February 12, 2026

Lee Zeldin
EPA Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted to Regulations.gov, Docket ID No. EPA-HQ-OW-2025-2929

Re: Comments on the Proposed Update to the CWA Section 401 Water Quality Certification Regulations

Dear Administrator Zeldin:

The National Tribal Water Council (NTWC) and National Tribal Caucus (NTC) submit the following comments regarding the Proposed Rule titled "Updating the Water Quality Certification Regulations" (Proposed Rule), 91 Fed. Reg. 2008 (January 15, 2026), released by the United States Environmental Protection Agency (EPA). The Proposed Rule restricts the authority of states and tribes under Section 401 of the Clean Water Act (CWA), limiting their abilities to protect the designated uses of their waterways and diminishing their roles in the CWA § 401 certification process. This proposal directly contradicts the cooperative federalism framework of the CWA that EPA recently championed and relied upon in its proposed Waters of the United States (WOTUS) revised rule. The Proposed Rule leaves key waters unprotected and significantly undermines years of work toward the CWA's primary goal of protecting and enhancing water quality across the nation.

The Proposed Rule also inappropriately limits the timeline for public comments to thirty days, giving the NTWC, NTC, and other commenters an unacceptably short window to provide significant feedback on this proposal. The restrictive timeframe is especially inappropriate for tribes, as it does not permit adequate or good faith government-to-government consultation, as required by the federal government's trust responsibility. Furthermore, tribal interests in this rulemaking differ significantly from those of other potentially affected parties, because for tribes the protection of water quality is critical to self-determination and cultural preservation.

1. Introduction

EPA's stated justification for proposing changes to its prior 2023 rule is "to align the regulations with the scope of the CWA, increase transparency, efficiency, and predictability for certifying authorities and the regulated community, and to ensure that States and authorized Tribes understand and adhere to their section 401 role."[1] As explained below, this justification is hollow: the current regulations properly implement the scope of the CWA in line with decades of practice and Supreme Court precedent. And as tribes unanimously explained to EPA only a few months ago in response to EPA's July 7, 2025, Request for Comment, 90 Fed. Reg. 29,828, the current regulations provide the needed transparency, efficiency, and predictability for certifying authorities and the regulated community. If finalized, the Proposed Rule will cause greater uncertainty, litigation, and conflicts with tribal and state laws than currently exist and will harm tribal waters and impinge on tribal sovereignty.

The Proposed Rule returns to the ill-advised 2020 rule, which significantly departed from the cooperative federalism structure underlying the CWA by restricting state and tribal utilization of Section 401 for the protection of water quality. Tribes previously explained to EPA that the 2020 rule "impaired or undermined tribal sovereignty and their ability to protect tribal waters."[2] The same holds true for the Proposed Rule and the procedural and substantive revisions it would make to the water quality certification regulations at 40 C.F.R. Part 121. By narrowing the scope and authorities of the certification process, the Proposed Rule reflects a failure by the federal government to uphold its responsibility to protect essential tribal trust resources, fulfill its consultation obligations, and adhere to the fundamental principles outlined in the EPA's 1984 Indian Policy. It also undermines and contradicts EPA's and the U.S. Army Corps' proposal in the WOTUS rulemaking to shift more of the burden of CWA implementation onto states and tribes.

The Proposed Rule negatively impacts both tribes that have obtained "treatment in a similar manner as a State" (TAS) for § 401 and tribes that have not. The Proposed Rule restricts the scope of certification for the 84 tribes that have received TAS for § 401 to the effects of the point source discharge into a WOTUS and to "water quality requirements," which are proposed to be limited to applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act and similarly narrow state and tribal water quality-related regulatory requirements for point source discharges into a WOTUS.[3] Tribes already face significant disadvantages in protecting their water

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[1] 91 Fed. Reg. at 2008-09.

[2] Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, EPA-HQ-OW-2022-0128-0005 at 7 (May 2022), available at https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0005.

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

quality, due to a lack of resources and insufficient federal funding. For this reason, as noted, out of the 330 tribes with reservations lands, only 84 tribes have been approved to administer their own CWA water quality standard programs, and none possesses a National Pollutant Discharge Elimination System or CWA § 404 Dredge or Fill permit program. The Proposed Rule exacerbates the problem by inappropriately removing the option for tribes to obtain TAS solely for § 401, separate from TAS for CWA § 303, or solely for § 401(a)(2), as a neighboring jurisdiction, thus limiting their participation further. Tribes explained to EPA that these provisions "promote[] Tribal authority, cooperative federalism, and water quality protection for more Tribal jurisdictions."[4] Instead, if the Proposed Rule is finalized, the 246 tribes without § 401 protections would be left with even fewer options to protect against pollutant discharges into their reservation waters.

The NTWC and NTC oppose EPA's proposed revision of Section 401 water quality certification regulations, as it undermines tribal participation in the CWA § 401 certification process and fails to protect tribal waterways. Making matters worse, EPA's restrictive 30-day comment period and limited outreach to tribal nations across the country fall short of ensuring meaningful consultation with tribes. The NTWC and NTC address these issues in more detail in the following comments.

