



February 24, 2023

EPA Docket Center
Sara Hisel McCoy
Director, Standards and Health Protection Division
Office of Water, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Washington, DC 20460

Subject: Comments Docket ID No. EPA-HQ-OW-2021-0791-0001, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

Dear Director:

Thank you for the opportunity to review and provide comments to the proposed rule on Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (TRR), dated December 4, 2022. As a co-regulator and delegated state, Idaho Department of Environmental Quality (IDEQ) has a keen interest in this rule and its potential to impact the majority of the state's waters.

IDEQ is first requesting that the U.S. Environmental Protection Agency (EPA) provide at least a 60-day extension of the public comment period. This proposed rule has broad economic and regulatory impact on the citizens of Idaho, and IDEQ is requesting additional time to clearly understand these impacts to provide further constructive comments. However, IDEQ has identified and highlighted our initial concerns below.

In section IV.E of the proposed rule revision, "EPA has concluded that this action does not have federalism implications." Also stating that "it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." IDEQ disagrees with this conclusion and believes it is in direct conflict with Executive Order 13132¹. This rule proposes the ability of EPA to override IDEQ state negotiated and approved water quality standards.

IDEQ has undertaken several lengthy and involved updates to our water quality standards recently, to include updates to our human health criteria (via a revision to our fish consumption rate), bacteria, and arsenic. These efforts took at least 2 years and up to 5 years to complete, were exhaustive of limited state resources (\$100,000 to \$750,000 of state general funds), and required significant staff time (2-5 FTEs per year). Adding the federal responsibility of identifying tribal reserved rights, conducting federally required consultation, and re-doing all these actions without sufficient time to plan or budget for them, would magnify the burden to an already overburdened program. As EPA is lagging in their responsibility to keep CWA §304(a) recommended criteria up to date and with the ever increasing number of

¹ Title 3, Executive Order 13132, August 4, 1999, Federalism. <https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf>

contaminants of emerging concern, state water quality standards programs are being adversely affected.

EPA failed to comprehensively consult with States on possible approaches or the background in creating the rule prior to the draft release. A substantial change such as this proposal, that could potentially impact the entire state of Idaho, should have included an inclusive consultation with state agencies, including IDEQ, prior to and during the drafting of the rule. In addition to these concerns, IDEQ would like to highlight the following that IDEQ believes needs to be addressed prior to the finalization of the rule.

IDEQ's water quality program works to protect the health of all residents dependent on the state's aquatic resources, including Tribal members. Any new or ongoing state rulemaking, to include our triennial review process, is conducted through an open process in which the Tribes and EPA are included, and their contribution is valued. This revision proposes that during the Triennial review process that states "provide an opportunity for tribal right holders to engage and provide information the state can use in this evaluation." This is something IDEQ has historically done.

I. Federal obligation to clarify treaty rights.

Under the proposed rule, 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." However, despite the federal nature of these agreements, and the variety of sources from which tribal reserved rights may be determined, EPA is putting the burden of establishing the extent of these reserved rights on the states. As part of a November 2021 Memorandum of Understanding (MOU) regarding Tribal Treaty Reserved Rights², 17 participating agencies, including the EPA, agreed to "support the creation, integration, and use of a searchable and indexed database of all treaties between the United States government and tribal nations, to facilitate compliance with our treaty obligations..." The establishment of such a database would certainly make querying EPA on tribal reserved rights a much simpler and streamlined process. IDEQ supports, at a minimum, the fulfillment of this MOU obligation as a precursor to the finalization of the tribal reserved rights rule.

The MOU also outlines how these federal agencies will strengthen consultation policies to give clear guidance on the duties and responsibilities of the parties to incorporate tribal treaty and reserved rights in their decision-making process, improve consultation, and develop best practices. Indeed, many of the obligations set out in the MOU complement the goals of the tribal reserved rights rule; however, not enough time has elapsed since the signing of the MOU for many of these precursory obligations to be fulfilled at the federal level, which would establish a clearer path forward for the application of the proposed rule for the states.

Requiring states to research, evaluate, and initiate consultation directly with all the tribes that claim reserved treaty rights in our state would significantly increase the workload to an already taxed staff. In Idaho, five tribal nations reside within the state, each claiming various fishing rights under divergent treaties and executive orders. Three of the five tribes have "treatment of state" while two do not. The October 2021 Summary Report³ of Tribal Consultation for the Proposed Rule, several tribes responded

² Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, November 2021, <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>

³ Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, EPA, October 2021

with a similar concern stating, “EPA cannot delegate its trust responsibility to consult with tribes and protect tribal reserved rights to states, noting that tribes’ government-to-government relationship is with the federal government rather than states.”

