

Region 10 EPA Tribal Consortium (RTOC)  
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October 20, 2019

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

**SUBMITTED VIA REGULATIONS.COM**

**RE: Comments on Docket ID No. EPA-HQ-OW-2019-0405**

Dear Mr. Ross:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is in regard to the Proposed Rule Updating Regulations on Water Quality Certification ("Rule").

First, the RTOC reiterates its that the comment period on this proposal be extended and that EPA conduct a tribal listening session in the Northwest. Region 10 has the greatest number of Tribes in the Nation and failing to conduct a listening session in Region is a significant oversight.

Clean water is essential to many Tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons. The protection of water quality is vital to the survival of Tribes. The RTOC strongly believes that EPA must engage in consultation on a government-to-government basis with tribal governments to fully understand the impact of the proposed changes to the Clean Water Act's regulations on treaty rights, tribal communities, and tribal resources. Webinars, comment letter, and phone calls are not consultation. EPA officials must meet face-to-face with tribal elected officials to comply with their obligations to consult. Accordingly, we request again that EPA extend the period for consultation and conduct more vigorous outreach with Tribes about this proposal.

Tribal communities, for whom fishing is critical not only for subsistence, but for cultural and commercial purposes will be most affected by this proposal. Sharing and eating fish is an integral part of Tribal culture, religion and social fabric in Region 10, and it is well-documented that Tribal communities consume fish at a higher-than-average rate. Many Tribes in Region 10 have treaty-protected rights to fish both on and off their reservation that preserve for all time the right to engage in commercial, subsistence, and ceremonial fishing. This Rule fails to consider the impacts to tribal members, their treaty-reserved rights, and presents an issue of environmental

justice, but ignoring the disproportionate impact this proposal will have on tribal people. Tribes that rely on locally caught fish for subsistence are already subject to impacts associated with projects impacting water quality and will experience greater harm as a result of this proposal.

Beyond the failure of EPA to properly consider impacts of this Rule on tribal communities, the RTOC has the following comments:

- 1. Timeframe established is unreasonable:** The Rule states that the one-year statutory timeframe for acting on a Section 401 certification request will begin as soon as the request is received, rather than running from the time the application is complete. This is counter to EPA's established practice for permit applications in general, under various environmental statutes including the CWA, which sets timelines based on receipt of a complete application and allows permitting authorities to request more information when needed.

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

This Proposal would require certain information to be part of a certification request, but the information required is fairly minimal and may not address all the relevant aspects of a project, especially if they are complex, such as in the case of a drinking water intake withdrawal project that would require continuous flow monitoring at multiple points to support a protocol for water use restrictions during times of drought. Accordingly, there needs to be discretion within the 401 process to ensure that States and Tribes have the information needed to make a well-reasoned certification decision.

Lastly, the Rule should ensure that a final certification decision is not required until the completion of the NEPA process for a project proposal. The NEPA analysis not only provides information regarding impacts on water quality, it also provides information regarding impacts on culturally significant resources, including fish and wildlife, which is especially critical knowledge for tribes to have when setting conditions of certification. If a Tribe is required to initiate an environmental evaluation before NEPA documents are available, this would place an unnecessary burden on the Tribe and is likely to result in an incomplete review and possible degradation of tribal trust resources such as fish and wildlife.

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- 2. The Rule unreasonably limits review solely to impacts from discharge:** The Rule limits “a certifying authority’s review and action under section 401 is limited to water quality impacts of waters of the United States resulting from a potential point source discharge associated with a proposed federally licensed or permitted project.” However, the scope of certification authority under Section 401 is not limited to ensuring compliance with the Clean Water Act, but includes authority to impose conditions consistent with “any other appropriate requirement of State [or authorized Tribal] law.” Moreover, EPA proposes that the scope be limited to “water quality requirements,” which it defines as federally approved state and tribal CWA requirements.

This Rule would leave most tribal waters unprotected even when specific tribal water quality protection ordinances or standards have been adopted, which would be a direct challenge to tribal sovereignty. Courts have interpreted the “other limitations” language in Section 401 to mean that, once a discharge is implicated, a certifying state or Tribe may impose conditions that address water resources issues that are specific to the violation of its water quality standards.

Where state or tribal certification is conditional, the federal permitting agency must accept all conditions in a Section 401 certification. That section states: “Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations,” under various sections of the CWA, “and with any other appropriate requirement of State law set forth in such certification.” Any such limitations identified “shall become a condition on any Federal license or permit subject to the provisions of this section.”

The Rule must be adjusted to recognize that other appropriate requirements of state and tribal law.

- 3. No Articulated Scientific or Legal Justification for Proposal:** There is no new science or law that justifies EPA’s changes to the 401 process. Unfortunately, politics, not science, is the only factor that would lead to this result. The EPA’s proposal will allow for significant limitation to how and when a State or Tribe will be able to impose conditions necessary to meet the goals of the Clean Water Act – to make our Nation’s waters fishable and swimmable.

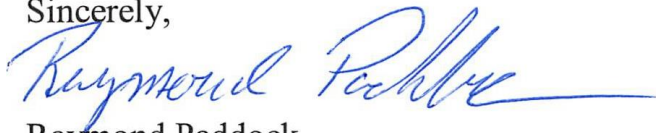
The current 401 process is the result of years of extensive public processes, involving tribal governments as well as industry representatives, environmental groups and other stakeholders and is designed to further the goals of Cooperative Federalism by granting States and Tribes significant roles in Clean Water Act implementation. This Rule is contrary to that.

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The RTOC appreciates your consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Raymond Paddock". The signature is fluid and cursive, with a long horizontal stroke at the end.

Raymond Paddock  
Region 10 RTOC, Tribal Caucus Co-chair