

March 3, 2023

Michael S. Regan
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
Washington, DC 20460

Submitted Electronically via Regulations.gov

RE: Comments on the Proposed Rulemaking Titled “Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights” (Docket ID No. EPA-HQ-OW-2021-0791)

Dear Administrator Regan:

The North Dakota Department of Environmental Quality¹ (NDDEQ) appreciates the opportunity to comment on the proposed revisions to the Water Quality Standards (40 C.F.R. pt. 131) to protect Tribal Reserved Rights. *See* 87 Fed. Reg. 74361 (proposed Dec. 5, 2022) (to be codified at 40 C.F.R. pt. 131) (Proposed Rule). NDDEQ, which has the authority for implementing North Dakota’s Water Quality Standards (WQS) as required by 33 U.S.C. § 1313, supports engaging tribes in the standard-setting process. However, the Proposed Rule is not the appropriate mechanism to do so. It will not “provide clarity, transparency, and predictability” but will instead create confusion and chaos. 87 Fed. Reg. at 74366. NDDEQ therefore requests that the Environmental Protection Agency (EPA) reject the Proposed Rule.

I. The Proposed Rule cannot be implemented.

The Proposed Rule cannot be implemented because the foundational step of the rule is impossible to execute. Under the Proposed Rule, states must first determine if tribal reserved rights apply in waters subject to state WQS. 87 Fed. Reg. at 74367. EPA acknowledges that this “may be a complex inquiry,” but fails to recognize that making this determination is beyond the scope of authority and outside the expertise of both EPA and NDDEQ. *Id.* NDDEQ is not aware of anything in the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., that gives it – or EPA – the authority to determine tribal reserved rights. NDDEQ and EPA are environmental experts, not Indian law experts.

Treaty rights are socially, politically, and legally complex issues. EPA’s overly simplistic directive that states should just ask the right holder ignores the reality that states may have no idea who possible right holders are, particularly for tribes that are no longer located in the state, and that

¹ NDDEQ also supports and joins the comments submitted by the Association of Clean Water Administrators.

there could be disagreement between parties over who holds which rights. *See* 87 Fed. Reg. at 74367. During the tribal consultation period, tribes also expressed concerns with the process of determining tribal reserved rights. EPA, *Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights* (Oct. 2021), <https://www.epa.gov/system/files/documents/2022-11/summary-report-tribal-consultation-proposed-rule-wqs.pdf>. Neither EPA nor NDDEQ is the proper entity to make a determination in the event of a treaty dispute.

Not only would the Proposed Rule require NDDEQ to undertake a task certain to fail, but it would also harm the relationship between the State of North Dakota and the tribes. NDDEQ strives to have a good working relationship with its tribal counterparts. Putting NDDEQ in the middle of possible treaty disputes would injure this relationship. The Proposed Rule will harm state-tribal relations.

II. The Proposed Rule is unnecessary.

When developing WQS, NDDEQ already determines the level of water quality necessary to protect aquatic life and users of the resource. *See* 40 C.F.R. § 131.6. Like all states, NDDEQ conducts a triennial review of its WQS that includes the opportunity for public comment. *See* 40 C.F.R. § 131.20. If NDDEQ is aware of a tribal reserved right, it will ensure that use is protected during its triennial review of its WQS. If there is a tribal reserved right that NDDEQ is unaware of, a right holder can bring that to NDDEQ's attention during the triennial review or by simply contacting NDDEQ.

As EPA recognizes, “[f]or many aquatic and aquatic-dependent resources that tribes have rights to fish, hunt or gather, the existing Federal WQS regulations already require states to provide a level of protection consistent with this proposed rulemaking.” 87 Fed. Reg. at 74370. EPA identifies two categories that may require revisions to a state's WQS: fish consumers and wild rice. *Id.* at 74371. But it is not necessary to revise the existing Federal WQS regulations to address these two circumstances. If a population is more vulnerable due to cultural difference (e.g., above average consumption of aquatic organisms) or physically (e.g., child, youth, or sex), there is authority under 40 C.F.R. § 131.4(a) to write WQS more stringent than required by CWA Sections 101(a)(2) or 304(a).

In its Proposed Rule, which requires that WQS must protect the health of the right holders to the same risk level as provided to the general population of the state, EPA gives the impression that it does not believe states develop WQS protective of everyone regardless of their geographic location. 87 Fed. Reg. at 74366. This is inaccurate and disrespectful to state partners.

III. The Proposed Rule is an unfunded mandate.

EPA states, “[t]his action does not contain any unfunded mandate as described in [the Unfunded Mandates Reform Act] UMRA, 2 U.S.C. 1531–1538” *Id.* at 74375. However, if adopted the

proposed revisions and additions to 40 C.F.R. pt. 131 would require investing a substantial increase of labor and expertise in the WQS review process, with no mechanism to pay for it.

For example, as proposed, the revisions would require: (1) the state to determine if a Tribal Reserved Right applies to a state water; (2) the nature of the right (*i.e.*, a fishing right, a hunting right, a resource gathering right); (3) where the right applies (*i.e.*, to a specific set of waterbodies or to waters generally within a broad geographic area); and (4) how the right is exercised by the right holders (*e.g.*, for subsistence purposes).

States would then have to develop WQS to protect any tribal reserved rights that were determined to be applicable. This would require determining the level of water quality necessary to protect users of the resource and/or the aquatic or aquatic-dependent resource itself, based on available data. This level of water quality is to be determined by applying proposed 40 C.F.R. § 131.9(a)(1) & (2) by requiring the state to: (1) determine the level of water quality needed to protect the right; (2) accounting for suppression effects and protecting right holders to the same risk levels as the general population. 87 Fed. Reg. at 74366.

IV. Conclusion

NDDEQ urges EPA to reject the Proposed Rule. The Proposed Rule cannot be implemented, and is unnecessary and unfunded. Where tribal reserved rights require additional consideration of the appropriate WQS for relevant waters, EPA should work with the states and tribes, using the existing tools available under the Federal WQS regulations.

Sincerely,



L. David Glatt, P.E.
Director

LDG:kmm