September 13, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted to cwa401@epa.gov and www.regulations.gov

Re: Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Docket ID No. EPA-HQ-OW-2021-0305)

Dear Administrator Regan:

The National Tribal Water Council (NTWC) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) request for early feedback as EPA considers revising the Clean Water Act (CWA) Section 401 Certification Rule.

The NTWC was formed by EPA to provide the Agency's media programs with technical input from Indian Country to strengthen EPA's coordination with tribes, and to allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages (ANVs) as they relate to EPA water programs and initiatives. Since 2008, the NTWC has worked collaboratively with EPA's Office of Water (OW) on many water issues impacting tribes and ANVs. Recently, the NTWC has committed to assist OW to reach a goal of 100 tribes obtaining treatment as a state status (TAS) to administer the water quality standard (WQS) program by 2023. Currently, there are 49 tribes with federally approved WQS and are administering CWA Section 401 Water Quality Certifications of federal licenses and permits for their tribal waters.

CWA § 401 provides an essential set of mechanisms to protect tribal water quality by ensuring that discharges associated with activities occurring either within reservations or off-reservation upstream do not negatively impact the quality of tribal waters. It allows tribes 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. In many circumstances, Section 401 serves as the first and only line of defense in protecting their waters. It provides veto authority over federal permits and licenses if the discharge originates in the waters within its

reservation over which the tribe has authority.[1] This authority applies to Section 404 Dredge and Fill permits issued by the Corps and EPA general permits, as well as EPA Section 402 NPDES discharge permits and Federal Energy Regulatory Commission (FERC) hydroelectric dam licenses that are subject Section 401.[2] Thus, 401 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. The process also gives permit applicants and federal agencies notice of these concerns and an opportunity to address them.

For tribes that do not have TAS for water quality standards, EPA generally regulates tribal activities for CWA purposes for their jurisdictional waters. However, a number of jurisdictional, procedural, and regulatory processes remain unclear, especially under the CWA Section 401 Certification authority.

The focus of the NTWC's comments is to provide ways in which CWA § 401 can be strengthened and employed to protect both tribal reserved rights – both treaty rights and *Winters* right – in areas outside reservation boundaries; rights to clean water resources on reservations and tribal reserved rights to hunt, fish and gather in territories ceded to the United States. Any revisions to the 2020 CWA Section 401 Certification Rule (2020 Rule) must ensure EPA's implementation of the relevant provisions of § 401 are consistent with its fundamental objective to protect human health and the environment, its statutory responsibilities under the CWA, its responsibility to protect critical tribal trust resources, its consultation responsibilities, and adherence to the key principles of EPA's 1984 Indian Policy. These obligations and responsibilities cannot be met if regulations inappropriately limit the § 401 process and scope. Section 401 certification is a critical water quality protection tool that strengthens tribal inherent sovereign authority to protect water quality.

The NTWC believes that the 2020 Rule inappropriately limited § 401 certification for reasons discussed in our comments on the proposed rule dated October 16, 2019 (Docket ID No. EPA-HQ-OW-2019-0405) and discussed below.

In its Notification of Consultation and Coordination on the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, EPA identifies that "Possible future revisions to the CWA Section 401 regulations will impact Tribes, with and without treatment in a similar manner as a state for CWA Section 401." The NTWC strongly supports EPA revisions to the 2020 Rule which limited the tribal TAS process. We encourage EPA to revise those regulations 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

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[1] *See* 33 U.S.C. §§ 1341(a)(1), 1377(e); 40 C.F.R. § 131.8; *see also* EPA 2010 Section 401 Handbook, *supra* note 55, at 6.

[2] EPA 2010 Section 401 Handbook, *supra* note 55, at 1-2; *see* 33 U.S.C. § 1377(e).

process under CWA § 401(a) (2), in particular with respect to the timeliness and transparency of the process.

The notification of consultation and coordination on the revisions to the 2020 CWA 401 Certification Rule also acknowledges that EPA wants to ensure meaningful opportunities for tribes to have input in the certification rule revision process. The NTWC welcomes opportunities for input into revising the 2020 Rule. The NTWC provides comments on seven (7) key provisions in revising the 2020 Rule:

1. Pre-filing meeting requests;
2. Certification requests;
3. Reasonable period of time;
4. Scope of certification;
5. Certification actions and federal agency reviews;
6. Neighboring jurisdictions; and
7. Data and other information.

