—covering NPDES and dredge or fill permits—to protect tribal waters. In contrast, states benefit from larger populations that can support more regulatory structures and personnel, including Clean Water Act ("CWA") programs. Thus, if the Agencies reduce the scope of the waters they protect, this action will have a disproportionate adverse impact on tribes.

EPA's policy implementing EO 12898 states EPA's goal "to understand definitions of human health and the environment from the perspective of federally recognized tribes." EPA, Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014) ("EPA's EJ Policy"), at 2. The tribal perspective is that all waters are deserving of Clean Water Act protections that ensure the health of tribal members and their environment, as explained above. EPA's EJ Policy also announces the agency's goal to "be responsive to the environmental justice concerns of federally recognized tribes," *id*., and to strive "for open communication and meaningful involvement with indigenous peoples and communities." *Id.* at 3. To meet these goals, EPA should consider the tribal concerns outlined here regarding the tribes' authorities to prevent or mitigate water pollution on tribal lands, and should be responsive to these concerns by not narrowing the abilities of tribes to protect and enforce their tribal water quality standards.

Tenets of international human rights law also call for agency attention here. The foundational statement of the rights belonging to indigenous peoples around the world is expressed in the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007), which was endorsed by the United States as a statement with "both moral and political force." *See* Department of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, https://2009-2017.state.gov/s/srgia/154553.htm. Article 29 of the Declaration explains that indigenous peoples have "the right to the conservation and protection of the environment," and that national governments "shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous people without their free, prior and informed consent." A narrowing of the tribes' authorities under Section 401 would undermine tribal conservation and protection of the environment and allow greater disposal of pollutants into tribal waters without tribal consent.

This result would be contrary to both international and domestic recognition of indigenous peoples' rights to a clean environment and a voice in the regulation of pollution.

II. Specific Comments

A. Meaningful Government-to-Government Consultation Needs to Occur on the Revised Rule and the Comment Period Should be Extended to Provide for it.

Despite the significant consequences of the revised rule, the EPA has not conducted meaningful consultation with tribal nations on its content. To date, EPA has not initiated consultation with tribal governments since the pre-proposal consultation that closed on May 24, 2019. During this pre-rule consultation, tribes were given no indication as to what provisions would be included in the current proposed rule and were therefore unable to offer meaningful comment. The NTWC did, however, explain to EPA that the consultation period was too short and lacked the sharing of information necessary to enable meaningful input. NTWC specifically requested that the consultation period be extended to enable an ongoing iterative process as required by USEPA's Consultation Policy.

The agency claims to have satisfied their consultation obligations by having communicated with tribal nations during the pre-proposal consultation and coordination process. The agency's own summary of these "consultations" documents that tribal nations expressed the "importance of meaningful consultation and engagement throughout the rulemaking process." [11]

The NTWC believes the complete absence of ongoing government-to-government consultation with Indian tribes violates Executive Order 13175, Consultation and Coordination With Indian Tribal Governments and U.S. EPA's May 2011 Policy for Consultation and Coordination with Indian Tribes (EPA's Consultation Policy), as well as the trust responsibility on which it is based, and renders the current rulemaking deficient.[12]

The NTWC respectfully urges EPA to immediately initiate a formal tribal consultation process to comply with EPA's Consultation Policy. This process should continue for as long as it takes to allow tribal governments the opportunity to provide meaningful input on the proposed rule and to allow EPA adequate time to address tribal concerns before the proposed rule is finalized. All that EPA has done to date is to invite tribes as a group to public hearings and webinars, and these do not fulfill EPA's government-to-government consultation requirements; indeed, they are no different than the public hearings and webinars held for states and the general public. Direct consultations with individual tribal governments, conducted by individuals with decision-making authority, are necessary to gather and consider input on the proposed rule's impacts on tribal nations.

B. The Proposed Rule Violates Principles of Tribal Sovereignty, the Federal Trust Responsibility, and Other Federal Obligations to Tribes.

