Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights
Comment period ends 3/6/23
Federal Rulemaking Portal: https://www.regulations.gov/
Docket ID No. EPA-HQ-OW-2021-0791

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To Docket ID NO. EPA-HQ-OW-2021-0791:

The South Dakota Department of Agriculture and Natural Resources (DANR) appreciates the opportunity to comment on the Environmental Protection Agency (EPA) proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (proposed rule). DANR has reviewed the proposed rule, engaged in listening sessions, and attended webinars regarding the proposed rule and provides the following comments.

South Dakota DANR recommends EPA withdraw the proposed rule. It is evident EPA has not thought through this proposed process, which is merely a concept with no meaningful implementation or conflict resolution strategies. It is destined to create an impasse on future state water quality standards submissions.

If EPA goes forward with this rulemaking, DANR requests EPA that EPA provide at least a 60-day extension of the public comment period. This proposed rule has broad economic and regulatory impact in South Dakota and additional time is necessary to clearly understand these impacts and provide further constructive comments. However, until such time as EPA withdraws the proposed rule or provides additional time for public comment, below are DANR's initial concerns with and recommended changes to the proposed rules:

1) This rule is not necessary, because there is already a legal requirement to protect treaty rights and downstream uses.

The Clean Water Act (CWA) already requires that water quality standards support downstream uses, which include protecting tribal reserved rights. The Preamble to the rule cites cases in Washington and Maine where reserved rights were determined, the exercise of those rights quantified, and appropriate standards to protect those rights were developed. The CWA and EPA expertise in developing criteria became a part of this process as a final step, after rights were determined. The proposed rule inverts this process placing both the determination of rights and exercising those rights under oversight of the triennial review process.

In section III.C. of the preamble to this proposed rule, EPA uses the statement in the CWA Section 511(a)(3), of the Act *"shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States."* as the basis for the proposed rule. DANR believes this interpretation is an overreach of federal authority because EPA is reaching beyond 511(a)(3) by undertaking a rulemaking that will interject EPA into the determination of reserved rights and evaluation of how those rights are exercised. The proposal implies any and all treaties, statutes, executive order, and other sources of Federal law apply to all tribes and all states.

2) EPA is assuming authority over the adjudication of rights by forcing this process through the States' triennial reviews and water quality standards changes.

Essential for implementation of this rule is the identification of tribal reserved rights. EPA intends to act as the mediator between states and tribes to determine what tribal reserved rights exist and if the state adequately protects those rights. EPA does not have the authority to arbitrate or determine what tribal reserved rights exist. In fact, many states, including South Dakota, have not fully adjudicated what tribal reserved rights exist. Of additional concern is the proposed rule does not provide clarity that the states would have any input in EPA's determination.

3) EPA's deliberate ambiguity with reference to Winters Rights raises questions about the intent of the rulemaking.

The proposed rule states "[t]ribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of Winters rights." By using the word "generally," EPA is not excluding the possibility that Winters rights may be considered as part of a tribal reserved right. This rulemaking should not be a backdoor approach in determining water quantification or used in a manner that sets precedence for which reserved rights exist. EPA does not have the legal authority to determine if a reserved right exists, and therefore, should not create a rule where EPA determines if that alleged right is protected as a part of water quality standards approval.

4) EPA has grossly underestimated the likelihood of litigation to determine reserved rights.

In the proposed rule, the tribal reserved rights may be held either expressly or implicitly through treaties, statutes, executive orders, or other sources of Federal law. If a tribal reserved right is implicitly held, that determination must be made either by the states and the tribes together, perhaps with the assistance of the United States Bureau of Indian Affairs or adjudicated in a court of law. EPA did not address time or money spent in litigation when considering the economic impacts of the rule, and added time and money to the water quality standards rule review process. EPA should reevaluate the potential and economic impacts of litigation and the water quality standards submission and approval process timeline extensions.

