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To the Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

The Clean Water Act at Fifty: Highlights and Lessons Learned from a Half Century of Transformative Legislation

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Thank you, Chair Napolitano, Ranking Member Rouzer, and all the members of the subcommittee for the opportunity to testify. My name is Stefanie Tsosie, and I am a senior attorney in the Tribal Partnerships Program at Earthjustice. Earthjustice is a non-profit environmental law firm and I have the honor and privilege of working with tribes and Indigenous communities across the country to protect their natural and cultural resources. I am an enrolled member of the Navajo Nation and I come to my role as a litigator with an immense pride of where I am from and the culture and land that raised me. Although my experiences and my passion may be similar to those of the tribal clients and partners we work with, I am not trying to speak for them. My testimony is intended to provide examples of the experiences we have had at Earthjustice in navigating the Clean Water Act, with an emphasis on the tribal clients and partners we work with. The Act has been a critical tool for tribes to protect the quality of precious waters over its first 50 years, yet still holds unfulfilled potential and can be implemented even more effectively in the future.

The Clean Water Act has been instrumental for many tribal communities as a tool to protect their water resources. The Act and implementing regulations provide an avenue for tribes to be treated as states to administer water quality programs with the same authority as federal agencies. Several tribal nations have used this program to designate uses, which can include cultural uses, for waters on tribal lands and have developed water quality standards to

protect those uses. Under the treatment as a state program, the Environmental Protection Agency (EPA) can approve tribal water quality standards and the tribe can then enforce those standards within tribal lands. This status also affords tribes that may be downstream from, or adjacent to, a project on a waterway that flows into their tribal lands a way to protect their water quality from degradation or pollution caused by off-reservation activity. This is a tangible tool that a few of our clients and partners have used to protect precious water resources.

The federal permitting structure and requirements in the Clean Water Act are also an avenue that many tribal nations use to participate in decision-making for potential projects that may impact tribal lands and waters. This range of participation can include commenting on permits required under the Clean Water Act to consulting with federal agencies under Section 106 of the National Historic Preservation Act. When the Army Corps of Engineers (Corps or Army Corps) issues a permit under the Clean Water Act, it is a federal action that triggers other federal laws, protections, and procedures, including government-to-government consultation. Tribes have used this requirement to seek and provide input on the environmental review under the National Environmental Policy Act, to consult on impacted flora and fauna that may be listed under the Endangered Species Act, and to consult on tribal historical resources under the National Historic Preservation Act. Thus, the Clean Water Act permitting process can be a critically important gateway for tribes to have input on potential projects that may impact water resources that are not on or adjacent to tribal lands.

Congress created the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[1] Although many of our partners and clients have had some success in utilizing the Clean Water Act to protect tribal resources, the Act is

[1] 33 U.S.C. § 1251(a).

only effective if it is being implemented correctly and consistent with the goal of protecting water resources. Many of our tribal clients and partners are still left out of the process entirely for decisions that impact their lands and resources, and provided only token consultation efforts if they are contacted at all. There are still significant hurdles for tribal governments and communities regarding tribal consultation. These hurdles are exacerbated when federal jurisdiction under the Clean Water Act is narrowed, or in some cases eliminated – an outcome that has occurred without any tribal consultation whatsoever.

For example, Section 404 of the Clean Water Act prohibits dredge and fill of material into waters of the United States without a permit from the Army Corps of Engineers.[2] This process begins with a jurisdictional determination – the Army Corps can only require a permit if the activity will be in jurisdictional "waters of the United States." Yet, even this first step can pose significant problems for tribes and neighboring communities. The Army Corps does not always consult with tribes before making a jurisdictional determination on areas that affect tribal nations. The effect is that the Corps can make a negative jurisdictional determination on an area that impacts tribal resources without input from that tribe. Once the Army Corps makes that determination, both the Corps' jurisdiction and the suite of federal statutes, such as the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act, that must be followed to permit an activity in that area can vanish. The effect can be severe and tribes and local communities can be cut out of any remaining permitting processes under state laws.

[2] 33 U.S.C. §1344.

