March 6, 2023

VIA ELECTRONIC SUBMISSION

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

https://www.regulations.gov

Re: Comments to Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights; Docket ID No. EPA-HQ-OW-2021-0791; 87 Fed. Reg. 74363 (Dec. 5, 2022) (to be codified at 40 C.F.R. Part 131)

Dear Administrator Regan:

The California State Water Resources Control Board (State Water Board) appreciates the opportunity to provide comments on the United States Environmental Protection Agency's (USEPA) proposed rulemaking which would require states to take specific actions to assess express or implied federal reserved rights for tribes in setting water quality standards under the Federal Water Pollution Control Act Amendments of 1972, as amended.[1] The rulemaking proposes changes and additions to the federal water quality standards regulations, 87 Fed. Reg. 74363 (Dec. 5, 2022)[2] (to be codified at 40 C.F.R. Part 131). The State Water Board exercises adjudicatory and regulatory functions in the field of water resources, including administering California's water rights system and protecting the quality of California's water resources (Cal. Wat. Code,

[1] 33 U.S.C. § 1251 et seq.; Clean Water Act, § 101 et seq. This letter refers to the section of the Clean Water Act as enacted by Congress and not to the corresponding section appearing in title 33.

[2] This letter cites to the proposed water quality standards regulation and preamble as "87 Fed. Reg. [page no.], col. [no.]."

§ 174), including through implementing the Clean Water Act and California's Porter-Cologne Water Quality Control Act (Cal. Wat. Code, § 13000 et seq.).

The State Water Board recognizes and agrees that water quality protections can be vital for a tribe's cultural, spiritual, and sustenance practices, as described in the proposed rule, and that explicit consideration of those practices in a water quality planning context is warranted.[3] Indeed, the State Water Board has worked extensively with California tribes and tribal representatives from both federally recognized tribes and tribes who currently lack federal recognition to, in 2017, establish two new tribal beneficial use definitions and adopt two corresponding water quality criteria,[4] all of which were approved by USEPA the same year.[5]

The State Water Board has significant concerns, however, with the USEPA proposed rule's "tribal reserved rights" framework for addressing tribal uses.[6] As detailed further below, USEPA's proposed approach fails to sufficiently account for and protect tribal water uses by tribes lacking federal recognition or a federal land base, fails to adequately protect tribal uses that were not a primary reason for the reservation, and imposes significant additional and unnecessary hurdles to timely adoption and implementation of water quality standards, including those that protect tribal uses. Focusing water quality review on the protection of tribal uses, rather than reserved rights, avoids these problems and presents a far superior option to protect water quality needs for tribal-specific purposes.

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[3] See State Water Board Resolution No. 2021-0050 (recognizing link between water resources and California Native American Tribes' cultural, spiritual and subsistence traditions, the cultural, spiritual, subsistence and health problems related to water quality concerns and displacement, and reaffirming the Board's commitment to improve consultation and input on decisions affecting California water resources, including drawing on traditional ecological knowledge).

[4] See section 4.F, below, for a fuller discussion of the State Water Board's development of water quality tribal beneficial use definitions and corresponding mercury water quality objectives, and footnote 33 for a status of the nine California Regional Water Quality Control Boards' (Regional Water Boards) planning actions involving those standards.

Under Clean Water Act section 303 and 40 C.F.R. Part 131, water quality standards include designated uses of the waters and water quality criteria to protect those uses. California refers to "designated use" as "beneficial use" and "water quality criteria" as "water quality objectives." In California, the water quality control plans contain the beneficial uses of waters of the state and water quality objectives to protect those uses. The terms "designated uses" and "beneficial uses" are used interchangeably throughout the remainder of this letter. The State Water Board and the Regional Water Boards adopt water quality control plans through a formal administrative rulemaking process, and once approved by California's Office of Administrative Law, the plans have the force of regulations.

[5] See *infra*, fn. 30 (identifying the State Water Board's adopting resolution, the statewide water quality control plan containing the water quality standards for tribal uses, and USEPA's approval letter.)

[6] The proposed rule defines "tribal reserved rights" at proposed 40 C.F.R. section 131.3(r). In this letter, "tribal reserved rights" refers to this proposed definition, while "federal reserved rights" refers to rights reserved by the federal government through acquisition or retention of lands.

1. Focusing water quality standards on tribal reserved rights fails to address the water quality needs of many California Native American tribes.

Throughout the United States, federal policies including forced relocation, forced assimilation, allotment and termination have resulted in inconsistent and severely limited federal recognition and federal land bases. This has resulted in many Native Americans lacking access to treaty rights, reservation lands, the ability to receive treatment-as-a-state status under federal statutes including the Clean Water Act, access to federal resources, and formal consultation on federal actions. This lack of recognition does not, however, determine whether a tribe maintains cultural, subsistence, spiritual or other practices that depend on water quality.

California has the largest Native American population in the United States and is home to approximately 15% of the entire nation's population identifying in whole or in part as Native American or Alaska Native.[7] The state is home to about 110 federally recognized tribes[8] and approximately 100 non-federally recognized tribes[9]. In the California context, the inequity of relying on a tribal reserved rights framework is particularly salient, as Mexican, federal, and state actions have severely limited tribes' access to federal reserved rights. Prior to statehood, thousands of Native peoples were displaced into Spanish missions along the coast. After the United States acquired California through the Treaty of Guadalupe de Hidalgo in 1848, federal negotiations with Native Americans across California resulted in 18 proposed treaties establishing reservations on approximately one seventh of California. But, the Senate refused to ratify the treaties in 1852, with the result that there are no treaties with California tribes and there were no reservations established near the time of statehood (1850).[10] Additionally, because tribal claims were not filed through the process established by the California Land Act of 1851 (9 Stat. 631), most tribes were found to have waived land claims stemming from

[7] Race and Ethnicity in the United States: 2010 Census and 2020 Census, at https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html.

