Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule

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Background

This consultation report was prepared to support the U.S. Environmental Protection Agency (EPA or the Agency) rulemaking to revise the water quality certification regulations at 40 CFR 121.

On January 20, 2021, President Biden signed Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis directing EPA to review and, as appropriate and consistent with applicable law, take action to revise or replace the 2020 Clean Water Act (CWA) Section 401 Certification Rule (2020 Rule). EPA reviewed the 2020 Rule in accordance with Executive Order 13990, and in the spring of 2021, determined that it would propose revisions to the 2020 Rule through a new rulemaking effort. See Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021). EPA considered a number of factors in making this determination, including but not limited to: the text of CWA section 401; Congressional intent and the cooperative federalism framework of CWA section 401; concerns raised by stakeholders about the 401 Certification Rule, including implementation related feedback; the principles outlined in the Executive Order; and issues raised in ongoing litigation challenges to the section 401 Certification Rule. Id. In particular, the Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. The Agency identified these and other concerns as they related to different provisions of the 2020 Rule in the Notice of Intention to Reconsider and Revise. See id. at 29543-44 (noting concerns with 2020 Rule provisions related to cooperative federalism, including certification requests, the reasonable period of time, scope of certification, certification actions and federal agency review, enforcement, and modifications).

Following publication of the Notice of Intention to Reconsider and Revise the 2020 Rule, the Agency solicited written feedback and held multiple webinar-based listening sessions for the public and stakeholders to receive feedback on the Agency’s plan to reconsider and revise the 2020 Rule. Furthermore, on October 21, 2021, the District Court for the Northern District of California issued an order remanding and vacating the 2020 Rule. The vacatur is nationwide. The order requires a temporary return to EPA’s 1971 Rule until EPA finalizes a new certification rule. Further details about the 2020 Rule vacatur and the Agency’s 1971 section 401 certification regulations can be found on EPA’s website at: https://www.epa.gov/cwa-401.

In addition to its pre-proposal outreach and engagement efforts, the Agency undertook tribal consultation consistent with the EPA Policy on Consultation and Coordination with Indian Tribes. EPA specifically requested feedback on several issues including: pre-filing meeting request, certification request, scope of certification, certification actions, enforcement, modifications, neighboring jurisdictions, and data and coordination. The tribal consultation and coordination process described in this report follows the EPA’s policy for implementing Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments.

As part of those efforts, the Agency initiated the tribal consultation and coordination process by sending a “Notification of Consultation and Coordination” letter on June 7, 2021, to all 574 of the tribes federally recognized at that time (see Docket ID No. EPA-HQ-OW-2021-0302). In addition to two national tribal webinars held on June 29 and July 7, 2021, the Agency convened other listening sessions for certifying
authorities and the public that tribal members and representatives attended. EPA continued outreach and engagement with tribes and sought other opportunities to provide information and hear feedback from tribes at national and regional tribal meetings during and after the end of the consultation period. The Agency did not receive any request for consultation during the consultation period. A few tribes requested to remain informed as the rulemaking process progresses. In all of these activities, the Agency solicited input on the existing CWA section 401 regulations and considered this input as it developed the proposed revisions to the regulations at 40 CFR 121.

This report provides a summary of the consultation and coordination conducted with tribes during the proposed rule development process. It also summarizes key themes from input provided by participants at tribal meetings, and the letters received during the tribal consultation period. The summary is intended to provide a description of the input received from tribes and tribal organizations as part of this consultation process.

Consultation and Engagement

Overview of the Agency’s Efforts

On June 7, 2021, EPA’s Assistant Administrator for the Office of Water, Radhika Fox, signed a “Notification of Consultation and Coordination” letter inviting tribal officials to participate in consultation and coordination events and provide feedback to EPA. The letter, available in the pre-proposal docket, was sent to all 574 federally recognized tribes at that time. EPA also provided information about the consultation opportunity via EPA’s Tribal Consultation Opportunities Tracking System (http://tcots.epa.gov). The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The Agency held two identical informational webinars concerning this matter for tribal representatives on June 29 and July 7, 2021. EPA consulted with tribes to gain an understanding of tribal views on a forthcoming proposed rulemaking to revise the CWA section 401 regulations.

