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March 6, 2023

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted online via https://www.regulations.gov

Re: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights
Docket Number EPA-HQ-OW-2021-0791

To Whom It May Concern:

Thank you for the opportunity to comment on the Environmental Protection Agency ("EPA")'s draft rulemaking at 40 CFR 131 ("Proposed Rule") revising the federal water quality standards ("WQS") regulations to protect "tribal reserved rights." The Proposed Rule purports to clarify what these rights are and how states must recognize and account for them in revising state WQS provisions related to designated uses, criteria, or antidegradation.

The Alaska Department of Environmental Conservation ("ADEC") Division of Water ("Division") has significant concerns with this Proposed Rule. First, it does not and cannot apply to 226 of the 227 federally recognized tribes[1] in Alaska. Second, EPA lacks authority to promulgate it. Third, implementing it would overwhelm my Division's administrative and financial capacity and hamstring our current human health criteria ("HHC") efforts. Accordingly, the Division respectfully requests it be withdrawn.

[1] Dep't of the Interior, BIA, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 88 FR 2112 (Jan. 12, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-01-12/pdf/2023-00504.pdf ("There is a total of 347 federally recognized Indian Tribes within the contiguous 48 states and 227 federally recognized Native entities within the state of Alaska that comprise the 574 federally recognized Indian Tribes of the United States.").

Background

Tribal reserved rights, as a general matter, are rights held by tribes that were not transferred from tribes to the federal government under a treaty[2] or similar document.[3] As the United States Supreme Court has explained, "Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress."[4] In addition to hunting and fishing rights, this concept has been applied to recognize the existence of implied reserved water quantity rights in Indian reservations.[5] These rights are determined from the perspective of tribes at the time a treaty was executed (or similar law enacted), using historical and other evidence bearing on the nature and scope of the right at issue.[6] Until now, no legal authority has applied this concept to the water quality context.[7]

With this Proposed Rule, EPA would require states to comprehensively[8] ascertain the nature and scope of tribal reserved rights affecting waters within the State.[9] EPA would then require states to use these rights as a basis for establishing state WQS under the Clean Water Act ("CWA") § 303(c).[10] WQS would have to be based on an "unsuppressed" use of the aquatic resource subject to this right, and states would have to protect the health of right holders "to at least the same risk level as provided to the general population of the state"—i.e., to the 90th percentile. States would also be required to submit to EPA information on the "scope, nature, and current and past use of reserved rights, as informed by the right holders." States must incorporate this evaluation and information into their triennial review of state WQS.[11] States that do not ascertain and use these rights in the way EPA requires would be met with EPA disapproval of state WQS (triggering EPA promulgation of state WQS) and violation of the new regulation.

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[2] In 1905, the Supreme Court held that the Yakima Nation Treaty executed in 1859 "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those [rights] not granted." *See United States v. Winans*, 198 U.S. 371, 381 (1905) ("Only a limitation of [aboriginal rights], however, was necessary and intended [by the treaty with the Yakima], not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those [rights] not granted.").

[3] *United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.").

[4] *Id.* at 738.

[5] *Winters v. United States*, 207 U.S. 564 (1908).

[6] *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979), *modified*, 444 U.S. 816 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974); *Mille Lacs*, 526 U.S. at 196 ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.").

[7] Indeed, the only relevant authority that EPA cites to support the existence of tribal reserved rights vis a vis water quality is a letter written by the Department of Interior in 2015. *See* 87 FR 74364 (citing Ltr. from Hilary C. Tompkins, Solicitor, DOI, to Avi Garbow, General Counsel, EPA, regarding Maine's WQS and Tribal Fishing Rights of Maine Tribes (January 30, 2015)).

[8] 87 FR 74367 (requiring States in their triennial review to submit an evaluation of "whether there are tribal reserved rights **applicable to waters subject to the state's WQS**); *see* EPA & USACE, *Revised Definition of Waters of the United States*, 88 FR 3004–3144 (Jan 18, 2023) (establishing significant nexus test which risks subjecting much of Alaska's waters to federal CWA jurisdiction, and, thus, CWA WQS requirements).

