

# 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. This report summarizes the Agency's Tribal consultation and coordination efforts and the feedback received throughout the consultation process. Additional discussion about how the Agency considered, responded to, and incorporated Tribal feedback into the final rule can be found in the preamble to the final rule and the Agency's responses to Tribal public comments are included in the Response to Comments which is available in the docket for this rulemaking. (Docket ID No. EPA-HQ-OW-2022-0128).

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. This report is being released in support of the final rule revising the CWA section 401 water quality certification process.

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*.<sup>1</sup> This final rule may have Tribal implications; however, it

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<sup>1</sup> Executive Order 13175 directs agencies "to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." *EPA Policy on Consultation and Coordination with Indian Tribes* provides guidance on when and how consultation should take place.

will neither impose substantial direct compliance costs on federally recognized Tribes, nor preempt Tribal law.

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 (June 14, 15, 23, and 24, 2021). 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 requests for consultation during the consultation and coordination period.<sup>2</sup> 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.

After publishing the proposed rule in the *Federal Register* on June 9, 2022, stakeholders were encouraged to submit comment letters during a 60-day public comment period, and EPA held a public hearing on July 18, 2022, for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for Tribal representatives on June 15, 22, and 28, 2022 – there were over 75 attendees at these listening sessions. Summaries of the public hearing sessions and of the input received during the Tribal listening sessions, as well as copies of the public comment letters received can be found in the docket for this rulemaking.

This report provides a summary of the consultation and coordination conducted with Tribes during the proposed rule and final rule development processes. It also summarizes key themes from pre-proposal input and public comments provided by participants at Tribal meetings, and the letters received during the Tribal consultation and coordination period and the public comment period. The summary is intended to provide a description of the input received from Tribes and Tribal organizations as part of this consultation and coordination 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 process 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,

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<sup>2</sup> While the Rappahannock Tribe requested to consult with EPA after the Notice of Intent was announced, the Tribe participated in EPA’s listening sessions and did not respond to EPA’s offer to schedule a government-to-government consultation meeting.

2021. Through its Tribal consultation and coordination process, EPA sought 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 and coordination period, EPA hosted three webinar-based listening sessions that included both states and Tribes (June 14, 23, and 24, 2021), and two sessions for the general public (June 15 and 23, 2021) 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 and coordination period formally ended on September 7, 2021; however, the Agency continued outreach and engagement with Tribes as well as offered to consult with individual Tribes throughout the rulemaking process.

The proposed rule was published in the *Federal Register* on June 9, 2022, which began a 60-day public comment period on the proposed CWA Section 401 Water Quality Certification Improvement Rule. Tribes were encouraged to submit comment letters during the public comment period, and EPA held a public hearing on July 18, 2022, for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for Tribal representatives on June 15, 22, and 28, 2022 – there were over 75 attendees at these listening sessions.

While EPA was developing the final rule, the Agency continued to participate in national and regional Tribal meetings with R6, R8, R9, R10, National Tribal Water Council and the National Tribal Caucus.

### 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, 2021 to September 7, 2021. EPA continued to engage with and accept written feedback from Tribal representatives and Tribal organizations after September 7, 2021.

Since the beginning of the Tribal coordination and consultation period, the Agency participated in ten Regional Tribal Operations Committee (RTOC) meetings and eight of the National Tribal Water Council monthly calls and meetings.

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. While the Rappahannock Tribe requested to consult with EPA after the Notice of Intent was announced, the Tribe participated in EPA’s listening sessions and did not respond to EPA’s offer to schedule a government-to-government consultation. The Agency acknowledges that the pre-proposal listening sessions and subsequent proposed rule listening sessions for Tribal representatives did not constitute consultation; however, more than 32 Tribes and Tribal organizations registered to participate in the pre-proposal listening sessions and more than 37 Tribes and Tribal organizations registered to participate in the

proposed rule listening sessions. The Agency did not receive any requests for government-to-government consultation regarding this rulemaking effort.