The NTWC addresses each issue in turn, providing both background and policy recommendations.

1. Pre-Filing Meeting Requests

The 2020 Rule requires the project proponent to submit a pre-filing meeting request to the certifying authority at least 30 days prior to submitting a certification request. The pre-filing meeting is intended to ensure that certifying authorities receive early notification and have an opportunity to discuss the project and potential information needs before the statutory timeframe for review begins.[3]

We agree that early coordination and cooperation between the project proponent, certifying authority, and federal authorizing agency is beneficial in discussing sufficient information about the proposed project in advance of starting the statutory certification clock. When EPA is the certifying authority on behalf of tribes without 401 TAS, it is critical that the potentially affected tribe be notified and included in the pre-filing meeting discussions. There are several procedural steps that can be implemented to ensure the needed early coordination and cooperation takes place with respect to any permittable/licensable activity with associated discharges that may impact downstream tribal water quality:

- EPA should take steps to ensure that the Agency itself implements CWA Section 401(a)(2) and its own Consultation Policy in a timely manner as to any potentially affected tribe, including early notice and an opportunity to provide input that will be meaningfully considered by decision-makers.

[3] 85 Fed.Reg.42210, 42241 (July 13, 2020).

- EPA should facilitate early dialogue between the project proponent and potentially affected tribes, including the sharing of whatever information the potentially affected tribe deems necessary to enable informed input and participation in decision-making.
- EPA should provide useful technical assistance to tribes regarding the CWA Section 401 certification process and how to best participate in the process in a timely manner alongside EPA and other relevant federal and state agencies to ensure the protection of tribal water quality.

The result of implementing these actions could provide better-informed water quality certification and mutually agreeable coordination between the certifying entity, affected tribe and the federal agency.

Recommendations

NTWC recommends that the revised 401 certification rule retain the requirement for pre-meeting request. This process should also recognize that tribes with TAS for 401 certification may have a specific process for engaging in a pre-meeting request. For example, tribes could have their own provisions for pre-meeting requests, including allowing some types of certifications to proceed without them. The project proponent should comply with that tribe's process. We also request that the pre-notification meeting provision include procedures for notification of any potentially affected tribe and for consultation and engagement, if the tribe requests, in pre-filing meeting discussions and decisions.

2. **Certification Requests**

The NTWC supports the certifying authority's ability to obtain information that is of sufficient quality and complete enough to support a § 401 certification analysis. The NTWC is concerned that the components in a "certification request" under the current rule lack information necessary to assess the proposed project's consistency with water quality requirements. In the preamble to the 2020 Rule, EPA acknowledges this lack by noting that "the components of a 'certification request' identified in the final rule are intended to be sufficient information to start the reasonable period of time but may not necessarily represent the totality of information a certifying authority may need to act on a certification request," and observes that a certifying authority may request and evaluate additional information within the reasonable period of time.[4]

The ability of certifying authorities under the 2020 Rule to request additional information appears to be limited and therefore does not effectively address information gaps. For example, when EPA is acting as the certifying authority, the 2020 Rule establishes certain criteria that limit EPA's ability to request additional information that can be generated and considered in the reasonable period of time. For tribes without CWA 401 TAS, EPA is the responsible certifying agency. This limitation on EPA to ask for additional information associated with discharges negatively impacts both EPA's ability to appropriately represent those

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[4] 85 Fed, Reg. 42210, 42245 (July 13, 2020).

tribes' interests as well as EPA's ability to fulfill its trust obligation to protect downstream tribal water quality and tribal aquatic resources generally.

The NTWC believes that 2020 Rule definition of "certification request" constrains what states, tribes, and federal agencies can require in a certification request. For tribes without TAS, the limitations placed on the federal certifying authority's ability to get additional information necessary to complete the analysis in a timely manner is unacceptable, and revisions to the rule will need to address this information gap.

Recommendations

NTWC recommends that the revised 401 certification rule provide states and tribes the ability to obtain information that is of sufficient quality and complete enough to support a 401 certification analysis.

