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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 6, 2023

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket, Mail Code 28221T
Docket ID No. EPA-HQ-OW-2021-0797
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: *Federal Register*, vol. 87, No. 232, Pages 74361 - 74379, December 5, 2022, U.S. Environmental Protection Agency; *Revised Definition of "Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights"*; *Notice of Proposed Rule; Availability of Public Comment*.

Dear Sir or Madame:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide comments on the rule proposed by the U.S. Environmental Protection Agency (EPA) to revise existing federal water quality standards regulations to protect tribal reserved rights. The proposal was published on December 5, 2022 in the *Federal Register*, vol. 87, No. 232, Pages 74361-74379. TCEQ has concerns with federalism issues, including the appropriateness and scope of water availability within the proposal, and the limited state resources available to comply with the revised regulations, if finalized as proposed. TCEQ has also provided comments on the need for clarification of key terms, and has suggestions on pertinent topics that may impact state water quality standards programs.

If you have questions concerning the enclosed comments, please contact Cari-Michel La Caille, Director of the Office of Water, at (512) 239-6479, or by e-mail at cari-michel.lacaille@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink that reads "Erin E. Chancellor".

Erin E. Chancellor
Interim Executive Director

Attachment

**Texas Commission on Environmental Quality (TCEQ) Comments on
Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights**

***Federal Register* Vol. 87, No. 232 74361-74379**

Background

On December 5, 2022, the U. S. Environmental Protection Agency (EPA) published for public comment a proposed rule to revise existing federal regulations for water quality standards (WQS) under the Clean Water Act (CWA). The revisions include new requirements for states to specifically protect tribal reserved rights for federally-recognized tribes. Tribal reserved rights are defined in the proposal 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.” The proposed rule includes extensive new requirements for states to engage and coordinate with federally-recognized tribes, ensure ongoing WQS review processes consider, and state-adopted WQS specifically protect, tribal reserved rights. EPA will consult with federally-recognized tribes on the protectiveness of state-adopted standards, and may disapprove or promulgate standards to meet the requirements of the CWA.

Federal WQS regulations codified at Title 40 Code of Federal Regulations (40 CFR) Part 131 provide the framework and requirements for states to develop and submit WQS for EPA approval. WQS adopted by states must be submitted for EPA approval prior to use in CWA activities such as: assessments for CWA Sections 305(b) and 303(d), total maximum daily loads, CWA Section 401 certifications, CWA Section 404 permits for dredged or fill material, and permitting of wastewater discharges. Currently, these regulations do not include requirements for states to consider and adopt WQS specifically for the protection of tribal reserved rights.

TCEQ offers the following recommendations as outlined below.

Comments Regarding *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights*

I. Comments concerning scope and limitation of federal authority.

- A. **The preamble and proposed rule revision should be revised to clearly indicate the scope and limitation of federal authority. Alternately, EPA may assume the responsibilities to implement these requirements as currently authorized.** EPA’s proposed revisions seem to delegate existing federal responsibilities to the states, by incorporating new requirements for states to consider and to protect treaty rights, rather than EPA, and circumvent established processes. Federal agencies (such as EPA) are required to consult with tribes on a government-government basis, pursuant to Executive Orders, Presidential

memoranda, and other authorities, on policies that have tribal implications, including regulations or actions that have a substantial direct effect on one or more Indian tribes. In particular, the proposed requirements establish a separate process from the “Treatment as States” (TAS) policy established in accordance with Section 518 of the CWA. The TAS process established at CWA Section 518(e) authorizes EPA to treat an “Indian tribe as a State” for purposes of administering water quality standards. EPA’s implementing TAS policies recognize tribes as self-governed, self-determined, and sovereign. Although mechanisms exist for EPA to delegate such responsibility (upon authorization by tribal nations), as part of cooperative agreements, the proposed rulemaking unilaterally creates new requirements for states and circumvents these established processes. If the existing processes are ineffective, including existing federal authorities and authorizations, the preamble and rule should be revised to clearly explain why new requirements are needed, and clarify the scope and limitations of federal authority.