This rule, as it’s currently written, shifts the regulatory burden of implementing existing EPA responsibilities to states —likely to the detriment of tribe-state relationships. In addition, during the negotiated rule making process, if one of the five tribes chooses not to engage with the state, it is unclear how IDEQ would be able to submit the rule in confidence that it has met the full tribal consultation requirement. According to the proposed rule section V.C.1, “In order to ensure that tribes with reserved rights are engaged in the process of determining whether reserved rights apply, proposed 40 CFR 131.6(g)(1) would require that WQS submissions to EPA include information about tribal reserved rights “**as informed by the right holders,**” where applicable” rather than “made opportunities for right holders to inform”.

II. Undo financial burden.

As part of the proposed rule, EPA prepared an Economic Analysis⁴ to inform the public of potential costs and benefits of this proposed rulemaking, including the estimate the potential administrative burden and costs to state governments. IDEQ disagrees with section 2.4 Estimated Burden and Cost to States. The amount of labor hours is very difficult to quantify, and for a state that is already overburdened, quantifying the task of revising water quality standards for both human health and aquatic life is insurmountable. The time it would take to complete consultation with disparate tribal governments, in addition to the already lengthy time devoted to open and transparent negotiations of rule language, would detract from IDEQ’s ability to protect water quality and ensure compliance with the current water quality rules.

The burden to the regulated community is not accounted for in this analysis, “EPA could not predict requirements that could ultimately be imposed on NPDES permittees and nonpoint sources”. If IDEQ were to undergo negotiated rule making and end in a substantive change to criteria, our over 1,400 current permits and hundreds of new permits issued through our Idaho Pollution Discharge Elimination System (IPDES) would require updates, and the permitted facilities would need to upgrade their wastewater treatment controls in order to comply with new or revised limits. In addition, the greatest burden of facility upgrades would hit the hardest the in Idaho’s most vulnerable communities that do not have the means or ability to implement upgrades. The Economic Analysis⁵ states that for the regulated community “...it is not clear whether or to what extent this proposed rule would impose additional costs beyond those incurred in complying with current requirements.”

III. Clarity on implementation.

In the proposed rule EPA states that one of the objectives of the proposed revision is to create a uniform approach to the establishment of water quality standards for tribal reserved rights, but then goes on to lay out several ways in which the standards can be site specific. The proposed rule language is broad, ambiguous, and difficult to apply.

⁴ Economic Analysis for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule), EPA, November 2022

⁵ Economic Analysis for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule), EPA, November 2022

The proposal explains that the unsuppressed analysis “should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody” but provides very little detail on how “reasonably achievable” would be determined. Waterways within Idaho are impacted by over 1,178 dams⁶, both within and downstream of state borders, that produce a substantial amount of power and have altered the ecosystem to the point it would not be economically feasible to restore the ecosystem to pre-altered pre-dam conditions.

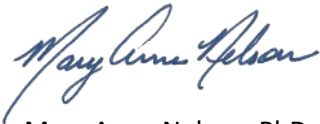
In Idaho, as in several western states, tribal reserved rights for a particular water resource may span state boundaries and with conflicting information, gaps in science, or professional opinions as to how and to what level to protect the reserved right, it remains unclear how this conflict would be resolved. IDEQ requests clarification on EPA responsibility as the trustee for resolving conflicts through consultation and the expected processes or timelines.

IDEQ has spent years developing site specific criteria for some constituents, through the stakeholder negotiation process, along with significant expense and research. It is unclear how or if these site-specific areas would be handled if this rule was implemented. In the Summary Report of the Tribal Consultation many tribal comments requested “clarification on how the level of water quality necessary to protect tribal reserved rights will be determined, who will be responsible for such determinations, and what will happen in the event of disagreement between the relevant state(s) and tribe(s).” IDEQ echoes these requests for additional clarity.

Additionally, proposed Section 131.9 requires that water quality standards be established to protect the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource. To determine the extent of unsuppressed tribal rights, EPA is asking states to determine the state of resources that existed when the tribal right was established. This is a responsibility of the federal government as the party to the treaty not the state.

In closing, IDEQ reiterates our request for an extension of the comment period for further discussion on the proposed rule.

Sincerely,



Mary Anne Nelson, PhD
Surface & Wastewater Division Administrator

c: Beth Spelsberg, IDEQ

⁶ <https://data-idwr.hub.arcgis.com/apps/dams-of-idaho-2/explore>