3. Reasonable Period of Time

The 2020 Rule requires the federal licensing or permitting agency to determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. When a federal agency is setting the reasonable period, the 2020 Rule indicates the agency should consider the complexity of the proposed project, the nature of any potential discharge, and the potential need for additional study or evaluation of water quality effects from the discharge.[5] The 2020 Rule also requires federal licensing or permitting agencies to notify the certifying authority in writing within 15 days of receiving a certification request, specifying the date of receipt, the applicable reasonable period, and the date upon which waiver will occur if the certifying authority fails or refuses to act.[6]

The NTWC recognizes the importance for the project proponent, certifying authority, and federal licensing or permitting agency to clearly understand when the reasonable period of time has started and when it will end. Providing clarification of the factors that determine the reasonable period of time should be addressed in a revised 401 certification rule. These factors include, for example, what is reasonable for a "reasonable period," who should establish what is a "reasonable period," tolling the reasonable period, and opportunities certifying authorities have to remedy a deficiency in a certification.

a. <u>What is Reasonable for a "Reasonable Period"</u>

Under the 2020 Rule reasonable periods vary among federal agencies. This variability has created confusion and uncertainty for certifying authorities as to when to act upon a certification request. For example, the Army Corps of Engineers (ACE) regulations identify "60 days after

[5] 40 C.F.R. § 121.6(b); 85 Fed. Reg. 42210, 42259-60 (July 13,2020).

[6] 40 C.F.R. § 121.6(b); 85 Fed. Reg. 42210, 42259 (July 13,2020).

receipt of such request unless the district engineer determines a shorter or longer period is reasonable for the state to act."[7] In contrast, the Federal Energy Regulatory Commission (FERC) regulations instruct a certifying agency that it must "den[y] or gran[t] certification by one year after the certifying agency received a written request for certification."[8]

The importance of predictability in the 401 certification process is critical for certifying tribes to respond to a federal agency's request for a general permit and avoid the risk of waiving a certification due to a missed deadline. Currently, there is no single default reasonable period only that it not exceed one year.

Recommendations

NTWC recommends that the revised certification rule establish the default reasonable period to be one year, unless project-specific circumstances suggest a shorter period is reasonable. Such a default period would provide predictability and clarity to the 401 certification process and better decision making in determining certification actions.

b. Stopping the Reasonable Period Clock

The 2020 Rule provides that the reasonable period of time "does not pause or stop for any reason once the certification request has been received."[9] In the 2020 Rule, EPA cites *Hoopa 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. However, the *Hoopa* decision does not prohibit certifying authorities from suggesting or requiring a project proponent to withdraw its certification request; the decision focuses on prohibiting a disingenuous scheme to evade the one-year deadline indefinitely.

The 2020 Rule, in contrast, prohibits a certifying authority from requesting that the applicant withdraw a certification request or from taking action independent of the federal licensing agency to extend the reasonable period of time, even when a project has materially changed or is no longer planned.[10] In these situations, under the 2020 Rule, a new request would initiate a new reasonable period of time and would not 'restart' the clock from withdrawal of the prior request for certification. The 2020 Rule does not clearly define what kind of project change would be sufficient to warrant submitting a new request that would restart the reasonable period or who determines that the project has met a criterion for withdrawal.

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[7] 33 C.F.R. § 325.2(b)(1)(ii).

[8] 18 C.F.R. §5.23(b)(2).

[9] 85 Fed. Reg. 42210, 42262 (July 13, 2020).

[10] 40 C.F.R. § 121. (6)(e); 85 Fed. Reg. 42210, 42262 (July 13, 2020).

Recommendations

NTWC recommends the revised 401 certification rule provide states and certifying tribes the opportunity to suggest or require that applications be withdrawn and resubmitted with new or more complete information to better evaluate the project.

c. Opportunities to Remedy a Certification Deficiency

The 2020 Rule does not include a clear and direct statement for certifying authorities to fix deficient conditions or citations after the certification action is taken. Under the 2020 Rule, a federal licensing or permitting agency may create in its own water quality regulations a procedure under which certifying authorities may remedy deficient conditions or denials, provided such procedures do not exceed the statutory one year.[11] If a condition or denial is identified as deficient and is not remedied, the federal agency may consider the condition or certification denial as a waiver and proceed without addressing terms of the certification.[12]

The NTWC is concerned about the federal agencies' role to review a certification or denial for procedural compliance. The NTWC views the federal agency's ability to override tribal certification conditions and denials for completeness as limiting the exercise of tribal authority under CWA § 401. Section 401 is a direct grant of authority to the states and authorized tribes, providing explicit roles for EPA none which includes overseeing state and tribal process and decision-making under Section 401.[13]

Recommendations

NTWC recommends the revised certification rule recognize that Section 401 is a direct grant of authority to states and tribes with TAS status and does not provide EPA or other federal agencies with an oversight role of certification conditions or processes.