2. Tribal Consultation and Coordination

We believe the Agency's limited consultation with tribes was not the good faith, government-to-government engagement envisioned by the federal trust responsibility, E.O. 13175 Consultation and Coordination with Indian Tribal Governments (2000), or EPA's Policy on Consultation with Indian Tribes (2023). On July 7, 2025, the Agency sent a Notification letter to all tribes and two weeks later held one national, tribe-specific webinar. The webinar topics tracked EPA's July 1, 2025, public request for any "regulatory uncertainties" or "implementation challenges" in six areas related to the Clean Water Act Section 401 Certification process.[5] For unexplained reasons, EPA presented its topics to just one of the ten Regional Tribal Operations Committees and to the NTWC. Had it wished to, EPA could have reached hundreds of tribal environmental professionals from across the country just three weeks later at the 2025 annual Tribal Lands & Environment Forum, the Nation's preeminent Indian country environmental conference, but the Agency did not raise its 401 Certification concerns there.

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[4] Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, EPA-HQ-OW-2022-0128-0435 at 13 (Sept. 2023), available at https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0435.

[5] 90 Fed. Reg. 29828 (July 7, 2025). EPA devoted its resources to this issue, by the Agency's account, because one state environmental director and one industry association "raised questions" about the scope of the § 401 certification process. *See* 91 Fed. Reg. at 2008 (America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025)).

Despite limited outreach and a short comment window, EPA did receive written comments from eleven tribes and three tribal organizations, including the NTWC, and had in-person meetings with three tribes. The Agency's *Summary Report of Tribal Consultation* noted the tribal commenters "unanimously support the definitions and procedures" of the existing, standalone § 401 rule and stated the rule had facilitated tribal water quality protection without creating implementation challenges or regulatory uncertainty.[6] Indeed, a reader of *EPA's own characterizations* of tribal comments would strain to find anything critical of the existing rule. Curiously, however, the proposed rule's preamble strikes a discordant tone: "A few Tribes and Tribal associations expressed support" for the standalone § 401 TAS.[7] Rather than communicating "unanimous support" among tribal commenters for the rule, the preamble implies instead that tribal support for the existing rule is weak. The reason for the muted tone is obvious though: despite clear tribal support, EPA wants to jettison nearly all the existing rules.

We recognize EPA must consider many interests in promulgating regulations. Tribes, however, are unique stakeholders in environmental protection, something EPA acknowledged over four decades ago in its historic Indian Policy (1984), which Administrator Zeldin reaffirmed on July 18, 2025.[8] The Policy explicitly recognizes tribes' inherent sovereignty to manage and protect tribal resources and promises Agency assistance in government-to-government fashion for developing tribal regulatory capacity consistent with the federal government's trust responsibility.[9] EPA's Policy depends on tribal capacity because its overarching goal is program delegation so that tribal governments become the primary parties for setting environmental standards, making policy decisions and managing reservation programs. EPA recognized, though, the history of Indian affairs made it unlikely tribes' inherent sovereignty contained the technical capacity to immediately implement complex, environmental regulatory programs. So, in Indian Policy Principle 3, EPA promised federal direct implementation while "encourag[ing]" tribes "to participate in policymaking and to assume lesser or partial roles" so that EPA benefits from tribal views and tribes develop institutional expertise to assume delegable programs in the future.[10]

That latter commitment has been a hallmark of the Agency's Indian Program for five decades: partnering with tribes to identify when current systems do not ensure proportionate environmental protection in Indian country, and then creating alternate approaches fostering nationwide environmental protection as Congress intended. For example, as the preamble notes, the TAS application and approval processes for § 303(c) and § 401 are logically connected: tribal

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[6] Summary Report of Tribal Consultation, n.4, at 3.

[7] 91 Fed. Reg. at 2036.

[8] *See EPA Administrator Zeldin Reaffirms EPA's Indian Policy*, https://www.epa.gov/newsreleases/epa-administrator-zeldin-reaffirms-epas-indian-policy.

[9] EPA Indian Policy at 2.

[10] *Id*.

water quality standards (WQS) under § 303(c) are the most common bases for tribal § 401 certifications.[11] And yet the Agency's progress in getting tribal WQS developed and approved has been frustratingly slow. Fewer than 20% of eligible tribes have EPA-approved WQS. Indeed, EPA has twice proposed filling the regulatory gap by creating *federal* WQS for Indian country.[12]

We know that limited tribal success is not from lack of interest: water quality directly implicates tribal health and welfare, treaty rights, Indigenous cultural interests, and the federal government's trust responsibility to Indian tribes. Yet, it took 15 years after enacting the modern Clean Water Act, which created federal-state partnerships to implement its programs, for Congress to authorize the Administrator "to treat an Indian Tribe as a State" for Indian country. And since then, Congress has never fully funded the agency's budget to build tribal environmental capacity and expertise allowing tribes to seek delegations and primacy. Many other systemic issues, most arising from the sordid history of the Nation's treatment of its First Peoples, have understandably slowed the development of tribal regulatory capacity.

Compounding the general challenge of limited institutional capacity is the specific challenge of the resource-intensive nature of developing WQS under the CWA. Limited financial and human resources and the technical complexity of the task slow development and discourages some tribes from even trying. And yet water quality is still critical to Indigenous health and welfare. The opportunity to seek § 401 TAS status separate from § 303 approval is a significant and productive way for tribes without the means for developing CWA-compliant WQS to begin participating in CWA programming, helping EPA ensure nationwide CWA compliance as Congress directed.

That is one reason the proposal to delete the Separate § 401 TAS status, addressed in detail below, is disappointing. Separate § 401 TAS is a logical and achievable step toward building tribal capacity for water quality protection that avoids the implementation challenges of developing water quality standards under § 303(c) and limits the litigation risks that have plagued Indian country since the United States was formed on Indigenous lands.