[9] 87 FR 74364, 74378.

[10] 87 FR 74378.

[11] 87 FR 74366. The triennial review process is simply a planning exercise with a public notice component that States are required to complete every three years. EPA does not have approval authority over this process.

EPA defines "tribal reserved rights" as "any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law."[12] Aquatic-dependent resources include "aquatic-dependent wildlife."[13] Aquatic-dependent wildlife is not further defined.[14] EPA justifies the Proposed Rule on the basis that tribal reserved rights "could be impaired by water quality levels that limit right holders' ability to utilize their rights."[15]

Warning that a State's determination of tribal reserved rights "can be a complex endeavor that involves weighing multiple lines of evidence,"[16] EPA states that the "critical information" that states must obtain consists of: (1) "the nature of the right"; (2) "where the right applies"; and (3) "how the right is exercised by the right holders."[17] To guide states in determining what, precisely, these rights are, EPA explains that these rights:

- Might not be limited to Indian Country;[18]
- Might require the collection of more information than listed above;[19]
- Might include additional, subsidiary, rights—like the right to cross private lands;[20]
- Might exist in any federal law;[21] and
- Might not be expressly articulated anywhere.[22]

Of further help, EPA takes a stab at explaining how courts ascertain these rights, and hints that state agencies, like courts, should use Indian canons of construction for guidance.[23] Most helpfully, EPA clarifies that these rights do not include rights that no longer exist,[24] and explains that these rights cannot be found in non-Federal law.[25]

To implement the Proposed Rule, EPA mandates that states:

- Determine the nature and scope of all tribal reserved rights;[26]
- Consult with tribes in some way;[27] and

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[12] 87 FR at 74363. EPA cites *Winters*, 207 U.S. at 576, *Cappaert v United States*, 426 U.S. 128, 139 (1976), *Arizona v United States*, 373 U.S. 546, 597–602 (1963) and *United States v Winans*, 198 U.S. 371, 381 (1905) in support. 87 FR at 74363 n.5, 6, 7. These cases do not apply to water quality.
[13] 87 FR 74370.
[14] ADEC requests that EPA define this term. What wildlife is *not* aquatic-dependent—i.e., does not depend on water for its existence?
[15] 87 FR 74364.
[16] 87 FR 74368.
[17] 87 FR 74367.
[18] 87 FR 74364.
[19] 87 FR 74367.
[20] 87 FR 74364.
[21] 87 FR 74364.
[22] 87 FR 74364 (rights can be implied).
[23] 87 FR 74364.
[24] 87 FR 74366.
[25] 87 FR 74366.
[26] 87 FR 74378 ("The State . . . shall . . . "evaluat[e] whether there are tribal reserved rights applicable to State waters . . . .").
[27] 87 FR 74378 (requiring the State to include as a "minimum requirement" for the state's WQS submission "[i]nformation about the scope, nature, and current and past use of the tribal reserved rights, **as informed by the right holders**"); *id.* (defining "right holders" as "tribes holding rights to aquatic and/or aquatic-dependent resources pursuant to an applicable

- Obtain and use information from tribes to promulgate state WQS.[28]

Without a trace of irony, EPA claims the Proposed Rule "does not have federalism implications."[29]

Concerns

Unlike EPA, my Division believes the Proposed Rule has serious federalism implications: it is only the latest in a string of EPA actions tracking out an alarming path. Under the banner of tribal interests, and in the name of "science," EPA has been relentlessly expanding its own power at the expense of states. This one is no different, and will fare no better in court.[30]

1. This Proposed Rule does not and cannot apply to 226 of Alaska's federally recognized tribes.

a. ANCSA abolished aboriginal hunting and fishing rights for all Alaska tribes but one.