4. Scope of Certification

The 2020 Rule inappropriately narrowed the scope of certification considerations to make Section 401 less effective at protecting water quality for tribes and states. It limits the scope of certification, both to the discharge itself rather than the project as a whole and to whether the discharge will comply with water quality standards rather than all "water quality requirements." The rule defines water quality requirements to mean "applicable provisions of Sections 301, 302,

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[11] 85 Fed. Reg. 42210, 42269 (July 13, 2020).

[12] *See* 40 C.F.R. § 121.9.

[13] EPA's responsibilities under CWA section 401 include (1) acting as a certifying authority if the state or tribe where the potential discharge may originate does not have certification authority, (2) oversee the process under *401(a)(2) which addresses impacts to neighboring jurisdictions, and (3) providing advice and technical assistance* when requested through the certification process. See CWA § 401(a)(1), 401(a)(2) and 401(b).

303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."[14]

The NTWC requests that EPA consider the following issues when determining what is appropriate for a 401 certification analysis: (1) water quality implications of the project as a whole, (2) evaluate all discharges, and (3) appropriate interpretation of "water quality requirement."

a. Project as a Whole

The NTWC opposes the 2020 Rule limitation on the scope of conditions that could be included in a certification. The 2020 Rule limited those conditions to point source discharges from federally licensed or permitted projects as opposed to the activity as a whole. This approach is contrary to Supreme Court precedent in *PUD No. 1*. In this case, the Supreme Court considered the appropriate scope of analysis for Section 401, and concluded it encompassed the project as a whole and was not limited to water quality controls specifically tied to a discharge.[15] The Court further explained the scope of certification authority under Section 401 is not limited to ensuring compliance with the CWA, but includes authority to impose conditions consistent with "any other appropriate requirement of State [or authorized Tribal] law."[16] As a result, while section 401(a)(1) "identifies the category of activities subject to certification – namely, those with discharges"— the Court held Section 401(d) authorizes additional conditions and limitations "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[17]

The NTWC believes EPA's 2020 interpretation of the scope of certification is too narrow; it ignores the holding of the U.S Supreme Court in *Jefferson County PUD No. 1* and prevents tribal and state authorities from adequately accessing water quality impacts to their jurisdictional waters.

Recommendations

NTWC recommends that the revised 401 certification rule adopt the Supreme Court's interpretation of 401 certification in *Jefferson County PUD* and indicate the appropriate scope of certification includes the water quality impacts of the project as a whole. That interpretation should also include conditions beyond those needed to prevent violations of water quality standards. The revised rule would recognize the authority of a certifying tribe to provide "other

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[14] 40 C.F.R. § 121.1(n). §§301, 302, and 306 addresses applicable effluent limitations for existing and new sources; §303 addresses water quality standards, and §307 addresses toxic pretreatment effluent standards.

[15] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700 (1994).

[16] *Id*. at 711.

[17] *Id*. at 711-12.

limitations" pursuant to Section 401(d) that may be used to protect designated uses and tribal reserved rights that depend on water quality.

b. Water Quality Requirements: Including All Discharges and All Regulatory Provisions

The 2020 Rule limits the scope of a Section 401 certification review to the impact of the point source discharge itself. It prohibits certifying authorities from imposing conditions on the project "activity as a whole," but instead limits the evaluation of a certification request to 'water quality requirements" which it defines as state or tribal regulatory requirements for point source discharges into WOTUS. In the Rule, "other appropriate requirements of state law" includes state or tribal regulatory requirements. However, the Rule's definition of "other appropriate requirements of state law," identified in CWA Section 401 as a key consideration in a certification analysis, is also defined narrowly as including only state and tribal regulatory provisions that address point sources. As a result, certifying may consider only the enumerated CWA provisions in the context of a specific discharge, and state or tribal regulatory water quality protection provisions that regulate point source discharges. Certifying authorities may not address water quality implications of nonpoint sources, non-regulatory water provisions (including treaty rights), or discharges into a non-federal water because these are not within the scope of certification as defined by the 2020 Rule.