Alternately, in lieu of rulemaking, EPA should assume these responsibilities to implement proposed requirements as part of their responsibilities already authorized by the U.S. Constitution and CWA, and memorialized in federal policies; including the identification of all tribal reserved rights. For example, EPA retains authority to implement the National Pollution Discharge Elimination System (NPDES) on tribal lands, regardless of a state’s delegation status to implement the NPDES program. EPA also has a primary role in consulting and coordinating with tribes. As stated in the preamble, EPA plans to coordinate with tribes during planned initial tribal consultation meetings with tribal reserved right holders, as specified in proposed 40 CFR §131.9(b), to determine whether state water quality standards protect applicable reserved rights. (See pages 74366 and 74367 in the FR.) Will EPA assume responsibility for identifying all tribal reserved rights in these consultation meetings, and then provide that detailed information to the appropriate states? Identifying and ensuring the protectiveness of tribal reserved rights, at the federal and tribal level, seems feasible given the existing federal regulatory framework.

- B. The definition of, and requirements to protect, tribal reserved rights needs clarification regarding their scope of applicability to water quality and water availability (quantity).** For example, does the definition of “tribal reserved rights” in proposed 40 CFR §131.3(r), as well as the proposed requirements to protect tribal reserved rights in 40 CFR §131.9, include sufficient water quantity to access and use fishing resources? Is water availability to access and use such resources within the scope of this regulation, if allocation of rights to state surface water is authorized and adjudicated within a state’s legal framework?
1. If water availability is not explicitly included in the definition and protection of “tribal reserved rights,” the language should be revised to clearly allow for, and explain, the limits of the exclusion.
 2. If water availability is intended to be included in the definition and protection of “tribal reserved rights,” how is this new regulation consistent with Section 101(g) of the CWA, which clearly recognizes state primacy in allocation of state surface water? Including water availability

has the potential to undermine Texas' authority to allocate and manage its surface water resources.

II. Concerns regarding state resources to comply with the proposed requirements.

- A. Implementation of the new regulations will require legal and technical expertise that may not be available within existing state resources. TCEQ requests federal resources be made available to implement new requirements.** If finalized as proposed, states will be required to identify any tribal reserved rights and document the scope, nature, and current and past use of the tribal reserved rights as informed by the right holders, as well as ensure WQS adopted by states are protective of tribal reserved rights. Specific legal and technical expertise will be needed to comply with these requirements, and to facilitate engagement and coordination with tribal right holders. Such expertise is not readily available within existing and limited state resources.

Since the scope of this proposed regulation includes consideration of only *federal* sources of law and policies (statutes, treaties, executive orders, etc.), EPA should ensure federal resources to coordinate and implement these provisions are available to states, particularly the identification of any and all applicable tribal reserved rights, and other pertinent information to identify and apply these rights for purposes of water quality standards. Such resources may be available within the EPA's American Indian Environmental Office, and each EPA Region's Tribal Program, including Regional Tribal Operations Committees. It is foreseeable that EPA could lead regional consultation meetings with tribes, and also invite state representatives, so that all parties can hear directly from the tribes on what issues need to be addressed related to tribal reserved rights. At a minimum, TCEQ requests EPA identify the aquatic and/or aquatic-dependent resources to be considered, using their existing federal authority. Without direct consultation with tribes (which is the purview of EPA), states cannot know which specific aquatic and/or aquatic-dependent resources are important to specific tribes. Following EPA's tribal consultation, a list of specific resources should be developed and provided to states in a timely manner to facilitate implementation of the rule.

- B. While EPA has emphasized they will work early and often with both tribes and states, it appears that the bulk of EPA's consultation with tribes will occur without state participation, and after the state has adopted water quality standards revisions and submitted a rule package to EPA for review and approval.** EPA coordination with both states and tribes to identify any major issues with the state's approach to protecting tribal rights should occur earlier in the rule revision process to help ensure that the state adopted revisions will meet tribal expectations and garner EPA approval. Coordination earlier, rather than after adoption, will help ensure scarce state and tribal resources are used most efficiently and effectively. Additionally, it is unclear how state participation and representation will be incorporated into EPA's tribal consultation program.