5) The proposed rule reassigns the responsibility for criteria development from EPA to the States.

The CWA is clear EPA is responsible for developing and publishing criteria and methods for water quality. The CWA Section 304(a) identifies the duty of EPA to establish criteria and methods and provide this information to the states. Section 304(a)(1) provides *"[t]he Administrator... shall develop and publish … criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare … which may be expected from the presence of pollutants in any body of water…. The Administrator… shall develop and publish ... information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water…."*

Section 304(a) further provides, *"[s]uch criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public. … The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants…. The Administrator shall … publish and revise as appropriate information identifying each water quality standard in effect under this chapter or State law, the specific pollutants*

associated with such water quality standard, and the particular waters to which such water quality standard applies. … Guidance to States – The Administrator, after consultation with appropriate state agencies and on the basis of criteria and information published in paragraphs (1) and (2) of this subsection, shall develop and publish … guidance to the States on performing the identification required by subsection (1)(1) of this section."

With this proposed rule, EPA disregards their responsibility under Section 304(a)(1) and passes the obligation to the states, putting an undue burden on the states.

6) The rule fails to define "aquatic or aquatic dependent resources."
The proposed rule is intended to protect "aquatic or aquatic dependent resources"; however, the phrase is not defined. These terms must be defined. DANR has twice asked EPA to discuss and define these terms, but EPA has remained silent with no proposed definition or substantive information provided to the states for a better understanding of the intent. Deliberate ambiguity creates uncertainty about where and how the rule will apply. If EPA continues with this rulemaking, this term requires a definition and opportunity for the public to evaluate and provide comments.

7) EPA does not have the authority to arbitrate how tribal rights are exercised.
40 CFR § 131.5(a) lists the factors EPA considers in determining whether state adopted water quality standards are consistent with CWA section 303(c). The proposed rule adds § 131.5(a)(9), specifying that when reviewing new or revised standards, EPA will evaluate whether water quality standards sufficiently protect tribal reserved rights. However, EPA has not provided information or guidance on <u>how</u> EPA will make that determination, other than in the proposed rule, EPA suggests the state consult with tribes and EPA to determine the appropriate protections necessary to protect the reserved right. EPA does not have the authority to arbitrate how a tribal reserved right is exercised and the level of protection that may be necessary to protect that right. If EPA continues with this rulemaking, they must define the process on how EPA will determine, including acceptance criteria, if water quality standards sufficiently protect tribal reserved rights.

In addition, DANR disagrees with the proposed language of § 131.5(a)(9) for three reasons: 1) the responsibility to develop and provide criteria and methods is the obligation of EPA, not the State; 2) requiring the agreement of tribal governments regarding the State's water quality standards infringes upon the State's right to establish water quality standards for state waters (either by adopting EPA criteria or developing state criteria); and 3) most states and tribes lack the expertise to develop state-specific water quality standards and criteria.

8) The water quality standards process must be rooted in science, not perceptions. The State should not be tasked with investigating "perceived" pollution or impacts.

Proposed 40 CFR § 131.6(g) would require states to submit "data and methods used" to develop water quality standards that protect tribal reserved rights. EPA recommends in the preamble that states request information from the right holders such as types of pollutants <u>perceived</u> to be impacting their rights, key aquatic species, and/or consumption rates that would be useful in developing protective water quality standards pursuant to proposed 40 CFR §131.20(a). EPA has not considered how states and right holders will reach an agreement on what types of pollutants are "perceived" to be impacting rights, who is responsible for determining if a "perceived" pollutant or impact is occurring, or how it is determined if the "perceived" pollutant is impacting a reserved right. The proposed rule should not require a state to investigate "perceived" pollutants or impacts without establishing a process that includes some accountability and responsibility for all parties. EPA should not codify a rule that simply allows a right holder to claim a "perceived" pollutant or impact and require the State to fully investigate that allegation. Requiring the State to act on

"perceived" pollution or impacts will result in an endless waste of time and money. If EPA continues this rulemaking effort, EPA must remove any discussion of perceived impacts and instead provide the science necessary to reach an agreement on the impacts and the steps necessary to address the impacts.