Considering the limited environmental capacity of most tribes, we believe that if the proposal's comment period were longer, more tribes and tribal organizations would comment on the Separate § 401 TAS issue as well as other issues. EPA's 30-day comment period is shorter than the 45-day *minimum time* EPA generally provides for significant matters. *See* 40 C.F.R. § 25.5(b). The Agency provided twice as long just for its *pre-proposal* consultation with tribes on six "topics" related to § 401 certification.

We also believe the Agency's process and timing on these important topics, as they relate to Tribal interests and Indian country environmental protection, are contrary to longstanding

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[11] 91 Fed. Reg. at 2036.

[12] *See* 81 Fed. Reg. 66900 (Sept. 29, 2016) (proposed Baseline WQS); 88 Fed. Reg. 29496 (May 5, 2023) (same).

principles of federal-tribal relations. While the parsimonious Supreme Court rarely finds federal liability for alleged breaches of the federal government's trust responsibility to tribes, it continues to use the grand language that earlier courts used in justification for unilaterally asserting control over native lands and resources: that the federal government had "[u]nder a humane and self-imposed policy . . . charged itself with moral obligations of the highest responsibility and trust."[13]

EPA's historic Indian Policy gives relevant context for the government's high moral obligations: against the backdrop of the government's overall duty for protecting human health and welfare is the Policy goal of helping tribes move toward primacy for environmental regulatory programs just as states do.[14] An intermediate step are "lesser roles" where tribal agencies help implement a federal program, thus gaining experience and perhaps educating EPA staff on tribal rights and interests.[15] That implicit two-way communication surely constitutes attempts at achieving consensus as EPA's Tribal Consultation Policy envisions.[16]

The Agency's minimum 30-day comment period is inconsistent with its Policy promises to tribes. Tribes need more time, and may need EPA's technical assistance, to address the proposed Rule, its impacts, and its ability to achieve the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This timeframe must be adequate to allow tribes to consult with the Agencies and request formal government-to-government consultation if desired. We suggest you extend the comment period for additional tribal engagement. In Principle 5 of its Indian Policy, EPA recognized the federal trust responsibility and promised it "will endeavor to protect the environmental interests of Indian Tribes."[17]

3. EPA's Proposed Narrowing of the Scope of Certification is Unlawful and Harmful

The Proposed Rule aims to narrow the existing regulation's activity-based scope of review for certifications to one limited to a facility's point source discharge into a water of the United States and whether it complies with certain established water quality standards and requirements. EPA claims its proposed changes to the scope of review align with Congress's intent, but in fact, this change in scope would run directly counter to the overriding CWA goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), by diminishing the effectiveness of Section 401 in protecting tribal and state water quality.

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[13] *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942).

[14] Indian Policy at 2 (Principles 1 & 2).

[15] *Id*. at 2 (Principle 3).

[16] EPA's Tribal Consultation Policy 3 (2011).

[17] Indian Policy at 3 (Principle 5).

Under the Proposed Rule, certifications would be confined to the discharge, rather than encompassing the entire project, and would focus only whether the discharge meets certain enumerated water quality requirements. The Proposed Rule specifies that the term "applicable water quality requirements" in Section 401(a)(1) is limited to the relevant provisions of CWA Sections 301, 302, 303, 306, and 307, along with state or tribal regulatory requirements for point source discharges into a WOTUS. This narrow scope of review also would prevent certifying authorities from addressing the water quality implications of the project's nonpoint sources, compliance with non-regulatory provisions (including treaty rights), and impacts from discharges into waters regulated by the state or tribe but not defined as a WOTUS.

Tribes are particularly concerned with this proposal because the overwhelming majority of tribes do not have EPA-approved water quality regulations, as noted above. The EPA serves as the certifying authority for the tribe in those circumstances, and any water quality regulations adopted by the tribe that do not explicitly address point source discharges into a WOTUS would be excluded from EPA's certification review, due to the narrowly defined "appropriate requirements." The Proposed Rule's restrictive definition of water quality requirements represents a radical departure from EPA's established stance that "[t]he legislative history of [section 401] indicates that Congress intended for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements related to water quality concerns."[18]

The NTWC and NTC disagree with EPA's proposed reading of CWA Section 401 as being limited to "discharge" instead of "activity." After fifty years of implementation, with decisions at every court level, it is hard to believe that everyone has been wrong about Congress's clear intention. EPA bears a high burden of showing why its new interpretation is correct, and it has not done so here. The language of Section 401(a)(1) is clear, namely, the threshold requirement for certification is triggered when an applicant's "activity" may result in a discharge into navigable waters. Both the CWA itself and its legislative history support a broad scope of review. The EPA therefore has consistently interpreted, for decades, the scope of certification to include the activity itself rather than just the discharge.[19]

The U.S. Supreme Court has confirmed this interpretation. In *PUD No. 1 of Jefferson County*, the Court considered the appropriate scope of certification under Section 401 and concluded that it included the whole project rather than solely focusing on water quality controls associated with a discharge.[20] Consequently, although Section 401(a)(1) "identifies the category

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[18] Environmental Protection Agency, 'Wetlands and 401 Certification – Opportunities and Guidelines for States and Eligible Indian Tribes," at 23 (1989). The NTWC is also opposed to any further restrictions on tribal and state water quality standards, including the suggestion that only EPA-approved water quality requirements may be considered. 91 Fed. Reg. at 2,027.