[8] Bureau of Indian Affairs, Pacific Region, map: https://www.bia.gov/sites/default/files/dup/assets/bia/pacreg/california%20map%202022_large.pdf?_gl=1*qshosr*_ga*MTc2MDY5MzgyNC4xNjQ4NTg3MTY3*_ga_99DR80KW2E*MTY1MDQ2NDYxNi40NS4xLjE2NTA0NjkzODMuNTc

[9] California's Native American Heritage Commission maintains contact information for non-federally recognized tribes. The number is subject to change based on a number of factors, including tribes' receipt of federal recognition, tribes' available resources to support consultation, new information, and a return of scattered descendants to a place and cultural practices previously disturbed.

[10] See Bureau of Indian Affairs, Pacific Region "Who We Are" https://www.bia.gov/regional-offices/pacific/who-we-are#:~:text=Between%201906%20and%201910%20a,the%20Rancheria%20System%20in%20California; Miller, Larisa K., *The Secret Treaties with California's Indians,* (2013), https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf

rights that pre-existed the transfer of California from Mexico to the U.S in 1848, at least where there was a patent issued free of such claim.[11]

Instead of the treaty process or the recognition of lands established under prior Mexican rule, a much smaller amount of reservation land was established in California. This occurred in a piecemeal manner, through a series of executive orders and administrative actions over the ensuing 60 years. Some of these federal tribal lands were established relatively early in statehood, and some many decades later. The effect of the later-established lands is that any federally reserved rights associated with the eventual land acquisition are as of a later baseline and may be junior to other appropriative water rights established in the intervening years.[12] Some federal tribal lands were reserved directly from the federal domain, while others were purchased for tribal purposes.[13] Some are within a tribe's traditional homelands and some are without. Some were established for resettlement of more than one tribe. Many tribes were wholly or largely displaced and have remained without a recognized land base or any formal federal recognition at all. After establishment, many of the tribal lands set aside were further fractured by allotment and termination. All of these factors are relevant to the scope and existence of federally reserved rights in California, yet none are relevant to the degree of water quality protection required to allow for the subsistence, cultural traditions, and spiritual practices of California Native American tribes.

As the California example highlights, tying water quality protections of tribal beneficial uses to tribal reserved rights is woefully inadequate. In fact, this strained approach results in the least protection for those tribal people who already face significant hurdles in sustaining cultural, spiritual, traditional subsistence and other practices.

A Native basket-weaver's risk from exposure to toxins accumulated on or in riparian plants does not depend on the federal status of their tribe, whether any federal instrument should be interpreted to establish a right to basketweaving, or the reservation status of the land on which the plants were gathered: it depends on the water quality in which the plants grow. In focusing on the "health of *[tribal reserved] right holders*" rather than on tribal people practicing basketweaving, the USEPA's proposed rule needlessly omits water quality protections for tribal peoples without such reserved rights, or who are practicing outside the bounds reserved by their federal instrument. (87 Fed. Reg. 74378, col. 3 (proposed 40 C.F.R. § 131.9 (a)(2).) Federal recognition and land status are similarly irrelevant to the water quality needed for other tribal water uses that California tribes have identified, including: high consumption levels of aquatic species; consumption of specific aquatic species not more broadly consumed; ritual

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[11] *Robinson v. Jewell* (9th Cir. 2015) 790 F.3d 910

[12] Unless, of course, such rights retain a "time immemorial" priority. (See *U.S. v. Adair*, 723 F.2d 1394, 1412-1414 (9th Cir. 1983) [treaty continued pre-existing hunting and fishing rights, so date of priority pre-dates date of reservation].)

[13] Federal reserved rights apply to lands "reserved" by the federal government from the public domain. See e.g. *Cappaert v United States*, 426 US 128, 138 (1976). There is a dearth of case law describing whether such principles can also apply on lands purchased for tribal purposes.

water use, including for immersion and consumption; centrality of a landscape, riverscape or ecosystem in a tribal cosmology; and medicinal wetland and riparian plant use. The proposed rule's focus on the exercise of tribal reserved rights and on right holders excludes those who were removed from their ancestral lands (or the areas thereof in which a practice is appropriate or available) and settled elsewhere, unrecognized tribes, and de-recognized tribes—and thus excludes the majority of California tribes.

2. Even for tribes with federal reservation lands, a focus on tribal reserved rights is inadequate.

By establishing a requirement that water quality standards be evaluated based on tribal reserved rights, rather than on supporting designated uses, the proposed rule places an undue burden and limitation even on federally recognized tribes' on-reservation activities. For no other designated use do USEPA regulations require that users first establish a federally established right to put the nation's waters to a particular use or to have criteria established to protect such a use. Rather, the Clean Water Act seeks to make all of the nation's waters fishable and swimmable, and requires protection of all existing uses. By imposing the significant burden of establishing a tribal reserved right to engage in a practice (see 3 below), USEPA's proposed rule places a barrier on protecting these actions that no other use or users face.

Furthermore, under *United States v. New Mexico,* implied federal reserved rights to water are available only for the primary purpose of a reservation, water for secondary purposes is not available.[14] While this case concerned implied federal rights for a national forest rather than a tribal reservation, some jurisdictions have applied the limitation in the tribal context, and the Supreme Court has not yet addressed the question.[15] There is no defensible reason not to apply the Clean Water Act's water quality standards protections to all tribal uses, including those that may have been considered "secondary" at the time a reservation was established.

Additionally, because many federally recognized tribes were driven far from their homes or granted only small tracts of land, many tribes' reservation lands do not include key areas in their ancestral home for important practices that depend on water quality. Thus, protecting the rights linked to their reservation land[16] often is inadequate for addressing

[14] *United States v. New Mexico*, 438 U.S. 696 (1978).