As explained above, tribal reserved rights are rights that were reserved by tribes following the execution of a treaty or enaction of other applicable federal law. In 1971, Congress passed one such law: the Alaska Native Claims Settlement Act ("ANCSA"). "ANCSA is a unique enactment, both in its complex relationship to the people and lands of Alaska, and its importance to the State."[31] As the United States Supreme Court explained, "[i]n enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy."[32] To this end, ANCSA abolishes all reservations in Alaska except the Annette Island Reserve, home of the Metlakatla Indian Community.[33] Key here, ANCSA expressly "extinguished" "any aboriginal hunting or fishing rights that may exist"[34] for every other Alaska tribe.[35]

This means that the Proposed Rule cannot apply to require Alaska to recognize *any* reserved hunting or fishing right in 226 of Alaska's 227 tribes. For accuracy and clarity, and to avoid misleading members of the public, EPA should have expressly addressed this in the Proposed Rule, rather than forcing ADEC to do so in these comments.

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treaty, statute, executive order, or other source of Federal law."). To obtain this information, in other words, States must consult with tribes, and must request certain information from tribes, irrespective of the State's tribal consultation policy.

[28] *See supra* n.27; 87 FR 74367.

[29] 87 FR 74375.

[30] *See W. Virginia v. EPA,* 142 S. Ct. 2587, 2596 (2022) (Clean Power Plan exceeds EPA's authority).

[31] *Paul v. Andrus*, 639 F.2d 507, 509 (9th Cir. 1980).

[32] *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998).

[33] 43 U.S.C. § 1618. In return, Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed pursuant to ANCSA. *Venetie*, 522 U.S. at 524.

[34] 43 U.S.C. § 1603(b).

[35] As the Alaska Supreme Court explained, the Metlakatlans were "an exception to the exception," in that Congress had set up a reservation for them. 'The Metlakatlans' reservation status sets them apart from other Alaska Natives, making them much more like the tribes of the other states.' Further, we noted that the Metlakatlans have 'a strong central tribal organization unlike most Alaska Native groups.' We noted that in general, '[t]he Native villages and communities of Alaska were not organized on 'tribal' lines, and the village rather than the ethnological tribe has been the central unit of organization.'" *Native Vill. of Stevens v. Alaska Mgmt. & Plan.*, 757 P.2d 32, 35 (Alaska 1988) (citations omitted).

If EPA envisions additional rights (besides hunting and fishing) to be encompassed by the Proposed Rule, EPA must have expressly stated so in its Proposed Rule,[36] to provide states and members of the public with a meaningful opportunity to comment.

b. EPA misapprehends the nature of its relationship with Alaska tribes.

With the Proposed Rule, EPA (again[37]) capes itself as savior of the Nation's tribes. EPA cites the "trust responsibility that the Federal government has with federally recognized tribal governments"[38] and explains that the "primary benefits" of the Proposed Rule include "improved ability to maintain traditions and cultural landscapes."[39] The Proposed Rule "relies on a combination" of two approaches taken by EPA: "(1) supporting the tribes' sovereignty and exercise of their own environmental authorities[;] and (2) taking direct action on behalf of the tribes as part of the Federal Government's tribal trust responsibility."[40]

EPA fundamentally misunderstands (and appears to have never evaluated) the nature of the relationship between Alaska tribes[41] and the federal government following the enactment of ANCSA. In *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr.*,[42] the court, evaluating ANCSA, stated that the Act "strongly suggests a shift from government superintendence to self regulation."[43] "[T]ribal independence, not dependence" was the point.[44] "[P]erhaps most notable," the *Alyeska* court explained, was ANCSA's rejection of a "wardship or trusteeship" relationship:

> Congress expressly declared its intention not to have an ongoing "wardship or trusteeship" relationship with Alaska Native tribes. . . . By the foregoing declaration of policy, Congress has clearly said, no more! Congress now means for Alaska Natives to have "maximum participation . . . in decisions affecting their rights and property … without . . . [a] wardship or trusteeship."[45]

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[36] This Proposed Rule does not and cannot apply to Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111–3126, because ANILCA's rural subsistence preference provision (a) is not a right that was reserved by tribes; (b) is a rural, not tribal, preference; and (c) would raise serious equal protection concerns for ADEC if ADEC were required to apply the Proposed Rule to this preference, *see McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989).