[19] 88 Fed. Reg. at 66,592.

[20] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700, 711-12 (1994).

of activities subject to certification – namely, those with discharges," the Court determined that Section 401(d) permits further conditions and limitations "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[21] The Proposed Rule is contrary to Supreme Court caselaw.

EPA's contrary – and illegal – interpretation, which restricts states and tribes from protecting waters under their jurisdiction, would undermine the language and intent of Section 401, the foundational principle of cooperative federalism that supports the Clean Water Act, and EPA's recently proposed WOTUS rule. As EPA accurately articulated in 2023, "Congress intended section 401 to afford states and authorized Tribes broad power to protect their waters from harm caused by federally licensed or permitted projects."[22] EPA should avoid interpreting Section 401 in a manner that would compel states and tribes to certify federal permits that violate their water quality laws. "The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."[23]

The NTWC and NTC recommend that EPA abide by the Supreme Court's interpretation of § 401 and withdraw its proposal to limit the scope of certification. EPA should consider any potential water quality implications from the issuing of a federal permit or license, including both regulatory and non-regulatory aspects, as well as point and nonpoint source discharges.

4. The Proposed Rule Unjustifiably Revokes the Option for Standalone TAS for Section 401

The Proposed Rule repeals 40 C.F.R. § 121.11, which allows tribes to acquire TAS solely for CWA Section 401 or even solely to participate as a neighboring jurisdiction under CWA Section 401(a)(2). Instead, EPA would require tribes to utilize the current TAS regulation at 40 C.F.R. § 131.8, which applies to the water quality standards program under CWA Section 303(c).[24] And while EPA says it does not anticipate any significant additional burden on tribes from its proposal, it does not appear to have even asked tribes about or otherwise attempted to estimate such a burden. It should be up to each individual tribe whether to apply for TAS solely for Section 401 (or solely for Section 401(a)(2)). Such is the tribe's sovereign right.

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

[22] 88 Fed. Reg. at 66,605.

[23] S. Rep. 92–414, at 1487 (1971).

[24] 40 C.F.R. § 131.8 establishes the basic regulatory requirements for eligible federally recognized Indian Tribes to obtain TAS to administer the CWA Section 303(c) water quality standards program. 40 C.F.R. § 131.4(c) states: "Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401."

As EPA explained in 2023, allowing standalone TAS for CWA Section 401 "promot[es] cooperative federalism and Tribal rights."[25] This option was promulgated "recogniz[ing] that section 401 and section 303(c) administration are related, but distinct functions," and that the option "is responsive to Tribal stakeholders who have expressed an interest in participating in the section 401 certification process."[26] Moreover, as EPA affirms in the Proposed Rule,[27] Section 401 certification is not limited to ensuring compliance with Clean Water Act Section 303(c) water quality standards and "authorized Tribes can base their section 401 certification decisions on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c)," such as Tribal ordinances or other Tribal laws related to water quality.[28] Section 303(c) water quality standards *are only one of* the primary water quality requirements with which a certifying authority must certify compliance. There is therefore no inherent reason to tie the two TAS provisions together.

EPA noted that most tribal commenters supported and appreciated the inclusion of these TAS options, with apparently no tribal opposition.[29] Nevertheless, without giving any notice during the preproposal recommendation docket and providing only 30 days to respond, EPA proposes to reverse course and diminish tribal rights by removing these provisions despite unanimous tribal support for them. EPA's chief justification is "the interest of reducing redundancies across Agency regulations."[30] EPA's action is not, however, defensible: Congress authorized tribes to seek TAS for CWA Section 401[31] and nothing in the statutory language suggests Congress requires tribes to seek TAS for CWA Section 303(c) at the same time or allows EPA to add such a requirement. If EPA is truly concerned about redundant regulations, then it can combine them in a way that maintains the option to seek TAS solely for CWA Section 401. Regardless, even if these TAS regulations are partially redundant (as all EPA TAS regulations are because they all require the same four elements to satisfy TAS), they do not overlap completely, cause no harm to anyone, and should not be used as the basis for limiting tribal sovereignty.

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[25] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558, 66,653 (Sept. 27, 2023).

[26] *Id.*

[27] 91 Fed. Reg. at 2,027 ("EPA recognizes that there may be State or Tribal regulatory provisions that address point source discharges into waters of the United States that only partially implement certain CWA programs or that were not submitted to the EPA for approval, including water quality protective ordinances or water quality standards adopted by Tribes under Tribal law. For this reason, EPA is not proposing to limit State or Tribal regulatory provisions to EPA-approved provisions.")

[28] *Id.*

[29] Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, EPA-HQ-OW-2022-0128-0435 (Sept. 2023), available at https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0435.

[30] 91 Fed. Reg. at 2,036.

[31] *See* 33 U.S.C. § 1377(e).

The NTWC and NTC support federally recognized tribes in their efforts to obtain TAS for Section 303(c) to establish water quality standards that meet or exceed federal criteria, thus protecting the waters within their jurisdiction and addressing pollutant discharge on their reservation lands. The NTWC collaborates with EPA to encourage tribes to seek TAS for CWA regulatory programs, with the goal of providing federal protection for tribal waters.[32] Nonetheless, tribes encounter many obstacles and challenges hindering their development of federally approvable water quality standard programs. Many tribes contend that federal funding for their water quality protection programs is inadequate to effectively manage, implement, and staff such a substantial undertaking. There are numerous reasons why a tribe may not wish to start the process for implementing water quality standards yet still apply for TAS for a Section 401 program, and EPA's proposal to take that decision away from the tribes, without any prior discussion, is disheartening.

