March 1, 2019

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

Transmitted via Ross.DavidP@epa.gov

RE: Early Engagement on Updating and Improving Implementation of Clean Water Act Section 401

Dear Mr. Ross,

The National Tribal Water Council (NTWC) appreciates being given the opportunity to provide input into U.S. EPA's review of the Clean Water Act ("CWA") § 401 certification process. It is a process that many of the tribes on our Council engage in and we would like to share some comments from our members.

Importantly, we wish to make clear that the current framework of CWA § 401 needs to be preserved. The Clean Water Act, like many of the federal environmental statutes, is an example of the cooperative federalism that this administration has pledged to honor. Pursuant to the statute, EPA establishes federal criteria for the protection of water quality. States and tribes set water quality standards that are at least as stringent as federal criteria to protect the waters within their jurisdictions and maintain a high standard of water quality.

The CWA § 401 certification process is a critical element in this process. It allows tribes and states 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 and states 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 states and tribes are the permitting agencies, *see* CWA § 402(d) (2) (NPDES permits); *see also* CWA § 404(j) (dredge and fill permits).

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The certification process is even more critical to tribes than to states because, due to lack of resources, no tribes implement their own CWA § 402 or 404 permit programs. Therefore, certification provides tribes with the only significant input they have into the issuance of federal CWA permits, and those permits are the primary means for implementing water quality standards and ensuring the protection of water quality on tribal lands.

Legislation introduced in the last session of Congress by Senators Barrasso and Carper will significantly alter the existing federal/state/tribal cooperative relationship in the certification process by limiting both the information that a tribe or state may use as the basis for a certification decision and the time in which that decision must be made. *See* S. 3303, Water Quality Certification Improvement Act of 2018.

We are strongly opposed to any amendments to the CWA, through this or similar legislation, that would limit state and tribal authority to protect the designated uses of their waters and diminish the tribal and state role in the CWA § 401 certification process. We do, however, realize that there is room for improvement in the implementation of the certification process under CWA § 401(a) (2), in particular with respect to the timeliness and transparency of the process.

The following sections highlight some of the critical issues that have clouded the certification process.

ISSUE #1: Section 401 should not be used to obstruct efforts to protect or improve water quality due to status as an affected but not a certifying jurisdiction.

The Hoopa Valley Tribe's water quality standards for the area of the Klamath River that touches the Hoopa Valley Reservation are enforced through the CWA § 401(a)(2) process, with the tribe being an affected jurisdiction but not the jurisdiction where a discharge originates. Unfortunately, the Hoopa Valley Tribe has been unable to address violations of its water quality standards that will be caused by a hydroelectric re-licensing process, due to California's ("upstream jurisdiction") waiver in asserting its § 401(a) (1) certification authority. This situation is inconsistent with the policies expressed in § 401(a) (2).

Although § 401 certification authority rests with the jurisdiction where the discharge originates, neighboring states and authorized tribes downstream or otherwise potentially affected by the discharge have always been provided an opportunity under § 401(a)(2) to raise objections to and comment on the federal permit or license, as required by the statute.

Pursuant to § 401(a) (2), the EPA Administrator initially determines whether a discharge subject to a state's § 401 certification process "may affect" the water quality of other states or tribes. The EPA is then required to notify the affected jurisdictions of the proposed federal permit or license and provide them with an opportunity to submit their views and objections about the proposed permit or license and associated § 401 certification. They may also request a hearing, at which the EPA Administrator will submit his evaluation and recommendations with respect to the objection to the licensing/permitting agency. Although recommendations from affected jurisdictions do not have the same force as actions by certifying states or tribes, the licensing/permitting agency must develop measures to address the affected jurisdiction's concerns.

EPA must be proactive in notifying states of the agency's obligation to ensure compliance with an affected tribe's Water Quality Standards (WQS) when EPA issues a NPDES permit, or when a state certifies a federal permit or license.

ISSUE #2: Section 401 should not be used to delay the dam re-licensing process, thereby prolonging decision-making efforts, which in turn can have severe consequences on water quality.