Tribes are particularly concerned that narrowing the scope of certification in this way fails to recognize that most tribes do not have CWA-approved water quality regulations to protect their reservation water quality. For these areas, EPA is the certifying authority for the tribe, and under narrowly defined "appropriate requirements" tribally adopted water quality regulations that don't specifically address point source discharges into a WOTUS are not considered in EPA's certification analysis on behalf of the tribe. The 2020 Rule's narrow definition of water quality requirements is a complete departure from EPA's longstanding position that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."[18] [19]

Congress gave broad authority under the CWA to states and tribes, noting "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including

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[18] Environmental Protection Agency, 'Wetlands and 401 Certification – Opportunities and Guidelines for States and Eligible Indian Tribes," at 23 (1989).

[19] Inconsistency with longstanding EPA policy and guidance regarding 401 water quality certifications is among the arguments made by states bringing a facial challenge to the 2020 Rule. Quoting EPA's 1989 Guidance, the state plaintiffs argue the "Rule also departs from EPA's longstanding position that '[t]he legislative history of Section 401 (d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirement related to water quality preservation' and that 'conditions that relate in any way to water quality maintenance are appropriate'."

restoration, preservation, and enhancement) of land and water resources."[20] Congress also provided that state and tribes may adopt more stringent water quality provisions than the federal minimums.[21] 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 or 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."[22] In addition, "[i]f the federal agency choose 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."[23]

The 2020 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 waterbodies" and to determine "whether those effects would comply with the state's or tribe's water quality standards."[24]

Recommendations

NTWC recommends that the revised 401 certification rule interpret the scope of certification broadly, consistent with Congressional intent. NTWC further recommends the rule not limit "water quality requirements" to just regulatory provisions and just to discharges from point sources, but consider both regulatory and non-regulatory provisions and address both point and nonpoint discharges.

5. Certification Actions and Federal Agency Review

The 2020 Rule identifies certain procedural requirements for certifying authorities to follow when taking a certification action. Certification authorities must include specific information for a denial or a certification with conditions, including a statement explaining why the condition is necessary to assure the discharge from the proposed project will comply with water quality requirements, and a citation to the federal, state, or tribal law that authorizes the condition.[25] If the certification or denial does not include the required information, the certification denial will

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[20] CWA §101(b), 33 U.S.C. §125(b).

[21] CWA §510, 33 U.S.C §1370.

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

[23] ("The 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)).

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

[25] 40 C.F.R. §121.7(d)(1)-(2).

be considered by the federal licensing or permitting agency as waived.[26] Furthermore, a federal licensing or permitting agency can waive a certifying authority's certification action if it does not follow the procedural requirements of Section 401, such as the public notice provisions, or if the certifying authority fails to complete its review within the reasonable period of time.[27]

The 2020 Rule also inflates the oversight role of federal licensing and permitting agencies when reviewing the actions taken by the certifying authorities. They can determine if the certifying authority has met the Section 401 procedural requirements as part of their certification response. The federal agency must determine whether waiver has occurred, either expressly or implicitly through a failure or refusal to act. If the federal agency determines that a certifying authority did not comply with CWA and 2020 Rule requirements, the certification action will be waived, whether it is a grant, grant with conditions, or denial.[28]

The 2020 Rule in effect gives federal agencies veto power over certifying authorities' certification decisions. The Rule allows a federal agency to interpret procedural requirements in a way that converts a denial to a waiver, and then proceed to license or permit the proposed project over the objections of the certifying authority. The preamble to the 2020 Rule describes the federal agency role as administrative: federal agencies are not called on to "substantively evaluate or determine whether a certification action was taken within the scope of certification. This federal agency review is entirely procedural in nature."[29] But that is not the effect these provisions have.

The 2020 Rule seems to expand the federal agency authority beyond the procedural review of certifications to a more substantive evaluation. If a certifying authority mistakenly fails to incorporate the proper procedural information or correct citation of the 2020 Rule, the rule does not require federal agencies to allow the certifying authority to correct any perceived deficiencies, no matter how minor; instead, the rule allows the agency to transform the deficient certification condition or denial into a waiver.

Recommendations

NTWC recommends that the revised certification rule should not require specific certification content and processes and should not authorize federal agencies to transform a certification condition or denial into a waiver if the content or process requirements are unmet.

6. Neighboring Jurisdictions

[26] 85 Fed. Reg. 42210, 42263 (July 13, 2020).

[27] *Id.*

[28] *Id.* at 42266.

[29] *Id.* at 42267.