The Proposed Rule suggests that tribes are not interested in the current options allowing TAS for CWA Section 401 separately from Section 303, noting that no tribes have submitted such applications, while only one tribe has sought TAS to act as a neighboring jurisdiction under Section 401(a)(2).[33] The lack of tribal involvement to date, when merely two years or so have passed since the options were made available in the 2023 rule, does not imply that tribes lack interest in making use of these provisions. Tribes have repeatedly expressed support for these provisions, had no way of knowing they were on the chopping block, and face considerable limitations and challenges in establishing water quality protection programs. We hope that EPA will at least discuss an issue like this in the future before making such a troubling characterization, let alone acting on it. Options for tribes to apply for TAS solely for Section 401 expand tribal sovereignty and protection of tribal waters. They play an essential role in motivating tribes to embark on the initial stages of developing their water quality regulatory framework, while simultaneously advancing EPA's mandatory goal of promoting CWA coverage for all the nation's waters, including those within Indian country. EPA needs to let these provisions work for tribes.

Allowing tribes to apply for TAS even more narrowly, under Section 401(a)(2) alone, as EPA provided in its 2023 rule promulgating 40 C.F.R. § 121.11(d), has similar benefits. EPA explained that acting as neighboring jurisdictions under Section 401(a)(2) could be reasonably severable from the other water quality certification functions of the statute, as "[s]ection 401 provides separate and distinct roles for certifying authorities and neighboring jurisdictions,"[34] and the "neighboring jurisdictions process . . . is distinct from the process for certification, which is a

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[32] *See* Strengthening the Nation-to-Nation Relationship with Tribes to Secure a Sustainable Water Future; EPA Office of Water (OW) Action Plan, EPA-823-F-21-001, pg. 10 (Oct. 2021). The NTWC and NTC 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.

[33] *Id*.

[34] Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35,318, 35,372-73 (June 9, 2022)

prior step in the statutory regime."[35] EPA thus allowed tribes to seek TAS for the limited purpose of acting as a neighboring jurisdiction.

The Proposed Rule represents a complete reversal of EPA's position on this score, seemingly with no real justification or consideration of tribal input. In the Proposed Rule, EPA claims that, upon reconsideration, "it does not believe the neighboring jurisdiction role . . . is reasonably severable from the [CWA's] other water quality certification activities."[36] But EPA offers no analysis that supports its conclusion (or contradicts its conclusion in 2023); instead, the Proposed Rule merely points to the fact that both the certification and neighboring jurisdiction functions inform the federal licensing or permitting process and that the neighboring jurisdiction may itself play a significant role in the final disposition of the license or permit.[37] This fact, without more, does not require a tribe to also play a role as a certifying agency.

EPA claims that the neighboring jurisdiction process "is procedurally similar to the certification process," apparently as a reason against viewing the two separately.[38] But this statement is incorrect, and in fact ignores EPA's own analysis in 2023 that: 1) a neighboring jurisdiction must make an affirmative case to support a ''will affect'' determination, a higher bar than that of a certifying authority, which can deny certification simply because of a lack of information supporting a conclusion that the activity will comply with water quality requirements; and 2) in contrast to a certification decision, which is made by the certifying authority, the outcome of the neighboring jurisdiction process is determined by the federal licensing or permitting agency, based upon the recommendations of the neighboring jurisdiction and EPA and any additional information presented at the hearing.[39] As EPA concluded in 2023, these procedural distinctions reflect the more limited authority of neighboring jurisdictions; EPA has not explained why these distinctions mattered in 2023 but now they do not. While "[a]gencies are free to change their existing policies," they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)). EPA has not done so here.

The NTWC and NTC request that EPA hold off on any changes to the TAS provisions at this time and allow more time for tribes to utilize the provisions and for dialogue on their usefulness. Removing these provisions would be a step backward in EPA's and the federal

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[35] 88 Fed. Reg. at 66,637. *See also id.* at 66,653.

[36] 91 Fed. Reg. at 2,037. EPA noted that CWA Section 518 does not list Section 401(a)(2) as one of the provisions available for TAS. *Id*. at n. 54. But that section lists Section 401 and contains nothing preventing EPA from allowing TAS for a portion of Section 401 as well as for the whole section.

[37] 91 Fed. Reg. at 2,037.

[38] 91 Fed. Reg. at 2,037.

[39] 88 Fed. Reg. at 66,637. *See also* 2023 Final Clean Water Act Section 401 Water Quality Certification Improvement Rule Response to Comments Document, EPA-HQ-OW-2022-0128-0437 at 275-77 (Sept. 27, 2023), available at https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0437.

government's support for tribal sovereignty and protection of tribal trust resources. It should not be taken lightly.

5. The Proposed Changes to the Section 401(a)(2) Process are Improper and Should be Withdrawn

In addition to the major concerns discussed above, the NTWC and NTC also comments on several other aspects of the Proposed Rule. First, in addition to revoking the TAS provision for Section 401(a)(2), discussed immediately above, EPA proposes certain procedural changes to the Section 401(a)(2) process that requires the EPA Administrator to notify neighboring states and tribes about a federal license or permit for a discharge that the Administrator determines "may affect . . . the quality of the waters" of such state or tribe.[40] This provision is important to tribes, as tribes are often in the position of being an affected jurisdiction rather than a primary certifying authority, and Section 401(a)(2) provides a way for tribes to protect their water quality in that situation.