EPA engaged tribes at four national or regional tribal meetings (i.e., Regional Tribal Operations Committee meetings). Additionally, during the consultation period, EPA hosted three webinar-based listening sessions that included both states and tribes (June 14, 23, and 24), and two sessions for the general public (June 15 and 23) occurring between June 14 and June 24, 2021. Summaries of the listening sessions are available in the pre-proposal docket (Docket ID No. EPA–HQ–OW–2021–0302). Furthermore, the Agency also participated in multiple calls with the National Tribal Water Council.

The consultation period formally ended on September 7, 2021; however, the Agency anticipates continued outreach and engagement with tribes as well as consultation with individual tribes throughout the rulemaking process.

Tribal Engagement for Development of the Proposed Rule

EPA published a Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule in the Federal Register on June 2, 2021. See 86 FR 29541-44. The public input period following the publication of the Notice of Intent extended until August 2, 2021. The Agency’s tribal coordination and
consultation period was held from June 7 to September 7, 2021. EPA continued to engage with and accept written feedback from tribal representatives and tribal associations after September 7, 2021.

The Agency participated in five Regional Tribal Operations Committee (RTOC) meetings and four of the National Tribal Water Council (NTWC) monthly calls.

The full list of meetings is available in Appendix B, the “Tribal Consultation, Coordination, and Outreach Meetings” section of this report. Note that no government-to-government consultation or staff-level engagement meetings were requested prior to the publication of the proposed rule.

Summary of Events

In summary, since May 27, 2021, EPA has:
- Held two national-level informational tribal webinars during the consultation period on June 29 and July 7, 2021.
- Held three national-level webinars for tribal and state governments on June 14, 23, and 24, 2021.
- Participated in a call with the National Tribal Water Council on December 1, 2021.
- Participated in the following Regional Tribal Operations Committees (RTOC) meetings:
  - Region 6: Teleconferences held on June 8, 2021;
  - Region 8: Teleconference held on October 19, 2021;
  - Region 9: RTOC Clean Water Workgroup call on August 12, 2021 and January 10, 2022; and
  - Region 10: Teleconference held on July 15, 2021.
- Provided section 401 rulemaking updates at the following tribal conferences: EPA Tribal Wetlands Workshop (September 20-23, 2021) and EPA Region 5’s State and Tribal Meeting (April 5, 2022).

A total of 13 pre-proposal feedback letters were submitted during the tribal consultation process that began on June 7, 2021. One of the tribes and one of the tribal organizations submitted two or more feedback letters. The total count includes letters from:

- Nine letters from individual tribes:
  - Six letters signed by tribal leaders; and
  - Three letters signed by tribal attorneys or staff.
- Four regional/national tribal groups or fish commissions that represent multiple tribes.

Tribes that provided pre-proposal input were located in EPA Regions 5, 6, 8, 9, and 10. The full list of tribes and tribal organizations that sent the Agency written consultation letters is also provided in Appendix A.
Key themes provided by participants at the tribal meetings and webinars, and the letters received during the tribal consultation period are summarized in this report. All letters submitted are publicly available in the pre-proposal docket. Common themes expressed in the tribal feedback letters included the need for applicants to submit complete certification requests, expanding the scope of certifications, cooperative federalism, concerns about a federal agency’s unilateral ability to determine the reasonable period of time, and concerns about federal agencies waiving certifying authority decisions. Feedback was relatively consistent across these stakeholders regardless of whether the feedback was from tribes having treatment in a similar manner as a state (TAS) or not.

Themes Emerging from Consultation Letters and Meetings

This section highlights input received as part of the tribal consultation process, including tribal consultation input letters sent to the Agency on the development of the proposed rule. Because tribal consultation commenced prior to development of the proposed rule, some of the themes reflected in tribal consultation feedback were based on the information that was available to the tribes at the time. For example, prior to the publication of the proposed rule, at the webinars and meetings, EPA provided a presentation and sought input on areas of section 401 that may require updating or that could benefit from clarification, including pre-filing meeting request process, certification request process, the reasonable period of time, the scope of certification, certification actions and federal agency review, enforcement, modifications, the neighboring jurisdiction process, data and other information, and implementation coordination. EPA requested input on issues and process improvements that EPA might consider for a future rule.