CWA Section 401(a)(2) provides a process by which EPA must notify a neighboring jurisdiction that a proposed federal license or permit may affect the quality of that state's or tribe's waters. This process begins when a federal licensing or permitting agency notifies EPA that they have received a license or permit application and associated water quality certification.[30] After EPA receives an application, it must determine whether the discharge involved may affect "the quality of the waters of any other state." If the discharge will, then EPA has 30 days to notify the other state or tribe.[31] The 2020 Rule asserts instead that determining whether the discharge "may affect" neighboring jurisdiction is discretionary.[32] Under the Rule, if EPA at its discretion makes a determination that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator shall notify the neighboring jurisdiction, the licensing or permitting agency, and the applicant.[33] The affected state or tribe then has 60 days to inform EPA that the discharge will violate that state's or tribe's water quality standards and to object to the license or permit issuances.[34] EPA then must "condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements. If the imposition of conditions cannot ensure such compliance, [EPA] shall not issue such license or permit."[35]

The NTWC opposes the 2020 Rule's regulatory language that make it discretionary for EPA to make a determination whether a discharge would impact a neighboring state or tribe (contrary to the statutory language, which requires that a determination be made, the results of which are discretionary).

The issue of whether EPA's action to determine if a discharge "may affect" other state or tribal water is discretionary was addressed in a recent court decision, *Fond du Lac v. Thiede*.[36] In this case, a Minnesota district court held that EPA was required to determine whether the discharge authorized by the proposed § 404 permit "may affect" the Band's waters. The court noted the existence of such a clear and limited [30-day] timeframe supported the argument that the statute imposes a duty on EPA to make a "may affect" determination, and interpreted the statutory text of 401(a)(2) in its broader statutory context:

"Given that the purpose of [CWA §401(a)(2)] appears to be to provide a mechanism to work out potential interstate conflicts over water pollution, it seems unlikely that, when a discharge

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[30] CWA § 401(a)(2), 33U.S.C. § 1341(a)(2) (1994).

[31] *Id.*

[32] 85 Fed. Reg. 42210, 42273-42274 (July 13, 2020).

[33] 40 C.F.R. § 121.12(c); 85 Fed. Reg. 42210, 42274 (July 13, 2020).

[34] *Id.*

[35] *Id.*

[36] *Fond du Lac Band of Lake Superior Chippewa v. Thiede*, (D.C. Mn. Case No. 19-CV-2489) (Decided February 16, 2021).

permitted by State A may pollute the waters of State B, Congress intended to leave State B's participation rights entirely up to the unreviewable discretion of EPA. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…)."[37]

The Court's decision underscores two looming concerns of the NTWC. The first concern highlights the potential impact to a downstream water from upstream waters, where neighboring (downstream) states or tribes lack independent authority to regulate discharges into those waters. If a state or tribe lacks independent authority to address such discharges, the only course of action for reviewing federally authorized discharge actions is through CWA § 401(a)(2). In exercising its oversight duties, if EPA is not required to determine whether discharges "may affect" the water quality in neighboring jurisdictions, Section 401(a)(2) may not adequately reduce the likelihood that discharges from upstream water may threaten water quality in the downstream waters. At a minimum, when a discharge affects reservation waters, the permit should be evaluated on the grounds that the permitted activity threatens tribal reserved rights that depend on water quality.[38]

The second area of concern addresses whether EPA will consider tribes without TAS for water quality standards or 401 certification as neighboring jurisdictions. As previously mentioned, CWA §401(a)(2) sets up a notification process for states and TAS tribes once a "may affect" determination has been made. However, it has been the position of EPA's Office of General Counsel (OGC) to not include non-TAS tribes in CWA § 401(a)(2) notifications. OGC interprets statutory language narrowly; tribes without TAS were not specifically mentioned, therefore, EPA is not obligated to notify them when a determination of a discharge "may affect" their jurisdictional waters. This practice leaves tribes without TAS no voice in this process and unable to address cross-border pollution impacts to their water quality. The NTWC strongly disagrees with OGC's interpretation, and finds it inconsistent with the CWA's emphasis on seeking tribal input, consultation, and principles outlined in EPA's Indian policy. It also could violate *Winters* reserved rights. The NTWC finds nothing in the statute that prohibits EPA from sending a 401(a)(2) notification to non-TAS tribes that a certification of an upstream discharge "may affect" the water quality of their reservation. Furthermore, the 2020 Rule doesn't provide any guidance or insights on the application of 401(a)(2) for non-TAS Tribes. The NTWC has a strong interest in assisting the EPA in updating the existing CWA Section 401 certification program to assure its use as a more effective and equitable water quality regulatory tool. The NTWC believes it would be a significant help if a revised certification rule further explains and clarifies that EPA has a mandatory, not discretionary, duty to issue 401(a)(2) letters to affected