[37] *See* USEPA, Final Determination To Prohibit the Specification of and Restrict the Use for Specification of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska, 88 FR 7441–7443 (Feb. 3. 2023) (exercising CWA § 404(c) veto in the name of saving Alaska's anadromous fish and Alaska Natives' traditional way of life and, in the process, treating Alaska Natives as a monolith and ignoring State protections of fish and fish habitat).

[38] 87 FR 74377.

[39] 87 FR 74374.

[40] 87 FR 74377.

[41] Excluding Metlakalta, as discussed *supra* n.35.

[42] 1995 WL 18256024, at *14 (D. Alaska 1995).

[43] *Id.*

[44] *Id.* This declaration of policy provides that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system **or lengthy wardship or trusteeship,** and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States government and the State of Alaska . . . ." 43 U.S.C. § 1601(b).

[45] *Alyeska*, 1995 WL 18256024, at *14 (citing 43 U.S.C. § 1601(b))

House consideration of the ANCSA bill, too, reflects this understanding:

> The [ANCSA] bill does not establish **any** trust relationship between the Federal Government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances will be in fee—not in trust."[46]

The United States Supreme Court affirmed this understanding, explaining that "[i]n enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian Policy" before holding that the Venetie tribe was not a "dependent Indian community" for purposes of determining whether their land qualified as Indian country under 18 U.S.C. § 1151.[47] In so holding, the Court rejected the argument that federally recognized tribes' status as "domestic dependent nations" means that tribes are "*ipso facto* under the superintendence of the Federal Government."[48] Reiterating that "ANCSA's settlement provisions were intended to avoid a 'lengthy wardship or trusteeship[,]'"[49] the Court ended its opinion by emphasizing ANCSA's purposes of "Native self-determination" and the desire to "end paternalism in federal Indian relations."[50]

EPA, in other words, may not treat itself as trustee, or Alaska's tribes as wards, for 226 of Alaska tribes. Because of ANCSA, that legal relationship simply does not exist. The Proposed Rule cannot alter this.

2. EPA lacks authority to promulgate the Proposed Rule.

EPA bases this rule on its general authority to prescribe regulations as necessary to implement the CWA[51] in conjunction with two provisions of the CWA: (1) § 303(c), which requires states to promulgate WQS for approval by EPA; and (2) § 511(a)(3), which provides that the CWA "shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States."[52] EPA elaborates that "more broadly," § 303(c)'s "structure and objectives for the establishment and oversight of WQS, including the discretion afforded to EPA, provide ample room for the agency to consider and give effect to all applicable reserved rights."[53]

a. The Proposed Rule exceeds EPA's statutory authority under the CWA.

Neither § 303(c) nor § 511(a)(3) justify the Proposed Rule. Section 303(c) provides EPA with the power to approve or disapprove WQS, and the power to promulgate WQS for states in the event of disapproval. It does not confer upon EPA the power to require states to undertake a wild goose chase in trying to locate unarticulated rights in federal law, consult with tribes, or obtain certain information from tribes.

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[46] H.R.Rep. 523, 92d Cong., 1st Sess. 9, reprinted in 1971 U.S.C.C.A.N. 2192, 2199 (emphasis added).
[47] *Venetie*, 522 U.S. at 523, 525, 534.
[48] *Id*. at 531 n.5.
[49] *Id.* at 533.
[50] *Id*.
[51] *See* CWA § 501.
[52] 87 FR 74365.
[53] 87 FR 74365.