Each "may affect" determination is based on the specific situation at hand. Given the fact-dependent nature of Section 401(a)(2) determinations and the broad range of federal licenses and permits triggering Section 401(a)(2), which EPA describes in the Proposed Rule, the NTWC and NTC agree with EPA's determination not to impose a set of "parameters" on the information EPA may consider in making its "may affect" determinations.[41] EPA should continue to consider all relevant information when making a "may affect" determination.

However, we disagree with EPA's proposal to develop "categorical determinations" based on "emerging trends" EPA has noticed in making "may affect" determinations.[42] There is no need nor any basis for establishing categorical determinations under Section 401(a)(2) that would pre-determine whether a neighboring jurisdiction's waters may be affected by the discharge at issue. Indeed, doing so would likely be unlawful and create more implementation challenges. First, Section 401(a)(2) does not provide EPA with the authority to make categorical determinations that would in effect exempt certain types of projects from the notification, objection, and hearing requirements of Section 401(a)(2). Moreover, because each "may affect" determination is fact-dependent, it will depend on a variety of factors that would be difficult if not impossible to capture in a categorical determination. In addition, even if EPA possessed the authority to craft a categorical approach to exclude entire classes of activities from Section 401(a)(2)—which it does not—there is no rational way to develop such an approach that would not also result in the impermissible exclusion of activities that might affect neighboring water quality. The NTWC and

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[40] 33 U.S.C. § 1341(a)(2).

[41] 91 Fed. Reg. at 2,033 ("EPA is not proposing to identify specific factors EPA must analyze in making a ''may affect'' determination).

[42] 91 Fed. Reg. at 2,033-34.

NTC are aware of no problems such categorical determinations would solve; instead, they would create far more problems.

While the NTWC and NTC disagree with EPA's apparent plan to develop categorical determinations, the NTWC appreciates the preamble's clarification that these categorical determinations would not be exclusions and EPA would still conduct the Section 401(a)(2) process for all categories of projects or discharges.[43] Moreover, to the extent EPA moves forward with implementing categorical determinations in the future, EPA would first be required to provide public notice, opportunity for meaningful comment, and meaningful consultation with tribes.

We also disagree with the addition of a 90-day deadline in § 121.14 for the federal agency to make a determination on a Section 401(a)(2) objection. First, while there are numerous deadlines in Section 401(a)(2), the Proposed Rule's 90-day deadline is not one of them; Congress did not intend such a deadline. Second, although 90 days may be sufficient in some cases, some determinations may be more complex, require additional information-gathering, requests, and responses, and require the development of conditions that inevitably will require more than 90 days to be done properly. Mandating such a deadline in these instances will result in projects that have to be denied rather than conditioned or greater litigation risk and uncertainty. While EPA claims this is to prevent unreasonable delays, the preamble does not describe one instance where there was a delay, let alone an unreasonable delay, nor has it evaluated any alternative options that could better address such issues.[44] At a minimum, EPA should provide for longer time frames when warranted by the circumstances.

6. The Proposed Rule Unlawfully Attempts to Overrule Tribal Certification Regulations

EPA does not have authority to require tribes (or states) to modify, or dictate how they implement, their certification regulations. The CWA itself allows tribes and states to adopt their own requirements, except as expressly provided otherwise in the CWA (prohibiting less stringent requirements).[45] CWA § 401(a) requires a tribe to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."[46] EPA regulations therefore must not infringe on a tribe's authority under CWA § 401 by conflicting with tribal certification regulations that comply with the plain language of CWA § 401. Nevertheless, EPA appears to have issued the Proposed Rule without considering its lack of authority in this regard and would force tribes and states to choose between violating their own administrative laws and procedures or violating the federal regulations.

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[43] 91 Fed. Reg. at 2,034.

[44] *See* 91 Fed. Reg. at 2,035.

[45] 33 U.S.C. § 1370.

[46] 33 U.S.C. § 1341(a).

For example, the current federal regulations provide that a request for certification must contain the contents identified by the certifying authority prior to the request for certification.[47] This requirement should be preserved. Having the contents identified prior to a request being submitted provides the regulated community with sufficient notice of what information is needed and when the reasonable period of time will begin. EPA has not, however, provided any justification or authority for requiring a uniform (and likely deficient) set of contents; different jurisdictions have different laws, experiences, and scenarios concerning water quality and thus are likely to need different information to decide on certification requests. EPA could provide a recommended list of the requirements for a valid request for certification that tribes, states, and the regulated community can utilize in the absence of jurisdiction-specific requirements, but the choice is theirs. EPA can also define what it considers a complete certification request when EPA is issuing the certification. Indeed, all previous federal rules as well as the Proposed Rule explain that insufficient information is an appropriate basis for denial of certification.[48] The NTWC and NTC support maintaining such a provision in the federal certification regulations.[49] But EPA has no authority to overrule tribal certification laws that specify what is required for a tribal certification request. EPA also cannot prevent tribes from asking for additional information at any point in the application process.

