



*STATE OF OKLAHOMA*  
*OFFICE OF THE*  
*SECRETARY OF ENERGY & ENVIRONMENT*

March 6, 2023

Submitted via: <https://www.regulations.gov/>

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

RE: U.S. Environmental Protection Agency's proposed *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Right*, EPA Docket ID No. EPA-HQ-OW-2021-0791

Dear Administrator Regan:

On behalf of my office and the Oklahoma Department of Environmental Quality, please accept the following comments in response to EPA's Proposed *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, EPA Docket ID No. EPA-HQ-OW-2021-0791, 87 Fed. Reg. 74,361 (Dec. 5, 2022). The proposed rule, if finalized, would have a substantial impact on the State of Oklahoma. As such, the opportunity to provide comments on the proposed rule, as well as EPA's consideration of said comments, is greatly appreciated.

As an initial matter, the precise relationship between water quality standards and reserved rights is unclear. However, the State of Oklahoma recognizes and appreciates the need, and without question shares the desire, to protect water rights and beneficial uses of water, including tribal reserved rights. Nevertheless, as drafted, the proposed rule would be essentially impossible to successfully implement in our State, and would undoubtedly and inappropriately, provide an opportunity for the federalization of Water Quality Standards in Oklahoma. Consequently, for the reasons detailed below, the State of Oklahoma requests that EPA not finalize the proposed rule.

*Determination of Reserved Rights*

It appears that the intended purpose of the proposed rule is to ensure that reserved rights are adequately preserved and protected by new or existing Water Quality Standards. A key requirement in the proposal is that States gather information and determine the nature and extent of reserved rights impacted by such Water Quality Standards. First and foremost, it does not appear that EPA has the authority to make a determination related to reserved rights, let alone the ability to delegate such authority to the States. Notwithstanding this lack of authority, prior to considering the role that Water Quality Standards play in protecting and preserving reserved rights (and definitely prior to determining that new and existing Water Quality Standards must

affirmatively demonstrate that such reserved rights are adequately protected), the reserved rights should *first be determined or adjudicated by a court of competent jurisdiction*. As EPA recognized in the proposed rule, determining the nature and extent of a reserved right requires an incredibly complex analysis. As defined in the proposed rule, a reserved right includes “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.” 87 Fed. Reg. at 74,362. The sources of Federal law that establish reserved rights do not typically lay out the precise nature and extent of the reserved right, but instead require a determination of the nature and extent of the right necessary to satisfy the purpose of the reservation. Every element of the proposed definition requires an extremely complex analysis: “any rights;” “aquatic and/or aquatic-dependent resources;” “reserved or held;” “expressly or implicitly;” and “through treaties, statutes, executive orders, or other sources of Federal law.”

To further complicate the determination, the proposed rule also provides that the States must determine what constitutes the unsuppressed use of any reserved resources (unsuppressed by water quality or availability), which requires the consideration of past, present, and future uses (which in turn requires taking “into account factors that may have substantially altered a waterbody.”). 87 Fed. Reg. at 74,367. This type of determination is difficult anywhere (as evidenced by the enormous number of State and Federal court cases dealing with such adjudications) and would be especially challenging in Oklahoma considering that 39 federally recognized tribal nations are located within the State’s exterior boundaries and that Indian country in Oklahoma ranges from reservations to over one hundred thousand acres of tribal trust land scattered across the State. Determining the nature and extent of the reserved rights applicable to each tribal nation would be especially difficult considering that any such reserved rights were likely created through separate and distinct treaties, statutes, executive orders, and/or other sources of Federal law.

#### *Primary Role of States in Protecting Water Quality*

Considering the geographic extent of Oklahoma’s unique jurisdictional situation, each statewide Water Quality Standard could potentially implicate reserved rights involving all 39 federally recognized tribal nations in Oklahoma. In addition, it appears that the proposed rule would also require the State to determine that all existing Water Quality Standards are adequately protective of all reserved rights during the required triennial review, and that such a determination would have to reoccur every three years. *See* 87 Fed. Reg. at 74,367 (Pursuant to the proposed rule, when conducting the triennial review of existing Water Quality Standards, States are required to “include an evaluation of whether there are tribal reserved rights applicable to waters subject to the state’s WQS and whether WQS need to be revised to protect those rights.”). The complexity of determining the nature and extent of reserved rights makes any single determination made by a State vulnerable to challenge by EPA or a third-party. When the number of new and existing Water Quality Standards is multiplied by the number of tribal nations potentially holding reserved rights in Oklahoma, the resulting number of complex and potentially controversial reserved rights determinations all but guarantees that the State would face difficult challenges to the nature and extent determination alone. The likelihood of challenge becomes even greater considering that each one of those determinations would likely need to be reviewed and updated every three years. These vulnerabilities will exist even before the State makes the difficult determinations related to the quality of water necessary to protect and preserve the reserved rights.

Again, the sheer number of court cases involving the determination of reserved rights demonstrates the difficulty involved in making such determinations, as well as the likelihood that any such State determination would be vulnerable to an infinite number of potential challenges. If, as proposed, such a determination is considered by EPA to be a prerequisite to developing approvable Water Quality Standards, then the challenge of any such determination is all but guaranteed and would be a potential justification for EPA to disapprove any related standard developed by the State, which would likely result in the federalization of Water Quality Standards in Oklahoma. In other words, requiring such a challenging determination to occur as part of the Water Quality Standards promulgation process, provides EPA with much greater discretion in determining that a State's standard is insufficient. The proposed rule recognizes that EPA must promulgate a Federal Water Quality Standard if it believes a State standard does not adequately protect a reserved right. Moreover, the complexity of such a determination would also bring the process of developing and promulgating new and revised Water Quality Standards to a halt. Failing to meet the required timelines could, in and of itself, provide a justification for EPA to federalize Water Quality Standards in Oklahoma. As stated by EPA in the proposed rule, "[s]hould a state fail to meet this tight timeline, EPA would be obligated to promulgate WQS for the state." 87 Fed. Reg. at 74,363. Mandating a determination that results in making a State's ability to successfully promulgate Water Quality Standards so vulnerable to challenge would be inconsistent with Congress' intent that the States are charged with the primary responsibility and right to prevent, reduce, and eliminate water pollution and to plan the development and use of water resources within their boundaries. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.").

#### *Burden on State Resources and Uncertain Regulatory Process*

Determining reserved rights is not typically a State environmental agency responsibility. Generally, State environment agencies do not have the expertise or personnel necessary to conduct the required complex reserved rights determinations. The creation of such a new and expansive responsibility would place a significant burden on already strained State resources. The potential impact on State resources from an unfunded federal mandate such as that required in the proposed rule cannot be overstated. In addition to the strain on State resources, the uncertainty related to determining the nature and extent of all reserved rights that must be protected in new and existing Water Quality Standards would result in a corresponding uncertainty to the adequacy of existing water quality discharge permits and the availability of new or modified discharge permits. This uncertainty would place a significant burden on the State water agencies and the regulated community.

*Conclusion*

As mentioned above, the State of Oklahoma appreciates the opportunity to comment on the proposed rule. Furthermore, the State strongly supports the protection of water rights and beneficial uses of water; however, the proposed rule, as drafted, is unworkable and would likely result in the federalization of Water Quality Standards in Oklahoma. Consequently, the State requests that EPA not finalize the proposed rule.

Sincerely,

A handwritten signature in blue ink that reads "Ken McQueen". The signature is written in a cursive, flowing style.

Ken McQueen  
Secretary of Energy & Environment