EPA Region 10 Tribal Consortium (RTOC)
P.O. Box 689 Spokane, Washington 99210
www.region10rtoc.net

August 2, 2021

U.S. Environmental Protection Agency, Office of Water
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

SUBMITTED VIA REGULATIONS.COM

RE: EPA Region 10 Tribal Consortium Comments on Docket ID No. EPA-HQ-OW-2021-0302

Dear Madam or Sir:

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 EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule ("401 Rule").

The RTOC of EPA Region 10 submits the following comments in response to the Agency's questions for consideration concerning revision to the 401 Rule:

1. The RTOC encourages the EPA to retain and amend the pre-filing meeting request requirement.

The RTOC finds the pre-filing meeting request requirement under 40 C.F.R. § 121.4 to be significant and a critical component to regulatory efficiency for Tribes. The RTOC recognizes the time available to permitting authorities to review Section 401 permit applications is limited, thus the EPA should construct the permit process in a manner that provides the earliest notice and greatest amount of information to permitting authorities.

The RTOC encourages the EPA to retain the pre-filing meeting request requirement and the RTOC implores the EPA to implement three additional amendments to 40 C.F.R. § 121.4.

First, the EPA should *require*, not simply encourage, applicants to present the information listed under 40 C.F.R. § 121.4(c) (see below):

1. The nature of the proposed project.
2. Potential water quality effects.
3. A list of required state, interstate, tribal, territorial, and federal authorizations.
4. The project's anticipated timeline for construction and operation.

Second, the EPA should require project proponents to identify neighboring jurisdictions in their pre-filing meeting request under 40 C.F.R. § 121.4(c), including those downstream or upstream from the proposed project. The EPA should also require project proponents to *notify* the listed neighboring jurisdictions of their intent to submit a Section 401 permit. The RTOC believes such amendments will provide adequate notice and information to the permitting and neighboring jurisdictions and keep all interested parties engaged and informed before the start of the permitting process.

Additionally, the RTOC shares the concerns of Tribes that have noted issues in relation to the submission of pre-filing meeting requests to incorrect jurisdictions by permit applicants. The RTOC recommends an amendment to 40 C.F.R. § 121.4 that requires applicants to submit pre-filing meeting requests to the proper permitting jurisdiction and the failure to submit the request to the proper jurisdiction resets the permitting process. The RTOC believes such an amendment will shift the burden to permit applicants and encourage the correct identification of permitting jurisdictions.

2. The current Rule prohibits permitting authorities from acquiring the requisite information necessary to begin a well-informed certification process.

The RTOC shares the Agency's concerns regarding the certification request provision and its constraint on permitting authorities' ability to obtain the requisite information to begin the Section 401 certification process.

The RTOC believes time and information are critical to regulatory success under Section 401. The RTOC also acknowledges States and Tribes share different values, face unique environmental challenges, and employ different approaches to confronting climate change and its evolving crises. Thus, the RTOC implores the EPA to return to established practice and revise the certification request provision to allow Tribes and other permitting authorities to require complete Section 401 applications before the statutory one-year "reasonable period of time" limit begins.

The RTOC believes permitting authorities should implement their own application requirements for Section 401 permits because:

- Not all proposed uses are the same. Some projects require more or less information before a well-informed decision-making process can begin.
- Not all proposed uses have the same impact. Some proposed uses have more or less destructive, interruptive, etc. impact or potential relative to other uses.
- Not all jurisdictions share the same values or considerations. For instance, Tribes have more concern for ecosystem health, minimum flows, etc. than non-tribal jurisdictions and have unique interests that are vital to public health, Indigenous cultures, and local economies (e.g.,. salmon, trout, plants, etc.).

The RTOC is aware of the Courts' skepticism of application requirements and subjective determinations of "incomplete" applications by Tribal and State authorities. Thus, the RTOC

encourages the EPA to cooperate with Tribes and States to design and implement Section 401 permit applications and establish an appeals process for certifying authorities where authorities believe applicants fail to comply with applications. To support the appeals process, the EPA should promulgate a uniform standard of review that establishes when applicants fail to submit a complete application and if found incomplete, reset the application process.

3. **The current rule restricts certifying authorities' power to set the "reasonable period of time."**

The RTOC believes that there needs to be greater flexibility in the time necessary to complete the Section 401 process. The existing 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 previously 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.

The current rule requires 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, any revision to the Rules 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.

4. The current rule prohibits certifying authorities from implementing standards and regulations approved by the Supreme Court of the United States in violation of the principles of cooperative federalism and tribal sovereignty.

The RTOC shares the EPA's concern that the Rule prohibits Tribes and other permitting authorities from implementing appropriate standards and regulations to adequately protect vital water resources. The 2020 Rule operates on a narrow interpretation of § 401(d) and limits State and Tribal permitting authority to only regulate direct discharges. The RTOC believes the Agency should return to conventional practice and allow States and Tribes to regulate discharges and *activities* under §401(d) as permitted by the United State Supreme Court in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*.