- C. **EPA’s economic analysis underestimates the burdens and costs to states.** EPA has not identified the realm of applicable tribal reserved rights in each state. Thus, the administrative burden and cost of implementing these rules is unknown and not appropriately considered in the proposed economic analysis. Additionally, EPA did not take into consideration the costs associated with the engagement and completion of tribal coordination by states to inform required revisions. Some of these uncertainties are reflected in Table 2-3 of EPA’s *Economic Analysis for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule)*, published to accompany the rule proposal, and with EPA’s inability to estimate costs to regulated entities. The costs of compliance by both states and regulated entities should be better-estimated and quantified, the *Economic Analysis* revised accordingly, and finalization of the rule delayed until uncertainties are addressed.

III. Requests for clarity of key terms, and coordination within the existing regulatory framework to administer water quality standards.

- A. **TCEQ requests EPA better-define or provide additional guidance regarding what is a “reasonably anticipated future use” and how to determine “heritage fish consumption rates.”**

Page 74367 of the rule preamble indicates “the regulation is intended to result in WQS that protect reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody,” however, there is no explicit requirement in revised 40 CFR Part 131 regarding “reasonably anticipated future uses.” Current regulations require states to consider existing uses, thus the concept of “reasonably anticipated future uses” is not currently codified. EPA must clearly define this concept in rule (as “existing uses” are codified), or provide additional detailed guidance to determine and apply a “reasonably anticipated future use.” This clarification is needed particularly considering the current requirements to protect existing uses and water quality in accordance with 40 CFR Part 131.

Additionally, in the rule preamble, EPA endeavors to ensure the level of water quality necessary to determine tribal resources “largely mirror the process states already follow,” and provide heritage fish consumption rates as an example. Although a footnote to EPA’s 2016 *Guidance for Conducting Fish Consumption Surveys* is provided in the preamble, the rule does not establish any nationally applicable thresholds. States without prior experience determining heritage rates and levels of suppression will encounter substantial uncertainty when attempting to comply with the new requirements, without additional clarification.

- B. **TCEQ requests EPA clarify if the requirement of 40 CFR §131.9(a)(1) to protect the “exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource” extends to other water quality standards requirements.** These include requirements specified in

TCEQ Comments

Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights; Proposed Rule

40 CFR §131.10(g) regarding designation and removal of uses; 40 CFR §131.12(a)(2)

regarding antidegradation and allowances for the lowering of water quality; and 40 CFR §131.13 and 40 CFR §131.14 regarding general policies including mixing zones,

low-flows and federal variances. Proposal of these revisions involving suppression of water quality or availability, without fully considering and anticipating impacts to other existing federal regulations that comprise the framework and implementation of the water quality standards program, is premature and may result in unintended conflict and confusion.

- C. **TCEQ requests EPA clarify how the proposed protections of tribal reserved rights should be coordinated with existing provisions regarding Use Attainability Analyses and Use and Value Demonstrations for non-Section 101(a)(2) uses.** On page 74372 of the preamble, EPA requests comment on whether and how states can revise designated uses, while also ensuring the protection of tribal reserved resources. In response to that question, TCEQ recommends tribal reserved rights be considered in a manner consistent with other existing uses to ensure proposed protections for tribal reserved rights are consistent, and do not conflict with, the existing regulatory framework of water quality standards.

Revision of designated uses to ensure compliance with the Section 101(a)(2) goal of fishable -swimmable, “wherever attainable” is an essential component of water quality standards, and the overall management of surface water quality in accordance with the goals of the CWA. EPA must clarify how the proposed revisions can be coordinated with current procedures for revising existing uses, the milestone upon which the federal framework is based. If the proposed revisions cannot be coordinated with current provisions and existing uses, then it is doubtful the revisions can be appropriately administered within existing water quality standards programs.