[15] See *In re. CSRBA Case No. 49576 Subcase No. 91-7755,* 165 Idaho 517, 538-41 (2019) (discussing decisions applying and declining to apply primary-secondary standard to federal reserved rights for tribes, and determining not to apply the standard in Idaho); *Agua Caliente Band of Cahuila Inidians v. Coachella Valley Water District*, 949 F.3d 1262, 1268 (9th Cir. 2017) (applying primary-secondary standard).

[16] See *In re. CSRBA Case No. 49576 Subcase No. 91-7755,* 165 Idaho 517, 547-54 (2019) (discussing decisions applying and declining to apply instream federal reserved rights for tribes to flows off reservation, and determining rights not reserved off-reservation in case at hand)

the aquatic life and consumption purposes that USEPA's proposed rule finds inadequately protected under existing procedures.[17]

3. USEPA's proposal to use a "tribal reserved rights" framework requires significant additional and unnecessary hurdles to timely adoption and implementation of water quality standard protections for tribal beneficial uses.

By focusing on an assessment of tribal reserved rights,[18] USEPA's proposal adds multiple layers of unnecessary interpretation and analysis requiring expertise in areas far removed from the core expertise required to establish water quality standards.

As a threshold issue, identification and interpretation of federal instruments that have the potential to create federal reserved rights is an uncertain exercise that requires expertise unrelated to water quality assessment. The proposed regulation carves a broad swath for identifying tribal reserved rights from treaties, statues, executive orders, or other sources of Federal law, noting that these rights may either be express or implied. (See 87 Fed. Reg. 74378, col. 2 (proposed 40 C.F.R. § 131.3 (r).) Not noted in this recitation is the long history of changes in federal policies and ensuing litigation that overlie interpretation of any one document. Take for example, a treaty (or in the case of California, an executive order) establishing a reservation. Given the multiple waves of federal policies reducing tribal rights, it cannot be clear on the face of the document whether the reservation was subject to allotment, whether the tribe later faced termination, whether the Indian Claims Commission made payments in lieu of fulfilling the original document's terms, or whether any of these actions was later reversed in one of the many individual or class action lawsuits challenging these federal actions. Thus, even if a scientist charged with establishing water quality standards can locate the appropriate historical instrument establishing a reservation, which itself requires specific research skills unrelated to water quality, this document provides little insight regarding present day rights. Additionally, for tribal lands established outside of the treaty process—which is all tribal lands in California—the founding instruments themselves are often brief and un-illuminating, making the identification of the rights reserved a further complex exercise of interpretation, requiring expertise unrelated to establishment and assessment of water quality requirements.

The federal courts have grappled for decades with the difficult questions of how to interpret treaties, executive orders, and other federal actions establishing reservations, and the survival of the rights thereby established or reserved through various changes

[17] See 87 Fed. Reg. 74371, col. 1.

[18] The proposed federal regulation states that "Tribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of *Winters* rights." (87 Fed. Reg. 74363, col. 2.) It is unclear what this statement means, as the regulation would require an evaluation of the existence and extent of tribally held federal reserved rights. Perhaps the word "quantification" was intended to indicate that the states will not be making a binding determination of the extent of the tribe's rights. But while the evaluation amounts to an estimation, it is still as quantification, at least to the extent necessary to determine whether states water quality standards are protective of tribally held federal reserved rights.

in federal policy. In California, with more than 100federally recognized tribes, this would be an enormous undertaking. Forcing states to acquire such expertise rather than focusing on protecting the use for all tribal people (regardless of whether the use is an exercise of a tribal reserved right or not) presents a significant burden.

Even after determining whether a tribal reserved right exists, determining the level of protection required for a right depends on the right's priority, which adds significant additional and unnecessary complication. For example, if a reservation was established in the early 1900's and was intended to provide for fishing, but upstream diversions prior to that date reduced flows and increased temperatures on the reservation lands to an extent that limits the ability to fish, the tribe's federal reserved right may be junior to the right of the existing diverter, unless the tribe could establish a "time immemorial" priority date.[19] Determining the water right priority of a federal reserved right, and its situation as compared to other water users, is a complex task. Where the federal reserved rights are not unquestionably among the most senior in a system, as will often be the case in California, a basin-wide assessment of senior demands is required to determine the scope and priority of a reserved right vis-à-vis other demands in the basin. Most states, including California, have not comprehensively adjudicated their waters. Absent such an existing adjudication, determining the extent to which a federal reserved right can be fulfilled, and what actions are available to fulfill it, is not straightforward; it involves expertise in water rights law that is distinct from the questions regarding the level of water quality required to support beneficial uses. Water right adjudications are for good reason considered one of the most complex analyses, often requiring decades of litigation.[20] Similarly, if gold mining prior to establishment of a reservation has polluted a stretch of stream that runs through the area with significant amounts of mercury-laden sediments, it is not clear that the tribe's federal reserved rights include a cleaner environment than initially provided. Assessing a hypothetical past condition of water quality and availability requires piecing together historic documents and information, but such an assessment is both unnecessary to establishing designated tribal uses and the level of water quality to protect those uses and is also unlikely to result in a determination with a high degree of certainty. Yet, USEPA's proposed rule requires such a fruitless assessment. The Clean Water Act's goal of fishable and swimmable waters does not tie these requirements to a specific right established at a specific time: requiring an analysis through a tribal-reserved-rights-lens adds significant complication to questions of water quality.

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[19] See e.g. *Winters v. United States,* 207 US 564, 572, 575, 577 (1908) (the priority of tribal reserved water right is the date the reservation was established and this date is important because reserved rights extend only to those waters that were not already appropriated at the time the reservation was created); but see *U.S. v. Adair,* 723 F.2d 1394, 1412-1414 (9th Cir. 1983) (treaty continued pre-existing hunting and fishing rights, so date of priority pre-dates date of reservation).