[11] 84 Fed. Reg. 44083 (August 22, 2019)

[12] *See* Consultation and Coordination With Indian Tribal Governments, § 2(a), 65 Fed. Reg. 67, 249 (Nov. 6, 2000); EPA Policy on Consultation and Coordination With Indian Tribes, at 5 (May 4, 2011), https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

The proposed rule would limit a tribe's review of applications for Section 401 certifications by: (1) interpreting in the most restrictive way possible the statutory period for tribes to act on Section 401 applications; (2) restricting the scope of information that tribes may require to fully evaluate applications, including requiring certifications to proceed before project reviews are completed under the National Environmental Policy Act ("NEPA"); (3) narrowing the permissible scope of certification; and (4) allowing federal permitting agencies to overturn tribal certification conditions and denials.

As discussed in the following sections, these proposed restrictions at best have no legal basis and at worst are directly contrary to federal trust responsibilities owed to tribal nations. For these reasons and others explained in more detail below, EPA should withdraw or revise the proposed rule.

1. Failure to Uphold the Federal Trust Responsibility and Violation of Tribal Sovereignty

EPA's proposal to restrict the Section 401 process amounts to a failure by the federal government to protect tribal trust resources. As federally licensed mining, hydroelectric, oil and gas drilling, pipelines, and other extraction and infrastructure activities are proposed on and upstream of tribal reservations, tribal input on any required federal permits, through the certification process, is essential to protect tribal water quality, water-related resources, and the integrity, economic security, public health, and welfare of the tribe, including tribal beliefs, cultural and traditional practices, and the tribal way of life. Currently, Section 401 review is the only mechanism available to tribes to ensure these protections. As discussed above, the EPA has a trust obligation to preserve this tribal role. EPA needs to actually exercise its trust obligations here.[13]

Any revisions to the existing CWA § 401 regulations must be consistent with what should be EPA's fundamental objective to protect human health and the environment, its statutory responsibilities under the Clean Water Act, its responsibility to protect critical trust resources and its consultation responsibilities, and adherence to the key principles of tribal sovereignty.

However, EPA's proposal to allow federal permitting agencies the ability to ignore tribal certification conditions and denials, and to grant federal agencies a veto authority over tribal certification decisions, is a slap in the face of tribal sovereignty. Tribes have inherent authority to protect and regulate tribal water quality and water-related resources because those resources affect the political integrity, economic security, health, and welfare of the tribe, as explained at the beginning of this comment letter. Tribes have exercised their authority under CWA § 401 to protect these resources, and EPA has recognized this sovereign authority in its prior rules, practices and guidance. EPA's proposal does not merely limit this authority, it reverses it by giving federal agencies the final word in the certification process. Significantly, EPA's proposed action not only violates principles of tribal sovereignty but also undermines EPA's professed goal of recognizing principles of cooperative federalism.

[13] *See*, *e.g.*, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy (April 5, 2019) [https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy]

2. Diminishment of Tribal Treaty Rights

By narrowing the permissible scope of certifications, in terms of both the activities and the impacts that may be considered, the proposed rule fails to adequately protect tribal treaty rights both on and off the reservation. Tribal treaty rights include rights to hunt, fish and gather, which are dependent on water quality protection, as well as rights to water quality protection directly. Virtually all tribal treaties, which are "the supreme law of the land," assure protection of these rights and resources.[14]

3. Violation of Reserved Water Rights

As discussed above, reserved water rights may be diminished by impairments to water quality. Tribal reserved water rights that protect a tribe's uses of its water were recognized by the Supreme Court over a century ago.[15] Tribal reserved water rights and the waters that satisfy those rights are trust assets for which federal protection is required.

C. The Proposed Rule Unduly Restricts Tribal Authority to Evaluate Federal Project Impacts and Protect Tribal Waters.

1. The Proposed Rule Limits Timelines and the Information Required to be Provided for CWA Section 401 Certifications.

The proposed rule states that the one-year statutory timeframe for acting on a Section 401 certification request will begin as soon as the request is received, rather than running from the time the application is complete. *See, e.g.*, 84 Fed. Reg. at 4401. This change runs counter to EPA's established practice for permit applications in general, under various environmental statutes including the CWA, which sets timelines based on receipt of a complete application and allows permitting authorities to request more information when needed.