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[37] *Id.*

[38] *See* Brendale v. Confederated Tribes & Bands to the Yakima Indian Nation, 492 U.S. 408, 428 (1989) (plurality opinion for Nos. 87 -1699 and 87-1711); Montana v. United States, 450 U.S. 544, 566 (1981); *supra* notes 165 -80 and accompanying text.

states and both authorized and unauthorized tribes when there is a violation or adverse impact to their water quality.

Recommendations

NTWC recommends that the revised 401 certification rule indicate the action of determining if a discharge "may affect" the quality of a neighboring jurisdiction's waters is mandatory, not discretionary. Also, the revised rule should explain that EPA will provide written notice to a tribe in every instance when a discharge may affect the quality of tribal reservation waters without determining at this stage of the process whether that discharge is significant or if the tribe has obtained TAS status.

7. Data and Other Information

EPA's Notice of Intent solicits data and other information on implementation of the 2020 Rule. EPA is also seeking tribal feedback on how states and EPA can protect tribal reserved rights in ceded territories. The NTWC recognizes that the proposed rulemaking for Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights directly impacts and intertwines with the process in revising the 2020 Rule.

NTWC strongly supports EPA's effort to recognize tribal reserved rights and to revise the federal WQS regulations to protect them, in all the ways outlined in EPA's Notice of Consultation Letter. NTWC also recommends that EPA expand its effort by interpreting CWA Section 401 in a manner that provides for tribal participation in comments on and objections to discharges within off-reservation state and federal lands both as to ceded territories where tribes exercise their treaty rights to hunt, fish, and gather, and where *Winters* rights depend on the protection of water quality.[39]

The NTWC recommends that EPA also examine how CWA Section 401(d)(2) certifications could best protect tribal reserved rights – both treaty rights outside reservation boundaries and *Winters* rights – when certifying projects in areas outside reservation boundaries. Under this approach, EPA would interpret the scope and implementation of 401(d)(2) broadly to include the protection of "tribal reserved rights." EPA also would make a 401(d)(2) determination on behalf of tribes lacking TAS. Principles of statutory construction support a broad interpretation of statutory language, especially on behalf of tribes in instances such as this one where Congress has not restricted the Agency's authority to protect tribal rights and resources.

Although a tribe has the right to object to a permit under Section 401(a)(2), the permissible scope of tribal objections has not been clearly interpreted by EPA or by the courts. Section 401(a)(2) directs that, once a state or tribe has determined that a "discharge will affect the quality of its waters so as to violate any water quality requirements in such State [or tribe]" and requests a

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

public hearing, the licensing or permitting agency must hold the requested hearing.[40] In addition, Section 401(d) provides that "other appropriate requirement[s]" may be included as conditions in federal permits or licenses, and does not preclude these other appropriate requirements from applying to the downstream states provisions of Section 401(a)(2).[41]

EPA should interpret Section 401(a)(2) to allow tribal objections to off-reservation discharges that would have an impact on a tribe's use of its *Winters* rights due to impairment of water quality within the reservation. This interpretation would view *Winters* rights as "other appropriate requirements," and would effectuate the principle that tribes may propose "conditions and limitations on the activity as a whole."[42] By doing so it would serve the purpose of Section 401(a)(2), which is to protect the waters of states or tribes affected by discharges originating upstream, and it would be consistent with EPA's fiduciary responsibilities to tribes under executive order and Agency policies.

Moreover, in instances where the affected tribe does not have TAS, EPA should itself determine whether the discharge would affect the quality of tribal waters, after providing notice and consulting with the tribe as to the potential impacts of the permitted activity on the tribe's uses of its waters.