In *PUD No. 1 of Jefferson County*, the State of Washington imposed minimum flow requirements for a §303 application (hydroelectric dam) under the State's §401 authority in order to preserve fisheries and fishery resources along the Dosewallips River. The applicants argued before the United States Supreme Court that Washington's minimum flow requirement was outside the scope of §401 and Washington was, as the Rule currently interprets §401, only permitted to regulate direct discharges. The Supreme Court upheld Washington's minimum flow requirement on a 7-2 ruling.

The Court believed the applicant's argument, and by extension the 2020 Rule's underlying logic, is contravened by § 401(d) of the Clean Water Act which reads as follows:

> 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* [emphasis added], under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

The Court held the above emphasized portion of §401(d) allows States and Tribes to regulate the activities of applicants, not just direct discharges:

> Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations ... necessary to assure that *any applicant* " will comply with various provisions of the Act and appropriate state law requirements...The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law.

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 711-712 (1994).

The Supreme Court's holding in *PUD No. 1 of Jefferson County* is further juxtaposed with the 2020 Rule as a direct discharge is not the regulatory ceiling but serves as the minimum "threshold condition" for a certifying authority to regulate the applicant's *activities*:

> § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

The Court notes, however, a State or Tribe's ability to regulate an applicant's activity is not unlimited. Rather, certifying authorities can only regulate activities that bear on the water's designated use and the standards underlying such use under 33 U.S.C. § 1313. Thus, the RTOC encourages the EPA to revise this rule and allow for greater deference to States and Tribes in designating uses, water quality standards, and regulating the activities of § 401 applicants as permitted by the Supreme Court.

In light of the Supreme Court's holding in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, the RTOC recommends the EPA incorporate treaty rights and the EPA's trust responsibility to all tribes in the revision to this rule. The RTOC believes treaty and trust rights such as fishing, the harvest of plants, etc., should be incorporated as a designated use that can be regulated under 33 U.S.C. § 1313.

5. EPA Review

The RTOC shares the concerns of the EPA, stakeholders, and Tribes across the Country regarding the Rule's requirements and standard of review under 40 C.F.R § 121.7-121.9.

The RTOC does not believe the information certifying authorities are required to disclose to applicants when granting or denying a § 401 application under 40 C.F.R. 121.7(c)-(e) is necessary or pertinent. The RTOC views these requirements as unnecessary, inefficient procedural red tape and instead recommends the EPA to dispose of this rule or simply *recommend*, not require, certifying authorities provide a summary including the enumerated details in their acceptance or denial of a § 401 application.

The RTOC believes 40 C.F.R. § 121.9 is excessive and contrary to the principles of cooperative federalism and tribal sovereignty, and the EPA should make significant revisions or dispose of the provision entirely. The RTOC believes the waiver of State and Tribal authority should only be reserved for egregious, substantive harms contrary to Congressional intent and the objectives of the Clean Water Act. Thus, the RTOC believes the EPA should distinguish harmless errors/actions from substantive, harmful errors/actions, and allow certifying authorities to respond to agency reviews. In the event of harmless errors and actions, the EPA should either allow authorities to correct their harmless mistakes or uphold the authorities' actions as the error is harmless by nature. The RTOC believes such revisions will facilitate a more efficient judicial economy, reduce the burden on the agency, and uphold the principles of cooperative federalism and tribal sovereignty.

6. Modifications/Reopeners

The EPA should revise this rule and grant certifying authorities the power to revisit § 401 permits and their compliance with the Clean Water Act. The RTOC believes 33 U.S.C. § 1341(a)(5) establishes statutory precedent for permit modifications:

> Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

33 U.S.C. § 1341(a)(5)

Additionally, the EPA has discretion to promulgate notice and compliance procedures pursuant to the objectives of 33 U.S.C. § 1341(a)(5) under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984). Under *Chevron*, Courts provide deference to agencies' interpretations of Acts of Congress where Congress did not expressly address the contested matter and the agency's interpretation is reasonable. First, the EPA is charged by Congress with the administration of the Clean Water Act, thus the EPA's interpretation and administration of § 1341(a)(5) qualifies for judicial deference. Second, it is expressly clear Congress vested the EPA with the power to suspend and/or revoke § 401 permits where licensees violate the applicable sections of the Clean Water Act. However, Congress did not address how the EPA is to carry out this Congressional mandate. Thus, the EPA has discretion to promulgate rules, procedures, and standards of review for the administration of 33 U.S.C. § 1341(a)(5).

The RTOC believes the EPA should design and implement a reporting mechanism for non-compliance with the Clean Water Act and encourage the monitoring and report of suspected non-compliance by certifying authorities. The RTOC believes such a mechanism will spread the federal agencies' burden and create a quasi-enforcement mechanism for certifying authorities.

The RTOC appreciates your consideration of these comments.

Sincerely,

Raymond Paddock
Region 10 RTOC, Tribal Caucus Co-chair