In the 2020 rule, EPA acknowledged that by finalizing similar requirements to those in the Proposed Rule, some states and tribes would have to enact conforming changes to their laws.[50] However, defying logic, EPA now claims this Proposed Rule "will neither impose substantial direct compliance costs on Federally recognized Tribal governments nor preempt Tribal law."[51] Similarly, in the Economic Analysis, EPA claims: "The proposed rule would not require States or Tribes to update their regulations, statutes, guidance documents, or forms."[52] EPA also states "The EPA is not aware to what extent States or Tribes may update their requirements, so this economic analysis does not attempt to quantify potential costs associated with States or Tribes doing so."[53] Before moving forward with the Proposed Rule, EPA must decide whether it will require changes to or preempt tribal and state laws and explain what authority EPA relies on to do so. If EPA nonetheless moves forward with its proposal, it should make clear that if there is a conflict, tribal

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[47] 40 C.F.R. § 121.5(c).

[48] 91 Fed. Reg. at 2,030, 85 Fed. Reg. 42,210, 42,265, 42,286.

[49] *See* Proposed 40 C.F.R. § 121.7(e)(3).

[50] 85 Fed. Reg. 42,210, 42,214-15.

[51] 91 Fed. Reg. at 2,039.

[52] Economic Analysis at 27. Although EPA puzzlingly also says: "The EPA recognizes that to increase certainty and clarity and to avoid other negative outcomes, certifying authorities may choose to update their section 401 requirements. As a result, States or Tribes that have section 401 regulations, statutes, guidance documents, and forms that are inconsistent with the EPA's rulemaking may incur costs to conform their requirements following a final rule."

[53] *Id.*

and state regulations regarding the certification process will control. Otherwise, EPA must provide notice and additional public comment on such significant changes.

EPA has not attempted to quantify the costs the Proposed Rule would have on tribes and states with conflicting certification laws nor has EPA explained why it is unable to do so. Tribal and state certification laws are readily available to EPA, or EPA can request such information if it truly cannot find it. EPA collected many of these laws in 2023.[54] EPA can easily determine what aspects of these laws conflict with the Proposed Rule and would need to be changed to avoid conflicts. And EPA already has knowledge of and methods to estimate how much statutory, regulatory, guidance, and form changes would cost jurisdictions. Before moving forward, EPA must evaluate conflicts with tribal and state laws, quantify the costs of requiring tribes and states to make changes, and provide for additional public comment. Moreover, any final rule that requires changes to be made by tribes and states, assuming such a rule would be lawful, should not become effective until tribes and states have been given sufficient time to make the required changes.

7. Modifications to a Grant of Certification Should Not Require the Applicant's Consent

The Proposed Rule's requirement that tribes and states need to obtain the applicant's agreement for the exact language of a modification to a grant of certification is a departure from EPA's longstanding practice.[55] The Proposed Rule does not provide any basis or justification for this departure. The NTWC and NTC believe the current regulations, which allow for modifications with the agreement of the certifying agency and the federal agency, are sufficient. The terms of the certification should be up to the regulators, not the applicant. In practice, this proposed requirement to obtain the agreement of the applicant is likely to result in more new certifications being required for minor changes that otherwise could potentially be addressed through a modification.

8. The NTWC Agrees that Federal Permitting Agencies May Not Review Tribal Conditions and Must Include them in the Federal License or Permit

EPA recognizes that tribal conditions must be included in the federal license or permit without alteration or rejection.[56] EPA also proposes that an "explanation of the condition and a citation to the water quality requirement underpinning the condition" should be included. A similar requirement is contained in 40 C.F.R. § 121.8, which the NTWC and NTC support retaining. That regulation confirms that the extent of federal agency review is limited to whether the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied

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[54] 88 Fed. Reg. at 66,657.

[55] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)).

[56] 91 Fed. Reg. at 2,030 (state and tribal conditions "must be included in a Federal license or permit").

with its public notice procedures established pursuant to Clean Water Act Section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.

9. General Permits Should be Subject to the Certification Requirement

Although the Proposed Rule contains no regulatory changes on this issue, EPA requested comment "on whether the best reading of the statute supports extending the CWA section 401 certification requirement to general permits, even in the absence of an 'applicant.'"[57] The NTWC and NTC agree with the case law and prior rulemakings and guidance recognizing that general federal licenses or permits are subject to CWA Section 401 certification.[58] A decision that general permits do not need certification would cause uncertainty and delays and would not avoid certification in any event. Section 401 would plainly require the individuals seeking coverage under the general permit, as "applicants" for a federal license or permit to conduct an activity which may result in any discharge into the navigable waters, to get individual certifications, which would be more burdensome than the existing scheme.

10. The Proposed Rule's Economic Analysis Leaves Out Important Costs with No Justification

EPA prepared an Economic Analysis to inform the public of potential effects associated with the rulemaking. Instead of informing the public, EPA's analysis misleads the public. It violates EPA's own Guidelines for Preparing Economic Analyses[59] and must be redone before EPA proceeds with this rulemaking.

In the Economic Analysis, EPA claims that the proposed narrower scope of certification would likely reduce the time and labor costs that state and tribal certifying authorities would otherwise spend requesting and reviewing information outside this new narrow scope.[60] On the contrary, tribal and state laws protecting waters outside the unlawfully narrow scope of a point source discharge into WOTUS will not just disappear if EPA finalizes these regulations. If EPA diminishes the most logical and strongest mechanism for tribal and state water quality protection, tribal and state regulators would be obligated to spend more time and search for alternative means to comply with their water quality laws. This effort will cost time and money and likely increase review times. Additionally, as discussed above and although EPA has stated otherwise, it appears the Proposed Rule would mandate that tribes and states revise their laws to conform to many of the new provisions, which would similarly require additional resources.

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[57] 91 Fed. Reg. at 2,020-21.

[58] 91 Fed. Reg. at 2,021.