The Klamath River provides an additional example of problems with the certification process. California's State Water Board, as a licensing or permitting agency subject to § 401(a)(2), has an obligation independent of EPA to ensure that re-licensing of dams along the Klamath River will not cause or contribute to violations of the downstream Hoopa Valley Tribe's water quality standards. Under the Clean Water Act, California (as the "upstream state") must ensure that its permitting or certification decision will not result in violations of the Hoopa water quality standards (See Arkansas v. Oklahoma, 503 U.S. 91-(1992)). Because the Hoopa standards are implemented through the Board's certification process, any delays in the Board's proceeding also result in delay of achieving tribal water quality standards, but unfortunately endless delays and postponements in decision-making during the re-licensing process have become the norm.

Since 2008, the Hoopa Valley Tribe has been asking the California State Water Board to issue a § 401 certification for dam re-licensing that meets both the state and the tribe's water quality standards. These requests continually were denied, and it appears that the certification process was being used as a tool for delaying the re-licensing process. Meanwhile, the delay has obstructed tribal efforts to improve water quality and interfered with critical passage of vital fish populations due to outdated dam operations. Delays in dam re-licensing have allowed water quality conditions to become seriously impaired, posing an ongoing threat to the health of fish and aquatic species relied upon by both tribal and non-tribal communities as an important food source. Over the past six years, there has been overwhelming evidence of a substantial increase of toxic blue-green algae resulting in an overall decline in fish populations.

The Klamath River hydroelectric re-licensing process is a concrete example of how the § 401 certification process was being manipulated by a state certification agency to delay implementation of effective water quality controls and enhancement measures. Moreover, California, as a signatory to the Klamath Hydroelectric Settlement Agreement (KHSA), agreed to hold its § 401 certification of the applicant license in abeyance until 2020 (or if federal legislation is introduced for dam removal).

NTWC is concerned about the use of status quo annual interim licenses in the FERC re-licensing process. In California, the NTWC believes the repetitive issuance of interim licenses to hydropower facilities that have operated in this manner for more than a decade raises the potential for abuse of the annual license process, and allowing the § 401 certification process to be used to achieve further delays in the re-licensing process is in turn an abuse of the certification process. Preserving the status quo of re-licensing processes that ignore changing conditions is detrimental to the improvement of water quality.

The above concerns were recently confirmed by the ruling of the U.S. Court of Appeals for the District of Columbia Circuit on January 25, 2019, *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* (No. 14-1271), specifically concerning the KHSA. In that case, the licensee's withdrawals and resubmissions of license applications were not just similar requests, they were not new requests at all. The KHSA makes clear that the licensee never intended to submit a "new request." Indeed, as agreed, before each calendar year had passed, the licensee sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same *… in the same one-page letter … for more than a decade.* Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project. The court concluded that the withdrawal and resubmission of water quality certification requests does not trigger new statutory periods of review.

ISSUE #3: The NTWC believes the current requirement to issue a certification decision within one year of a certification request needs to be revised.

Section 401(a) (1) requires a state or tribe to issue its certification decision within one year from the date of the certification request. If this deadline is not met, the requirement to obtain a certification is deemed waived. This loophole in the § 401 certification process undermines congressional intent and subverts the overall goals of the Clean Water Act.

Applicants around the nation are repeatedly abusing the certification process by: (1) delaying or refusing to conduct necessary studies and environmental analysis within the one-year timeframe, (2) withdrawing their certification request just before the one-year time period expires, and then (3) re-submitting their application to start a new one-year timeframe. This continuing abuse of process results in continued delay of the § 401 certification decision, with all the detrimental results discussed above. Because a FERC license cannot be issued until certification is obtained, there is an indefinite delay of FERC licensing proceedings. In the meantime, the project continues to operate, generating revenues for the licensee, while the water quality and affected resources suffer.

The NTWC recommends changes to the recertification process through the rulemaking process. The regulations should expressly address and prohibit the repeated withdrawal and re-submission of § 401 certification applications in hydroelectric re-licensing proceedings. This addition to the regulations would be supported by § 401(a)(1): Congress, in the express language of § 401 of the Clean Water Act, and EPA, in its regulations implementing the Clean Water Act, have mandated that the certification decision must happen within one year. FERC regulations also support timely certification.

ISSUE #4: EPA must uphold its obligation to ensure compliance with an affected tribe's WQS.