There are many reasons why a complete application should be required before the timeframe for review of a certification request begins. A complete application is necessary to *provide affected tribal communities proper notification and meaningful input.* A complete application is necessary to obtain all of the input a tribe needs for its decision, otherwise tribes may be unable to determine whether water quality standards and other water quality requirements will be met. If a certification request contains insufficient information, which is likely under EPA's proposal, a tribe may be forced to deny the request to avoid waiving its certification authority.

For example, The Fond du Lac Band of Lake Superior Chippewa has processed over ninety water quality certification requests since the Band's procedures were first implemented in 2006. The applications are immediately reviewed for completeness before public notice, but are often missing statements or proposed BMPs that would ensure compliance with the Band's water

[14] Constitution Art. II, § 2, cl. 2; Art. VI, cl. 2.

[15] *United States v. Winters*, 207 U.S. 564 (1908).

quality standards. The technical review cannot be completed without sufficient information to fully understand the potential for water quality impacts to receiving waters, including existing or baseline water quality data for those waters.

Tribes are already placed at a disadvantage with respect to harmful discharges for a number of reasons, including that many proposed projects occur within or upstream of reservations. Many tribes do not have in-house expertise to evaluate the potential impacts of these discharges on tribal resources, and tribes may require outside technical assistance to address the proposed project complexities and compliance with tribal environmental laws. EPA's proposed rule would only add to the burdens tribes already face.

EPA's proposal would require certain information to be part of a certification request, *see, e.g., id.* and proposed §121.1(c) (Definitions), but the information required is fairly minimal and may not address all the relevant aspects of a project, especially if they are complex, such as in the case of a drinking water intake withdrawal project that would require continuous flow monitoring at multiple points to support a protocol for water use restrictions during times of drought.

Another example is taking place in California, which is the recognized authority to regulate wastewater discharges from a proposed project to decommission four dams in the Lower Klamath Basin. Since 2016, the applicant has been engaged with the Federal Energy Regulatory Commission (FERC) to decommission the dams, and submitted a water quality certification application to California's State Water Resources Control Board (Board) for the project. A CWA § 401 certification is required before FERC can issue a license surrender order for the project.

Due to the Klamath basin's complex hydrologic system of inter-connected rivers, lakes, marshes, dams, diversions, wildlife refuges, and critical fish habitat, the Board has chosen to provide the public and affected jurisdictions, such as the Hoopa Valley Tribe (HVT), a downstream jurisdiction, with an early opportunity to review the necessary information and evaluate the project's anticipated water quality impacts prior to the Board issuing a final CWA § 401 determination.

The Hoopa Valley Tribe used FERC's Environmental Impact Statement and the Board's environmental document under the California Environmental Quality Act to make its recommendation to modify or condition the Board's proposed 401 certification for the project. The Board's early consultation with the HVT provided the necessary documents to evaluate how the river would respond to the dam removal and the length of time it would take to recover. It demonstrated how a successful 401 certification process can be implemented, and that a license is likely to receive approval without the need for further modification or judicial intervention if the necessary information and an adequate timeframe for evaluation are provided.

In the proposed rule, EPA cites *Hoopa Valley Tribe v. FERC, 913 F 3d. 1099 (D.C. Cir. 2019),* as a reason for limiting the timeframe for certifying authorities to act on certification requests. In that case the court addressed HVT's concern that continual delays by certifying authorities allowed a project proponent to withdraw and resubmit the same section 401 request for "more than a decade." These delays allowed water quality conditions to deteriorate and

negatively affect salmon runs in the Klamath River. The court found that the certifying authorities "California and Oregon's deliberate and contractual idleness" defied the statute's one-year limitation and "usurp[ed] FERC's control over whether and when a federal license will issue."

The court's decision recognized that in certain circumstances, either applicants or certifying authorities have inappropriately used aspects of the current CWA § 401 certification process to significantly delay the completion of the process. In some cases, this has impacted the ability of an important project to obtain necessary permitting; in other cases, it has delayed the imposition of necessary water quality protection measures. That is no longer the situation in California with the Klamath Basin dams. Regardless, these examples are not routine and should not be used to justify unnecessary limitations on a tribe's ability to effectively preserve its water quality through a reasonable CWA § 401 certification process.