## Summary of Events

In summary of pre-proposal engagement, 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.
- Held two national-level public webinars on June 15 and 23, 2021.
- Participated in National Tribal Water Council monthly calls – June and November 2021, and February and May 2022 to update Tribal representatives on the rulemaking and the 2020 Rule vacatur, and the stay of the 2020 Rule vacatur.
- Participated in an annual meeting call with the National Tribal Water Council on December 1, 2021.
- Participated in the following Regional Tribal Operations Committees (RTOC) meetings:
  - o Region 6: Teleconference held on June 8, 2021;
  - o Region 8: Teleconference held on October 19, 2021;
  - o Region 9: RTOC Clean Water Workgroup call on August 12, 2021 and January 10, 2022; and
  - o 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:
  - o Six letters signed by Tribal leaders; and
  - o 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 in the letters received during the Tribal consultation period are summarized below in this report. All letters submitted are publicly available in the pre-proposal docket (Docket ID No. EPA-HQ-OW-2021-0302). Common themes expressed in the Tribal feedback letters included the need for applicants to submit complete certification requests, expanding the scope of certification, 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 the Tribes who commented, regardless of whether the feedback was from Tribes having treatment in a similar manner as a state (TAS) or not.

In summary of engagement after the announcement of the proposed rule, since June 1, 2022, EPA has:

- Held three national-level webinars for Tribal representatives on June 15, 22, and 28, 2022.
- Held a national-level public hearing on July 18, 2022.
- Participated in National Tribal Water Council monthly calls – June and July 2022, to update Tribal representatives on the rulemaking.
- Participated in an annual meeting call with the National Tribal Water Council on October 12, 2022.
- Participated in the following Regional Tribal Operations Committees (RTOC) meetings:
  - o Region 6: Teleconference held on July 14, 2022;
  - o Region 8: Teleconference held on July 21, 2022; and
  - o Region 9: Teleconference held on July 28, 2022;
- Provided section 401 rulemaking updates at the following Tribal conferences: EPA Region 10's Tribal/State Wetland Program Virtual Meeting on January 24, 2023, and EPA Region 9's Tribal Meeting on April 17, 2023.

A total of 11 comment letters were submitted by Tribes or Tribal Organizations during the public comment period that began on June 9, 2022. One letter was submitted within 24 hours of the close of the 60-day public comment period and was accepted into the docket. The total count includes letters from:

- Seven letters from individual Tribes:
  - o Four letters signed by Tribal leaders; and
  - o Three letters signed by Tribal attorneys or staff.
- Three regional/national Tribal groups or fish commissions that represent multiple Tribes.
- One letter from a Earthjustice on behalf of Orutsararmit Native Council, Suquamish Tribe, Columbia Riverkeeper, Sierra Club, and the Natural Resources Defense Council, et al.

Tribes that provided comment letters were located in EPA Regions 5, 6, 8, and 10. The full list of Tribes and Tribal organizations that sent the Agency written comment letters is also provided in Appendix A.

Key themes provided by Tribal representatives during the Tribal meetings and webinars, and in the letters received during the public comment period are summarized in this report. All letters submitted are publicly available in the proposed rule docket (Docket ID No. EPA-HQ-OW-2022-0128). Common themes expressed in the Tribal comment letters were very similar to the pre-proposal input letters; however, Tribal commenters were reacting to the proposed rule instead of the 2020 Rule. Most Tribal commenters expressed support for the proposed rule's return to pre-2020 rule practices to restore Tribal sovereignty for the protection of their water resources. Many Tribal commenters supported inclusion of a section 401 TAS process independent of TAS for section 303(c), asserting that it would increase Tribal authority related to the neighboring jurisdictions process and increase Tribal regulatory capability as certifying authorities. Many Tribal commenters supported EPA's return to the Agency's longstanding "activity as a whole" scope of review. Many Tribal commenters also expressed support for the proposed rule's approach to extensions to the reasonable period of time, as well as the proposed removal of the regulatory prohibition on withdrawal and resubmission of requests for certification. Some Tribal commenters supported increased flexibility for modifications.

While many of the Tribal commenters supported the proposed rule, some Tribal commenters expressed disagreement or concern with portions of the proposed rule. A few Tribal commenters said that they were concerned that if EPA does not commit in the regulation to consulting with Tribes during EPA's 30-day review period under section 401(a)(2), then Tribes would be unable to participate in the neighboring

jurisdictions process. Another issue some Tribal commenters raised was the need for more clarity regarding Tribal enforcement of section 401 certification conditions. Additionally, a few Tribal commenters expressed concern that the default 60-day reasonable period of time would not be enough time for their review of large, complex projects.