Therefore, NTWC proposes that a revised rule would include the following: 1) allow tribes with TAS to request a hearing to object to a permit on the basis of the discharge adversely affecting tribal use of its reservation waters reserved under the *Winters* doctrine; and 2) provide notice of the proposed discharge to downstream tribes regardless of their TAS status, and request and participate in a hearing before the permitting or licensing agency on behalf of a non-TAS tribe, upon the request of the tribe and after consultation with the tribe to determine whether and how the permitted activity threatens tribal reserved rights that depend on water quality.

a. Scope of CWA § 401(a)(2) – Protecting Off-Reservation Treaty Rights from Discharges

Similar to the *Winters* rights situation discussed above, protection of off-reservation tribal treaty rights would be best served if EPA consulted with the potentially affected treaty tribe(s) as to any threatened impact a permitted activity might have on the tribe's treaty rights. EPA would first

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[40] 33 U.S.C § 1341(a)(2) (2012).

[41] *Id*. § 1341(d). The text applies to "[a]ny certification provided under this section," and is not limited to paragraph 401(a)(1). *Id.* Since the preceding paragraphs of Section 401, including paragraphs 401(a)(3), 401(a)(4), and 401(a)(5), explicitly limit their application to a certification obtained pursuant to paragraph (a)(1), the absence of this limitation in Section 401(d) should be interpreted to allow "other appropriate requirements" to be raised and included under paragraph 401(a)(2).

[42] *See* PUD No.1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 712 (1994); see *also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 374 (2006).

notify all tribes with treaty rights in the area in question, regardless of the tribes' TAS status. EPA could then either request a hearing itself (most likely in the case of non-TAS treaty tribes) and represent the tribe's interests before the licensing or permitting agency, after proper consultation and upon request, or allow a treaty tribe (most likely one with TAS) to object to and request a hearing on impacts that would threaten tribal treaty rights.

As in the situation discussed above, EPA would be viewing the tribe's treaty rights as "other appropriate requirements" protected by CWA § 401(d). This proposal extends somewhat beyond 401(a)(2), however, in that it addresses water quality impacts outside of rather than within the reservation. For that reason, EPA may choose to limit its proposal to an offer for EPA to request and represent a tribe at a hearing, although the provisions of 401(a)(2) read in conjunction with the federal government's trust responsibility and legal obligation to protect treaty rights may provide sufficient authority.

Co-Management of Waters in Ceded Lands

Finally, when ceded lands are under the control of the federal government, protection of off-reservation treaty rights would be best served if EPA allowed for tribal co-management of water resources in those lands. Direct tribal involvement in the federal government's protection of water quality, rather than merely the potential for tribal consultation, would increase the likelihood that treaty rights to hunt, fish and gather would be protected in the face of proposals for pipelines, mineral extraction, and other industrial development on these federal lands.

The tribe would need to show that the water resources that the tribe seeks to co-manage are, in fact, held by the federal government. The tribe would also need to demonstrate that its members retain reserved rights to hunt, fish or gather on this federal land, and that treaties, statutes, regulations, or other federal authorities establish fiduciary responsibilities to protect tribal reserved rights on the federal land at issue. EPA could require other eligibility criteria as well, such as a requirement that the tribe have qualified for TAS under CWA § 303. And EPA could establish procedures for how tribal input would be considered and incorporated into regulation of the water quality at issue.

Recommendations

NTWC recommends that the proposed rule include the revisions EPA proposes to the federal WQS regulations, as further discussed in these comments; an expansion of EPA's interpretation of Section 401(a)(2) certification; and an opportunity to participate in co-management with the federal government of certain off-reservation waters. Increasing the scope of tribal participation under the CWA in these ways will further the recognition of tribal interests and inherent sovereignty in protecting water quality and will allow for better informed management of these precious resources.

Conclusion

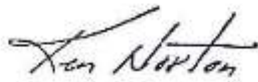
The 2020 Rule is fundamentally flawed, both on its merits and in the procedures which EPA is using to implement it. The Rule ignores expressed Congressional text and intent, is inconsistent with U.S Supreme Court decisions and state and tribal laws interpreting Section 401, and

restricts the use of 401 certifications as an effective water quality tool to help states and tribes protect their waters.

The NTWC believes that its comments and recommendations align with the goals of the CWA and strengthen the important role states and tribes play in protecting their waters within their respective borders. The NTWC would like to acknowledge the contributions of Ms. Donna Downing and extend our sincere appreciation for her assistance in helping the NTWC understand, shape and assemble our comments and policy recommendations in support of EPA's effort to revise the 2020 Rule.

The NTWC appreciates the opportunity to submit early comments as EPA considers revising the Clean Water Act Section 401 Certification Rule.

Sincerely,



Ken Norton, Chair
National Tribal Water Council

Cc: Karen Gude, USEPA Office of Water