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March 3, 2023

Mr. Michael S. Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Dear Administrator Regan,

The Environmental Protection Agency (EPA) recently issued a new proposed rule, *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights*. This proposed rule dramatically impinges on states' rights to develop water quality standards for state waters as specifically reserved to the states by Congress in the Clean Water Act.

The proposed rule asserts that states must now take into consideration tribal treaty rights outside of designated reservations in setting state water quality standards, a substantial change to federal interpretation of the Clean Water Act not based on any revisions to the law. Rather it is based on EPA's attempt to mandate a result based on treaty right interpretation--an area where the agency has no jurisdiction or expertise. The Clean Water Act does envision a role for Tribes to set water quality standards within reservation boundaries under the treatment of state provisions of the Clean Water Act, and many Tribes have taken advantage of these provisions. However, there is nothing in the Clean Water Act that mandates Tribes must be part of the state water quality standards-setting process outside treaty land. The EPA proposal clearly encroaches on state sovereignty under the Clean Water Act and the U.S. Constitution.

Additionally, the mandate in the proposed rule as to how states must set water quality standards for state waters based on implied tribal treaty rights is equally problematic. Rather than requiring states to analyze current conditions of state waters, the proposed rule mandates that when setting water quality standards, states must now consider, or speculate, what water quality and aquatic resource conditions were when Tribal treaties were executed in the middle of the 19th century. This unprecedented requirement directs states to essentially ignore development over the last 175 years and set water quality standards accordingly whether such requirements are attainable or not. Nothing in the Clean Water Act mandates such a result, clearly indicating this proposed rule to be a severe overstep by the EPA. If such a requirement becomes part of the state standard-setting process, the ability for Idaho industries, businesses, and municipalities to economically operate within the law will be substantially affected.


The proposed rule will uniquely impact Idaho due to recent legal developments within the state. Between 2014 and 2019, the state of Idaho undertook a lengthy and comprehensive water quality standard-setting process that included engaging a statewide fish consumption study to set water quality standards, with consideration for modern Tribal fish consumption rates. Although the EPA balked at approving these science-based standards for the same reasons articulated in the new proposed rule, the standards were ultimately approved. The proposed rule would clearly undermine Idaho's extensive and collaborative efforts.

Additionally, the proposed rule, which is based on the premise that Tribal treaties imply reserved rights to water quality in state waters outside reservations, could have significant and concerning implications for water quantity by suggesting that treaties give Tribes an implied reservation to water rights outside the Reservation.

Although such broad claims were raised in the Snake River Basin Adjudication by the United States, they were soundly rejected by Idaho courts. This proposed rule would now embolden similar claims to be raised again throughout the state of Idaho, putting vested water rights at major risk.

The proposed rule is a substantial overreach by the EPA beyond anything Congress ever envisioned. The proposed rule must not go forward. We look forward to your action and response.

Sincerely,



JAMES E. RISCH
United States Senator



MIKE CRAPO
United States Senator



MIKE SIMPSON
Member of Congress



RUSS FULCHER
Member of Congress