[20] See, e.g., United States Department of Justice, Federal Reserved Water Rights and State Law Claims available at https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims) ("…the majority of federal reserved water rights litigation has taken place, not before the United States Supreme Court, but in the state courts in the context of their comprehensive and on-going general stream adjudications—many of which spanned decades or more").

Beyond the significant questions related to priority, centering a rights framework for water quality protection on tribal reserved rights unnecessarily requires interpretation of many areas of law that are undecided concerning implied rights. For example, it is not clear whether, and to what extent, federal reserved rights can extend beyond reservation lands absent a treaty articulating such a right.[21] Where a source of pollution is upstream, or where downstream sources of pollution interfere with the ecosystem sustaining a tribal use, the question of whether and how a tribal reserved right extends off-reservation is vital in determining whether such right is being achieved or impeded. Yet it is irrelevant to the salient question under the Clean Water Act standard-setting of what level of water quality is required to support a designated use. Similarly, it is not clear whether, and to what extent, a tribal reserved right – or any federal reserved right – attaches to land that was purchased or originally reserved to the federal government for other purposes.[22] In California, many of the federal acts establishing reservations occurred significantly after statehood, and involved purchase of private lands or re-purposing of lands reserved under other statutes. State actions to set water quality standards are ill-suited to address these definitional issues regarding the status of federal reserved rights. Requiring state water quality regulators to address these questions, rather than focusing on water quality, unnecessarily burdens the states and creates barriers to adopting and implementing water quality standards.

In addition to focusing state water quality regulators inappropriately on questions of rights rather than water quality, the USEPA's proposal will also invite substantial opposition and water rights-based litigation into standard-setting processes. Questions regarding the scope and existence of federal reserved rights have significant implications for tribes, water right holders, and dischargers far beyond the scope of any single water quality standards-setting process in a particular basin. For example, what might seem a focused determination on a tribe's rights within a basin, often implicates all reservations established under that statute, in watersheds across the state. Similarly, answering questions about the off-reservation extent of federal reserved rights or the scope or existence of federal reserved rights on purchased lands has statewide and nationwide implications. It is not appropriate or helpful to require state standards-setting in particular basins to also address these issues of statewide and national importance,

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[21] See *United States v. Winans,* 198 U.S. 371 (1905) (finding easement to access fishing location reserved in treaty); *In re. CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 547-54 (2019) (discussing decisions applying and declining to apply instream federal reserved rights for tribes to flows off reservation, and determining rights not reserved off-reservation in case at hand).

[22] The United States Supreme Court defines the reserved rights doctrine as applying to lands withdrawn from the public domain. "The canonical statement of [the reserved water rights doctrine] goes as follows: '[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated ...'" [Citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)])." *Sturgeon v. Frost*, __ U.S. __, 139 S.Ct. 1066, 1078 (2019) (emphasis added). The State Water Board knows of no cases that have reached the high court addressing the issue of whether, in the tribal context, reserved rights to purchased lands may accrue.

and doing so will substantially burden the states' important work to implement the Clean Water Act.

In light of these substantial burdens, the proposed rule underestimates the costs[23] for this significant effort, by several orders of magnitude. As described above, the proposed rule will require developing substantial new areas of expertise in the uncertain field of tribal reserved rights (as opposed to water quality), and invites broad opposition and engagement from entities affected by determinations related to federal reserved rights (but not the water quality standards at issue). Equally unreasonable is the proposed rule's suggesting that this Herculean effort should occur during a triennial review. The closest analogue to such a rights-determination process is the basin adjudication process in water rights, where the state courts assess reserved right claims alongside other claims to water use. These processes typically require at least a decade of litigation and require hundreds of thousands of dollars in state costs.[24] As noted, there are about 110federally recognized tribes in California: the cost and time required to assess reserved rights for each of these is substantial and unwarranted in the water quality standard-setting process.

The high cost and extensive time involved in evaluating tribal reserved rights is unwarranted because, in addition to being ineffective to address the health concerns related to tribal levels of consumption of aquatic species, as discussed in section 1 above, it is not anticipated to result in significant changes to other existing water quality criteria. As USEPA acknowledges, "EPA does not anticipate that more stringent criteria to protect aquatic or aquatic-dependent resources themselves would be necessary *in most cases* to comply with this proposed rulemaking than already required by the existing federal water quality standards regulations."[25]

Requiring states to evaluate the existence and scope of tribal reserved rights is a burden far out of proportion to the limited potential benefits the proposed rule seeks to achieve. This is especially so where such exercise is unnecessary and ill-suited to address real health concerns related to consumption of aquatic species, and is conversely, and as stated by USEPA, unlikely to result in changes to other criteria. USEPA is a federal agency with trust responsibilities to tribes that extend to ensuring adequate protection of federal reserved rights, in addition to its water quality

[23] While this comment letter focuses on costs to states implementing the Clean Water Act, it is worth noting that the USEPA rule would also impose a significant cost burden on tribes, as developing a body of evidence to support establishment of a reserved right is significant.

[24] For example, the 1932 Shasta River Adjudication spanned eleven years, and the State Water Board's costs were approximately $46,000, which is between $900,000 and $1.1 million today. In 2019, the State Water Board estimated that the agency's costs for an adjudication of approximately 300 water rights in the Fresno River Basin would be approximately $3 million dollars. For more complex watersheds, the example of the Klamath Basin Adjudication in Oregon is instructive, with the administrative phase of the adjudication requiring 38 years.

[25] 82 Fed. Reg., 74371, col. 1 (emphasis added).

responsibilities. USEPA can fulfill this role without conflating that responsibility for federal trust assets with its implementation of the Clean Water Act.