Perhaps recognizing 303(c)'s insufficiency, EPA invokes § 511(a)(3). But § 511(a)(3) is not a grant of power, it is a limitation on the CWA as a whole. Even if § 511(a)(3) could be understood as a grant of power: it is limited to rights recognized in treaty provisions. It does not include statutes, executive orders, all federal law, and other non-treaties; and it does not include rights that are implied or unarticulated or otherwise not spelled out in a provision. EPA's infidelity to the text of § 511(a)(3) is not cured by EPA's vague nod to the discretion afforded by § 303(c).

EPA has not demonstrated statutory authority for promulgating this rule. Even if the Proposed Rule were grounded in the CWA, to the extent it applies to rights recognized in non-treaties and not contained in any provision, it exceeds any power conferred by § 511(a)(3).

b. The Proposed Rule violates the United States Constitution.

"Administrative agencies are creatures of statute" and "accordingly possess only the authority" that Congress has lawfully provided.[54] Agencies must hew closely to the law as written and meticulously justify their actions. They are never at liberty to expand their own power.[55]

EPA roots its authority to act in the CWA, which was enacted pursuant to the Interstate Commerce Clause power.[56] Far beyond simply disregarding cooperative federalism, the Proposed Rule, if finalized, would exceed the interstate Commerce Clause power, violate the anti-commandeering doctrine, exceed the Spending Clause power, and violate the major questions doctrine.

i. Commerce Clause

The Constitution gives Congress the power to regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce."[57] Because the CWA was enacted pursuant to the Interstate Commerce Clause power, any regulations promulgated under this Act may not exceed the bounds of that power.

EPA's Proposed Rule mandates that: (1) state agencies determine the existence, nature, and scope of certain federal legal rights; and (2) states consult with, and solicit information from, tribes. This is not a regulation of the channels or instrumentalities of interstate commerce, nor of an activity that "substantially affects" interstate commerce. It is a regulation of State–Tribe relations and a mandate that States take a certain approach to interacting with tribes. Such a regulation is entirely unconnected to interstate commerce.

This regulation is not a valid exercise of the Interstate Commerce Clause power, so cannot be a valid exercise of the power conferred upon EPA by the CWA.

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[54] *NFIB. v. Dep't of Lab., Occ'l Safety & Health Admin*., 142 S. Ct. 661, 665 (2022).
[55] *See NRDC v. EPA*, 822 F.2d 104, 131 (D.C. Cir. 1987) ("[EPA]'s rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.").
[56] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).
[57] *NFIB*, 567 U.S. at 536 (2012); *United States v. Morrison*, 529 U.S. 598, 609 (2000).

ii. Anti-commandeering doctrine

By requiring states to recognize new rights and by regulating State–Tribe relations, EPA regulates states in their capacity as sovereigns. This violates the anti-commandeering doctrine of the United States Constitution.

The anti-commandeering doctrine safeguards the "fundamental structural decision incorporated into the Constitution" that the federal government may not issue affirmative ("do this") or negative ("avoid that") commands "directly to the States."[58] Commandeering threatens the "healthy balance of power between the States and the Federal Government" and distorts political accountability by blurring responsibility between states and the federal government and leaving state voters uncertain whom to "credit or blame" for a state action.[59]

Unlike other regulations promulgated under the CWA, which are permissibly aimed at the technical regulation of water pollution, the Proposed Rule is impermissibly aimed at regulating states as sovereigns. It requires States to determine the existence and scope of federal rights and requires states to manage State–Tribe relations on EPA's terms. While my Division shares EPA's goal of protecting water quality for Alaska tribes, EPA "may not conscript state governments as its agents" to achieve this goal.[60] State voters observing my Division struggling to ascertain federal rights, and engaging with tribes to solicit and collect certain information, may have trouble ascertaining whether the Division or EPA is to credit or to blame for these activities. More realistically, these voters may wonder whether they have my Division or EPA to blame for throwing limited government resources into the black hole of administranglia created by the Proposed Rule.

iii. Spending Clause

The Proposed Rule is not tied to any funds: it is simply an unfunded mandate. ADEC does, however, receive federal funding to implement WQS, and EPA may tie the Proposed Rule explicitly to those funds when finalized.