As stated earlier, Section 401(a) (2) provides a process by which EPA, exercising its oversight capacity, must notify a state or authorized tribe that a proposed federal permit may affect the quality of that state's or tribe's waters so as to violate any of their water quality requirements. This notification enables the affected state or tribe to determine whether its water quality standards

will be violated and if so, notify the Administrator and permitting agency in writing of their objection to the issuance of that permit or license, and request a public hearing. Based upon evidence provided at the hearing, the permitting or licensing agency must condition the license or permit in such manner as to ensure compliance with the downstream authority's water quality requirements. If imposing conditions cannot ensure compliance, the permit or license may not be issued.

In northeastern Minnesota, the Fond du Lac Band of Lake Superior Chippewa has elevated their concerns to EPA about multiple upstream federal CWA § 404 permits being issued for hard rock mining projects, resulting in both new and expanded discharges, when existing discharges from those mines already exceed state and tribal water quality standards. Even though the Band has explicitly requested notification from EPA on several proposed permits, and the opportunity for public hearings to offer evidence of violation of the tribal water quality standards, the EPA Regional Administrator has neither proactively issued a 401(a) (2) letter, nor honored the Band's specific request for such notice. In one instance, a direct request from the Tribal Chairman to the EPA Regional Administrator for a public hearing on a mine expansion project that the Band had determined would affect reservation waters, received a response from the Water Division Director stating that they deferred to the U.S. Army Corps of Engineers, as the permitting agency, to respond to the Band's request. This response entirely abdicated the EPA's role and responsibilities under the Clean Water Act. More recently, the Band directly notified the Regional Administrator, the Corps, and the state permitting agencies that it objected to the issuance of permits for a new mine, because the permit would violate the Band's downstream water quality standards. There has been no response from EPA or any of the other agencies to this request. The Band has been effectively shut out of exercising its rights under the CWA to protect tribal waters, including the inherent right to exercise authority under § 401 to object to a proposed upstream discharge that would violate its WQS.

It is paramount that a specific procedure be required identifying a time frame, in advance of permitting or licensing, during which EPA must notify a tribe or state when a discharge subject to a federal permit or license may affect the quality of the tribe's or state's waters. The procedure also must provide that, if the tribe or state objects to the permit, the EPA has a duty to evaluate and make recommendations regarding those objections to the federal licensing or permitting agency at a public hearing. The EPA must provide explicit policy guidance setting forth its responsibilities in evaluating and making recommendations to the permitting agency with reference to the objections raised by the tribe or state.

In conclusion, the NTWC has a strong interest in assisting the EPA in updating the implementation of the existing CWA § 401 certification program to assure its consistent use as a more effective and equitable water quality regulatory tool. Elimination of loopholes and improvements to the § 401 certification process will allow tribes to more effectively manage their own water quality issues. The NTWC recommends that EPA clarify, in rulemaking or through updated guidance, that the basis for § 401 certification decisions be public and provide opportunities for public input, and that EPA has a mandatory, not discretionary, duty to issue

401(a) (2) letters to affected states and authorized tribes when there is potential for violation of their water quality standards.

The EPA must consider implementing changes to the § 401 certification process through an expansive consultative review of tribal and state authority established under § 401. If amendments are made to CWA § 401, they should be made to address issues such as those noted above and not to diminish tribal or state roles in the certification process.

Under CWA § 401(a) (2), the EPA has an obligation as well as an opportunity to facilitate protection of tribal waters. The EPA, in accordance with Administrator McCarthy's December 1, 2014 *Memorandum Commemorating the 30th Anniversary of the EPA Indian Policy*, will consider all relevant information to help ensure the agency's actions do not conflict with existing treaty rights. The EPA must be fully informed when it seeks to implement its programs and protect treaty rights and resources when it has the discretion to do so.

Members of the NTWC are strongly opposed to any amendments to the CWA that would limit state and tribal authority to protect the designated uses of their waters and diminish the long-standing roles tribes and states have played during the CWA § 401 certification process. Tribes must not lose their authority to safeguard the quality of their water resources.

Sincerely yours,

Ken Norton, Chairman
National Tribal Water Council

Cc: John Goodin, Acting Director, EPA Office of Wetlands, Oceans, and Watersheds
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