4. Protection of tribal uses would be better served by focusing on the Clean Water Act's traditional water quality standards framework, rather than a new tribal reserved rights framework.

Water quality protections for tribal uses of waters can, and should, occur through the Clean Water Act's existing traditional water quality standards framework, rather than an ill-suited new framework that is based on tribal reserved rights. Protecting tribal uses through the development or revision of traditional water quality standards, where needed to protect those uses, is consistent with the Clean Water Act authority.[26] New requirements to protect tribal uses would be more effective in producing those protections if they were constructed within the traditional water quality standards framework.

Under the Clean Water Act, designated uses and water quality criteria to protect those uses are the cornerstone of water quality protection for a given waterbody.[27] USEPA's regulations implementing the Act ensure that the waterbody's highest degree of uses and the necessary levels of water quality actually achieved on or after November 28, 1975, will be maintained and protected consistent with the overall objective of the Clean Water Act to restore and maintain the physical, chemical, and biological integrity of the nation's waters.

Water quality protections for the unique relationship tribes have with water and the environment can be established through designated uses and water quality criteria to protect those uses within a water quality standards framework. It is unnecessary to first determine whether tribal reserved rights apply and the level of water quality necessary to protect those rights, as contemplated by the proposed rule.

USEPA's proposed rule should focus on the tribal use of waters, not the federally established right to the use. As discussed in the following sections, there are many advantages to developing water quality protections for tribal uses under a traditional water quality standards framework unburdened by the need to determine tribal reserved rights. These advantages align with USEPA's goal to support tribal sovereignty (87 Fed. Reg. 74377, col. 2) while also fitting within the existing framework and clear authority of the Clean Water Act.

[26] USEPA's existing regulation at 40 C.F.R. section 131.10(i) generally requires states to revise their water quality standards to reflect presently attained uses if those uses require more stringent criteria than the currently designated uses. Therefore, if a tribal use is a use that is presently being attained and the currently designated uses require less stringent criteria than the tribal use, it would be consistent with the existing regulatory framework to require water quality standards to be revised to reflect the tribal use.

[27] Clean Water Act, § 303(c)(2)(A); 40 C.F.R. § 131.2.

A. The Clean Water Act's existing framework requires states to identify and protect the uses specific to the waterbodies involved.

The Clean Water Act and USEPA's implementing regulations require states to establish designated uses reflecting general categories of uses specific to the navigable waters involved and water quality criteria to protect those uses.[28] The statutory and regulatory framework require states to focus on appropriate water uses, taking into consideration the uses and values of the waterbodies under evaluation.[29] That is, under existing law, the uses and suitability of the waterbody are examined, not the existence and scope of any tribal reserved rights.

B. The use of waterbodies by *all tribes* within a state could be protected under a traditional standards framework.

One advantage of requiring water quality protections for tribal uses under a traditional water quality standards framework is that all tribes within a state would be afforded the same water quality protections when applicable. This is approach is more equitable and efficient than requiring states to develop such protections for the limited subcategory of federally recognized tribes that have tribal reserved rights, as the proposed rule contemplates. Not only would a traditional water quality standards framework approach be far more equitable and meaningful, but it would also comport with the purposes of the Clean Water Act to protect uses of our nation's waters. For example, a state's water quality standards could protect at the same higher risk level for all tribes within a state that are engaged in similar higher consumption rates of fish based, rather than protecting only those tribes that are federally recognized.

C. A full range of activities comprising the tribal traditions and lifeways could be protected under a traditional water quality standards framework.

USEPA's decision to tether the proposed rule to a rights-based approach will not adequately protect all the tribes' uses of waters. All of a tribe's activities and actual uses of a waterbody are not necessarily reflected by the tribal reserved right. In such cases, limiting water quality protections to only those tribal activities stemming from the tribal reserved right has the drawback of not reflecting all of the tribal uses actually being made of waterbodies. For example, tribes may engage in spiritual or ceremonial activities in or near waterbodies or gather aquatic plants. Such activities may fall outside the primary purpose of the reservation, and therefore, those uses are not covered in any reserved right, as discussed in section 2 above. USEPA attempts to paper-over these concerns in the preamble by noting "that implementing the [Clean Water Act] to give effect to applicable reserved rights to aquatic and/or aquatic-dependent resources does not require that the relevant […] legal instrument explicitly reference water quality." (87 Fed. Reg. 74366, col. 1). This statement lacks consistency and transparency with

[28] Clean Water Act, § 303(c)(2)(A); 40 C.F.R. § 131.10(a).

[29] See *ibid*.

whether the full range of activities tribes make of the waters involved are recognized by the tribal reserved rights.

By comparison, establishing water quality protections within a water quality standards regulatory framework can ensure that the full range of tribal traditions and lifeways tribes make on the relevant waters can be protected. Available data and information may be gathered to determine whether those uses are currently attainable or feasible to be attained, without regard to whether the uses are also embodied in tribal reserved rights. Proceeding under this approach would meaningfully respect tribal sovereignty. The tribes themselves know their unique relationship to waterbodies and the environment and should be given the platform suitable to their unique relationship.

D. New water quality criteria are not needed if existing water quality criteria already protect tribal uses.

Although different types of water quality criteria have a specific focus, a state's water quality standards work cooperatively for the overall protection of a waterbody. For example, 40 C.F.R. section 131.11(a)(1) provides that where there are multiple designated uses adopted for a waterbody, states must adopt criteria that support the most sensitive use. Under this existing regulatory framework, states may evaluate whether more stringent water quality criteria are needed to protect the tribal designated uses including, for example, when tribal consumption or cultural use of aquatic species or other resources creates an elevated exposure pathway as compared to the general population. On the other hand, in many instances the water quality criteria that are already adopted for non-tribal uses may already fully support other tribal uses, in which case a state should not be required to expend its limited resources to establish new water quality criteria that are not more stringent than the existing water quality criteria.