Another example of where the delegation, and thus relinquishing, of federal jurisdiction impacts tribes is through the state assumption of Section 404 permitting.[3] State-assumed permitting processes, even though they are required to be at least as stringent as the Clean Water Act, do not carry with them the federal trust responsibility to consult with tribes or Native Organizations. We have worked on a case where a state that assumed Section 404 permitting authority under the Clean Water Act did not consult with the impacted tribe and did not include the tribe in the permitting process, as would have been required by a federal permitting process. In that case, both the Army Corps and the Environmental Protection Agency claimed they could not provide any redress to the Tribe. This led to language in a decision from the Seventh Circuit acknowledging that "the Tribe got the runaround here" and the tribe's efforts "ran into a legal labyrinth and regulatory misdirection."[4]

These examples of narrowing Section 404 jurisdiction ultimately will weaken protection for the nation's waters, in direct contravention of the goals of the Clean Water Act. The consequences of possibly losing Clean Water Act jurisdiction are dire for tribes in particular, as demonstrated in a case pending before the Supreme Court of the United States, *Sackett v. Environmental Protection Agency*.[5] For our tribal clients, the elimination of federal jurisdiction over a wide array of wetlands and waters would deprive them of important tools for protecting water quality standards on reservation. It would also impair the tribes' ability to enforce treaty

[3] 33 U.S.C. § 1344(g).

[4] *Menominee Indian Tribe of Wisconsin v. EPA et. al.*, 947 F.3d 1065, 1070, 1074 (7th Cir. 2020).

[5] *Sackett v. Environmental Protection Agency*. 8 F.4th 1075 (9th Cir. 2021, *cert. granted*, No. 21-454 (U.S. Jan. 24, 2022).

rights and protect sacred waters off reservation.[6] This potential threat to the Clean Water Act is also a threat to tribal lands and resources.

Another important tool for protecting water quality in the Clean Water Act is the Section 401 program. This program is incredibly important for tribes, yet our tribal clients and partners face potential new hurdles in successfully implementing the Section 401 program. Section 401 requires that a "certifying authority", including a state or tribe, review (or waive review) of whether an activity will comply with applicable water quality standards before a federal agency can issue a license or permit.[7] If the certifying authority concludes that the activity as proposed will not comply with applicable water quality standards, which will result in an impairment of waters within its jurisdiction, it can place conditions on the license or permit, or must deny certification of the project altogether if the project cannot be brought into compliance. Several tribes have developed their own programs under Section 401 to be a certifying authority and have promulgated water quality standards for tribal waters.

In 2020, EPA finalized new Section 401 regulations that dramatically departed from the previous rules, contravened the text and purpose of the Clean Water Act, and curtailed state and tribal authority to ensure integrity of their waters.[8] A federal district court ordered remand and vacatur of the rule on October 21, 2021, however, the 2020 rule remains in effect due to the Supreme Court staying that vacatur order in April. EPA has recently proposed a new rule

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[6] Brief Amicus Curiae for Menominee Indian Tribe of Wisconsin, et al., Sackett v. Environmental Protection Agency, No. 21-454 (U.S. June 17, 2022), available at https://www.supremecourt.gov/DocketPDF/21/21-454/228237/20220617081619977_21-454%20Amicus%20Menominee%20Indian%20Tribe%20Of%20Wisconsin.pdf (last accessed Sept. 15, 2022).

[7] 33 U.S.C. § 1341(a)(1).

[8] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (2020 Rule).

announcing an intention to bring EPA's regulations back in line with the Clean Water Act, subsequent court precedent, and the cooperative federalist structure that undergirds the Act.[9]

It is imperative that states and tribes retain broad authority to review projects that may impact their water quality – not just the point-source discharge itself but the project "activity as a whole," as intended by the Clean Water Act. A review of the whole project can often reveal a much larger footprint of a project's impacts or the impacts may be much greater in magnitude, and thus greater impacts to tribal resources. In addition, as proposed by EPA in its new rule, the certifying authority should be authorized to consider environmental justice impacts of a proposed project, including human health impacts on the local population; impacts to resources used for subsistence, cultural resources and uses; treaty-protected resources; and historical injustices such as damming, diversion, or reduction in flow of a waterbody, and how those actions have impacted the resources and human population, and whether the activity as a whole will have a long-term impact on the watershed. EPA is required to act as the certifying authority on behalf of states or tribes that do not have ''authority to give such certification,'' and in carrying out this duty, we support codification of the requirement that EPA comply with applicable consultation policies and tribal treaty provisions. Finally, the requirement that a certifying authority make its determination within a "reasonable time" must account for extensions, particularly where delays in the certification process result from the applicant's failure to provide complete or requested information about the project and potential impacts.

