STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

March 6, 2023

Michael S. Regan
United States Environmental Protection Agency
EPA Docket Center, Office of Water Docket
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2021-0791

Administrator Regan,

The US Environmental Protection Agency's proposed rule, "Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights," represents a first-of-its-kind step that will press states into a new quagmire of regulatory burdens. These burdens will fall particularly hard on Idaho, whose boundaries include five federally recognized Indian tribes. As set out below, Idaho welcomes the opportunity to speak to important issues arising from the EPA's action and invites the EPA to the table to coordinate a better way forward.

Procedurally, the proposed rule warrants a longer public comment period with more public hearing opportunities. The current 90-day period, which is set to close on March 6, does not provide stakeholders sufficient time for input. And the two public hearings, each only two hours, left little room for dialogue. The proposed rule's novelty and complexity requires more. *See* 33 U.S.C. § 1251(e). So Idaho joins the other public commenters that have called on the EPA to extend the public comment period. Please do so.

Substantively, the proposed rule strays well beyond its statutory footing. The purpose of the Clean Water Act is to control pollution of federal waters. *See* 33 U.S.C. § 1251. But the proposed rule introduces a wholly new aim of preserving "tribal reserved rights." This experiment falls outside the scope of EPA's authority under the Clean Water Act. The Act delineates what the EPA may consider in setting water quality standards, and nothing approaching the category of tribal reserved rights is among the considerations. *See* 33 U.S.C. § 1313(c)(2)(A). Simply put, protecting federal waters from pollution is not the same as protecting "past, present, or future" tribal rights. Nor is EPA entitled to administrative deference, whether for its

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rulemaking or for the scope of its jurisdiction, with respect to Indian treaties and their accompanying federal regulatory regime, which EPA does not administer.

This new endeavor also introduces an entitlement foreign to the CWA regulatory landscape. Under the proposed rule, State Water Quality Standards must be informed by "right holders" and protect "tribal reserved rights." This effectively codifies an entitlement to the *continuing availability* of "aquatic and/or aquatic-dependent resources," as opposed just to access such resources. And trusteeship of the so-called tribal reserved rights is being foisted upon states. The Clean Water Act in no way delegates this rulemaking authority to the EPA. At the very least, such a major question requires a clearer delegation from Congress.

The proposed rule thus runs afoul of important constitutional concerns. It tramples over federalism by commandeering states and their resources. For example, the EPA now commands states to (i) discover the "current and past use" of tribal reserved rights (a feat that has eluded the federal government for 150 years); (ii) consult with "Right Holders"; (iii) designate uses that "expressly incorporate protection of tribal reserved rights or encompass such rights"; (iv) establish water quality criteria that "protect tribal reserved rights"; (v) hold public hearings to evaluate whether there are tribal reserved rights in need of protection; and (vi) reexamine any waterbody segment with water quality standards to ensure tribal reserved rights are protected, amongst other tasks. This gargantuan demand not only disrespects state sovereignty, but it also imposes an enormous economic burden on states—one that plainly makes the proposed rule a "major rule" under 5 U.S.C. § 804(2).

The proposed rule also unnecessarily entangles states with federal questions of tribal relations. Any "treaty, statute, executive order, or other source of federal law" is the province of the federal government, not Idaho, to figure out with tribes. Indeed, the US Constitution reserves this role to the federal government. States should not be forced to act as ambassadors to tribes to ensure federally granted rights are protected.

Congress enacted the Clean Water Act under its Commerce Clause powers. The proposed rule demonstrates just how far afield from that constitutional grant the EPA has run. And so the bottom line is that the Clean Water Act is not the proper vehicle to protect what the EPA is calling tribal reserved rights. Idaho respectfully requests the EPA to withdraw the proposed rule or at the very least to extend the public comment period an appropriate length for additional stakeholder input.

Respectfully,

/s/ Scott L. Campbell
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Chief, Energy & Natural Resources Division