E. States are already well-equipped to designate uses to recognize tribal uses of waters and establish criteria necessary to protect the uses.

USEPA's proposal to add a new requirement that obligates states to examine the scope of tribal reserved rights would interfere with states that, like California, are already developing designated uses and water quality criteria to protect tribal uses. States are responsible for overseeing water quality programs necessary to administer the Clean Water Act. The states have decades of expertise in promulgating technical and scientific-intensive rules to make manifest the goals of the Act. Proceeding with a water quality standards approach fits within the water quality control planning expertise that states already possess, as well as the legally binding procedures for standards revisions states already have in place to comply with water quality standards submissions under 40 C.F.R. section 131.6. As explained in the next section, the State Water Board and California's Regional Water Boards are actively engaged in evaluating and accounting for the technical and scientific basis to update water quality standards for the protection of tribal uses.

F. The State Water Board's water quality standards action in 2017 serves as an example of how states can protect tribal uses under existing authority.

On May 2, 2017, the State Water Board established new designated uses for the explicit protection of uses of water by California Native American tribes.[30] More specifically, the State Water Board adopted, and USEPA approved, the Tribal Tradition and Culture ("CUL") beneficial use and the Tribal Subsistence Fishing ("T-SUB") beneficial use.[31] The State Water Board's 2017 water quality standards action also included two human health numeric water quality criteria for mercury (expressed as concentrations of methylmercury in fish tissue) corresponding to the level of water quality to protect the CUL and T-SUB tribal beneficial uses.[32]

The State Water Board developed the language of these tribal beneficial uses to include a full range of activities concerning tribal tradition, culture, and subsistence. The range of activities described by the tribal beneficial uses were informed by the uses made of waterbodies. California Native American tribes articulated these uses through resolutions adopted by tribes and submitted to the State Water Board, and as further articulated by tribal members, representatives, and interested parties during extensive public outreach over several years. Tellingly, the identification of the tribal uses made of waters and the relevant environment involved no inquiry whatsoever into tribal reserved rights.

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[30] State Water Board Resolution No. 2017-0027 (May 2, 2017) (establishing Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions) (hereinafter, "Part 2 Water Quality Standards to Protect Tribal Uses"); see Cal. Code Regs., tit. 23, § 3010 (providing a concise summary of the statewide water quality standards action); Tomas Torres, Director of the Water Division, USEPA Region IX, letter to Felicia Marcus, Chairperson of the State Water Resources Control Board (July 14, 2017) (approving the statewide water quality standards action).

[31] The two beneficial uses for the protection of tribal uses are:

> Tribal Tradition and Culture (CUL): Uses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials.
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> Tribal Subsistence Fishing (T-SUB): Uses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet needs for sustenance.

(See, Part II Water Quality Standards to Protect Tribal Uses, ch. II.) The beneficial uses contain defined terms indicated by all capital letters that are not reflected here.

[32] See, Part II Water Quality Standards to Protect Tribal Uses, chs. III.2.a & III.2.a.b. The mercury water quality objective that corresponds to traditional fishing (i.e., the CUL beneficial use) was derived to protect consumption at a rate of one meal per week and is the same objective established to protect consumption by non-tribal people at recreational levels. The mercury T-SUB beneficial use was derived to protect people consuming four-to-five meals per week (142 grams per day) based on detailed information from a survey of fish consumption by California Native American Tribes.

With the development of the new tribal beneficial uses, the State Water Board recognized the importance of identifying and describing beneficial uses unique to California Native American tribes. Changes to California's waters, hastened by the effects of climate change, along with new sources of contamination and pollution to those waters, present distinctive challenges to the tribes and their members. Establishing beneficial use categories designed to protect California Native American uses of waters is an important step to ensure that tribes have the opportunity to continue to practice their tribal tradition, culture, and lifeways.

Since the State Water Board adopted the statewide designated uses to protect tribes, the nine Regional Water Boards are actively undertaking a full range of water quality control planning actions, including evaluating whether to amend their respective water quality control plans to incorporate the tribal beneficial uses, and beginning the work to designate specific waterbodies, as appropriate.[33] The Regional Water Boards are engaged in substantial outreach efforts to solicit information from the California Native American tribes within their jurisdictions to determine the appropriate use designations for their waterbodies.

> ***Recommendation****: The State Water Board is committed to evaluating or revising water quality standards as necessary to comply with the Clean Water Act to protect populations, including tribes, and aquatic life dependent on waters within California consistent with the goals of the Act. For the reasons discussed above, the State Water Board recommends that the protection of tribal activities be informed solely through a traditional water quality standards framework, rather than through a complex examination of tribal reserved rights.*
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> *The State Water Board supports adding a new regulatory requirement that would require states to ensure their water quality standards protect tribal uses. As an alternative to the proposed rule's focus on "tribal reserved rights," the State Water Board recommends that section 40 C.F.R. section 131.10(a) be amended to add "tribal uses" to the enumerated uses that states must take into*