## Themes Emerging from Consultation Letters and Meetings

This section highlights input received as part of the Tribal consultation and coordination process, including Tribal input letters sent to the Agency on the development of the proposed rule and public comment letters submitted by Tribal representatives during the public comment period for the proposed rule. Because Tribal consultation and coordination commenced prior to development of the proposed rule, some of the themes reflected in Tribal 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. EPA requested comment on similar topics in the proposed rule which is why the Tribal comment letters also addressed those areas of the section 401 regulations.

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, webinars, feedback letters, and comment letters are summarized below. EPA carefully considered all Tribal input received during the pre-proposal input period and the proposed rule public comment period, as EPA developed a final 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 and 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 applicability 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, 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 2020 Rule impaired or undermined Tribal sovereignty and their ability to protect Tribal waters.
- Several Tribes remarked that several provisions in the 2020 Rule were unlawful, inconsistent with the CWA, and were inconsistent with previous court rulings regarding section 401 implementation by certifying authorities.

In response to the proposed rule, during the listening sessions and in their public comment letters, many Tribal representatives expressed support for the proposed changes which they asserted reaffirmed Tribal authority to protect the quality of reservation waters and respected Tribal sovereignty by being more consistent with the statutory text of the 1972 CWA. A few Tribal commenters reiterated that some aspects of the 2020 Rule limited Tribes' abilities to protect their water resources and urged EPA to finalize a rule similar to the proposed rule.

## Section 401 Rule Provisions

Many Tribes provided input and public comments regarding section 401 certification process improvements. EPA considered Tribal input for the development of the proposed rule and considered Tribal comments for the development of the final rule. A summary of the Tribal feedback and Tribal comments pertaining to the section 401 rule provisions is provided below:

### Pre-filing Meeting Requests

- Most Tribes generally supported the 2020 Rule's pre-filing meeting request requirement; however, some had concerns that the 30-day wait period is very rigid and requested that EPA include more flexibility in allowing certifying authorities to waive the 30-day requirement.
  - In response to the proposed rule, most Tribal commenters supported EPA's retention of the pre-filing meeting request requirement in the proposed rule and the addition of flexibility to waive the requirement when the certifying authority chooses.
- In their public comment letters, a few Tribal commenters called the 2020 Rule pre-filing meeting request requirement burdensome and asserted that pre-filing meeting requests can be waived for the majority of projects, except for the larger, more complex projects.
- A few Tribes recommended that the pre-filing meeting request should only be sent after the federal licensing or permitting agency has received the license or permit application and has determined the license or 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"

- In their pre-proposal input letters, some Tribes and Tribal organizations asserted that the certifying authority should not 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.

- In response to the proposed rule, most Tribal commenters appreciated the proposed approach to allow certifying authorities to determine the additional information requirements necessary to make an informed decision regarding protecting their water quality.
- One Tribal commenter was also concerned that the permit application is not one of the requirements of a certification request under the 2020 Rule, 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.
  - A few Tribal commenters supported EPA's proposed list of minimum contents for requests for certification; however, most Tribal commenters highlighted the need for Tribal certifying authorities to define the information that would be sufficient for them to complete the certification analysis.

#### Reasonable Period of Time

- Some Tribes expressed concern that the 2020 Rule prevented certifying authorities from determining the "reasonable period of time." In their pre-proposal input letters, these Tribes recommended that the certifying authority and federal agency should work together to determine the reasonable period of time.
  - Many Tribal commenters supported the proposed rule's approach to setting the reasonable period of time jointly but recommended that the default reasonable period of time be more than 90 days – if not one year. A few Tribal commenters asserted that the proposed 60-day default reasonable period of time would not be enough time to complete their analysis for larger and more complex projects.
- During the pre-proposal input period, a few Tribes recommended that the clock should start when the application is deemed complete, not when the request is received.
  - In response to the proposed rule, most Tribal commenters reiterated that the reasonable period of time should not begin until the certifying authority received a complete application.
- 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.
  - In response to the proposed rule, a few Tribal commenters argued that EPA should finalize a provision authorizing withdrawal and resubmission of requests for certification rather than remaining silent.
- 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.
- A few Tribal commenters supported the proposed approach to providing automatic extensions to the reasonable period of time for public notice processes and force majeure events.