Finally, while most CWA § 401 certifications are fairly routine, EPA needs to provide in its rule for those which are not. Specifically, EPA should revert to its prior interpretation of allowing certifying authorities the ability to request more information and having the reasonable time period begin with receipt of a complete application rather than some truncated version of it.

2. EPA's Suggestion that Certifications Take Place Prior to the Completion of a NEPA Analysis Would Deprive Tribes of Vital Information.

On top of restricting certification reviews to limited application information, the proposed rule suggests that a certification review need not be coordinated with the National Environmental Protection Act (NEPA) review process. Instead, the revised rule seeks to bypass NEPA by recommending that states and tribes act on a certification request even when NEPA review is incomplete. 84 Fed. Reg. at 44114 n. 45. EPA reasons that NEPA reviews take longer than a year, and that such reviews are broader in scope than Section 401 reviews.

The Fond du Lac Band has managed more than thirty certification requests for major pipeline projects across the reservation that would impact sensitive wetlands and surface waters, and routinely evaluates these requests received during the formal NEPA process. Until that environmental review process is complete, and all avoidance/minimization revisions, reroutes, and alternatives to the project are fully known, it is simply not possible to anticipate all of the appropriate and relevant conditions that may need to be imposed in a certification decision. The Band notes that these projects require extensive site-specific conditions that can only be developed when the route and construction methods are fully defined.

EPA's proposed approach would defeat the purpose of NEPA by allowing permits to go forward for projects before they underwent full NEPA review. It would deprive certifying authorities of vital information on the project. The NEPA analysis not only provides information regarding impacts on water quality, it also provides information regarding impacts on culturally significant resources, including fish and wildlife, which is especially critical knowledge for tribes to have when setting conditions of certification. If a tribe is required to initiate an environmental evaluation before NEPA documents are available, this would place an unnecessary burden on the

tribe and is likely to result in an incomplete review and possible degradation of tribal trust resources such as fish and wildlife.

Furthermore, if tribes lack the information they need to make an appropriate and substantiated 401 certification, tribes are more likely to deny the certification. Under the CWA, such denial is supposed to be followed by the EPA. However, as stated below, if the EPA vetoes the tribe's denial, as the new rule would allow, then this decision will also likely engender more litigation against the EPA to protect tribal water quality. Tribes also lack the resources to protect their water sources through litigation.

D. The Proposed Rule Unlawfully Limits the Scope of the Certification that EPA, Tribes and States are Authorized to Provide.

The proposed rule states "[t]hat a certifying authority's review and action under section 401 is limited to water quality impacts of waters of the United States resulting from a potential point source discharge associated with a proposed federally licensed or permitted project."[16] As the Supreme Court has explained, the scope of certification authority under Section 401 is not limited to ensuring compliance with the Clean Water Act, but includes authority to impose conditions consistent with "any other appropriate requirement of State [or authorized Tribal] law."[17] For example, the scope of the certification should explicitly recognize the importance of water quality to tribal health, welfare, economic security, and political integrity, and should acknowledge the expertise of tribal governments in regulating threats to water resources. In the proposed rule, however, EPA recommends that the scope of a Section 401 certification review be limited to the impact of the point source discharge itself. Moreover, EPA proposes that the scope be limited to "water quality requirements," which it defines as federally approved state and tribal CWA requirements.[18]

The Fond du Lac Band has always taken a holistic approach in water quality certification decisions, incorporating both general and site-specific conditions in every certification that is granted. Those conditions are, without exception, grounded in the Band's delegated authority under the Clean Water Act to prohibit impacts to waters of the reservation. Point source discharges are only one of the factors that cause impacts to waters and wetlands from permitted activities. The Band also requires proper containment of petroleum products and other chemical pollutants from motorized equipment and fuel tanks, prohibits *any* discharge that causes deposition of solids or increased turbidity in violation of water quality standards, requires all erosion control BMPs be properly installed, maintained, inspected, and removed once the area has been properly stabilized and revegetated, and requires a site to be returned to original contours as much as possible. Implementation and enforcement of these conditions is key to ensuring that a permitted activity has only minimal and temporary impacts to sensitive aquatic ecosystems, and is entirely consistent with the narrative and numeric criteria in the Band's water quality standards.