[33] As of the date of this letter, the Regional Water Boards for the San Diego, Los Angeles, Central Valley, and Lahontan regions have adopted amendments to include the CUL, T-SUB, and SUB beneficial uses in their respective water quality control plans, and are actively engaged in projects to gather information to support designating specific waterbodies with one or more of the beneficial uses. The Regional Water Boards for the San Francisco and Colorado River regions have completed triennial review and have identified as priority projects incorporating the beneficial uses and designating specific waterbodies with the uses. The Regional Water Boards for the Santa Ana and Central Coast regions anticipate identifying as priority projects updates to incorporate the new beneficial uses. The North Coast Regional Water Board has not taken explicit action on the tribal beneficial uses because the region's water quality control plan contains beneficial uses for Native American Cultural ("CUL") uses and subsistence fishing ("FISH") that predate the State Water Board's 2017 water quality standards action. (North Coast Regional Water Board, Water Quality Control Plan for the North Coast (May 2011), p. 2-3.00.) Additionally, the North Coast Region designates numerous waterbodies or hydrologic areas or subareas with the CUL and FISH beneficial uses where the uses were determined to be existing or potential future uses. (*Id*., table 2-1.) The State Water Board has completed triennial review of the California Ocean Plan and has identified as a priority project incorporating the tribal beneficial uses into the plan and designating ocean waters with the uses.

consideration and protect. Additionally, the State Water Board recommends USEPA replace the proposed requirement to protect "tribal reserved rights" at section 131.9(a) and instead specify that states must protect tribal uses by "establishing tribal designated uses applicable to waters subject to such standards consistent with section 131.10." The proposed rule could also direct states to "establish water quality criteria consistent with section 131.11 to protect tribal uses, as needed." Finally, the proposed rule could require states to specifically evaluate the need to develop such standards during triennial review, and if appropriate, to prioritize the development and adoption of revised or new water quality standards to protect tribal uses.

5. Additional comments to the proposed rulemaking.

As stated above, the State Water Board strongly recommends that USEPA shift the focus of its proposed rule to a traditional water quality standards framework. In addition, there are two elements of the proposed rule that warrant specific comment. The first relates to USEPA's new suppression effects concept. The second relates to USEPA's cost estimates for water quality standards development, which is relevant under either framework.

A. The requirement to account for "suppression effects" should be clarified.

USEPA proposes to add section 131.9(a)(1) to require states' water quality standards to protect tribal reserved rights "unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource" where tribal reserved rights apply and where supported by available data and information. (40 Fed. Reg. 74378, col. 3.) USEPA explains in the preamble that a suppression effect would exist if, for example, fish are no longer available in that waterbody in historical quantities or kinds commensurate with what the tribe was entitled to in exercise of their treaty rights. (See 40 Fed. Reg. 74368, col. 3, and fn. 51.)

In requiring states to account for suppression effects, the proposed rule introduces ambiguity as to the states' obligation to protect and maintain baseline water quality conditions under the Clean Water Act.

USEPA's regulations define designated uses as those that "express the desired condition of the water and do not need to be currently attained to be designated."[34] Additionally, existing uses are defined as "those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards."[35]

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[34] 40 C.F.R. § 131.3(f).

[35] 40 C.F.R. § 131.3(e). With reference to an USEPA letter to the State of Oklahoma, USEPA asserts in the preamble to its proposed 2013 water quality standards rulemaking that "existing uses" are "known to be 'attained' when both the use *and* the water quality necessary to support the use has been achieved."

USEPA's water quality standards regulations set a high bar for protecting existing use of our nation's navigable waters. 40 C.F.R. section 131.10(g) prohibits the removal of a designated use that would also remove an existing use. In addition, 40 C.F.R. section 131.12(a) requires states to maintain and protect existing water uses and the level of water quality necessary to protect existing uses when implementing a state's antidegradation policy. 40 C.F.R. section 131.10(g) further specifies that if a state adopts a new or revised water quality standard based on a use attainability analysis, the state must adopt the "highest" attainable use.[36]

USEPA should clarify the extent to which a state would be required to revise or adopt water quality standards to protect tribal reserved rights unsuppressed by water quality or availability of the aquatic resource for a tribal activity that has neither occurred nor where the water quality has not been achieved to support the activity since November 28, 1975, and where the activity is not feasible pursuant to the use attainability factors at 40 C.F.R. section 131.10(g). For example, if tribal navigation is no longer available in a waterbody because a dam or other type of hydrologic modification constructed prior to November 28, 1975, precludes navigation, it is unclear whether states would be obligated to protect that activity.

> ***Recommendation**: If USEPA, against the State Water Board's advice, moves forward under a "tribal reserved rights" framework, the State Water Board recommends that USEPA clarify in any proposed rule whether states are required to protect tribal uses or tribal reserved rights in their water quality standards where the tribal activity under consideration is neither an existing use (under 40 C.F.R. § 131.3(e)) nor feasibly attainable (under 40 C.F.R. § 131.10(g)).*

B. The economic analysis should better account for the potential costs to states to evaluate or revise their water quality standards.

Independent of whether the final rule includes a requirement for states to examine and protect tribal reserved rights, the economic analysis of the rulemaking should inform the public of the potential costs to states necessary to adopt revised or new water quality

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(70 Fed. Reg. 54518, 54523, col. 1 (Sept. 4, 2013) (to be codified at 40 C.F.R. Part 131) (emphasis in the original) (referring to Denise Keehner, Director of Standards and Health Protection Division, USEPA, Letter to Derek Smithee, Water Resources Board, State of Oklahoma (Sept. 5, 2008) (with attachment), available at http://water.epa.gov/scitech/swguidance/standards/upload/Smithee-existing-uses-2008-09-23.pdf).)

[36] "Highest attainable use" is defined as:

> the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

(40 C.F.R. § 131.3(m).)

standards. Such costs are a foreseeable outcome of the proposed rulemaking and are not speculative. USEPA's analysis of the assumed administrative costs to the states to evaluate or revise water quality standards falls far short of what would be required. (87 Fed. Reg. 74374, col. 1-2 [assuming states would each undertake three water quality standards rulemakings to comply with the proposed rule, one rulemaking for each of the following purposes: evaluating or revising water quality standards for the protection of human health and aquatic life, and accounting for other standards changes to protect tribal reserved rights, including information that emerges in the future that may inform the existence of, or level of protection for, tribal reserved rights].) USEPA's assumed administrative burden on states entirely misses the mark. It woefully underestimates the number of rulemakings that would be required, but also the scope and number of hours for each rulemaking.