The Spending Clause empowers Congress to "lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."[61] The federal government[62] may, within limits, use this power to encourage states to "tak[e] certain actions that [it] could not [otherwise] require them to take."[63] A state's acceptance of the federal funds will generally constitute consent to the conditions imposed by Congress.[64]

The federal government may "fix the terms on which it shall disburse federal money to the States."[65] To validly exercise this power, the federal government must speak "unambiguously" and "with a clear voice" when

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[58] *Murphy*, 138 S. Ct. at 1475.
[59] *Id.* at 1477 (citations omitted).
[60] 505 U.S. at 178.
[61] U.S. Const. art. I, § 8, cl. 1.
[62] An agency that Congress has tasked with implementing a statute that imposes spending conditions is also subject to the Spending Clause's restrictions. *See New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 566–72 (S.D.N.Y. 2019).
[63] *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 686 (1999).
[64] *Id.*
[65] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

articulating conditions.[66] These conditions must be articulated clearly enough for "the States to exercise their choice knowingly, cognizant of the consequences of their participation."[67] A state cannot knowingly accept a condition if the state "is unable to ascertain what is expected of it."[68]

The conditions set forth in the Proposed Rule are unconstitutionally ambiguous. They require the states to ascertain the nature and scope of federal rights that may not presently be recognized in law, without offering meaningful guidance on how to ascertain these rights. The closest EPA comes to speaking clearly is telling states to look at federal law and talk to tribes. Conditions that leave states unable to ascertain what is required, like how to ascertain the nature and scope of a right, are unconstitutional.[69]

iv. Major Questions Doctrine

If Congress "wishes to assign to an agency decisions of vast economic and political significance[,]" the U.S. Supreme Court "expect[s] Congress to speak clearly."[70] This tenet responds to "the danger posed by the growing power of the administrative state"[71] by ensuring that top-level, political decisions are made by elected officials, not appointed agency officers.[72] To that end, the major questions doctrine provides that an agency must "point to 'clear congressional authorization'" in the "extraordinary case[]" where the agency claims the power to make decisions of vast "economic and political significance."[73]

Recognizing that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body[,]"[74] the major questions doctrine polices politically significant agency action premised on vague statutory grants of power.[75]

EPA's Proposed Rule directs states to work with tribes and to do so on EPA's terms. In order to meet EPA's requirement that information states submit is "obtained from tribes," states must meet with tribes, and must solicit them for the information EPA requests. EPA unabashedly "aims to facilitate greater coordination between states and tribal governments"[76] and boldly states as its goal "that the sovereignty and management role of both state and tribal governments will be better understood and aligned" by implementing the Proposed Rule.[77]

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[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *W. Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1143 (11th Cir. 2023).
[70] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up).
[71] *City of Arlington v. FCC*, 569 U.S. 290, 315 (Roberts, C.J., dissenting).
[72] *W. Virginia v. EPA*, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).
[73] *Id.* at 2605.
[74] *Id.* at 2616.
[75] *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (Attorney General lacked authority from "oblique" statutory provision to criminalize assisted suicide). In January of this year, the Supreme Court concluded that a lone statutory subsection of the Occupational Safety and Health Act did not clearly authorize OSHA's COVID-vaccine mandate. *NFIB v. Dep. of Lab., OSHA*, 142 S. Ct. 661 (2022) (per curium). Just last June, the Supreme Court held that Congress' grant of power to EPA to regulate "systems" did not clearly authorize the Clean Power Plan rule. *West Virginia*, 142 S. Ct at 2616.
[76] 87 FR 74378.
[77] 87 FR 74378.