Participant recommendations from webinar-based listening sessions and the docket represent a diverse range of interests, positions and suggestions; however, the feedback was generally consistent from tribes with TAS for CWA section 401 and from tribes without TAS. Several themes emerged throughout this process, including support for ongoing tribal engagement, support for retention of tribal authority, and suggestions for process improvements for CWA section 401 implementation.

Key themes that emerged from the tribal meetings and consultation letters are summarized below. EPA carefully considered all tribal consultation letters, and all feedback received during the pre-proposal input period, as EPA developed a proposed rule.

Tribal Engagement and Other Rulemakings

Many tribes and tribal organizations expressed a desire to work with the Agency in a cooperative or collaborative manner. Many tribal feedback letters or meeting participants expressed an interest in receiving additional information and in continued engagement with the Agency during development of the proposed rule; however, most of these tribal representatives highlighted other ongoing rulemakings that also required their engagement. Some tribal feedback regarding this theme included the following:

- Many tribes requested further participation in the rulemaking process, such as receiving notification when the proposed rule is published.
- Multiple tribal organizations discussed the recent and upcoming changes to the definition of “waters of the United States” which impacts the scope of CWA section 401 certification.
One tribal organization submitted a feedback letter to another rulemaking (Baseline Water Quality Standards) that discussed the section 401(a)(2) process.

Several tribes reiterated that both the letters and the participation in the listening sessions did not constitute formal tribal consultation.

Tribal Authority and EPA’s Rulemaking Authority

Many tribes and tribal organizations stated that the 2020 Rule impacted tribal sovereignty and undermined tribal authority to protect their waters and was contrary to the principles of cooperative federalism. In particular, tribal input included the following:

- Several tribes remarked that the now vacated 2020 Rule impaired or undermined tribal sovereignty and their ability to protect tribal waters.
- Several tribes remarked that several provisions included in the 2020 Rule were unlawful, inconsistent with the Clean Water Act and went against previous court rulings with regards to section 401 implementation by certifying authorities.

Section 401 Rule Provisions

Many tribes provided input regarding section 401 certification process improvements and specific provisions of the now vacated 2020 Rule which they believe need to be addressed by the proposed rule. The Federal Register Notice of Intent from June 2, 2021, requested stakeholder input on the 2020 Rule, including a series of questions on specific aspects of the 2020 Rule. Tribal feedback pertaining to these questions included the following:

- **Pre-filing Meeting Requests**
  - Most tribes generally supported the pre-filing meeting request requirement; however, some had concerns that the 30-day wait period is very rigid and would like to see more flexibility in allowing certifying authorities to waive the 30-day requirement.
  - A few tribes recommended that the pre-filing meeting request can only be sent after the licensing or permitting agency has received the permit application and has determined the permit pathway (e.g., a general/nationwide permit or a standard individual permit). These tribes noted that delays tend to occur when the information supplied in the application is insufficient to appropriately analyze the impacts of the project.

- **Definition of “Certification Request”**
  - Tribes and tribal organizations generally do not want the certifying authority to be prevented from requesting additional information in a certification request, if needed. They expressed concern that the 2020 Rule’s definition of a certification request does not allow tribes to conduct an efficient analysis due to limits on what a tribe can require in a certification request.
• One tribe was also concerned that the permit application is not one of the requirements of a certification request, which has resulted in some confusion for all parties. They recommended clarifying in the list of required information that there must be a copy of the license or permit application and that it should be deemed complete by the licensing or permitting agency.

• **Reasonable Period of Time**
  o Some tribes expressed concern that the 2020 Rule prevented certifying authorities from determining the “reasonable period of time.” These tribes recommended that the certifying authority and federal agency should work together to determine the reasonable period of time.
  o A few tribes recommended that the clock should start when the application is deemed complete, not when the request is received.
  o Furthermore, a few tribes and tribal organizations suggested that there should be some flexibility for adjusting the reasonable period of time for complex projects with more technical issues.
  o One tribe recommended that the proposal should include an appeal process if the federal agency and certifying authority disagree on extending the reasonable period of time.