#### Scope of Certification

- Several Tribes recommended changing the regulation so that all potential discharges of the activity are considered, not just point source discharges.
- Most Tribal commenters asserted that the proposed rule's definition of water quality requirements properly recognizes state and Tribal laws governing their water quality programs.

Many Tribes stated that the 2020 Rule limited certifying authorities 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*).

- In response to the proposed rule, most Tribal commenters supported EPA's return to the "activity as a whole" approach consistent with *PUD No. 1*.
- 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.
  - A few Tribal commenters asserted that the proposed rule strikes a good balance by allowing a certifying authority to evaluate all water quality impacts of the activity; however, one Tribal organization expressed concern that the proposed scope would allow conditions that are not related to water quality effects.
- 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.
- A few Tribes stated that the 2020 Rule's definition of "water quality requirements" was too limited and does not support comprehensive, holistic protection of water quality.
- 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

- The majority of Tribes that provided pre-proposal input stated that the 2020 Rule's justification and citation requirements for conditions were burdensome and should be removed. However, these Tribes also provided that EPA should continue to recommend that certifying authorities provide that contextual information where possible.
  - In response to the proposed rule, some Tribal commenters asserted that certifying authorities are in the best position to determine the components of their certification decisions, and recommended that EPA finalize a rule that removes the 2020 Rule required contents for certification conditions and denials of certification.
- 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.
  - In response to the proposed rule, some Tribal commenters agreed with EPA's attempt to restore limitations to Federal Agency Review so that a certification is not waived due to procedural defects and so that the certifying authority has an opportunity to cure defects.
- 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.
  - In response to the proposed rule, many Tribal commenters recommended that EPA finalize a rule with more clarity regarding Tribal enforcement of section 401 certification conditions.
  - One Tribal commenter disagreed with EPA's position in the proposed rule on Tribal enforcement of certification conditions and asserted that the proposed rule would turn Section 401, a federal law, into a pseudo-regulatory power of states and Tribes.
- Many Tribes recommended joint enforcement authority because even though the certification conditions become a condition of the federal license or permit, they believed that the certifying authority would be 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.
  - Some Tribal commenters reacting to the proposed rule's position on Tribal enforcement of certification conditions asserted that Tribes are in the best position to enforce certification conditions within their jurisdictions.

## 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.
- In response to the proposed rule, some Tribal commenters supported the addition of a modification provision with flexibility to adapt to new information during the life of the project. However, one Tribal commenter recommended that EPA finalize a modification provision that prevents modification to a certification after the federal license or permit has been issued.

## 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). These Tribes recommended that the proposed 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 Tribes also expressed the view that the 2020 Rule's position that "may affect" determinations are "discretionary" violates the Administrative Procedure Act.
- In response to the proposed rule, most Tribal commenters argued that EPA should respect Tribal authority to protect their water quality by engaging Tribes during EPA's 30-day review period because a Tribe would not be able to participate in the section 401(a)(2) process if EPA does not make a "may affect" determination.
- 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.

- A few Tribes expressed support for EPA’s proposed TAS provision for participation in the section 401(a)(2) process as a neighboring jurisdiction; however, a few Tribes reiterated that a Tribe should be notified of water quality impacts even in the absence of TAS.
- A few Tribal organizations expressed concern that current implementation of section 401(a)(2) under the 2020 Rule does not protect off-reservation treaty rights from discharges.
- A few Tribal commenters requested that EPA finalize the section 401(a)(2) provisions of the proposed rule with the requirement for EPA to consider subsistence and cultural uses of water quality-dependent resources when making its “may affect” determination.

#### Treatment in a Similar Manner as a State (TAS)

- Most Tribal commenters appreciated the inclusion of a TAS provision in the proposed rule, so that a Tribe seeking TAS for section 401 does not also have to apply for TAS for section 303(c) water quality standards.
- Additionally, most Tribal commenters expressed support for the ability for Tribes to apply for TAS for the section 401(a)(2) process, which the commenters stated promotes Tribal authority, cooperative federalism, and water quality protection for more Tribal jurisdictions.
- Many Tribal commenters acknowledged that the proposed TAS application process is consistent with the current TAS application process for section 303(c).