This is not EPA's job: EPA's job is to protect human health and the environment. How the State should manage its relationship with tribes is a quintessential major political question. It is a delicate political dance involving relationship building, negotiation, and finding amicable ways to coexist and resolve differences. EPA here writes itself a ticket to this dance *and* tries to puppeteer the dance moves. And it believes it can do this using §§ 303(c) and 511, neither of which remotely hint at this power. EPA's Proposed Rule, like the Clean Power Plan rule recently invalidated by the Supreme Court, is entirely out of bounds.

3. The Proposed Rule is unworkable.

If EPA (incorrectly) intends to apply the Proposed Rule to Alaska tribes, my Division will be overwhelmed with the administrative and financial burden of implementing it. Ascertaining potentially applicable tribal reserved rights at an unsuppressed use, and crafting WQS to protect the health of right holders at the 90th percentile could be challenging for states in the Lower 48 having several federally recognized tribes. For Alaska—home to 227 federally recognized tribes—this task is unfathomable. EPA's notion that states may do this using the existing apparatus of their current WQS revision process—an already complicated and technical process—is unconscionable and naïve. My Division's specialists and engineers are trained in, and skilled at, scientific and technical decision-making; they are not trained to divine unarticulated rights at a hypothetical usage rate by collecting historical- and cultural-practices data from tribes. EPA blissfully ignores the likelihood of disagreements between states and tribes, between tribes and tribes, between tribes and Alaska Native Corporations (both regional and village), between states and EPA, and between tribes and EPA; or the likelihood of conflicting or inconsistent data from different tribes or tribal members; or the likelihood that litigation will result. ADEC may not even have the authority to make these determinations in the first place. In short, EPA appears to be setting state agencies up to fail.[78]

Additionally, to the extent EPA believes this Proposed Rule is applicable to Alaska, it grossly underestimates its costs to ADEC, which would exceed financial capacity. EPA cannot conduct a realistic economic analysis without first clarifying this rule.

Further, to the extent it applies to Alaska, the Proposed Rule would hamstring ADEC's effort to revise Alaska's human health water quality criteria. The Proposed Rule affects the Fish Consumption Rate ("FCR"), Cancer Risk Level ("CRL"), and other inputs to the HHC formula. Regarding the FCR, EPA's 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*[79] allows states to choose either the 90th percentile of the statewide (general) population or the 50th percentile of a high consuming subpopulation. The Proposed Rule appears to eliminate the latter as an option, requiring the former. In other words, states might be required to consider an FCR that is protective of the 90th percentile of a tribe holding a reserved right. EPA provides no science-based explanation of why this is necessary or of what this might cost to states like Alaska that have a great deal of fish and a large number of tribes. The Proposed Rule also does not address whether an HHC for a particular pollutant would be applicable only to waters associated with tribal reserved rights, or applicable on a regional or statewide basis; or how this might work for a state taking a regional or

[78] Agencies are not required to undertake processes that will place an intolerable burden upon them. *See Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960).
[79] USEPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*, EPA-822-B-00-004 (2000).

statewide approach to promulgating HHC. The logistics of ascertaining what an unsuppressed use is remain unanswered by this rule. The Proposed Rule would jeopardize my Division's chances of meeting our EPA-imposed 2-year timeline for finalizing the HHC regulations.

Conclusion

ADEC Division of Water respectfully requests the Proposed Rule be withdrawn. Should EPA choose to bulldoze ahead with finalization, continuing along the path of exceeding its own power and trampling on state power, ADEC Division of Water requests that EPA expressly exclude Alaska tribes from coverage under the final rule. If you have any questions, please contact me at (907) 465-5180 or by e-mail at randy.bates@alaska.gov.

Sincerely,

Randy Bates
Director

CC: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Mary Peltola, United States House of Representatives
Jason Brune, Commissioner, Alaska Department of Environmental Conservation
Douglas Vincent-Lang, Commissioner, Alaska Department of Fish and Game
John Boyle, Commissioner, Alaska Department of Natural Resources
Treg Taylor, Attorney General, Alaska Department of Law