[16] 84 Fed. Reg. 44098 (Aug. 22, 2019).

[17] *Pub. Util. District No. 1 of Jefferson Cty.,* 511 U.S. 698, 711-713 (1994); 33 U.S.C. § 1341(d).

[18] 84 Fed. Reg. 44093 (August 22, 2019).

As noted above, the Fond du Lac Band has procedures in place for processing requests for certification to ensure permits are protective of the Band's jurisdictional waters. These are processes that EPA has already approved, and they represent an exercise of the Band's sovereignty in connection with the management and protection of critical trust resources.

EPA's proposed interpretation to limit the scope of a Section 401 certification to federally approved tribal CWA requirements also fails to recognize that most tribes do not have CWA authorized water quality regulations. In these areas where EPA is the certifying authority, EPA staff would not be able to consider tribally adopted water quality protective ordinances or water quality standards leaving no protection for most tribal waters. For example, the Blackfeet Tribal Aquatic Protection Ordinance 117 has been adopted by the tribe in order to holistically protect and preserve the water quality of wetland and riparian resources on the reservation by integrating site specific project review with the latest scientific research and traditional ecological knowledge. Increased growth and development on the Blackfeet Reservation is resulting in increased negative impacts on water and aquatic lands. Comprehensive protection of water quality is critical to the preservation of fish, wildlife, vegetation and the culture and economy of the Blackfeet Indian Reservation. Under current CWA § 401 practice, EPA plays an important role as the Section 401 certifying entity for the tribe and is able to cite the tribe's aquatic protection ordinance as a basis for conditions to protect water quality. The proposed interpretation to narrowly define "appropriate requirements" to mean only EPA-approved CWA provisions is not appropriate or reasonable and would leave most tribal waters unprotected even when specific tribal water quality protection ordinances or standards have been adopted, which would be a direct challenge to tribal sovereignty.

Courts have interpreted the "other limitations" language in section 401(d) to mean that, once a discharge is implicated under section 401(a) (1), the certifying state may impose conditions that address water resources issues that are specific to the violation of its water quality standards. In the lead case of *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the United States Supreme Court affirmed that a state may condition Section 401 certification "upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of state law,'" including protection of designated uses. The Court upheld the State of Washington's imposition of minimum flow requirements at a hydroelectric dam in order to protect the designated use of the Dosewallips River for salmon spawning and migration, on the grounds that the CWA requires states to "take into consideration the use of waters for propagation of fish and wildlife'" in setting water quality standards.

EPA's 2010 Handbook got it right. In the Handbook, EPA interprets Section 401(d) to mean "[o]nce a potential discharge triggers the requirement for [section] 401, the certifying agency may develop 'additional conditions and limitations on the activity as a whole.'"[19] Such additional conditions must then "become conditions of the resulting federal permit or license." EPA should return to this correct interpretation of the CWA.

[19] EPA 2010 Section 401 Handbook, *supra* note 55, at 10 (quoting *Jefferson Cnty.,* 511 U.S. at 712).

E. The Proposed Rule Violates Tribal Sovereignty and Principles of Cooperative Federalism by Providing that Federal Permitting Agencies may Overturn Tribal Certification Conditions and Denials

Where state or tribal certification is conditional, the federal permitting agency must accept all conditions in a Section 401(a)(1) certification. Section 401(d) of the CWA states: "Any certification provided 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 limitations *and other limitations*," under various sections of the CWA, "*and with any other appropriate requirement of State law* set forth in such certification." Any such limitations identified "shall become a condition on any Federal license or permit subject to the provisions of this section".[20] By explicitly granting tribes the right to make Section 401 decisions, the CWA also supports tribal sovereignty and honors the federal government's trust responsibility. Congress deliberately did not give EPA or other federal licensing and permitting agencies any authority to override or diminish a tribe's decision under Section 401. Accordingly, EPA's 2010 Handbook provides, "[t]he federal agency may not select among conditions when deciding which to include and which to reject."[21] In addition, "[i]f the federal agency chooses not to accept all conditions placed on the certification, then the permit or license may not be issued." The EPA also advises that "[c]onsiderations can be quite broad so long as they relate to water quality."[22]

The proposed rule violates the CWA and the principles it supports. Section 401 entitles a state or tribe to "conduct its own review" of a project's "likely effect on its water bodies" and to determine "whether those effects would comply with the state's or tribe's water quality standards."[23] EPA General Counsel decisions previously "interpreted this provision broadly to preclude federal agency review of state or tribal certifications." EPA's Section 401 regulations provide that any "[r]eview and appeals of limitations and conditions attributable to State or Tribal certifications shall be made through the applicable procedures of the State or Tribe."