• **Scope of Certification**
  o Several tribes recommended changing the regulation so that all potential discharges of the activity are considered, not just point source discharges.
  o Many tribes stated that the 2020 Rule limited the scope of 401 review from considering the overall impact on water quality; those tribes recommend returning to the Supreme Court majority interpretation from *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*).
  o A few tribes expressed concern that under the 2020 Rule, tribes and states were no longer able to address water quality-related impacts from a project that may not be directly associated with discharges, such as increased water withdrawals, pollution, and erosion.
  o Most tribes argued that the 2020 Rule narrowed the scope of certification contrary to Congressional intent for tribes and states to have a tool to protect the waters under their jurisdiction.
  o A few tribes stated that the definition of “water quality requirements” is too limited and does not support comprehensive, holistic protection of water quality.
  o During the listening sessions, some tribes noted that the definition of “waters of the United States” rulemaking is also ongoing and will therefore affect the scope of section 401 implementation.

• **Certification Actions and Federal Agency Review**
  o The majority of tribes that provided pre-proposal input stated that the justification and citation requirements for conditions were burdensome and should be removed.
However, these tribes also provided that EPA can continue to recommend that certifying authorities provide that contextual information where possible.

- Some tribes expressed concerns over the potential for federal agency review to result in a certification condition(s) or a whole certification decision being waived.
- Most tribes requested that this proposal not allow a federal agency to negate a tribe’s certification actions.
- Some tribes recommended that if the certifying authority takes an action on a certification request (to grant, condition, deny, or waive certification), the decision should not be vetoed by the federal agency; review of certification actions should be handled by the courts.
- A few tribes suggested that if there will be a federal agency review process, it should include an opportunity to remedy deficiencies rather than affect the tribe’s authority to determine what is required to protect their water quality.

**Enforcement**

- Tribes who provided pre-proposal feedback stated that the certifying authority should have enforcement authority under section 401.
- Many tribes recommended joint enforcement authority because even though the certification conditions become a condition of the license or permit, they believe the certifying authority is better suited to ensuring compliance with their water quality requirements.
- Some tribes stated that federal agencies do not have the capacity to enforce every license or permit that they authorize, but violation of certification conditions will have an impact on the tribe’s resources.

**Modifications**

- Several tribes recommended that certifying authorities have the authority to modify certifications (i.e., to adapt to project changes such as design or plan changes).
- A few tribes recommended that they be also be allowed the opportunity to adjust certifications to address federal agency concerns.

**Section 401(a)(2) Neighboring Jurisdiction Process**

- Several tribes expressed that the 2020 Rule’s position that “may affect” determinations are discretionary was contrary to the statutory language of the CWA and was unlawful, citing the Minnesota District Court decision in *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549 (D. Minn. 2021).
- A few tribes also expressed that the “discretionary” nature violates the Administrative Procedure Act.
- Two of the tribes recommended that the “may affect” notification to neighboring jurisdictions should apply to all tribal lands rather than just “authorized” tribes. A tribal organization recommended that the notification be sent to any potentially affected tribes, even those without TAS.
Several tribes recommended that the revised rule should clearly state that the CWA requires the Administrator to evaluate neighboring jurisdictions to determine if the proposed action “may affect” water quality.

A few tribal organizations expressed concern that current implementation of section 401(a)(2) does not protect off-reservation treaty rights from discharges.

### Tribes Requesting Consultation

No tribes notified the Agency that they wanted to engage in individual consultation or staff-level engagement on the development of the proposed rulemaking. Most of the feedback letters from tribes described a continued desire for engagement with the rulemaking process; however, no requests for government-to-government consultation were received during the consultation period, or via their feedback prior to the development of the proposed rule.
Appendix A: Tribes/Tribal Organizations Sending Consultation Letters

All tribal consultation letters are available in the docket at Docket ID EPA-HQ-OW-2021-0302.