Section 401 also provides downstream, or adjacent, tribes with treatment as a state status and approved water quality standards, an opportunity to weigh in on whether the upstream

[9] 87 Fed. Reg. 35318-35381 (June 9, 2022).

project will affect or impair the water quality within their jurisdiction.[10] For projects requiring a federal permit under the Clean Water Act, the Corps might handle the permitting process, but EPA has an opportunity to review whether the project will have impacts on neighboring jurisdictions' water quality. EPA has the authority to notify neighboring jurisdictions of potential project impacts, and the downstream jurisdiction can determine whether the project will affect their water quality. Although the statutory language in Section 401 is clear on the project materials required and the timing of when such a review period begins, EPA and the Corps have differed in their interpretation of the statute and their implementing regulations of this subsection. This discrepancy has the potential to leave downstream tribal jurisdictions out of the Section 401(a)(2) process and leave them without redress for projects that can degrade waters within their jurisdiction.

Several tribes have successfully used the Section 401 program to regulate water quality. However, many tribal nations do not have treatment as a state under the Section 401 program. For example, all of Alaska's 229 tribes do not have treatment as a state and the state routinely fails to consult with tribes. For tribes like these around the country, the language of the statute becomes ever more important. Section 401 imposes on all certifying authorities, including states, a duty to safeguard waterways and ensure that the goals of the Clean Water Act are met. Many of our tribal clients and partners either do not have or are not eligible for treatment as a state under Section 401, and must work with state agencies to ensure that the statutory requirements in Section 401 are upheld and implemented fairly and consistently. If Section 401 is weakened, many of those tribes will lose one of the strongest tools by which they can work

[10] 33 U.S.C. § 1341(a)(2).

with states to weigh in on potentially damaging projects and ensure that their resources are protected.

The Clean Water Act created many tools to achieve its goals, and also made many parties responsible for its implementation: the Army Corps of Engineers, EPA, states, and tribes. Unfortunately, states have often been ill-equipped and ill-prepared to handle Clean Water Act programs, putting water resources which tribes, and all other communities, depend on in danger. The state of Florida, a state often defined by its waters, is a prime example of where state-implemented Clean Water Act programs have fallen short. Florida's National Pollutant Discharge Elimination System (NPDES) program, under Section 402 of the Clean Water Act, has failed to ensure clean waterways, and the state is increasingly known for its toxic algae outbreaks and massive fish kills more than its pristine waters. Water pollution has led to starvation of the state's beloved manatees, a once unthinkable fate. The Trump administration's approval of Florida's inadequate Section 404 program threatens rampant development, and because it is no longer federally run, Florida now lacks the community engagement required under NEPA, the tribal consultation required under NHPA, or the robust listed species protection guaranteed under the ESA.

If we are to realize the promises and potential of the Clean Water Act during its future, federal agencies must insist that states meet their statutory obligations under federal law before they are authorized to administer a federal program. In addition, federal agencies must ensure that delegation of these authorities to states does not absolve them of the federal trust responsibility to safeguard tribal resources and consult with tribal governments on permitting actions that impact their water and other resources. Far too often, tribal communities are left out

of the process entirely or are afforded inadequate tribal consultation. This is a particular danger when states assume Section 404 permitting authority.

The Army Corps and EPA must also communicate and work together to ensure the goals of the Clean Water Act are met, and also to protect tribal and community interests. The discrepancy between the Corps and EPA is what left the tribe out of a remedy from the Seventh Circuit when the state assumed Section 404 permitting authority. If the Corps and EPA responded, the tribe may not have "gotten the runaround." A potential disagreement between the Corps' and EPA's respective regulatory schemes implementing Section 401 could also leave a tribal government that has the authority to regulate waters within its jurisdiction out of the process entirely. If tribes are going to be able to utilize the tools within the Clean Water Act to protect precious water resources, then federal agencies must uphold their end in ensuring tribes are consulted and they must implement the statutory requirements as clearly stated in the Act.

For many of our tribal clients and partners the water resources they are protecting are more than "resources." Water is life. Water is sacred. Water can be a tie to cultural, spiritual, and historical resources that are essential to tribal identities. The Clean Water Act has been a bedrock environmental statute for 50 years, but tribal lands and waters, and the communities tied to them, date back to time immemorial. The issues presented in this testimony are not hypothetical, they involve clients and partners directly facing both the strengths and pitfalls of the Clean Water Act. As a litigator, advocate, and tribal member, I am grateful for the opportunity to lift up these stories, and I am hopeful that we all can act so that we do not have to wait another 50 years to realize the goals of the Clean Water Act.