[59] EPA, Guidelines for Preparing Economic Analyses, EPA-240-R-24-001 (3d ed. Dec. 2024).

[60] Economic Analysis at 15.

The Economic Analysis recognizes that narrowing the scope of a certifying authority's review could reduce the potential project impacts considered during its review, which could have negative environmental impacts relative to the baseline.[61] Yet EPA chooses to completely ignore these impacts, falsely concluding "the proposed rule would have no environmental impacts," and claiming that "because the changes to the scope of certification reflect the statutory text (i.e., discharge), certification decisions reflective of the narrower scope would be less likely to face legal challenges."[62]

By making this claim, EPA improperly changes the baseline with the apparent intent to skew results. EPA has not pointed to one case in the decades of implementation of the current scope of CWA Section 401 when a legal challenge to the scope of the certification rules was successful; instead, even the Supreme Court has rejected the Proposed Rule's narrow scope, finding the broader scope the most reasonable read of the statute.[63] Has EPA looked at the rate of challenges over the past fifty years and determined the likelihood of their success? Moreover, the same argument as to the susceptibility to legal challenge could be made regarding the narrower scope of certification on which the purported benefits claimed in the Economic Analysis are based. Given that the proposed scope is new (with the brief exception of the 2020 rule, which was effective for only three years) and contrary to Supreme Court precedent, the justification for making this argument would be far greater. In short, EPA must evaluate the environmental impacts of its Proposed Rule and provide that cost information for public review and comment before moving forward.

EPA also claims that removing the TAS provisions "for section 401 as a whole or, in the alternative, for section 401(a)(2) only would remove redundancies among different regulatory programs, thereby presenting additional net cost savings for applicants, certifying authorities, and the EPA."[64] Later, EPA says it "does not anticipate any change in burden as a result of repealing the [TAS] regulations at section 121.11" and that repealing the TAS provisions will have de minimis overall impacts.[65]

As explained above, EPA does not appear to have asked or made any attempt to consider how removing these provisions would impact tribes. The fact that there is already a tribe that has applied for TAS for Section 401(a)(2) using the current regulations, and others that have invested time and resources into the process relying on the current regulations, proves that their removal will incur costs for tribes and increase burdens. Also, by revoking these TAS provisions, EPA is removing two options for tribes to protect their waters. While the TAS application requirements

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[61] Economic Analysis at 28-29.

[62] Economic Analysis at 29.

[63] *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 712.

[64] Economic Analysis at 3.

[65] Economic Analysis at 25-26, 29.

may be similar for CWA Section 303(c) water quality standards and Section 401 or 401(a)(2), the implementation burden is vastly different. EPA has not attempted to measure the impact of revoking these provisions: tribes that want to seek TAS for Section 401 or 401(a)(2) may be forced to forgo TAS altogether and rely on other water quality protection laws, or do nothing to try to protect their waters, or expend more resources and prepare and implement an additional program that they otherwise would not attempt at this time. Those are real costs, even if they may be difficult to quantify, that EPA cannot just wish away.

11. Conclusion

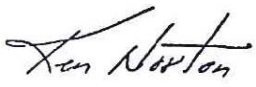
The NTWC and NTC consider the Proposed Rule to be a failure of the federal government's duty to protect vital tribal resources. It would diminish tribal opportunities and authorities to protect tribal waters. Moreover, it would likely have the opposite effects EPA claims to seek, that is, it would result in more regulatory uncertainty and litigation. We urge EPA to reconsider the Proposed Rule and engage in constructive dialogue with tribes on how best to implement Section 401 certifications consistent with the CWA and with obligations to enhance tribal sovereignty.

The Proposed Rule would make significant changes to long-standing certification regulations and practices and would limit the authority of states and authorized tribes to respond to Section 401 certification requests. It also would revoke the opportunity for tribes to apply for TAS solely for Section 401 or only for Section 401(a)(2). These actions would erode tribal authority and sovereignty, especially considering EPA's recent proposal to redefine "waters of the United States," which has weakened state and tribal authority by narrowing the scope of waters and wetlands protected by the Clean Water Act. EPA's proposal to limit Section 401 to point source discharges into a WOTUS has detrimental effects that are intensified when taking into account the combined consequences of each decision. The NTWC and NTC express significant concern that these actions, especially when viewed in combination, would further widen the existing regulatory gap in the protection of tribal waters and hinder tribes from exercising their authority over their waters.

The NTWC and NTC consider the proposed changes to the 2023 rule unnecessary and inappropriate, resulting more from a desire to satisfy industry interests than a legitimate effort to improve Section 401, which is vital for protecting tribal waters from pollution that flows within and onto tribal lands. We believe that the majority of the proposed revisions weaken the EPA's commitment to protecting essential tribal water resources, as well as its responsibility to appropriately consult with tribes and adhere to the key principles established in the EPA's 1984 Indian Policy. The Proposed Rule imposes arbitrary limits on the Section 401 process and scope, diminishing its effectiveness. Section 401, when properly interpreted, serves as a valuable tool for protecting water quality and reinforcing tribes' inherent sovereignty to protect their valuable water resources.

The NTWC and NTC express their concerns and objections regarding any changes to the CWA § 401 certification process that would erode tribal authority and capacity to protect their waters. We also strongly encourage EPA to reconsider its proposal to revoke the option that allows tribes to pursue TAS solely as a neighboring jurisdiction under CWA §401(a)(2).

Sincerely,



Ken Norton, Chair
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