There are multiple steps necessary to adopt revised or new water quality standards. The first formal step is often conducting triennial reviews to identify and prioritize waters for which uses should be designated or water quality criteria should be added or revised. Conducting a triennial review generally takes a year of effort. Within California, the nine Regional Water Boards conduct triennial reviews for water quality standards regarding waterbodies designated by ten water quality control plans and the State Water Board conducts triennial reviews on waters subject to its three statewide water quality control plans. Each triennial review would likely consider rulemaking actions to comply with the proposed rule, and such considerations may occur during multiple triennial reviews for each water quality control plan.

The triennial review process is followed by gathering data and information to support the use designation(s) or the new or revised water quality criteria, on a waterbody-by waterbody or watershed basis, which is undertaken in collaboration and consultation with relevant stakeholders. Gathering data and information to inform the scope of the standards action can take several years. Although the rulemaking processes for designating uses and adding or revising water quality criteria, if necessary, can be done simultaneously, they are often undertaken separately as the data and information needed to support the actions vary in scale and type. For example, designating uses may require a survey of uses and may be undertaken across a region, while adding or revising a water quality criterion may require information on the route of exposure and length of exposure to calculate toxicity from a particular pollutant on a waterbody or multi-waterbody scale.

Once the scope of the standards action and its justification are developed, the next steps include consideration of potential environmental impacts, consideration of economic impacts, public comment and response, a hearing held by a Regional Water Board followed by the Regional Water Board's consideration and adoption, and public rulemaking review for approval by the State Water Board, prior to review by USEPA. Generally, these steps take two to three years at a minimum. Following approval comes the critical steps of training, educating, and transferring knowledge from planning to permitting staff and those who implement actions to attain standards.

***Recommendation**: The State Water Board recommends that USEPA's cost analysis reasonably encompasses the numerous planning efforts and rulemakings states would be required to undertake an evaluation of water quality standards revisions necessary to protect tribal activities—on a waterbody or watershed basis throughout each state.*

C. USEPA should ensure that states' subsequent submission of tribal designated uses—not based on "tribal reserved rights"—would be consistent with a final rule based on such rights.

As already discussed, the Water Boards are actively involved in various stages of tribal water quality standards development, including waterbody designations based on the tribal use definitions established by the State Water Board in 2017 (i.e., the CUL and T-SUB uses).[37] The two corresponding water quality criteria for mercury established by the State Water Board will automatically apply to such designations, barring site-specific considerations. The State Water Board expects it will soon be considering tribal use designations of waterbodies adopted by Regional Water Boards, and will submit them to USEPA upon the State Water Board's approval.

Should USEPA find it necessary to promulgate a requirement for states to adopt water quality standards that protect tribal reserved rights, the State Water Board believes that the State Water Board's subsequent submissions of water quality standards to USEPA based instead on its recently established and USEPA approved tribal beneficial use definitions framework would satisfy the requirement for consistency with proposed 40 C.F.R. section 131.9 contained in proposed 40 C.F.R. section 131.5(a)(9). To avoid any ambiguity, however, the State Water Board requests that USEPA to affirm its concurrence (in the preamble or the final rule itself) that such subsequent submissions would satisfy the consistency standard.

Alternatively, if USEPA finds that future submissions of tribal use designations and water quality criteria to protect tribal designated use would not meet the consistency requirement of proposed 40 C.F.R. section 131.5(a)(9), the State Water Board requests that USEPA include a grandfather provision in the final rule, so that states with an existing traditional water quality standards approach to protect tribal uses may continue establishing such water quality standards.

Either of these approaches would preserve the states' primary role in establishing water quality standards and allow states appropriate flexibility in water quality standards development, consistent with the purpose and spirit of the Clean Water Act. In overseeing water quality standards submissions, it is reasonable for USEPA to accommodate the states that have already forged ahead to implement the protection of tribal uses in their water quality programs. That is particularly true for states like California, where, as this letter details, establishing water quality protections for tribes under a tribal reserved rights framework is fraught with uncertainties at best and, in any case, not applicable to many of the state's tribes. USEPA's concurrence or

[37] See, *supra*, section 4.F and fn. 33.

establishment of a grandfather provision as requested would also increase transparency and avoid potential ambiguity about the consistency requirement. Most importantly, both of these requested approaches comport with the important principles of cooperative federalism underlying the Clean Water Act.

> ***Recommendation**: Should USEPA's final rule be based on a "tribal reserved rights" framework, rather than a traditional water quality standards framework as recommended by the State Water Board, the State Water Board requests that USEPA confirm (in the final rule or preamble) that the State Water Board's subsequent submissions to USEPA of tribal water quality standards based on its existing water quality standards framework meet the consistency requirement of proposed 40 C.F.R. section 131.5(a)(9).*
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> *Alternatively, if USEPA finds that such submissions of tribal water quality standards would not meet the consistency requirement of proposed 40 C.F.R. section 131.5(a)(9), the State Water Board requests that USEPA include a grandfather provision in the final rule to ensure that states that are already implementing water quality protections for tribes solely through a traditional water quality standards approach may continue doing so.*

The State Water Board sincerely appreciates USEPA's effort to propose water quality protections for tribes and USEPA's consideration of the State Water Board's recommendations.

If you have any questions regarding these comments, please contact Senior Staff Counsel Marianna Aue at (916) 327-4440 or marianna.aue@waterboards.ca.gov, or Senior Staff Counsel Stacy Gillespie at (916) 341-5190 or stacy.gillespie@waterboards.ca.gov.

Sincerely,

Eileen Sobeck
Executive Director
State Water Resources Control Board