9) The proposed rule cannot reasonably be carried out within the time constraints of a rule change or triennial review and will likely result in time delays and failures.

EPA is also proposing to add an element to the list of "Minimum Requirements for Water Quality Standards Submission" set forth in 40 CFR § 131.6. by requiring submissions to include 1) information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders; and 2) data and methods used to develop the water quality standards. EPA suggests these elements be carried out before and/or during the public involvement process. EPA has grossly underestimated the time involved for meaningful engagement on tribal reserved rights and developing water quality criteria to protect the reserved right. The proposed rule cannot reasonably be completed within the time constraints of a rule change or a triennial review. There is a broad range of possible issues including: disagreement on what reserved rights exist, disagreement on "perceived" pollutants or impacts, disagreement on the level of protection necessary to protect the reserved right, lack of available data to show that a "perceived" pollutant is causing an impact, lack of availability of federal resources to provide guidance on specific treaties, the fact that many reserved rights or water rights have not been identified or adjudicated, and most importantly that EPA does not have the authority to determine if a reserved right exists or how that right is exercised. These issues will cause delays or failures in adopting water quality standards in a timely manner.

In addition, there is no obligation for EPA to consult with the tribes until the agency is reviewing a state's water quality standards submission. If the state invites tribes to provide input early in the process, there is no requirement for the tribe to timely bring issues forward. By initiating formal tribal consultation after the state's efforts for input, EPA is setting the stage for standards approvals to lag indefinitely. In South Dakota, changes to our surface water quality standards become state rules, with the force and effect of law, whether or not EPA approves the standards. South Dakota could be left in limbo where our state rules conflict with EPA-approved water quality standards, effecting our state's water protection efforts, limiting our ability to issue discharge permits, develop and implement total maximum daily loads, or issue our biennial Integrated Report.

If EPA continues this rulemaking process, they must reconsider the proposed rule and its implications on future state rule changes and triennial reviews. There is need to protect water for all users, but water quality rule changes and the triennial review process are not the place to delay protection efforts until tribal reserved rights agreed upon.

10) Proposed 40 CFR 131.9(a)(1) conflicts with 40 CFR 131.10(d).

Proposed 40 CFR § 131.9(a)(1) requires water quality standards to the extent supported by available data be established to protect "the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource." This is intended to address situations where existing water quality is lower than what is necessary for right holders to fully exercise their tribal reserved rights. This proposed requirement appears to conflict with 40 CFR § 131.10(d) *"[a]t a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control."* The proposed rule requires water quality standards be established to protect tribal reserved rights unsuppressed by water quality or the availability of the aquatic resource regardless if the use is attainable. DANR

recommends that if EPA continues with this rulemaking, they revise the proposed rule to address "unsuppressed" in terms of achievable and attainable. Additionally, by requiring the water quality standards to protect the reserved right unsuppressed by water quality, there is a likelihood states would be forced to set water quality standards that are not achievable. This will result in waters listed on the state's Section 303(d) list of impaired waters, and subsequently a total maximum daily load would be required. Again, DANR believes the EPA has grossly underestimated the economic impact of the proposed rule and recommends EPA reevaluate the economic impact to fully discuss the anticipated outcomes of the rule. This should include items such as increasing the state's workload with additional total maximum daily loads efforts without providing any increase in funding or other resources.

Thank you again for the opportunity to provide comments on the proposed rulemaking. South Dakota DANR cannot support this rule and respectfully requests EPA withdraw the proposed rules. If EPA moves forward with the rule, please address the above concerns to avoid unintentional consequences of the rulemaking. Thank you.

Sincerely,

Hunter Roberts
Secretary

cc: Marty Jackley, Attorney General