III. Conclusion

The proposed revisions weaken EPA's implementation of the relevant provisions of Section 401 and are not consistent with its fundamental objective to protect human health and the environment, its statutory responsibilities under the Clean Water Act, its responsibility to protect critical tribal trust resources, its consultation responsibilities, and adherence to the key principles of EPA's 2010 §401 guidance.

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[20] §1341(d)

[21] *Id*. (citing Am. Rivers, Inc. v. FERC, 129 F.3d 99, 110-11 (2d Cir. 1997)).

[22] *Id.* at 23 ("The U.S. Supreme Court has stated that, once the threshold of a discharge is reached … the conditions and limitations included in the certification may address the permit activity as a whole." (citing *Jefferson Cnty.,* 511 U.S. at 712)).

[23] *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation,* 868 F. 3d 87, 101 (2d Cir. 2017).

The proposed rule also injects additional confusion and litigation into the existing Section 401 process. Moving forward with the proposed rule changes to the Section 401 certification process will leave the EPA and other agencies open to legal challenges based on the numerous inconsistencies and conflicts between the proposed rule and the Clean Water Act.

Specifically, as discussed above, the proposed rule:

- Limits tribes' traditional authority by narrowing the grounds upon which they may deny projects that may pollute their waterways. Tribes should be allowed to propose conditions and limitations on the activity as a whole, especially those that affect reservation water quality necessary to support rights reserved under treaty as well as tribal objections related to the violation of water quality standards in reservation waters.
- Limits ability to bring enforcement actions to abate water pollution within and onto tribal lands.
    - 45 tribes currently have significant authority over federal permits issued on the reservation (or for upstream federally permitted facilities) in that a tribe can deny a permit if the permit conditions won't meet the tribe's federally approved WQS or other conditions.
    - Many of these are dredge and fill permits for construction activities.
    - If fewer permits are issued due to the narrower scope of Section 401 certifications, this will diminish tribal authority to protect water resources.
- Narrows EPA's authority and lessens the instances when EPA can intervene to protect tribal resources.
- Raises jurisdictional issues related to fulfillment of the federal trust responsibility, treaty compliance, and violations of reserved rights, especially in light of the agency's proposal to limit its permitting oversight.
- Encroaches on tribal sovereignty and authority by authorizing federal permitting and licensing agencies to reject tribal certifications, contrary to CWA § 401.

Furthermore, the EPA has not provided either a sound or reasonable explanation for its proposed change in practice and interpretation.[24]

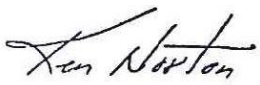
Combined with the WOTUS rule, which currently proposes to narrow the types of waters covered by CWA programs, the proposed rule not only will result in fewer CWA discharge permits being issued, but also in less protection for tribal water quality standards. The end result is that there will be more pollution and harm to tribal water quality standards, health, and water-dependent resources; diminishment of tribal authority to protect tribal water resources; and breaches of the federal government's trust obligation to protect tribal waters and resources.

NTWC urges EPA to withdraw the proposed rule and reinstate EPA's existing regulations and 2010 Handbook, which interpreted the certification process broadly in accordance with U.S. Supreme Court decisions and implicitly recognized tribal views of water. Finally, as previously stated, we respectfully request that EPA immediately initiate a formal government-to-government consultation process, and extend the comment period accordingly to

[24] See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (an agency cannot disregard "facts and circumstances that underlay or were engendered by the prior policy" without providing a reasoned explanation)

provide an appropriate mechanism for EPA to engage with tribes so that we may provide additional meaningful input and ensure our concerns are meaningfully taken into account.

Sincerely,



Ken Norton, Chairman
National Tribal Water Council

Cc: Karen Gude, EPA Office of Water