## 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.

While, as mentioned above, the Rappahannock Tribe requested to consult with EPA after the Notice of Intent was announced, the Tribe participated in EPA’s listening sessions and did not respond to EPA’s offer to schedule a government-to-government consultation meeting.

## Appendix A: Tribes/Tribal Organizations Sending Letters

### Letters Received During the Tribal Consultation Period

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

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

\*Tribe or Tribal organization submitted two or more letters.

### Letters Received During the Public Comment Period

All public comment letters are available in the docket at Docket ID EPA-HQ-OW-2022-0128.

<b>Tribe or Tribal Organization Name</b>	<b>Role</b>	<b>EPA Region Represented</b>
National Tribal Water Council	Tribal Organization	All
Great Lakes Indian Fish and Wildlife Commission	Tribal Organization	R5
Fond du Lac Band of Lake Superior Chippewa	Tribal Attorney	R5
Pueblo of San Felipe	Tribal Leader	R6
Southern Ute Indian Tribe	Tribal Leader	R8
Calista Corporation	Tribal Organization	R10
Earthjustice for Orutsararmiut Native Council, Suquamish Tribe, Columbia Riverkeeper, Sierra Club, and the Natural Resources Defense Council, et al.	Tribal Counsel	R10
Confederated Tribes and Bands of Yakama Nation	Tribal Leader	R10

Jamestown S'Klallam Tribe	Tribal Staff	R10
Makah Tribal Council*	Tribal Leader	R10
Port Gamble S'Klallam Tribe	Tribal Attorney	R10

\*Letter was submitted and accepted on August 9, 2022.

## Appendix B: Tribal Consultation, Coordination, and Outreach Meetings

### Meetings and Outreach Occurring During the Consultation Period

Date	Meeting
June 8, 2021	Region 2 Tribes - Seneca Nation of Indians, St. Regis Mohawk Tribe, Shinnecock Indian Nation
June 8, 2021	Region 6 RTOC
June 9, 2021	National Tribal Water Council monthly call
June 14, 2021	Certifying Authorities speaking, Federal Agencies listening
June 15, 2021	General public
June 23, 2021	General public
June 23, 2021	Certifying Authorities speaking, Federal Agencies listening
June 24, 2021	Certifying Authorities speaking, Federal Agencies listening
June 29, 2021	Federally recognized Tribes
July 7, 2021	Federally recognized Tribes
July 15, 2021	Region 10 RTOC
August 12, 2021	Region 9 RTOC Clean Water Workgroup call

### Meetings and Outreach Occurring After the End of the Consultation period through Announcement of the Proposed Rule

Date	Meeting
September 22, 2021	EPA Tribal Wetlands Workshop
October 19, 2021	Region 8 RTOC
November 10, 2021	National Tribal Water Council monthly call
December 1, 2021	National Tribal Water Council call with EPA
January 10, 2022	Region 9 RTOC Clean Water Workgroup call
February 9, 2022	National Tribal Water Council monthly call
April 5, 2022	EPA Region 5's State and Tribal Wetlands Meeting
May 11, 2022	National Tribal Water Council monthly call

### Meetings and Outreach Occurring After Announcement of the Proposed Rule

Date	Meeting
June 7, 2022	Region 6 RTOC
June 8, 2022	National Tribal Water Council monthly call

June 15, 2022	Tribal Listening Session
June 22, 2022	Tribal Listening Session
June 23, 2022	National Tribal Water Council meeting
June 28, 2022	Tribal Listening Session
July 12, 2022	Informational meeting with KBIC
July 13, 2022	National Tribal Water Council monthly call
July 14, 2022	Region 6 RTOC
July 18, 2022	Public Hearing on the Proposed Rule
July 21, 2022	Region 8 RTOC
July 28, 2022	Region 9 RTOC
August 16, 2022	National Association of State Wetland Managers State/Tribal/Federal Coordination Meeting
September 15, 2022	National Tribal Caucus Meeting
October 12, 2022	National Tribal Water Council Annual Meeting
January 24, 2023	Region 10 State/Tribal Wetland Program Virtual Meeting
April 17, 2023	Region 9 RTOC Workshop