<table>
<thead>
<tr>
<th>Tribe or Tribal Organization Name</th>
<th>Role</th>
<th>EPA Region Represented</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Tribal Water Council*</td>
<td>Tribal Organization</td>
<td>All</td>
</tr>
<tr>
<td>Fond du Lac Band of Lake Superior Chippewa</td>
<td>Tribal Attorney</td>
<td>R5</td>
</tr>
<tr>
<td>Little Traverse Bay Bands of Odawa Indians</td>
<td>Tribal Staff</td>
<td>R5</td>
</tr>
<tr>
<td>Sokaogon Chippewa Community</td>
<td>Tribal Leader</td>
<td>R5</td>
</tr>
<tr>
<td>Pueblo of San Felipe</td>
<td>Tribal Leader</td>
<td>R6</td>
</tr>
<tr>
<td>Southern Ute Indian Tribe</td>
<td>Tribal Leader</td>
<td>R8</td>
</tr>
<tr>
<td>Navajo Nation*</td>
<td>Tribal Leader</td>
<td>R9</td>
</tr>
<tr>
<td>Columbia River Inter-Tribal Fish Commission (CRITFC)</td>
<td>Tribal Organization</td>
<td>R10</td>
</tr>
<tr>
<td>Confederated Tribes of the Colville Reservation</td>
<td>Tribal Staff</td>
<td>R10</td>
</tr>
<tr>
<td>Puyallup Tribe of Indians</td>
<td>Tribal Leader</td>
<td>R10</td>
</tr>
<tr>
<td>Region 10 Regional Tribal Operations Committee (RTOC)</td>
<td>Tribal Organization</td>
<td>R10</td>
</tr>
</tbody>
</table>

*Tribe or Tribal organization submitted two or more letters.

Appendix B: Tribal Consultation, Coordination, and Outreach Meetings

Meetings and Outreach Occurring During the Consultation Period

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 8, 2021</td>
<td>Region 2 Tribes - Seneca Nation of Indians, St. Regis Mohawk Tribe, Shinnecock Indian Nation</td>
</tr>
<tr>
<td>June 8, 2021</td>
<td>Region 6 RTOC</td>
</tr>
<tr>
<td>June 9, 2021</td>
<td>National Tribal Water Council monthly call</td>
</tr>
<tr>
<td>June 14, 2021</td>
<td>Certifying Authorities speaking, Federal Agencies listening</td>
</tr>
<tr>
<td>June 15, 2021</td>
<td>General public</td>
</tr>
<tr>
<td>June 23, 2021</td>
<td>General public</td>
</tr>
<tr>
<td>June 23, 2021</td>
<td>Certifying Authorities speaking, Federal Agencies listening</td>
</tr>
<tr>
<td>June 24, 2021</td>
<td>Certifying Authorities speaking, Federal Agencies listening</td>
</tr>
<tr>
<td>June 29, 2021</td>
<td>Federally recognized tribes</td>
</tr>
<tr>
<td>July 7, 2021</td>
<td>Federally recognized tribes</td>
</tr>
<tr>
<td>July 15, 2021</td>
<td>Region 10 RTOC</td>
</tr>
<tr>
<td>August 12, 2021</td>
<td>Region 9 RTOC Clean Water Workgroup call</td>
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</table>
Meetings and Outreach Occurring After the End of the Consultation period through Signature of the Proposed Rule

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting</th>
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</thead>
<tbody>
<tr>
<td>September 22, 2021</td>
<td>EPA Tribal Wetlands Workshop</td>
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<tr>
<td>October 19, 2021</td>
<td>Region 8 RTOC</td>
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<tr>
<td>November 10, 2021</td>
<td>National Tribal Water Council monthly call</td>
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<tr>
<td>December 1, 2021</td>
<td>National Tribal Water Council call with EPA</td>
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<tr>
<td>January 10, 2022</td>
<td>Region 9 RTOC Clean Water Workgroup call</td>
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<tr>
<td>February 9, 2022</td>
<td>National Tribal Water Council monthly call</td>
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<tr>
<td>April 5, 2022</td>
<td>EPA Region 5’s State and Tribal Wetlands Meeting</td>
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<td>May 11, 2022</td>
<td>National Tribal Water Council monthly call</td>
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